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COURT OF APPEALS

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JUDGE

MICHELLE RICK



The Honorable Michelle Rick was elected to the Michigan Court of Appeals in November 2020 and began her term of service representing the 4th Judicial District in January 2021. Judge Rick served as a trial judge from 2007–2020 for the 29th Circuit Court, comprising Clinton and Gratiot Counties. Before that, Judge Rick worked briefly as a private practitioner before transitioning to a career in public service. That service included working as an assistant prosecutor, as a senior assistant attorney general for the state of Michigan, and as deputy legal counsel to Michigan's Governor Jennifer M. Granholm.

Judge Rick is a graduate of Michigan State University and the University of Detroit Mercy School of Law. She is a member of the University of Detroit Mercy School of Law Justice Frank Murphy Honor Society. Judge Rick is a former district director for the National Association of Women Judges and current Vice President of District Directors. She is the president of the Michigan Judges Association and a member of the State Bar of Michigan Judicial Council. Judge Rick has served as a member of the State Bar of Michigan Limited-Scope Representation Workgroup and to the

State Bar of Michigan Affordable Legal Services Committee. Judge Rick is a committee member of the State Bar of Michigan Corrections and Prisons Section and the State Bar's Judicial Council.

In 2015, the Women Lawyers Association of Mid-Michigan awarded Judge Rick the Carolyn A. Stell Award. In January 2019, the Michigan Supreme Court recognized Judge Rick as a judge who gives back and makes a difference. In 2020, the State Bar of Michigan awarded Judge Rick and select University of Detroit Mercy School of Law faculty and students the Kimberly M. Cahill Bar Leadership Award. The award was given for creating and executing "Project Access," a traveling expungement clinic that brought expungement relief to six rural communities in Michigan's northern Lower Peninsula. In 2022, the National Association of Women Judges awarded Judge Rick the Vaino Spencer Award for outstanding leadership in promoting the vision, core values and mission of NAWJ.

Judge Rick teaches courses concerning access to justice at the University of Detroit Mercy School of Law, and she is a Michigan State Bar Foundation Fellow and an American Bar Foundation Fellow. Judge Rick is a frequent guest speaker and lecturer at various statewide and local law-related events. Judge Rick is married to her college sweetheart, Matthew, and they have 4 adult children.

COURT OF APPEALS CASES

PEOPLE v HILL

Docket No. 351828. Submitted October 14, 2020, at Detroit. Decided December 3, 2020, at 9:00 a.m.

Lyle H. Hill, Jr., was charged in the Wayne Circuit Court with assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, discharge of a firearm in a building, MCL 750.234b(3), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant and his wife, Taylor Hill (Taylor), held a birthday party at their home for their children. Taylor's brother, Daniel Simmons (Simmons), also attended the party. At some point during the party, defendant and Taylor began arguing, and defendant charged at Taylor and poked her in the face with his fingers. Taylor sought assistance from Simmons because she believed the argument would escalate. Simmons stood next to them and told them to relax. Defendant and Simmons began to grapple physically, at one point causing Simmons's arm to break through a window. Defendant drew a firearm and shot Simmons; Simmons's wounds were not fatal. Defendant was charged as described; defendant was not charged with an offense against Taylor. Taylor testified before a grand jury and described the incident. Although she was willing to testify before the grand jury, defendant later moved to permit Taylor to assert spousal privilege under MCL 600.2162(2) and to refuse to testify at trial. At the motion hearing, Taylor informed the trial court that she would assert spousal privilege if it were available to her. The trial court, Qiana Lillard, J., granted defendant's motion, denying the admission of Taylor's testimony on grounds of spousal privilege. The prosecution appealed.

The Court of Appeals *held*:

Under MCL 600.2162(2), in a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in MCL 600.2162(3). Accordingly, in criminal proceedings, the spousal privilege is vested with the witness-spouse unless an exception in MCL 600.2162(3) applies. MCL 600.2162(3)(d) provides, in relevant part, that the spousal

privilege in MCL 600.2162(2) does not apply in a cause of action that grows out of a personal wrong or injury done by one to the other. The Supreme Court has interpreted the scope of the spousal-wrong exception in cases that were all decided before the effective date of the amendment of MCL 600.2162 in 2000 that provided that the spousal privilege vested in the witness-spouse, rather than in the defendant-spouse; accordingly, none of the cases—*People v Love*, 425 Mich 691 (1986), *People v Vann*, 448 Mich 47 (1995), and *People v Warren*, 462 Mich 415 (2000)—addressed whether a witness-spouse in whom the spousal privilege is vested (as under the current statutory scheme) may be compelled to testify when the spousal privilege is inapplicable. However, *People v Szabo*, 303 Mich App 737 (2014), applied the post-amendment language of MCL 600.2162; *Szabo* held that MCL 600.2162 specifically denies the victim-spouse a testimonial privilege in a case that grew out of a personal wrong or injury done by the defendant-spouse to the victim-spouse and permits a trial court to compel that spouse's testimony. *Szabo* differed from this case in that the only charges that remained pending in *Szabo* were the charges relating to the spousal-witness; the charges relating to the third party were no longer pending. Therefore, the Court in *Szabo* was only addressing MCL 600.2162 in the context of charges directly relating to the spousal-witness; it was not addressing the statute in the context of charges relating to third parties that arguably "grew out of" a personal wrong or injury done to the spousal-witness. Considering the body of the caselaw in its totality, the trial court in this case erred by holding that Taylor could assert spousal privilege. Like in *Vann* and *Warren*, Taylor's testimony at defendant's trial would relate to several offenses allegedly committed against a third party (Simmons) that occurred contemporaneously with (or after) his alleged assault on her. Also as in *Vann*, defendant was not charged with an offense against Taylor. And as in *Warren*, defendant's purpose in allegedly shooting Simmons was to facilitate his assault against Taylor. Under these circumstances, the charges against defendant grew out of an alleged personal wrong or injury to Taylor; therefore, Taylor was not vested with a spousal privilege because the spousal-wrong exception applied. Accordingly, Taylor's consent to testify was not required, and she could be compelled to testify. The trial court erred by reaching a contrary conclusion.

Reversed and remanded.

CRIMINAL LAW — HUSBAND AND WIFE — SPOUSAL PRIVILEGE — SPOUSAL-WRONG EXCEPTION.

Under MCL 600.2162(2), in a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his

consent or a wife for or against her husband without her consent, except as provided in MCL 600.2162(3); MCL 600.2162(3)(d) provides, in relevant part, that the spousal privilege in MCL 600.2162(2) does not apply in a cause of action that grows out of a personal wrong or injury done by one to the other; in the context of charges relating to third parties that arguably "grew out of" a personal wrong or injury done to the spousal-witness, even when the defendant-spouse is not charged with an offense against the spousal-witness, the spousal-witness is not vested with a spousal privilege because MCL 600.2162(3)(d) applies; accordingly, the spousal-witness's consent to testify is not required, and the spousal-witness can be compelled to testify against the defendant-spouse.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Brittany Taratuta*, Assistant Prosecuting Attorney, for the people.

David R. Cripps for defendant.

Before: BOONSTRA, P.J., and MARKEY and FORT HOOD, JJ.

BOONSTRA, P.J. In this interlocutory appeal, the prosecution appeals by leave granted[1] the trial court's order permitting Taylor Hill (Taylor) to assert spousal privilege and to refuse to testify against defendant, her husband. We reverse and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In August 2019, Taylor and defendant held a birthday party at their home for one of their children. Taylor's brother, Daniel Simmons (Simmons), and Taylor's mother, Sonya Harris (Harris), attended the party.

[1] *People v Hill*, unpublished order of the Court of Appeals, entered January 24, 2020 (Docket No. 351828).

According to testimony presented before a grand jury in this matter, defendant was irritable throughout the party, and at some point, he and Taylor began arguing about the music being played on Taylor's phone. As the argument grew heated, Harris removed the children from the vicinity. At some point during the argument, defendant charged at Taylor and poked her in the face with his fingers. Taylor sought assistance from Simmons because she believed the argument would escalate.[2] While Simmons was initially reluctant to intervene, he did stand next to defendant and Taylor and told them to relax. His efforts were unsuccessful, however, and defendant and Simmons began to grapple physically, at one point causing Simmons's arm to break through a window. Defendant drew a firearm and shot Simmons. Simmons's wounds were not fatal.

Defendant was charged with assault with intent to commit murder (AWIM), MCL 750.83, assault with intent to do great bodily harm less than murder (AWIGBH), MCL 750.84, discharge of a firearm in a building, MCL 750.234b(3), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was not charged with an offense against Taylor.

Taylor testified before a grand jury and described the incident. Although she was willing to testify before the grand jury, defendant later moved to permit Taylor to assert spousal privilege under MCL 600.2162(2) and to refuse to testify at trial. At the motion hearing, Taylor informed the trial court that she would assert the spousal privilege if it were available to her. The trial court granted defendant's motion. The effect of that

[2] Taylor and defendant had had physical fights previously in their relationship.

ruling was to deny the admission of Taylor's testimony on grounds of spousal privilege. This appeal followed.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision to admit or to deny the admission of evidence, but we review de novo questions of law concerning the admissibility of that evidence, such as whether admission of the evidence is precluded by the assertion of privilege. See *People v Allen*, 310 Mich App 328, 341; 872 NW2d 21 (2015), rev'd in part on other grounds 499 Mich 307 (2016). We review de novo issues of statutory interpretation. *People v Davis*, 310 Mich App 276, 286; 871 NW2d 392 (2015). "Our overriding goal for interpreting a statute is to determine and give effect to the Legislature's intent." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). "The first step in ascertaining the Legislature's intent is to review the specific language of the statute." *People v Szabo*, 303 Mich App 737, 741; 846 NW2d 412 (2014). "The Legislature is presumed to have intended the meaning it plainly expressed and, therefore, clear statutory language must be enforced as written." *Id*.

III. ANALYSIS

The prosecution argues that the trial court erred by granting defendant's motion because the "spousal wrong" exception to spousal privilege applies in this case. We agree.

"In a criminal prosecution, a husband shall not be examined as a witness for or against his wife without his consent or a wife for or against her husband without her consent, except as provided in subsection (3)." MCL 600.2162(2). Accordingly, in criminal proceedings, the

spousal privilege is vested with the witness-spouse *unless* an exception in MCL 600.2162(3) applies. *Szabo*, 303 Mich App at 748. Under the spousal-wrong exception, "[t]he spousal privilege[] established in subsection[] . . . (2) . . . do[es] not apply . . . [i]n a cause of action that grows out of a personal wrong or injury done by one to the other . . . ." MCL 600.2162(3)(d).

Our Supreme Court has on several occasions interpreted the scope of the spousal-wrong exception. In *People v Love*, 425 Mich 691, 694-695; 391 NW2d 738 (1986) (opinion by CAVANAGH, J.), the defendant, Abner Love, suspected his wife of having an affair with a friend. Love shot the friend, killing him, and then drove around with his (Love's) wife at gunpoint. *Id*. at 695. Love was convicted of murder and felony-firearm regarding his conduct against the friend and was convicted of kidnapping regarding his conduct against his wife. *Id*. at 693-694. At trial, Love moved to suppress his wife's testimony, asserting spousal privilege.[3] *Id*. at 695. The trial court denied the motion, and Love's wife was compelled to testify. *Id*. at 695-696. The parties agreed on appeal that the spousal privilege did not apply to the kidnapping charge because it clearly grew out of a personal wrong done to her by Love and thus was subject to the spousal-wrong exception. *Id*. at 696. The issue before the Court was whether the murder and felony-firearm charges were also subject to the spousal-wrong exception.

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[3] Originally, the spousal privilege in criminal proceedings was vested with the defendant-spouse, requiring his or her consent for the witness-spouse to testify unless an exception was applicable. MCL 600.2162, as enacted by 1961 PA 236. Since October 2000, however, the spousal privilege has been vested in the witness-spouse. See MCL 600.2162(2), as amended by 2000 PA 182 (effective October 1, 2000); 2001 PA 11 (effective May 29, 2001).

The Supreme Court issued three opinions in *Love*, each joined by only two justices.[4] Two opinions (encompassing a total of four justices) held, albeit for different reasons, that the spousal-wrong exception did not apply to the murder and felony-firearm charges. In the lead opinion, Justice CAVANAGH (joined by Justice LEVIN) concluded that the spousal-wrong exception only applied if the particular offense charged was for the injury inflicted on one spouse by the other. *Love*, 425 Mich at 702-706. Therefore, because Love's murder and felony-firearm charges were not for injury inflicted on Love's wife, the exception was not applicable. *Id*.

Chief Justice WILLIAMS (joined by Justice BRICKLEY) reached the same result, but for the reason that "a cause of action cannot 'grow[] out of a personal wrong or injury done by one to the other' that did not occur at the time of the 'cause of action' (murder). Something cannot 'grow[] out of' something that did not exist." *Id*. at 709 (opinion by WILLIAMS, C.J.) (alterations in original). Therefore, the two opinions agreed that the spousal-wrong exception was not implicated with respect to the murder (and related felony-firearm) charge but disagreed about whether that was because the murder charge was not for an injury inflicted on Love's wife or because Love kidnapped his wife *after* completing the murder.[5]

Subsequently, in *People v Vann*, 448 Mich 47, 52; 528 NW2d 693 (1995), our Supreme Court seemingly ap-

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[4] One justice did not participate. *Id*. at 709.

[5] Justice BOYLE (joined by Justice RILEY) authored a third opinion that would have affirmed the Court of Appeals' holding that the spousal-wrong exception applies when a crime against a third person occurs during the same criminal transaction as a crime committed against the witness-spouse. *Love*, 425 Mich at 716 (opinion by BOYLE, J.).

proved of Chief Justice WILLIAMS's position in *Love*, noting that "[i]n *Love*, the kidnapping of the defendant's wife occurred *after* the murder of the third party. Accordingly, the third party's cause of action did not 'grow out of' the personal injury or wrong to the wife." The defendant in *Vann*, Lawrence Vann, was convicted of felonious assault and felony-firearm after Vann's wife was permitted to testify at trial. *Id*. at 48-50. Both offenses related to Vann's conduct toward a third-party victim; Vann was not charged with an offense against his wife. *Id*. at 53 (CAVANAGH, J., dissenting). However, Vann's wife was present for the third-party assault, and Vann assaulted his wife contemporaneously with his assault of the third party. *Id*. at 49 (opinion of the Court). Distinguishing the case from *Love*, the Supreme Court stated:

> Here, however, the prosecution's evidence indicated that there was an assault on the defendant's wife, and that it occurred contemporaneously with the assault on the third party. In other words, unlike the situation in *Love*, the offense committed against the third party in the instant case did "grow out of" the personal wrong or injury done by the defendant to his wife. [*Id*. at 52.]

The Court in *Vann* did not discuss the competing rationales of the various opinions in *Love* and appears to have errantly characterized Chief Justice WILLIAMS's position as that of the *Love* majority. Nonetheless, by affirming the trial court's decision to permit Vann's wife to testify against Vann, the Supreme Court appears to have put to rest Justice CAVANAGH's assertion in *Love* that the spousal-wrong exception applies only when a defendant is charged with crimes committed against a spouse. Instead, the spousal privilege was found to be unavailable even though the charges were not for injuries to Vann's wife.

In *People v Warren*, 462 Mich 415, 427; 615 NW2d 691 (2000), the Supreme Court noted that "*Love* lacks a majority holding. It does not serve as binding precedent." It explained that the opinions of Justice CAVANAGH and Chief Justice WILLIAMS in *Love* "cannot be reconciled; they have no common denominator except in result." *Id*. The Court also noted that *Vann*'s comments regarding Chief Justice WILLIAMS's temporal-sequence test were dicta because the defendant's offenses against his wife and the third party in *Vann* occurred simultaneously and as part of a single criminal act, such that the *Vann* Court "did not employ the temporal-sequence test in reaching its conclusion . . . ." *Id*. at 426-427.

The Court in *Warren* then expressly rejected Justice CAVANAGH's position (as well as Justice BOYLE's position) in *Love* and stated that "[t]he 'grows out of' wording requires a connection between the cause of action and the harm or injury committed against the spouse. However, the phrase does not limit spousal testimony to those crimes of which the spouse was the *direct* victim." *Id*. at 428 (emphasis added). Consistently with Chief Justice WILLIAMS's position in *Love*, the Court affirmed that the spousal-wrong exception may apply even when the charge was not for injury to the witness-spouse, *Warren*, 462 Mich at 430-431, and it noted that "the temporal sequence test set out in Chief Justice WILLIAMS' *Love* concurrence has support in the language of the statute," *id*. at 429. The Court continued:

> Additionally, we read the exception to allow a victim-spouse to testify about a persecuting spouse's precedent criminal acts where (1) the underlying goal or purpose of the persecuting spouse is to cause the victim-spouse to suffer personal wrong or injury, (2) the earlier criminal acts

> are committed in furtherance of that goal, and (3) the personal wrong or injury against the spouse is ultimately completed or "done."
>
> Thus, where a persecuting spouse's criminal activities have roots in acts ultimately committed against the victim-spouse, those preparatory crimes constitute "cause[s] of action that grow[] out of a personal wrong or injury done by one to the other . . . ." MCL 600.2162[(1)](d). This is because the underlying intent, the "seed" from which the other criminal acts grew, was the personal wrong or injury done to the spouse. [*Id*. at 429 (citation omitted).]

There is a glaring issue with applying any of these cases to the case before us, i.e., they were all decided before the effective date of the amendment of MCL 600.2162 in 2000 to provide that the spousal privilege vested in the witness-spouse, rather than in the defendant-spouse. The procedural posture of this case is thus substantially different from that of *Love*, *Vann*, or *Warren*. Rather than having a defendant seeking to assert a statutory right to preclude spousal testimony against him, the prosecution in this case is seeking to compel the testimony of a witness against him. Moreover, because those cases all predated the 2000 amendment of MCL 600.2162, none of them addressed whether a witness-spouse in whom the spousal privilege is vested (as under the current statutory scheme) may be compelled to testify when the spousal privilege is inapplicable.[6]

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[6] Even under the previous version of the statute (which vested the spousal privilege in the defendant-spouse), it is unclear from the Supreme Court caselaw whether and when a witness-spouse could be compelled to testify. In *Vann* and *Warren*, the spousal testimony was voluntary. And in *Love*, Justice CAVANAGH's opinion suggested that a witness-spouse could voluntarily testify but that he or she could not be compelled to testify. Chief Justice WILLIAMS and Justice BOYLE disagreed about whether the spousal-wrong exception applied (and therefore about whether the spou-

But this Court did have occasion in *Szabo* to apply the post-amendment language of MCL 600.2162. The defendant in *Szabo* allegedly took a rifle into the home of his estranged wife. The gun was fired; the estranged wife was not shot, but another man who was present was shot in the arm. The defendant was charged with assault with intent to murder and felonious assault with regard to the man as well as felonious assault with regard to the estranged wife. The estranged wife testified at the defendant's preliminary examination, although whether she did so voluntarily was disputed. The prosecution moved for a bindover on the charges relating to the estranged wife,[7] and the defendant moved to dismiss those charges. The trial court concluded that the estranged wife could not be compelled to testify against the defendant, and it therefore granted the defendant's motion to dismiss.

This Court held on appeal that MCL 600.2162 "specifically denies the victim-spouse a testimonial privilege in a case that grew out of a personal wrong or injury done by the defendant-spouse to the victim-spouse" and permits a trial court to compel that spouse's testimony. *Szabo*, 303 Mich App at 748-749. *Szabo* thus appears to have answered the question that was necessarily left unanswered in the Supreme Court cases applying the earlier statutory scheme.

We note, however, that *Szabo* also is not on all fours with the case before us. Specifically, the only charges

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sal privilege applied), but they agreed that a spouse may be compelled to testify. See *Love*, 425 Mich at 696, 708-709 (opinion by CAVANAGH, J.); *id*. at 709 (opinion by WILLIAMS, C.J.); *id*. at 714 (opinion by BOYLE, J.). See also *Szabo*, 303 Mich App at 744-745 ("Thus, four Justices held that a victim-spouse could be compelled to testify against the criminal defendant-spouse when an exception to the spousal privilege was applicable.").

[7] The charges relating to the shooting of the other man were dismissed without prejudice.

that remained pending in *Szabo* were the charges relating to the spousal-witness, i.e., the estranged wife. The charges relating to the shooting of the other man were no longer pending. Therefore, the Court in *Szabo* was only addressing MCL 600.2162 in the context of charges directly relating to the spousal-witness; it was not addressing the statute in the context of charges relating to third parties that arguably "grew out of" a personal wrong or injury done to the spousal-witness.

We thus are left with no authority that definitively answers the pertinent question in the precise procedural context of the case before us. Nonetheless, considering the body of the pertinent caselaw in its totality, we conclude that the trial court erred by holding that Taylor could assert the spousal privilege. The trial court concluded that "the spousal privilege is available for [Taylor] to take if she wishes because [defendant is] not charged with anything related to her in this case." The trial court's holding is directly contrary to the Supreme Court's decisions in *Vann* and *Warren*. Like in *Vann* and *Warren*, Taylor's testimony at defendant's trial would relate to several offenses allegedly committed against a third party (Simmons) that occurred contemporaneously with (or after) his alleged assault on her. According to the allegations, defendant made physical contact with Taylor, and Taylor feared for her safety, causing her to ask Simmons for help. When Simmons attempted to provide that assistance, defendant shot him. Also as in *Vann*, defendant was not charged with an offense against Taylor. And as in *Warren*, defendant's purpose in allegedly shooting Simmons was to facilitate his assault against Taylor. We conclude under these circumstances, and consistently with *Vann* and *Warren*, that the charges against defendant grew out of an alleged personal wrong or injury to

Taylor and therefore that the spousal-wrong exception prevents Taylor from asserting spousal privilege. MCL 600.2162(3)(d).

Moreover, *Szabo* held, under the current statutory scheme, that "defendant's wife was not vested with a spousal privilege; thus, her consent to testify was not required and she could be compelled to testify against defendant in this criminal prosecution." *Szabo*, 303 Mich App at 749. Similarly in this case, Taylor was not vested with a spousal privilege because the spousal-wrong exception applied. Therefore, her consent to testify was not required, and she could be compelled to testify. By reaching a contrary conclusion, the trial court erred.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

MARKEY and FORT HOOD, JJ., concurred with BOONSTRA, P.J.

GRAVES v COLLIER

Docket No. 350131. Submitted October 6, 2020, at Detroit. Decided October 22, 2020. Approved for publication December 3, 2020, at 9:05 a.m.

Canisha Graves brought an action in the Wayne Circuit Court against Kyara Collier, John Doe Insurer, and the Michigan Automobile Insurance Placement Facility (MAIPF) after she was injured in a motor vehicle accident. The injuries occurred when plaintiff opened the driver's side door of her vehicle and Collier's vehicle hit the door, pinning plaintiff between the door and her vehicle. Plaintiff's vehicle was uninsured. Plaintiff sued MAIPF for first-party no-fault benefits, alleging that it unreasonably refused to pay or assign plaintiff's claim for no-fault benefits to a Michigan no-fault insurer, and named John Doe Insurer as the prospective assigned insurer by MAIPF, alleging that it also failed to pay plaintiff's claim for no-fault benefits. MAIPF moved for summary disposition, arguing that plaintiff was not entitled to no-fault benefits because she failed to maintain effective security on her vehicle at the time of the accident as required under MCL 500.3101. In response, plaintiff argued that security was not required when plaintiff exited her vehicle. In a reply brief, MAIPF argued for the first time that plaintiff was also ineligible for no-fault benefits under the parked-car exclusion of MCL 500.3106(1)(c). Plaintiff objected, contending that MAIPF was required to assert all its arguments in its motion for summary disposition. The court, Muriel D. Hughes, J., dismissed the motion without prejudice and adjourned to allow plaintiff to file a response to MAIPF's additional argument. Plaintiff filed a supplemental response, asserting that the parked-car exclusion did not preclude her from no-fault benefits because her claim was not related to the operation of her vehicle but to avoid being hit by Collier. MAIPF responded that the parked-car exclusion treated entering and occupying a vehicle in the exact same manner and that because plaintiff's injury arose out of using her vehicle, she was ineligible for no-fault benefits. After a hearing, the trial court granted MAIPF's motion for summary disposition, finding that plaintiff intended to operate her vehicle when she parked it and that there was no genuine issue of material fact that plaintiff was

driving her uninsured vehicle on the day of the accident. Therefore, the court ruled that plaintiff was required to maintain the requisite security on her vehicle. The trial court entered a default judgment against Collier. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court did not err by granting MAIPF summary disposition and finding that plaintiff was required to have security on her vehicle to be eligible for no-fault benefits. Under MCL 500.3101(1), security is required to be in effect during the period the motor vehicle is driven or moved on a highway. This driving period refers to any time the owner of the vehicle expects and intends the vehicle to be driven or moved on a highway on demand. In this case, plaintiff's testimony established that she ran to her vehicle and opened the driver's side door with the intention of getting inside and leaving. Therefore, plaintiff was required to comply with the security requirement found in MCL 500.3101(1).

2. Under MCL 500.3113(b), the owner of an uninsured vehicle is not entitled to no-fault benefits for injury resulting from an accident involving that vehicle. To be involved in the accident, the vehicle must actively, as opposed to passively, contribute to the accident and have more than a random association with the accident scene. In this case, by opening the car door and attempting to enter her vehicle, plaintiff actively contributed to the occurrence of the accident. Therefore, plaintiff was precluded from receiving no-fault benefits under MCL 500.3113(b).

3. Plaintiff could not take advantage of the parked-car exclusion found in MCL 500.3106(1)(c) because plaintiff was entering her vehicle at the time of the accident. Generally, a parked vehicle is not involved in an accident for purposes of the no-fault act unless the injury at issue was sustained by a person while occupying, entering into, or alighting from the vehicle. Entry does not occur when a person is simply preparing to enter a vehicle; rather, it occurs when a person touches or opens their car door. Because plaintiff opened the door to her vehicle with the intention of entering the vehicle, she had entered her vehicle for purposes of MCL 500.3106(1)(c) at the time the accident occurred. Therefore, she was also precluded from obtaining no-fault benefits under this subsection.

Affirmed.

1. INSURANCE — NO-FAULT — SECURITY REQUIREMENT — DRIVING PERIOD.

The owner or registrant of a motor vehicle required to be registered in this state, with certain exceptions, is required to maintain security for payment of benefits under personal protection insur-

ance and property protection insurance during the period the motor vehicle is driven or moved on a highway; this driving period refers to any time the owner of the vehicle expects and intends the vehicle to be driven or moved on a highway on demand (MCL 500.3101).

2. INSURANCE — NO-FAULT — UNINSURED VEHICLES — INVOLVEMENT IN THE ACCIDENT.

Under MCL 500.3113(b), the owner of an uninsured vehicle is not entitled to no-fault benefits for injury resulting from an accident involving that vehicle; to be involved in the accident, the vehicle must actively, as opposed to passively, contribute to the accident and have more than a random association with the accident scene; a plaintiff who opens the door of their vehicle and attempts to enter the vehicle actively contributes to the occurrence of the accident for purposes of this provision.

3. INSURANCE — NO-FAULT — PARKED-CAR EXCLUSION.

Under MCL 500.3106(1)(c), a parked vehicle is not involved in an accident for purposes of the no-fault act unless the injury at issue was sustained by a person while occupying, entering into, or alighting from the vehicle; entry does not occur when a person is simply preparing to enter a vehicle; rather, it occurs when a person touches or opens their car door.

Skupin & Lucas, PC (by *Casey J. Majestic, Jr.*) for Canisha Graves.

Anselmi Mierzejewski Ruth & Sowle PC (by *Michael D. Phillips*) for the Michigan Automobile Insurance Placement Facility.

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

PER CURIAM. Plaintiff, Canisha Graves, appeals as of right the trial court's order for entry of a default judgment against defendant Kyara Collier. However, plaintiff actually challenges on appeal the trial court's earlier order granting summary disposition to defendant Michigan Automobile Insurance Placement Facility (MAIPF) under MCR 2.116(C)(10). We affirm.

I. FACTS AND PROCEDURAL BACKGROUND

This case concerns injuries to plaintiff sustained in a motor vehicle accident. Plaintiff gave her friend a ride in plaintiff's uninsured vehicle. At their destination, plaintiff parallel parked her vehicle on the street with her driver's side door facing the street, turned off the vehicle, and exited the vehicle. At the same time, Collier and her sister, who were parallel parked in front of plaintiff's vehicle, exited their vehicle. When Collier and her sister suddenly ran back to their vehicle and got in it, plaintiff and her friend were prompted to run back to plaintiff's vehicle. Plaintiff opened the driver's side door of her vehicle, but before she could get inside, Collier's vehicle hit plaintiff's door, pinning plaintiff's arms and legs between the door and her vehicle. Collier then reversed her vehicle, allowing plaintiff to get free and run behind her vehicle for safety.

Plaintiff sued MAIPF for first-party no-fault benefits, alleging that it unreasonably refused to pay or assign plaintiff's claim for no-fault benefits to a Michigan no-fault insurer. Plaintiff named John Doe Insurer as the prospective assigned insurer by MAIPF, alleging that it also failed to pay plaintiff's claim for no-fault benefits. To date, MAIPF has not assigned an insurer to plaintiff's claim.

MAIPF filed a motion for summary disposition in lieu of an answer, arguing that plaintiff was not entitled to no-fault benefits because she failed to maintain effective security on her vehicle at the time of the accident as required under MCL 500.3101. In response, plaintiff argued that security was not required when plaintiff had exited her vehicle. In a reply brief, MAIPF argued for the first time that plaintiff was also ineligible for no-fault benefits under the "parked-car exclusion" of

MCL 500.3106(1)(c). Plaintiff objected, contending that MAIPF was required to assert all its arguments in its motion for summary disposition. The trial court dismissed the motion without prejudice and adjourned to allow plaintiff to file a response to MAIPF's additional argument.

Plaintiff filed a supplemental response, asserting that the parked-car exclusion did not preclude her from no-fault benefits because her claim was not related to the operation of her vehicle but to avoid being hit by Collier. MAIPF responded that the parked-car exclusion treated entering and occupying a vehicle in the exact same manner and because plaintiff's injury arose out of using her vehicle, she was ineligible for no-fault benefits.

The trial court held a hearing on MAIPF's motion for summary disposition, at which the parties argued consistently with their briefs. Ultimately, the trial court granted MAIPF's motion for summary disposition, finding that there was uncontroverted evidence plaintiff intended to operate her vehicle when she parked it and that there was no genuine issue of material fact that plaintiff was driving her uninsured vehicle on the day of the accident. Therefore, the court ruled that plaintiff was required to maintain the requisite security on her vehicle, having concluded that her injuries on reentry into the vehicle were directly related to the vehicle's character and use. After entry of the summary disposition order, the trial court entered a default judgment against Collier. This appeal followed.

II. STANDARD OF REVIEW

This Court

> review[s] a trial court's decision regarding a motion for summary disposition de novo. *Lowrey v LMPS & LMPJ,*

> *Inc*, 500 Mich 1, 5-6; 890 NW2d 344 (2016). A motion for summary disposition brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint," *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 768; 887 NW2d 635 (2016), and should be granted when "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).
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> "The moving party has the initial burden to support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). The court must consider all of the admissible evidence in a light most favorable to the non-moving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). However, the party opposing summary disposition under MCR 2.116(C)(10) "may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Oliver v Smith*, 269 Mich App 560, 564; 715 NW2d 314 (2006) (quotation marks and citation omitted). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 423; 864 NW2d 609 (2014) (quotation marks and citation omitted). [*Lockwood v Ellington Twp*, 323 Mich App 392, 400-401; 917 NW2d 413 (2018).]

This Court also reviews de novo whether the trial court properly interpreted and applied the relevant statutes. *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). In interpreting a statute, the reviewing court's role is to find out the legislative intent that may reasonably be inferred from the express language in the statute. *Id*. If the statutory language is unambiguous, then the statute must be applied as written without judicial interpre-

tation. *Id*. It is presumed that "the Legislature intended the meaning it plainly expressed . . . ." *Cox v Hartman*, 322 Mich App 292, 298-299; 911 NW2d 219 (2017) (quotation marks and citation omitted). In particular, "[t]he no-fault insurance act is remedial in nature and must be liberally construed in favor of persons intended to benefit from its goal of guaranteeing motor vehicle accident victims compensation for certain economic losses." *Copus v Meemic Ins Co*, 291 Mich App 593, 596; 805 NW2d 623 (2011) (quotation marks and citation omitted).

III. ANALYSIS

Plaintiff asserts that the trial court erred by granting summary disposition to MAIPF and finding that plaintiff's vehicle was involved in the accident, thus requiring her to have maintained effective security on her vehicle to be eligible for no-fault benefits. We disagree.

Plaintiff first argues that she was not required to maintain security on her vehicle because she was not operating the vehicle on a highway at the time of the accident. "The purpose of the Michigan no-fault act is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 37; 748 NW2d 574 (2008) (quotation marks and citation omitted). MCL 500.3101(1) states:

> [T]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance and property protection insurance . . . . Security is only required to be in effect during the period the motor vehicle is driven or moved on a highway. [MCL 500.3101(1).]

Although the no-fault act is meant to protect all Michigan residents injured in motor vehicle accidents, *Iqbal*, 278 Mich App at 37, those benefits are unambiguously tied to the owner's responsibility to maintain effective security on their vehicle, *Dye by Siporin & Assoc, Inc v Esurance Prop & Cas Ins Co*, 504 Mich 167, 182; 934 NW2d 674 (2019).

" '[S]ecurity is only required to be in effect during the *period* the motor vehicle is driven or moved on a highway.' " *Shinn v Mich Assigned Claims Facility*, 314 Mich App 765, 774; 887 NW2d 635 (2016), quoting MCL 500.3101(1) (emphasis added). "The term 'period' is defined as 'the completion of a cycle, a series of events, or a single action.' " *Id*. at 775, quoting *Merriam-Webster's Collegiate Dictionary* (11th ed).

We conclude that the trial court did not err by finding that MCL 500.3101(1) required plaintiff to maintain security on her vehicle. Plaintiff contends she was not required to maintain security on her vehicle at the time of the accident because it was turned off and parked. However, plaintiff's interpretation of the security requirement would effectively rewrite the statute to mean that security is only required while the motor vehicle is actually being driven or moved on the highway. We decline to accept plaintiff's interpretation and instead conclude that the driving period in MCL 500.3101(1) refers to any time the owner of the vehicle expects and intends the vehicle to be driven or moved on a highway on demand.[1] In this case, plaintiff's testimony established that she ran to her vehicle and

[1] Comparatively, plaintiff would not be required to maintain security on her vehicle while the vehicle was undergoing repairs, *Shinn*, 314 Mich App at 774-775, or when the vehicle was placed in storage, *Meemic Ins Co v Mich Millers Mut Ins*, 313 Mich App 94, 96, 102; 880 NW2d 327 (2015).

opened the driver's side door with the intention of getting inside and leaving. Therefore, plaintiff was required to comply with the security requirement found in MCL 500.3101(1).

Plaintiff also argues that MCL 500.3113(b), which would preclude her from recovering personal protection insurance (PIP) benefits for her failure to comply with MCL 500.3101(1), is not applicable because her vehicle was parked when the accident occurred and not involved in the accident. Under MCL 500.3113(b), a person is precluded from no-fault benefits for accidental bodily injury if at the time of the accident:

> The person was the owner or registrant of a motor vehicle *involved in the accident* with respect to which the security required by section 3101 or 3103 was not in effect. [MCL 500.3113(b) (emphasis added).]

Thus, the owner of an uninsured vehicle is not entitled to no-fault benefits for injury resulting from an accident involving that vehicle. *Iqbal*, 278 Mich App at 45. To be involved in the accident, the vehicle "must actively, as opposed to passively, contribute to the accident, and have more than a random association with the accident scene. There must be some activity, with respect to the vehicle, which somehow contributes to the happening of the accident." *Detroit Med Ctr v Progressive Mich Ins Co*, 302 Mich App 392, 396; 838 NW2d 910 (2013) (brackets, quotation marks, and citations omitted).

We conclude that under MCL 500.3113(b), plaintiff was indeed precluded from recovering PIP benefits. Plaintiff contends that she was only a few feet away from her vehicle when the sudden actions of Collier and her sister prompted her to run back to her parked vehicle. As plaintiff stood on the edge of the street near her driver's side door, she saw Collier's vehicle rapidly

coming toward her. To avoid being run over by Collier's vehicle, plaintiff sought shelter in her vehicle: plaintiff opened the door and attempted to get inside. Before plaintiff could get into the driver's seat, Collier's vehicle collided with the open door, pinning plaintiff between the door and her vehicle. Plaintiff's use of the vehicle as a safety barrier does not change the vehicle's involvement in the accident for purposes of MCL 500.3113(b). By opening the car door and attempting to enter her vehicle, plaintiff actively contributed to the occurrence of the accident. Plaintiff's vehicle had "more than a random association with the accident scene" and, instead, actively contributed to the accident and plaintiff's injuries. *Detroit Med Ctr*, 302 Mich App at 396 (quotation marks and citation omitted). Therefore, plaintiff was precluded from receiving no-fault benefits under MCL 500.3113(b).

Finally, we briefly address MAIPF's proposed alternate grounds for affirmance—that plaintiff cannot take advantage of the parked-car exclusion found in MCL 500.3106(1)(c) because plaintiff was entering her vehicle at the time of the accident. Generally, a parked vehicle is not involved in an accident unless "the injury was sustained by a person while occupying, entering into, or alighting from the vehicle." MCL 500.3106(1)(c); see also *Shinn*, 314 Mich App at 771. Entry does not occur when a person is simply preparing to enter a vehicle. *King v Aetna Cas & Surety Co*, 118 Mich App 648, 650-651; 325 NW2d 528 (1982). Rather, entry occurs when a person touches or opens their car door. *Hunt v Citizens Ins Co*, 183 Mich App 660, 664; 455 NW2d 384 (1990). Because plaintiff opened the door to her vehicle with the intention of entering the vehicle, plaintiff had entered her vehicle for purposes of MCL 500.3106(1)(c) at the time the accident occurred. Therefore, plaintiff is also

precluded from obtaining no-fault benefits under this subsection.

Affirmed.

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

BRONSON HEALTH CARE GROUP, INC v USAA CASUALTY INSURANCE COMPANY

Docket No. 351050. Submitted December 1, 2020, at Grand Rapids. Decided December 10, 2020, at 9:05 a.m.

Plaintiff, Bronson Health Care Group, Inc., brought an action in the 8th District Court against defendants, USAA Casualty Insurance Company and USAA General Indemnity Company (collectively, USAA), seeking payment for the medical care it provided to Brian Moore after he was injured in an automobile crash. Bronson specifically sought payment of personal protection insurance (PIP) benefits allegedly owed to Moore by USAA. On two occasions, Moore had signed a consent-to-treatment form that included an assignment-of-rights provision before he was examined by Bronson staff. Bronson alleged that the assignments gave it the right to pursue payment of Moore's bills from USAA. USAA moved for summary disposition, arguing that the assignments were void under MCL 500.3143. The court, Vincent C. Westra, J., denied USAA's motion. USAA filed an application for leave to appeal to the Kalamazoo Circuit Court, Alexander C. Lipsey, J., which was denied. USAA then applied for leave to appeal in the Court of Appeals, which granted the application.

The Court of Appeals *held*:

MCL 500.3143 states that an agreement for assignment of a right to benefits payable in the future is void. When Moore entered into the assignments, the assignments concerned a right to PIP benefits payable in the future. When Moore signed the assignments, he had no right to any benefits because benefits were not payable unless and until treatment was received or services were performed. Bronson argued that it had been assigned the right to benefits that were presently payable because PIP benefits are payable as loss accrues, which happens when an expense is incurred, and an expense is incurred when one becomes liable for payment by signing a contract for products or services, which Moore did when he signed the assignments, creating contractual liability to pay for the care he contemporaneously received. Under MCL 500.3142(1), PIP benefits are payable as loss accrues, and MCL 500.3110(4) provides that PIP benefits payable for accidental bodily injury accrue as the allowable expense, work loss, or

survivors' loss is incurred. Accordingly, an expense is incurred, and a patient becomes liable, when an agreement to pay is signed and treatment is received. While an insured may become liable for costs by signing a contract for products or services, it cannot be said that Moore incurred an expense by signing the assignments. The agreement to pay for medical services did not obligate Moore to receive services; rather, Moore only became obligated to pay—and Bronson only became entitled to payment—if Moore actually received medical treatment. Therefore, Moore did not incur an expense, and a loss did not accrue, until medical services were actually provided. Accordingly, PIP benefits were not payable at the time Moore had merely signed the assignments. Because Moore appeared in the emergency department and signed the assignments before he received any medical treatment related to the assignments, he assigned rights to benefits payable in the future, rendering the assignments void under MCL 500.3143. The district court erred by denying USAA's motion for summary disposition, and the circuit court erred by denying USAA's application for leave to appeal.

Reversed and remanded.

INSURANCE — NO-FAULT AUTOMOBILE INSURANCE — ASSIGNMENTS — EXECUTION OF AN ASSIGNMENT BEFORE TREATMENT.

MCL 500.3143 states that an agreement for assignment of a right to benefits payable in the future is void; personal protection insurance benefits are payable as loss accrues, which happens when an expense is incurred; an expense is incurred when an agreement to pay is signed and treatment is received; signing an assignment before receiving treatment renders the assignment void under MCL 500.3143.

Miller Johnson (by *Joseph J. Gavin*) for Bronson Health Care Group, Inc.

Garan Lucow Miller, PC (by *Lauren A. Saad*) for USAA Casualty Insurance Company and USAA General Indemnity Company.

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

MARKEY, J. Defendants, USAA Casualty Insurance Company and USAA General Indemnity Company

(collectively, USAA), appeal by leave granted an order of the circuit court that denied USAA's application for leave to appeal an order of the district court in this suit involving the no-fault act, MCL 500.3101 *et seq*. The district court had entered an order denying USAA's motion for summary disposition under MCR 2.116(C)(7) and (10). We reverse the circuit court's ruling and remand to the circuit court for entry of an order granting USAA's application for leave, reversing the district court's order, and remanding the action to the district court for entry of judgment in favor of USAA and against plaintiff, Bronson Health Care Group, Inc. (Bronson).

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This appeal concerns the interpretation and application of MCL 500.3143, which provides that "[a]n agreement for assignment of a right to benefits payable in the future is void." On May 8, 2018, Brian Moore was injured in a motor vehicle crash. He had a no-fault insurance policy with USAA. Moore went to the emergency department at Bronson Lakeview Hospital for treatment. At 7:36 a.m., after having arrived at the hospital, Moore signed a consent-to-treat form, which provided, in pertinent part, as follows:

> I agree to all procedures, hospital care, and treatment my doctor has ordered.
>
> My doctor may have help from other healthcare professionals. My doctor may change my care to benefit my life or health.
>
> * * *
>
> **Assignment of Rights** I assign to Bronson all rights to bill for services I receive. I give Bronson all rights to

pursue payment of my bills. This means that Bronson can, for example:

- Send my bills to insurance companies and health plans. Communicate with them for the purpose of getting Payment
- Appeal the denial of payment or an adverse benefit determination
- File a lawsuit to get payment of a bill
- Be involved in any lawsuit or proceeding which involves my bill
- This includes pursuing all costs, interests, penalties and attorney fees allowed by law. I give up all rights to settle, release, or retain monies for my Bronson bill. I give up the right to take any action which would compromise payment or reimbursement of my Bronson bill.

* * *

My Responsibility for Payment

- I am responsible to pay all Bronson charges not covered by insurance.
- There may be a difference between Bronson's charges and the amounts paid by insurance. I am responsible for paying the difference.

Although the title of the form indicated that it was a consent form, the terms were broader than consent. For ease of reference and given the issue on appeal, we will refer to this document as an "assignment." The assignment did not contain any information regarding specific medical treatment that would be provided to Moore, the dates of any services, or the estimated costs of any treatment.

According to hospital records, Moore's triage vitals were taken at 7:40 a.m. A physician then examined

Moore and ordered a head CT[1] scan and a cervical spine CT scan. Moore was discharged soon after the scans were taken. Moore returned to the emergency department at Bronson Lakeview Hospital on May 23, 2018. At 11:52 a.m., Moore signed another consent-to-treat form, which was identical to the one he signed on May 5, 2018, and, like the earlier form, will be referred to as an "assignment." Hospital records indicated that Moore's triage vitals were taken at 11:57 a.m. and that he was eventually seen by a physician's assistant and discharged.

On May 2, 2019, Bronson sued USAA to collect payment for its charges, totaling $5,411.22, related to Moore's medical care during the two emergency department visits. Bronson alleged that Moore had assigned to Bronson the right to pursue payment of no-fault personal protection insurance (PIP) benefits from USAA. In Count I of the complaint, Bronson alleged that USAA breached the no-fault insurance policy by failing to pay the PIP benefits. In Count II, Bronson sought a declaratory judgment that USAA was responsible for the charges for Moore's medical treatment.

In the district court, USAA moved for summary disposition under MCR 2.116(C)(7) and (10). USAA argued that the assignments were void under MCL 500.3143 because they constituted assignments of a right to benefits payable in the future and not a right to payment of past or presently due benefits. USAA contended that because Moore signed the assignments before he received any medical treatment and before any charges were incurred, the assignments were for benefits payable in the future. USAA maintained that

[1] CT stands for computerized tomography.

this Court in unpublished opinions had held that assignments executed under similar circumstances were void.

In its response, Bronson argued that because Moore executed the assignments contemporaneously with his treatment, the assignments did not violate MCL 500.3143 and are valid. Bronson's position was that PIP benefits are payable as loss accrues, that loss accrues when an expense is incurred, that an expense is incurred when a person signs a contract for products or services, and that Moore incurred the medical expenses, promising payment of the charges, when he signed the assignments. Bronson additionally argued that even if the assignments "only assigned future benefits due to the time of the signature and treatment," the May 23, 2018 assignment "still operate[d] to assign past due benefits to Bronson, which would include the charges for May 8, 2018."

At the hearing on the motion for summary disposition in the district court, USAA contended that Bronson's argument was the same argument that the hospital had made in another case and that although the argument was initially accepted by the circuit court in the other case, the argument was rejected by the Court of Appeals in an unpublished opinion. See *Bronson Health Care Group, Inc v Farm Bureau Mut Ins Co of Mich*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2019 (Docket No. 341200). Bronson responded that this Court's holding was not binding precedent and that it was going to appeal that case in the Michigan Supreme Court. We note that our Supreme Court did eventually deny Bronson's application for leave to appeal in that other litigation. *Bronson Health Care Group, Inc v Farm Bureau Mut Ins Co of Mich*, 505 Mich 942 (2019).

In this case, the district court denied USAA's motion for summary disposition, explaining that the other Bronson lawsuit was still pending in the Michigan Supreme Court, that this Court's opinion was not binding precedent, and that it believed that it should continue to follow the circuit court's ruling in the other Bronson case despite this Court's reversal of the ruling. The district court also concluded that the May 23 assignment effectively covered the prior treatment provided to Moore on May 8. The district court further ruled that medical services were received by Moore just minutes after he signed the assignments; therefore, the execution of the assignments and the delivery of treatment were essentially contemporaneous events and thus these assignments did not concern future benefits for purposes of MCL 500.3143.

USAA filed an application for leave to appeal in the circuit court, and the court denied the application in an order because it was "not persuaded that the issues presented should be reviewed by" the court. USAA then sought leave to appeal in this Court; this Court granted the application. *Bronson Health Care Group Inc v USAA Cas Ins Co*, unpublished order of the Court of Appeals, entered February 28, 2020 (Docket No. 351050). The appeal was limited to the issues raised in the application. *Id*.

II. ANALYSIS

A. STANDARD OF REVIEW AND THE CONSTRUCTION OF CONTRACTS AND STATUTES

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). We also review de novo questions concerning the proper interpretation and application of contractual and statu-

tory language. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005); *Gray v Chrostowski*, 298 Mich App 769, 774-775; 828 NW2d 435 (2012).

"The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To this rule all others are subordinate." *McIntosh v Groomes*, 227 Mich 215, 218; 198 NW 954 (1924). "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." *Rory*, 473 Mich at 464. "[U]nless a contract provision violates law or one of the traditional defenses to the enforceability of a contract applies, a court must construe and apply unambiguous contract provisions as written." *Id*. at 461. If the language of a contract is ambiguous, testimony may be taken to explain the ambiguity. *New Amsterdam Cas Co v Sokolowski*, 374 Mich 340, 342; 132 NW2d 66 (1965); see also *Frankenmuth Mut Ins Co v Masters*, 460 Mich 105, 111; 595 NW2d 832 (1999).

In *Highfield Beach at Lake Mich v Sanderson*, 331 Mich App 636, 654-655; 954 NW2d 231 (2020), this Court recited the rules that govern statutory construction:

> "The primary task in construing a statute is to discern and give effect to the Legislature's intent, and in doing so, we start with an examination of the language of the statute, which constitutes the most reliable evidence of legislative intent. When the language of a statutory provision is unambiguous, we must conclude that the Legislature intended the meaning that was clearly expressed, requiring enforcement of the statute as written, without any additional judicial construction. Only when an ambiguity in a statute exists may a court go beyond the statute's words to ascertain legislative intent. We must give effect to every word, phrase, and clause in a

> statute, avoiding a construction that would render any part of the statute nugatory or surplusage." [Citation omitted.]

B. ARGUMENTS ON APPEAL

USAA argues that the assignments are void under MCL 500.3143 because the statute provides that an agreement to assign a right to benefits to be paid in the future is void. According to USAA, the assignments in this case did not assign a right to any past or presently due benefits but only to future benefits. Furthermore, the assignments did not indicate that any services had already been provided, did not identify the nature of any services that would be provided, and did not specify estimated charges for any services. Instead, the assignments reflected that Moore would receive services in the future. USAA argues that in three unpublished opinions this Court held that similar and even identical assignments were void under MCL 500.3143. USAA also maintains that with respect to the May 23, 2018 assignment, there was no language that could be construed as assigning a right to benefits for services that were provided back on May 8, 2018, or that were otherwise past due.

Bronson again argues that it was assigned a right to benefits that were presently payable. Bronson contends that PIP benefits are payable as loss accrues, which happens when an expense is incurred. And an expense is incurred, according to Bronson, when one becomes liable for payment, such as by signing a contract for products or services. Bronson asserts that when Moore went to the hospital for medical care, he agreed to be responsible for the payment of all charges not covered by insurance and that this created contractual liability to pay for the care he contemporaneously

received. Bronson maintains that the fact that its performance was not yet complete when Moore executed an assignment did not render Moore's promise unenforceable, as performance is not an element of contract formation.

C. DISCUSSION AND RESOLUTION

Under the no-fault act, a medical provider "has no statutory cause of action of its own to directly sue a no-fault insurer." *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 217-218; 895 NW2d 490 (2017). But the Supreme Court also noted:

> Our conclusion today is not intended to alter an insured's ability to assign his or her right to past or presently due benefits to a healthcare provider. See MCL 500.3143; *Professional Rehab Assoc v State Farm Mut Auto Ins Co*, 228 Mich App 167, 172; 577 NW2d 909 (1998) (noting that only the assignment of future benefits is prohibited by MCL 500.3143). [*Covenant Med*, 500 Mich at 217 n 40.]

We conclude that Bronson's position is wholly inconsistent with the plain and unambiguous language of MCL 500.3143, which, again, provides that "[a]n agreement for assignment of a right to benefits payable in the future is void." Simply put, when Moore entered into the assignments, the assignments concerned a right to PIP benefits payable in the future. MCL 500.3143 requires a focus on the point in time at which benefits would be payable in comparison to the point in time at which the assignment was executed, precluding an assignment of benefits payable in the future. And the statute does not add any temporal restrictions to the word "future." For example, benefits first payable five days or five minutes into the future, i.e., five days or five minutes after an assignment has been executed, cannot be assigned under MCL 500.3143. At the exact moment when Moore

signed the assignments, he had no right to any benefits because benefits were not payable unless and until the treatment was received or services were performed. Any conclusion to the contrary finds no support in the statute. A no-fault insurer cannot be obligated to pay benefits until after medical services are actually provided.[2] Moreover, a healthcare provider would not be entitled to payment without yet having treated a patient. In no form or fashion did Moore assign a right to past or presently due benefits.[3] Absent the performance of services, there is, of course, no financial liability regardless of whether a patient may have signed an agreement to pay. Had Moore chosen to walk out of the emergency department without receiving any medical treatment after executing the assignments, Bronson would have had no basis to demand payment from Moore, and certainly not from USAA, even if the assignment identified the specific medical services that were planned.

PIP "benefits are payable as loss accrues." MCL 500.3142(1). And MCL 500.3110(4) provides that PIP "benefits payable for accidental bodily injury accrue not when the injury occurs but as the allowable expense, work loss or survivors' loss is incurred." We conclude that an expense is incurred or a patient becomes liable

[2] PIP "benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." MCL 500.3142(2).

[3] We reject any assertion that the May 23, 2018 assignment effectively assigned to Bronson a right to benefits for treatment provided to Moore on May 8, 2018. Nothing in the assignment of May 23, 2018, indicated that Moore had received treatment from Bronson in the past. The assignment did not reference any particular services or the charges for past medical treatment. Instead, the May 23, 2018 assignment was an open-ended agreement for unspecified services in unknown amounts relative to future treatment.

when an agreement to pay is executed *and* treatment is received. See *Clark v Al-Amin*, 309 Mich App 387, 397; 872 NW2d 730 (2015) ("An insured becomes liable for an expense when he accepts the medical treatment for which he (or his insurer) is being charged."); *Community Resource Consultants, Inc v Progressive Mich Ins Co*, 480 Mich 1097, 1098 (2008) ("Generally, one becomes liable for the payment of services once those services have been rendered.").

In *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003), our Supreme Court indicated that the term "incur" means "[t]o become liable or subject to, [especially] because of one's own actions." (Quotation marks and citation omitted; alterations in original.) The *Proudfoot* Court further noted that "[a]n insured could be liable for costs by various means, including . . . signing a contract for products or services." *Id*. at 484 n 4. Citing *Proudfoot*, Bronson argues that an expense is incurred when a contract for medical services is executed; therefore, loss accrues when the contract is signed, which necessarily means that benefits are payable when the contract is executed.

In examining the meaning of "incurred," the Supreme Court in *Proudfoot* determined that expenses for the future modification of the plaintiff insured's home to accommodate the use of a wheelchair were not yet incurred, and therefore, the insurance company was not required to pay for the modification until the expense was actually incurred. *Id*. at 484. The Court reasoned that "[a]t the time of the judgment, plaintiff had not yet taken action to become liable for the costs of the proposed home modifications." *Id*.

At first glance, *Proudfoot* appears to support Bronson's position; however, on closer inspection it

becomes clear that *Proudfoot* is not controlling and is distinguishable because of the nature of the contract in this case as compared to the contract for home modifications discussed in *Proudfoot*. As noted earlier, there can be no reasonable dispute that had Moore, on either date, left the emergency department after executing the assignment but before treatment was actually provided, he would have had no liability, and thus, no expense would have been incurred. Accordingly, it cannot be said that Moore incurred an expense by simply signing the assignments. In contrast, the *Proudfoot* Court analyzed a construction contract that would give rise to liability, resulting in the insured's incurring an expense. In that situation, the insured could not simply walk away from the contract: the insured could incur contractual liability for breach of a construction contract and be forced to pay damages. The agreement to pay for medical services did not obligate Moore to receive services; rather, Moore only became obligated to pay—and Bronson only became entitled to payment—if Moore actually received medical treatment. Therefore, Moore did not incur an expense and a loss did not accrue until medical services were provided. Accordingly, PIP benefits were not payable at the time Moore had merely executed the assignments.

This Court has held that an assignment executed before any medical services are provided constitutes an assignment of a right to benefits payable in the future, rendering the assignment void under MCL 500.3143. In *Bronson*, unpub op at 9,[4] the Court ruled:

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[4] "Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value." *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

> The pretreatment assignments upon which Bronson relies, however, were executed before any treatment was provided. [The other four individuals] only signed the registration release forms which plainly did not assign rights to pursue benefits for past or presently due services Bronson already provided. Instead, these insureds assigned their rights to PIP benefits for unknown services to be provided in [the] future. The registration release forms did not render the insureds liable within the meaning of the no-fault act at the time of their execution because the insureds did not become legally responsible to pay for allowable expenses at that time. Because all of the rights to benefits contemplated by the assignments involved rights to benefits payable in the future, these assignments executed before treatment were void under MCL 500.3143. Consequently, the trial court erred by denying Farm Bureau's motion for summary disposition regarding Bronson's claims based upon the void pretreatment assignments executed by the insureds.

Again, our Supreme Court denied leave in the case. *Bronson*, 505 Mich 942.

In *VHS of Mich, Inc v Everest Nat'l Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued May 9, 2019 (Docket No. 341190), p 8, this Court similarly held:

> In this case, the language of the Consent to Treat forms suggests that Ellis was assigning a future right, which would be void. He had not yet received any medical services at the time he signed each form, so assigning any right for the anticipated medical services would, of necessity, be the assignment of a future right. . . . Ellis' assignments in the Consent to Treat forms were invalid as an attempt to assign future rights. As an assignment of future rights, Ellis' assignments on March 15, 2016 and April 13, 2016 are void under MCL 500.3143.

In *Oaklawn Hosp v Auto-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals,

issued July 30, 2019 (Docket No. 343189), pp 9-10, this Court likewise ruled:

> When Dothsuk signed the consent for treatment forms, he had not yet incurred allowable expenses for his medical treatment, at that point he was merely requesting and providing consent to in fact receive medical treatment as a general matter. Notably, the consent for treatment form provides that Dothsuck [sic] was "request[ing] and consent[ing] to health care provided by [plaintiff], its physicians, and health care providers." The consent to treatment form also specified that health care could include "examinations, diagnostic procedures and treatment considered appropriate by my attending physician(s) or other health care providers at Oaklawn." The consent for treatment form also specified that Dothsuk reserved the right to refuse any medical treatment, and that "unless an emergency or extraordinary circumstances" arose, "no substantial procedures will be performed upon me" unless Dothsuk had discussed the proposed treatment, to his personal satisfaction, with his physician or other appropriate health care providers. Accordingly, when he signed the consent to treatment forms, while Dothsuk requested that plaintiff provide medical treatment and he consented to health care being provided by plaintiff, PIP benefits had not accrued because allowable expenses had not yet been incurred. MCL 500.3110(4). Under such circumstances, the trial court correctly granted summary disposition in favor of defendants, because even if the consent for treatment forms were construed to be valid assignments, they contravened the prohibition against the assignment of future benefits set forth in MCL 500.3143. [Alterations in original.]

We agree with all three unpublished opinions, as they honor the plain and unambiguous language of MCL 500.3143. Because Moore appeared in the emergency department and signed the assignments before he received any medical treatment related to the assignments, he indeed assigned rights to benefits

payable in the future, rendering the assignments void under MCL 500.3143.

In sum, the assignments are void under MCL 500.3143, and therefore, the district court erred by denying USAA's motion for summary disposition and the circuit court erred by denying USAA's application for leave to appeal. Accordingly, we reverse the circuit court's ruling and remand to the circuit court for entry of an order granting USAA's application for leave, reversing the district court's order, and remanding the action to the district court for entry of judgment in favor of USAA and against Bronson.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction. Having fully prevailed on appeal, USAA may tax costs under MCR 7.219.

RONAYNE KRAUSE, P.J., and BORRELLO, J., concurred with MARKEY, J.

SCHAUMANN-BELTRAN v GEMMETE
SCHAUMANN-BELTRAN v UNIVERSITY OF MICHIGAN REGENTS

Docket Nos. 347683 and 347684. Submitted November 9, 2020, at Lansing. Decided December 10, 2020, at 9:10 a.m. Reversed and remanded 509 Mich 979 (2022).

Aliama X. Schaumann-Beltran, through her then next friend, filed a medical malpractice action against Dr. Joseph Gemmete in the Washtenaw Circuit Court and a separate action against the University of Michigan Board of Regents in the Court of Claims alleging that the board was vicariously liable for Gemmete's malpractice. The cases were ultimately consolidated in the Washtenaw Circuit Court. During the proceedings, the parties agreed that plaintiff would submit to a neuropsychological evaluation, but defendants objected to plaintiff's request that her attorney be present and that the evaluation be videorecorded. Defendants moved to compel a physical and mental examination under MCR 2.311(A) and objected to plaintiff's continued request to have her attorney present and that the evaluation be videorecorded. The court, Timothy P. Connors, J., ordered that plaintiff undergo a neuropsychological exam and that plaintiff be allowed to videorecord the evaluation in lieu of having her attorney present. Defendants appealed.

The Court of Appeals *held*:

Under MCR 2.311(A), the trial court has discretion to grant a motion to order a mental or physical examination of a party when the party's mental or physical condition is in controversy and good cause has been shown. That court rule also specifically provides that the court's order "may provide that the attorney for the person to be examined may be present at the examination." Here, plaintiff argued that because MCR 2.311(A) authorized the court to permit her counsel to be present during the examination, the court also had discretion to authorize videorecording of the examination. Plaintiff further argued that because the court rule directs the court to specify the conditions of an examination, the court could impose videorecording as a condition of the examination. But caselaw interpreting the predecessor of the current

court rule and a similar provision of the Worker's Compensation Disability Act, MCL 418.101 *et seq*., indicated that the Court should not write into the court rule authorization for the trial court to permit videorecording of the examination when that authorization is not present in the language of the court rule. Accordingly, the trial court abused its discretion by ordering that plaintiff, or more specifically her counsel, be permitted to videorecord the examination.

Reversed and remanded.

MENTAL OR PHYSICAL EXAMINATION OF A PARTY — VIDEORECORDING.

Under MCR 2.311(A), the trial court has discretion to grant a motion to order a mental or physical examination of a party when the party's mental or physical condition is in controversy and good cause has been shown; the rule states that the order "may provide that the attorney for the person to be examined may be present at the examination"; the rule does not give a trial court discretion to permit videorecording of the examination.

Mark Granzotto, PC (by *Mark Granzotto*) and *Barry J. Gates* for plaintiff.

Tanoury, Nauts, McKinney & Garbarino, PLLC (by *Linda M. Garbarino* and *David R. Nauts*) for defendants.

Amici Curiae:

Kerr, Russell and Weber, PLC (by *Joanne Geha Swanson*) for the American Academy of Clinical Neuropsychology, the National Academy of Neuropsychology, the Society for Clinical Neuropsychology of the American Psychological Association, the American Board of Professional Neuropsychology, and the Michigan Psychological Association.

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

GADOLA, J. In this interlocutory appeal, defendants appeal by leave granted the order of the trial court under MCR 2.311(A), requiring plaintiff to participate

in a neuropsychological examination to be conducted by defendants' neuropsychology expert but permitting plaintiff's counsel to videorecord the examination. We reverse and remand to the trial court for proceedings consistent with this opinion.

I. FACTS

Defendant Joseph Gemmete, M.D., practices within the University of Michigan Health System, now referred to as Michigan Medicine. In 2014, Dr. Gemmete diagnosed plaintiff, Aliama X. Schaumann-Beltran, who was then a minor, as suffering from a vascular malformation in her left forearm, wrist, and hand known as venous malformation, which is an abnormal collection of veins. Dr. Gemmete recommended a procedure known as sclerotherapy, and Aliama's parents agreed to the procedure.

Dr. Gemmete performed the sclerotherapy and allegedly injected bleomycin, a chemotherapy drug not approved by the FDA for use in sclerotherapy, into Aliama's vascular malformation. He also allegedly injected sodium tetradecyl sulfate into the vascular formation. Over the course of the following month, Aliama's left index and middle fingers contracted and turned various shades of blue, white, and purple, and she experienced a decrease in sensation in her left hand. Additional surgeries were performed, and ultimately, doctors amputated Aliama's left index and middle fingers, which had become black.

Following the initial surgery, Dr. Gemmete allegedly accused Aliama of drug abuse, accused Aliama's parents of medical neglect, and allegedly directed someone at defendant C.S. Mott Children's Hospital to file a medical neglect complaint against Aliama's parents with Child Protective Services. In addition, during a

meeting with Aliama's family, Dr. Gemmete allegedly shouted at Aliama's sister while jabbing his finger close to her face.

Plaintiff initiated a medical malpractice action against Dr. Gemmete[1] in the Washtenaw Circuit Court. Plaintiff also initiated a medical malpractice action in the Court of Claims against defendants, The Board of Regents of the University of Michigan, d/b/a University of Michigan Health System (now Michigan Medicine), the University of Michigan Medical Center, and C.S. Mott Children's Hospital, seeking recovery under a theory of vicarious liability. Plaintiff, her parents, and her sister also initiated an action against Dr. Gemmete in the Washtenaw Circuit Court alleging defamation and assault. Upon stipulation of the parties, the Court of Claims transferred the case before that court to the Washtenaw Circuit Court where it was consolidated with the two cases before the circuit court.

Before the trial court, the parties agreed that Aliama would submit to a neuropsychological evaluation to be performed by defendants' neuropsychological expert, Jennifer Huffman, Ph.D. Defendants, however, did not agree to plaintiff's requests that her attorney be present during the evaluation and that the evaluation be videorecorded. Defendants filed a motion to compel a physical and mental examination under MCR 2.311(A) and also sought a protective order under MCR 2.302(C). Defendants argued that third-party observers and videorecording of the testing would be intrusive, would affect the performance of the evaluation, would undermine the validity of the findings, and would violate the ethical standards of practice for psychologists in Michi-

[1] Plaintiff was a minor at the time the lawsuits were initiated; the lawsuits were initiated on her behalf by her next friend, Jose Luis Beltran.

gan. Defendants supported the motion with the affidavit of Dr. Huffman, attesting that she would withdraw from the evaluation rather than violate her ethical duties by testing plaintiff while a third-party was allowed to observe the testing, either directly or indirectly. Defendants also supported their motion with medical literature defending their position that third parties should not observe psychological testing.

The trial court granted defendants' motion in part and ordered plaintiff to participate in the neuropsychological evaluation by defendants' expert under MCR 2.311(A). The trial court, however, also ordered that plaintiff would be allowed to video record the evaluation in lieu of having her attorney present. The trial court explained that it was unconvinced that the presence of a camera would give rise to any ethical concern or affect the validity of the testing.

Defendants sought interlocutory leave to appeal the order of the trial court in the three cases. This Court granted the applications and consolidated the cases on appeal.[2] Thereafter, the trial court dismissed the defamation lawsuit in light of the parties' March 2019 settlement of that claim; this Court accordingly dismissed that appeal.[3] We also accepted for filing in the consolidated cases an amici curiae brief submitted by various professional psychological and clinical neuro-

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[2] *Schaumann-Beltran v Gemmete*, unpublished order of the Court of Appeals, entered July 16, 2019 (Docket No. 347682); *Schaumann-Beltran v Gemmete*, unpublished order of the Court of Appeals, entered July 16, 2019 (Docket No. 347683); *Schaumann-Beltran v Univ of Mich Regents*, unpublished order of the Court of Appeals, entered July 16, 2019 (Docket No. 347684).

[3] *Schaumann-Beltran v Gemmete*, unpublished order of the Court of Appeals, entered October 31, 2019 (Docket No. 347682).

psychology organizations[4] supporting the position that third parties should not be permitted to observe a neuropsychological examination, nor should such examinations be videorecorded.

II. DISCUSSION

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's decision on a motion to compel a medical examination under MCR 2.311(A). *Burris v KAM Transp, Inc*, 301 Mich App 482, 487; 836 NW2d 727 (2013). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 604; 886 NW2d 135 (2016). A trial court also necessarily abuses its discretion when it makes an error of law. *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 274; 884 NW2d 257 (2016). This Court reviews de novo the proper application and interpretation of court rules. *Henry v Dow Chemical Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

B. VIDEORECORDING OF THE EXAMINATION

Defendants contend that the trial court abused its discretion by ordering that plaintiff be permitted to

[4] Amici curiae in this case are the American Academy of Clinical Neuropsychology, the National Academy of Neuropsychology, the Society for Clinical Neuropsychology of the American Psychological Association, the American Board of Professional Neuropsychology, and the Michigan Psychological Association. The amici curiae describe at length scientific literature and position statements of governing professional bodies on the subject of the potential detrimental impact of third-party observance and recording on test reliability and test security, and the ethical implications for the practitioner.

video record the neuropsychological examination in this case. We agree.

Michigan courts have long had discretion to direct a party to submit to a medical examination when the party's injuries are at issue. See, e.g., *Logan v Agricultural Society of Lenawee Co*, 156 Mich 537, 542; 121 NW 485 (1909) (holding that the trial court was within its discretion when it denied the defendant's motion to compel the plaintiff to participate in a medical examination), and *Graves v Battle Creek*, 95 Mich 266, 268; 54 NW 757 (1893) (holding that the trial court had discretion to grant or deny a motion to compel a medical examination of a party). A trial court's discretion to order a party to participate in a medical examination is now set forth in MCR 2.311(A), which has as its basis former Michigan court rule GRC 1963, 311.1, which in turn was modeled on FR Civ P 35. See *Burris*, 301 Mich App at 495 (M. J. KELLY, P.J., dissenting).

Under MCR 2.311(A), a trial court has discretion to order a party to submit to a physical or mental examination (1) upon motion of a party when (2) the mental or physical condition of a party is in controversy, and (3) good cause is demonstrated. That court rule also specifically provides that the trial court may order that the attorney for the person undergoing the examination may be present during the examination. Specifically, 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**. [Emphasis added.]

Court rules are construed using the principles of statutory interpretation. *Planet Bingo, LLC v VKGS, LLC*, 319 Mich App 308, 324; 900 NW2d 680 (2017). "The intent of the rule must be determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole." *Haliw v Sterling Heights*, 471 Mich 700, 706; 691 NW2d 753 (2005). If the language of the court rule is clear and unambiguous, it is enforced as written. *Acorn Investment Co v Mich Basic Prop Ins Ass'n*, 495 Mich 338, 350; 852 NW2d 22 (2014).

Although MCR 2.311(A) provides that the trial court may order that the attorney for the person to be examined may be present at the examination, the court rule does not provide that an examination of a party may be videorecorded. In this case, the trial court reasoned that videorecording was less obtrusive than the presence of plaintiff's counsel at the examination. The trial court thereby concluded that its discretionary authority under MCR 2.311(A) to permit plaintiff's attorney to attend the examination extended to include, or perhaps was synonymous with, permitting the examination to be videorecorded in lieu of plaintiff's counsel attending the examination.

We observe first that there is little authority shedding light on this question. As noted, MCR 2.311(A) has as its basis former Michigan court rule GRC 1963, 311.1. That predecessor court rule provided, in pertinent part:

> In an action in which the mental or physical condition or the blood relationship of a party, or of an agent or 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 to produce for such examination his agent or the person in his custody or legal control. The order may be made only for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination, the person or persons by whom it is to be made, and **shall provide that the attorney for the person to be examined may be present at the examination**. [GCR 1963, 311.1 (emphasis added).]

This Court discussed the former court rule in *Nemes v Smith*, 37 Mich App 124; 194 NW2d 440 (1971). In *Nemes*, the plaintiff brought an action based on injuries allegedly arising from an automobile accident. The trial court ordered the plaintiff, under GRC 1963, 311.1, to participate in a physical examination by the defendant's expert, and the trial court denied the plaintiff's request either to tape-record or record by court reporter the questions asked and the answers given during the examination. *Nemes*, 37 Mich App at 125, 131. On appeal, this Court affirmed the trial court's order. Observing that the court rule permitted the attorney of the person being examined to be present during the examination but did not provide for recording the examination, this Court held:

> We are constrained to determine that the court rule is all inclusive and provides the safeguards necessary to protect the interests of a person to be examined by a doctor for the opposing side.
>
> The plaintiff asserts that in construing the court rule we should consider that the plaintiff has the right to make a record of the questions asked and the answers given at

> the physical examination by the use of either a mechanical tape recorder, or in lieu thereof, a court reporter. We decline to write in the court rule by interpretation that which is absent in its language. [*Id*. at 131.]

As noted, this Court in *Nemes* was not discussing MCR 2.311(A), but instead was discussing the similar provision in the precursor to the current court rule. We also observe that under MCR 7.215(J)(1), this Court is not required to follow as precedential opinions from this Court issued before November 1, 1990. Nonetheless, under traditional principles of stare decisis, published opinions of this Court issued before that date have precedential effect, MCR 7.215(C)(2); *New Covert Generating Co, LLC v Covert Twp*, 334 Mich App 24, 48 n 3; 964 NW2d 378 (2020), and therefore are entitled to deference. See *Woodring v Phoenix Ins Co*, 325 Mich App 108, 114-115; 923 NW2d 607 (2018). We therefore consider with deference this Court's decision in *Nemes* that the similar language of the predecessor court rule to MCR 2.311(A), which permitted the attorney's presence during an ordered examination, did not authorize the person being examined to record the examination.

Although not discussing MCR 2.311(A), our Supreme Court employed reasoning similar to that of *Nemes* and arrived at a similar conclusion in construing § 385 of the Worker's Disability Compensation Act, MCL 418.385, in *Feld v Robert & Charles Beauty Salon*, 435 Mich 352; 459 NW2d 279 (1990). There, the plaintiff was allegedly injured in a work-related accident and sought workers' compensation benefits. The defendant employer requested, under § 385 of that act, that the plaintiff participate in an examination by the defendant's medical expert. The plaintiff refused to participate unless her attorney was present during the examination. The magistrate determined that § 385 permitted the plaintiff to have her physician present

during the examination but did not bestow upon the plaintiff the right to have her attorney present. The magistrate thereafter dismissed the plaintiff's petition, and the Workers' Compensation Appeal Board (WCAB) affirmed the magistrate's decision. *Id*. at 356-357 (opinion by RILEY, C.J.).

This Court reversed the decision of the WCAB, holding that the plaintiff had the right to have her attorney present during the examination and that the attorney could make an audio recording of the examination. *Id*. at 357. Our Supreme Court reversed the decision of this Court and held that although § 385 permitted a plaintiff to have his or her own physician present during the examination, that statute did not entitle the plaintiff to have her attorney present. *Id*. at 364 (opinion by RILEY, C.J.); *id*. at 369 (BOYLE, J., concurring). The lead opinion further determined that the issue of whether the plaintiff's attorney was entitled to record the examination was moot given that the plaintiff did not have the right to have her attorney present. *Id*. at 355-356 (opinion by RILEY, C.J.). The Court rejected the plaintiff's argument that because § 385 does not specifically preclude the presence of an attorney, it should be construed as permitting counsel to be present during the examination. *Id*. at 364-368 (opinion by RILEY, C.J.); *id*. at 369 (BOYLE, J., concurring). The lead opinion reasoned:

> Section 385 grants an employer or its carrier the authority to have a physician of its choice conduct a medical examination of an employee. The statute is clear and unambiguous in that it permits the employee "the right to have a physician provided and paid for by himself or herself present at the examination." It is equally clear that § 385 does *not* provide the employee with the right to have counsel present at the examination. The right of the employee is plainly granted within the statute and exists

only to the extent plainly granted. Therefore, the mode prescribed within § 385 "must be followed and none other . . . ."

* * *

The plaintiff advances the argument that an employee has the right to have counsel present during a § 385 medical examination because the statute does not expressly preclude attorneys. This rationale ignores the obvious fact that the Legislature has *expressly prescribed* that an employee has the right to have a personal physician present. To extend the right of an employee to include the presence of an attorney merely because the statute does not *expressly prohibit* counsel would neutralize the effect of the entire § 385 sentence in question and render it nothing more than surplusage. This is a conclusion that may only be reached when we are presented with a strong countervailing legislative implication, and that is not the case here.

* * *

Section 385 provides a procedure which allows an employer or its carrier to conduct a physical examination of an injured employee. The statute is clear in that it provides an employee with the right to have a personal physician present at the examination. To extend the effect of § 385 beyond the language of the statute would breach the rules of statutory construction, as well as the summary spirit of the [Worker's Disability Compensation Act].

* * *

We hold that an employee does not have the right to have counsel present during a physical examination requested by an employer or its carrier pursuant to § 385. Consequently, we find as moot the second issue regarding the audio recording of the examination. [*Id*. at 364-368 (opinion by RILEY, C.J.) (quotation marks and citations omitted).]

In this case, plaintiff contends, and the trial court held, that because MCR 2.311(A) authorizes the trial court to permit plaintiff's counsel to be present during the neuropsychological examination, the trial court also had discretion to authorize the videorecording of the examination. Plaintiff contends, and the trial court agreed, that videorecording the examination is less obtrusive than the presence of plaintiff's attorney at the examination. Plaintiff also argues that the court rule directs that the trial court specify the conditions of an examination, suggesting that the trial court could impose videorecording as a "condition" of the examination. However, despite the former court rule also permitting the trial court to specify the conditions of the examination, this Court in *Nemes* did not construe that provision as authority to permit the recording of the examination. As in *Nemes*, and in the spirit of *Feld*, we decline to write into the court rule authorization for the trial court to permit videorecording of the examination when that authorization is not present in the language of the court rule. We therefore conclude that the trial court abused its discretion by ordering that plaintiff, or more specifically her counsel, be permitted to videorecord the examination.

On appeal, defendants and amici point out various detrimental effects of videorecording an examination, namely, that videorecording may taint the evaluation results, render impossible the comparison of data, endanger the security of the test, and run afoul of ethical concerns for the practitioners administering the tests. Defendants and amici also outline the similar detrimental effects of having an observer present during a neuropsychological examination. Based on the supporting literature provided, an argument could be made that either method of observation is detrimental to the examination process. But one distinction

between the two options is clear—MCR 2.311(A) does not explicitly permit the trial court to allow an examination to be video recorded, but it does explicitly permit the trial court to allow the attorney of the person being examined to be present during the examination.

When the language of a court rule is clear and unambiguous, we enforce it as written. *Acorn Investment Co*, 495 Mich at 350. We therefore decline the invitation of defendants and amici to consider whether, as a policy matter, third-party observation of a neuropsychological examination is always contrary to the interests of patients, litigants, and the practical and ethical concerns of neuropsychology generally, which is a topic more properly directed to our Supreme Court. See *Ozimek v Rodger*, 317 Mich App 69, 80; 893 NW2d 125 (2016) (stating that if practitioners "wish to promote an expanded court rule, our Supreme Court would be the proper venue for that request"), overruled on other grounds by *Marik v Marik*, 501 Mich 918 (2017).

We do, however, note that MCR 2.311(A) provides discretion to the trial court in various respects. Under the court rule, a trial court has discretion to order a party to submit to a physical or mental examination, upon motion of a party, when the mental or physical condition of a party is in controversy and good cause is demonstrated. "In the context of our court rules, good cause simply means a satisfactory, sound or valid reason. A trial court has broad discretion to determine what constitutes good cause." *Thomas M Cooley Law Sch v Doe 1*, 300 Mich App 245, 264; 833 NW2d 331 (2013) (quotation marks and citations omitted). In other words, MCR 2.311(A) does not require the trial court to order an examination, even if the party's

mental or physical condition is in controversy, and even if good cause is shown. Rather, ordering an examination is discretionary with the trial court under MCR 2.311(A), and an abuse of the trial court's discretion will be found only if the trial court chooses an option outside the range of principled outcomes. The abuse-of-discretion standard recognizes that in some circumstances a single correct result does not exist. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Similarly, under MCR 2.311(A) the trial court has discretion to permit the attorney for the person undergoing the examination to be present during the examination. Although there may be circumstances in which permitting third-party observation by the examinee's attorney could be found to be an abuse of the trial court's discretion, we cannot conclude that permitting the examinee's attorney to observe the examination is always, in and of itself, an abuse of the trial court's discretion, given that MCR 2.311(A) contemplates that exercise of discretion. In addition, we disagree with defendants' contention that MCR 2.311(A) requires a showing of good cause before the trial court may permit the presence of the attorney at the examination. The court rule provides that the trial court may order a party to submit to a physical or mental examination, upon motion of a party, when the mental or physical condition of a party is in controversy and good cause is demonstrated. The court rule further provides that "[t]he 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." MCR 2.311(A). The court rule does not specify that "good cause" *must* be established before the attorney of the examinee is

permitted to observe the examination, though the trial court may choose to require some showing of good cause in the course of exercising its discretion.

That being said, we find it difficult to envision under what circumstances, if ever, it would be advisable to have an examinee's attorney present during a psychological examination. A party conducting the examination is subject to discovery of its expert's report, and its expert is subject to being deposed. We consider that it would be the rare occasion when these discovery mechanisms are insufficient to protect the examinee, and they likewise would appear to provide sufficient discovery tools to the party examined. However, the question whether plaintiff's attorney should be present at the examination in this case was not decided by the trial court, and we will not speculate in advance of the trial court's decision.

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

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

JORDAN v DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No. 349641. Submitted November 10, 2020, at Lansing. Decided December 10, 2020, at 9:15 a.m.

Helen Jordan, a nurse who had been employed by defendant, the Department of Health and Human Services (DHHS), challenged in the Michigan Compensation Appellate Commission (the MCAC) a decision of the Workers' Compensation Board of Magistrates that Jordan was not entitled to workers' compensation benefits under the Worker's Disability Compensation Act (the WDCA), MCL 418.101 *et seq*., because her loss of wage-earning capacity was unrelated to a work injury she sustained in 1995. After Jordan sustained the injury, health professionals prescribed opioids to treat Jordan's leg and back pain. Jordan continued to receive benefits on the basis of the incident for 20 years. In 2015, Jordan underwent two independent medical examinations at DHHS's request. DHHS terminated Jordan's benefits in March 2015 following those examinations. Jordan submitted an application seeking reinstatement of her benefits in the Workers' Compensation Board of Magistrates, and Magistrate Beatrice B. Logan issued an opinion and order finding that Jordan's loss of wage-earning capacity was due to chronic opioid use, not her work-related injury, and therefore concluded that Jordan was not entitled to benefits. The magistrate agreed with DHHS's expert that Jordan was suffering from age-related degenerative changes to the lumbar spine and had chronic pain of unknown etiology. Jordan appealed the magistrate's decision in the MCAC, and the MCAC reversed, concluding that Jordan was disabled because of her use of prescribed opioids, that her opioid use was directly traceable to alleviating symptoms connected to the injuries sustained in the 1995 work incident, and that the treatment with opioids was reasonable and necessary under the circumstances. DHHS appealed, arguing that the MCAC did not apply the proper deferential standard of review to the magistrate's fact-finding and that the MCAC erred by reversing the magistrate's order because treatment of Jordan's back and leg pain with opioids was not reasonable or necessary.

The Court of Appeals *held*:

The MCAC reviews the magistrate's factual findings under the substantial-evidence standard. Substantial evidence is such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion. The MCAC must consider as conclusive the findings of fact made by a workers' compensation magistrate, as long as those facts are supported by competent, material, and substantial evidence on the whole record. Furthermore, the MCAC is not empowered to set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. Under MCL 418.301(1) of the WDCA, an employee who receives a personal injury arising out of and in the course of employment by an employer who is subject to the WDCA at the time of the injury shall be paid compensation as provided in the WDCA. Under MCL 418.301(4)(a), a "disability" is defined as a limitation of an employee's wage-earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease. In this case, the MCAC employed the wrong legal framework, and its analysis was based on erroneous legal reasoning. The MCAC determined that Jordan's opioid use that caused her disability was directly traceable to the work-related incident. However, the properly framed question was whether Jordan's opioid use in 2015, i.e., the treatment at the time her benefits were halted, was traceable to the 1995 work-related injury, but only to the extent that the effects of that injury still existed in 2015 when she was still being prescribed the opioids. The magistrate effectively determined that Jordan's 2015 opioid use was not for the purpose of alleviating pain associated with or caused by the 1995 assault, but the MCAC gave no weight to the magistrate's fact-finding and essentially exercised de novo review. The MCAC relied on *Staggs v Genesee Dist Library*, 197 Mich App 571 (1992), which held that treatment provided in response to a work-related injury, if reasonable or necessary under the circumstances, can create or give rise to a disability causing loss of wage-earning capacity that entitles the employee to workers' compensation benefits, even if the physical injury alone would not have supported an award of benefits. However, *Staggs* did not support the MCAC's ruling because *Staggs* involved treatment—a diagnostic myelogram—that took place one time, resulting in adverse lingering effects that rendered the plaintiff in *Staggs* unable to work; in this case, the relevant treatment involved prescriptions for opioids that were renewed over many years after numerous assessments and evaluations. Furthermore, even if the opioids prescribed to Jordan in 2015 were for the treatment of current pain resulting from or caused by

the 1995 work-related assault and injury, the MCAC's conclusion that the opioid prescriptions were reasonable and necessary was problematic. The magistrate, while not expressly indicating that treatment with opioids was unreasonable or unnecessary, agreed with the medical testimony that opioids were not effective, useful, or appropriate for the treatment of chronic pain, and there was substantial evidence to support the magistrate's finding. The MCAC gave no weight to that fact-finding. Finally, to the extent that opioid addiction or dependency in 2015 can be linked to or developed out of the first use of opioids in 1995 in treating Jordan's work-related injury, an award of workers' compensation benefits would not be proper because the connection between the work-related injury and the disability—possible endless drug addiction—would be much too tenuous, thereby dishonoring the intent of the WDCA.

Reversed and remanded for entry of judgment in favor of DHHS consistent with the magistrate's ruling.

METER, J., dissenting, disagreed with the majority's conclusion to reverse the MCAC's determination that plaintiff's opioid prescriptions were reasonable and necessary treatments and wrote separately to highlight the highly deferential standard of review in cases involving the MCAC. The Court of Appeals begins by reviewing the MCAC's decision, not the magistrate's, and findings of fact made by the MCAC are conclusive on appeal, absent fraud, if there is any competent evidence in the record to support them. In this case, there was competent evidence to support the MCAC's determination that plaintiff's opioid prescriptions were reasonable and necessary: plaintiff and her treating doctors testified that she was prescribed opioids on the basis of her 1995 work-related injury and that at the time of the prescriptions, opioids were a reasonable and necessary treatment for pain. Thus, the MCAC's findings were conclusive on appeal. Furthermore, the MCAC did not misconstrue or misapply *Staggs* because plaintiff's doctors continued to prescribe opioids as a reasonable and necessary treatment for plaintiff's work-related injury and that treatment caused the loss of her wage-earning capacity. Judge METER therefore would have affirmed the MCAC's decision.

Charles W. Palmer for Helen Jordan.

Christopher M. Allen, Assistant Solicitor General, and *William S. Selesky*, Assistant Attorney General, for the Department of Health and Human Services.

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

MARKEY, P.J. Defendant, the Department of Health and Human Services (DHHS), appeals by leave granted[1] an order of the Michigan Compensation Appellate Commission (the MCAC) that reversed a magistrate's order denying the continuation of benefits for plaintiff, Helen Jordan, under the Worker's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. Jordan, a DHHS nurse, suffered a work-related back injury in 1995, and ever since, she has been prescribed opioids by health professionals to treat back and leg pain. Jordan received workers' compensation benefits on the basis of the incident for 20 years. In 2015, DHHS terminated the benefits after Jordan underwent independent medical examinations (IMEs). Jordan challenged the decision. In 2017, the magistrate found that Jordan's loss of wage-earning capacity was unrelated to her work injury; rather, it was due to chronic opioid use, and thus Jordan was not entitled to benefits. In her analysis, the magistrate agreed with DHHS's expert that Jordan was suffering from age-related degenerative changes to the lumbar spine and had chronic pain of unknown etiology. Jordan appealed that decision in the MCAC, and the MCAC reversed, concluding that Jordan was disabled because of her use of prescribed opioids, that her opioid use was directly traceable to alleviating symptoms connected to the injuries sustained in the 1995 work incident, and that the treatment with opioids was reasonable and necessary under the circumstances. On appeal, DHHS argues that the MCAC erred by reversing the magistrate's order because treatment of Jordan's back and

[1] *Jordan v Dep't of Health & Human Servs*, unpublished order of the Court of Appeals, entered October 31, 2019 (Docket No. 349641).

leg pain with opioids is not reasonable or necessary. DHHS principally contends that the MCAC did not apply the proper deferential standard of review to the magistrate's fact-finding. We agree with DHHS. Accordingly, we reverse and remand for entry of judgment in favor of DHHS consistent with the magistrate's ruling.

In 1990, Jordan was hired by DHHS to work at the Hawthorn Center as a registered nurse. She treated adolescents with behavioral problems. On October 3, 1995, Jordan was involved in an altercation with a female patient while at work. The patient pulled Jordan to the ground, causing Jordan to hit her back and head on the floor. Jordan lost consciousness for approximately five minutes. In the 20 years following the assault, Jordan has complained of back and leg pain, has been treated by a series of health professionals, has received workers' compensation benefits, and has been prescribed and has used opioids for the pain.

At DHHS's request, Jordan participated in two IMEs conducted by Dr. Philip J. Mayer, an orthopedic surgeon, in February 2015 and August 2016. Dr. Mayer opined that a surgical lumbar laminectomy performed years earlier on Jordan was not necessary and that no treatment was required for Jordan's spine. In addition, Dr. Mayer concluded that Jordan's 1995 incident at work was not the cause of her back and leg pain; rather, it resulted from degenerative changes to her spine. He also believed that the opioids Jordan was taking were not justified or appropriate for treating her chronic pain.

In light of Dr. Mayer's medical opinions, DHHS terminated Jordan's WDCA benefits in March 2015. Jordan then submitted an application for mediation or hearing, seeking reinstatement of her benefits. The

magistrate held a hearing on Jordan's application over two days in April and May 2017. The parties stipulated several facts, including the following: (1) Jordan was an employee of DHHS on the alleged injury date of October 3, 1995; (2) the parties were subject to the WDCA at the time of the assault; (3) Jordan's "personal injury arose out of and in the course of employment"; (4) DHHS "had notice . . . of the personal injury during the statutory prescribed period"; (5) the value of Jordan's "discontinued fringe benefits was $633.40 and the appropriate compensation rate after coordination was $153.83"; (6) Jordan was paid "[w]orkers' compensation benefits of $153.83 a week until March 31, 2015"; and (7) "[i]t was disputed that [Jordan's] disability is due to the alleged personal injury." Jordan presented the deposition testimony of Drs. Blaise Audet, Jack Belen, and Herbert Mendelson, as well as of James Fuller, a vocational expert. Jordan also testified on her own behalf. DHHS presented the deposition testimony of Dr. Mayer and vocational expert John Stokes. Also, DHHS called to the stand private investigator David Bergman. Numerous medical reports and records, which referred to various physicians and their diagnoses, were admitted into evidence.

On June 22, 2017, the magistrate issued an order and opinion denying Jordan continuing benefits under the WDCA. For purposes of our analysis, it is important to understand the full extent of the magistrate's ruling; consequently, we shall quote at length from the decision of the magistrate:

> It is undisputed that [Jordan] sustained an injury to her back on October 3, 1995 while restraining a patient. It is also undisputed that [Jordan] was paid worker's disability compensation payments from the date of injury in 1995 until 2015. The issue therefore is not whether [Jordan]

was disabled from the initial injury on October 3, 1995 but whether she continues to be disabled from the 1995 injury.

* * *

I give no weight to Dr. Belen's testimony. Dr. Belen said working would likely cause pathologic worsening of [Jordan's] underlying condition and likely thwart any treatment to make her feel better. [Jordan] has not worked in over 20 years so her condition was not worsened due to work and there was no evidence presented of any treatment to make her feel better other than increased amounts of opioids. Dr. Belen suggested [Jordan] continue treating with the doctor prescribing her analgesic medication. However, Dr. Belen had agreed that some recent medical studies have shown that narcotic medications such as OxyContin and Oxycodone are not effective in the treatment of chronic pain and there are significant side-effects and issues regarding the person's ability to function as a result of long-term use of these types of medications.

I also reject Dr. Belen's testimony that [Jordan] is permanently and totally disabled as a result of the injury she sustained in October 1995 and unable to return to her employment as an RN. In *Peterson v Consumers Energy Company*, 2012 ACO #31[,] the Appellate Commission held that a doctor's opinion that the plaintiff cannot work does not constitute competent evidence as to disability. While the doctor qualifies as a competent medical expert, a medical doctor cannot in most instances provide an expert opinion regarding the translation of medical restrictions into vocational outcome. *Peterson*, supra.

Dr. Mendelson last treated [Jordan] on October 15, 1996 and he evaluated plaintiff on April 28, 2015. Dr. Mendelson said [Jordan's] surgery in 1996 did not improve her condition enough to return to work or make her more functional. He said [Jordan's] mild foot drop was an indication of a lack of improvement in the radiculopathy he diagnosed in 1995. Dr. Mendelson testified [that Jordan] was incapable of working as an RN as she was not

responding to treatment but he could not say that she was unable to perform any work. Dr. Mendelson also testified that the long-time narcotic medications [Jordan] was taking were not useful for the treatment of chronic pain and she was addicted to and dependent on the narcotics. Dr. Czuk-Smith, Dr. Chatas, Dr. Washabaugh, and Dr. Benecke all noted [Jordan's] narcotic dependence.

There was a voluminous amount of medical records and reports introduced into evidence from the various doctors that either evaluated or treated [Jordan] subsequent to the assault in 1995. In all of the records there is no diagnosis of osteoarthritis until Dr. Hardman states in his records on August 4, 2003 and March 30, 2004 that [Jordan] was seen for reevaluation of osteoarthritic symptoms and osteoarthritic pains in her back and legs. Dr. Hardman said [Jordan] has had chronic pain in her back, leg and knee since the assault in 1995. He evaluated [Jordan] in June 2007 for arthritic pain in her low back and hip secondary to the 1995 trauma.

Osteoarthritis is a condition of the aging process and Section 301(2) of the Act states conditions of the aging process shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. However this test applied only to injuries occurring on or after December 19, 2011. *Woods v Eaton Corp*., 210 ACO #9; *Hunt v Michigan Auto Compressor, Inc.*, 1999 #133 held when degenerative arthritis was caused by a traumatic incident, it is not considered a condition of the aging process and the significant manner test is not applied.

Dr. Hardman said [Jordan's] osteoarthritis was aggravated by the assault in 1995. I reject Dr. Hardman's opinion that [Jordan's] osteoarthritis was aggravated by the 1995 assault. The only mention of failed back syndrome in Dr. Hardman's records was the letter he authored on May 29, 2015. His prior diagnoses were osteoarthritis. Dr. Hardman attributes all of [Jordan's] ailments/conditions to the assault of 1995 with no supporting evidence. The assault occurred in 1995, nine years before Dr. Hardman diagnoses.

> I give greater weight to Dr. Mayer's findings of age-related degenerative changes in [Jordan's] lumbar spine and chronic opioid use. *I accept Dr. Mayer's diagnosis of status post decompressive laminectomies to the left at L3-4 and L4-5, chronic pain of unknown etiology, age-related degenerative changes in the lumbar spine, opioid dependency and chronic opioid use*. His diagnoses are supported by the record.
>
> The doctors at the Comprehensive Pain Clinic, Dr. Mendelson and Dr. Mayer testified or have stated [Jordan] is addicted to and dependent on the opioids. Mr. Fuller testified that [Jordan's] use of narcotics would render her unemployable with no vocational options and no wage earning capacity. Mr. Stokes agreed [Jordan's] use of opioids would be an impediment to the jobs he located. *Therefore, [Jordan's] loss of wage earning capacity is not related to her 1995 work injury but to her opioid dependency*. [Emphasis added.]

On August 7, 2017, Jordan filed a claim for review of the magistrate's order. She argued that the magistrate failed to consider the entire record when rendering the opinion and order. Jordan also contended that the magistrate's findings were not supported by the evidence presented by the parties. Lastly, Jordan maintained that the magistrate's conclusion that she was not entitled to benefits because of her opioid dependency was erroneous.

DHHS responded, arguing that the magistrate considered the entire record, that the denial of benefits was supported by the evidence, and that Jordan's loss of wage-earning capacity was unrelated to her injury in 1995. On June 5, 2019, the MCAC, relying on this Court's opinion in *Staggs v Genesee Dist Library*, 197 Mich App 571; 495 NW2d 832 (1992), issued its opinion and order reversing the magistrate's decision. The MCAC ruled:

Most troubling with the last sentence of the magistrate's reasoning is that her conclusion flies in the face of *Staggs*. . . . In *Staggs*, the plaintiff suffered a fall in the work place, injuring his back and right hip. He was off work for nearly six months and sought treatment for persistent back pain. Eventually, plaintiff underwent a myelogram procedure and suffered serious side effects. The side effects likewise persisted and plaintiff could only return to work with restrictions. However, no favored work was available.

Plaintiff Staggs applied for benefits and the referee denied those benefits based on a finding that the fall did not significantly contribute to his longstanding orthopedic problems. The Workers' Compensation Appeal Board reversed the referee finding that although the fall neither caused nor aggravated the back condition, he was entitled to benefits because the injury was caused by the myelogram that was ordered to diagnose the cause of persistent symptoms from the fall at work. The court held in *Staggs* that where the reasonable treatment of a work-related injury results in disability, the injured employee is entitled to benefits, even if the underlying injury did not itself result in disability.

In the case at bar, as the magistrate correctly recognized, [Jordan] had received over 20 years of treatment from multiple treating physicians since the incident in October of 1995 by the time of trial. Along with surgery and multiple different therapies, her treatment consisted of ever-growing doses of various opioid medications. There is no evidence of opioid use prior to the incident and no evidence of illegal opioid use. The record is clear that [Jordan's] opioid use was occasioned by prescriptions from her various treating physicians and several pain clinics.

Inasmuch as [Jordan's] vocational expert, Mr. James Fuller, and [DHHS's] vocational expert, Mr. John Stokes, agree that [Jordan's] opioid use precludes her from the workforce, we conclude that [Jordan] is disabled because of said opioid use. Because the opioid use is directly traceable to ameliorating the well documented symptoms incurred from the work incident in October of 1995, we

> further conclude that [Jordan] is entitled to benefits pursuant to the reasoning of *Staggs*, supra. Further, in that the record is replete with testimony that the opioids have consistently reduced [Jordan's] pain levels to allow her some quality of life, we find that the opioid prescriptions were reasonable and necessary on this particular record. See *Dixon v General Motors Corporation*, 2019 Mich ACO 3.

The MCAC reversed the magistrate's order, thereby entitling Jordan to continue receiving WDCA benefits. DHHS appeals by leave granted.

In *Omer v Steel Technologies, Inc*, 332 Mich App 120, 133-134; 955 NW2d 575 (2020), this Court articulated the various applicable standards of review:

> The MCAC reviews the magistrate's factual findings under the substantial evidence standard. Substantial evidence is such evidence, considering the whole record, as a reasonable mind will accept as adequate to justify the conclusion. The MCAC must consider as conclusive the findings of fact made by a workers' compensation magistrate, as long as those facts are supported by competent, material, and substantial evidence on the whole record.
>
> The MCAC has *limited* fact-finding power. It may substitute its own factual findings for those of the magistrate when a qualitative and quantitative analysis of the record yields a different result. However, the MCAC's factual review of the magistrate's opinion is *not* de novo. Rather, it involves reviewing the whole record, analyzing all the evidence presented, and determining whether the magistrate's decision is supported by competent, material, and substantial evidence. In other words, the MCAC must begin by considering the whole record to determine whether the evidence considered by the magistrate meets the legislative standard of competent, material, and substantial evidence. If it does, further review exceeds the MCAC's authority. The MCAC is not empowered to set

> aside findings merely because alternative findings also could have been supported by substantial evidence on the record.
>
> This Court must treat the MCAC's factual findings as conclusive if there is any competent record evidence supporting them. But we are empowered to review de novo questions of law embedded within a final order. A decision of the MCAC is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework. [Quotation marks, citations, and brackets omitted.]

"An employee, who receives a personal injury arising out of and in the course of employment by an employer who is subject to this act at the time of the injury, shall be paid compensation as provided in" the WDCA. MCL 418.301(1); see also *Rakestraw v Gen Dynamics Land Sys, Inc*, 469 Mich 220, 225; 666 NW2d 199 (2003). A "disability" under the WDCA is defined as a "limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." MCL 418.301(4)(a); see also *Sington v Chrysler Corp*, 467 Mich 144, 155; 648 NW2d 624 (2002).

In *Staggs*, 197 Mich App at 571-573, the underlying facts were as follows:

> On June 23, 1984, while working for defendant Genesee District Library as a library technical assistant, plaintiff tripped over a floor grate and fell into some shelving and onto the concrete floor. Shortly thereafter, plaintiff felt sharp pains in his back and right hip. Plaintiff was subsequently off work until December 6, 1984, during which time he received benefits. Also during this time, plaintiff sought medical treatment for persistent back pain. The treatment included a myelogram on November 9, 1984. Unfortunately, the myelogram caused plaintiff serious side effects, including nausea, headaches, and double vision. As a result, plaintiff was hospitalized for nine days. The side effects of the myelogram persisted and, consequently, plain-

tiff is only able to return to work with restrictions, which the library apparently cannot accommodate.

Plaintiff applied for workers' compensation benefits, alleging personal injury and occupational disease beginning June 23, 1984, due to lower back injuries and complications from the myelogram. It is basically undisputed that plaintiff sustained a work-related injury when he fell in June 1984 and that the myelogram was performed because plaintiff's symptoms persisted. However, evidence was presented before the hearing referee that the June 1984 fall had not caused or aggravated plaintiff's longstanding orthopedic problems. Evidence was presented that plaintiff had a pin surgically placed in his right hip during childhood because of a congenital condition, and that plaintiff thereafter periodically experienced pain in that hip. Hospital records indicated that plaintiff had been in an automobile accident in 1980, which resulted in plaintiff having a back spasm. Plaintiff also injured his back in 1982 while bending down to load books while working for the library. After bed rest was prescribed and plaintiff was off work for six weeks, all symptoms had cleared up. Plaintiff also injured his hip in November 1983 during a fall that was not related to work. Dr. Gutscher, who treated plaintiff shortly after the June 1984 fall, opined that, although the fall caused plaintiff back pain at the time, plaintiff's current back and hip problems were related to degenerative disc disease and degenerative arthritis. Dr. MacNeil, an expert retained by defendants, examined plaintiff after the fall, found no link between the fall and the persistent back condition, and opined that the symptoms arising from the strain caused by the fall should have been resolved by October 1984.

The plaintiff was denied workers' compensation benefits by the hearing referee on the basis that the plaintiff had not been disabled from performing his job and that the injury in June 1984 did not contribute significantly to the plaintiff's longstanding orthopedic

problems. *Id*. at 573. The Workers' Compensation Appeal Board (WCAB), a precursor to the Workers' Compensation Appellate Commission, reversed the referee's decision and awarded benefits to the plaintiff. *Id*. The WCAB ruled "that, although the June 1984 fall neither caused nor aggravated the back condition, the injury was compensable because plaintiff was disabled by complications resulting from the myelogram that was performed because of the persistent symptoms following the June 1984 fall." *Id*. The WCAB concluded that the diagnostic myelogram was only used because of the persistence of symptoms that followed the 1984 incident. *Id*.

This Court, in affirming the WCAB, agreed that "where medical treatment is necessitated by a work-related injury, and the medical treatment results in a disability, the claimant is entitled to benefits because the subsequent disability is traceable to the work-related injury." *Id*. at 575. The Court further ruled:

> Defendants argue that, because plaintiff's back condition was neither caused nor aggravated by the fall, an injury resulting from medical treatment cannot be traced to a work-related injury. Defendants, however, confuse plaintiff's preexisting health problems with the fact that plaintiff sought medical treatment as a result of pain experienced after the work-related fall and while plaintiff was receiving benefits for the disability arising from the fall. While we agree that under these circumstances plaintiff cannot recover benefits due to his preexisting back and hip problems, the disability resulting from the myelogram can be traced to the work-related fall that caused plaintiff to seek the medical treatment. We therefore hold that where the reasonable treatment of a work-related injury results in disability, the injured employee is entitled to benefits, even if the underlying injury did not itself result in that disability. [*Id*. at 575-576.]

In this case, the magistrate agreed with Dr. Mayer that Jordan was currently suffering from age-related degenerative changes in her lumbar spine with chronic pain of unknown etiology and that her dependency on opioids rendered her unemployable; therefore, the magistrate concluded that Jordan's loss of wage-earning capacity was not related to her 1995 work injury but to her opioid use. The magistrate's ruling reflected a determination that Jordan's current back and leg pain could not serve as a disability justifying the *continuation* of workers' compensation benefits.[2] The MCAC did not rule otherwise, nor did it speak to that particular issue. The magistrate's decision also revealed that she did not contemplate whether the effect of opioid use or dependency, in and of itself, could constitute a disability that would allow for Jordan to continue receiving benefits. The MCAC, relying on *Staggs*, rendered its decision exclusively on the basis of Jordan's use of prescribed opioids, which left her unable to work. The principle or proposition that emanated from *Staggs* is that treatment provided in response to a work-related injury, if reasonable or necessary under the circumstances, can create or give rise to a disability causing loss of wage-earning capacity that entitles the employee to workers' compensation benefits, even if the physical injury alone would not have supported an award of benefits.

We conclude that *Staggs* does not support the MCAC's ruling. *Staggs* involved treatment—a diagnostic myelogram—that took place one time, resulting in adverse lingering effects that rendered the plaintiff

[2] The magistrate expressed that "[t]he issue . . . is not whether [Jordan] was disabled from the initial injury on October 3, 1995[,] but whether she *continues to be disabled from the 1995 injury*." (Emphasis added.)

unable to work. In this case, the relevant treatment involved prescriptions for opioids, which treatment was continually renewed over many years after numerous assessments and evaluations; this case did not entail a one-time treatment as in *Staggs*. This distinction is important. As reflected in *Staggs*, the medical treatment must be in response and traceable to a work-related event and injury. Because Jordan's use of opioids was part of ongoing treatment over several years and because this case concerns whether Jordan was entitled to continue receiving benefits in 2015, the injury-treatment examination must be viewed under the circumstances that existed in 2015.

The MCAC determined that Jordan's opioid use that caused her disability was "directly traceable to ameliorating the well documented symptoms incurred from the work incident in October of 1995 . . . ." The MCAC employed the wrong legal framework, and its analysis was based on erroneous legal reasoning. The properly framed question is whether Jordan's opioid use in 2015, i.e., the treatment at the time her benefits were halted, was in response or traceable to the 1995 work-related injury, but only to the extent that the effects of that injury still existed in 2015 when she was still being prescribed the opioids. Without this linkage, Jordan would simply be a patient receiving opioid medication for back and leg pain unassociated with a work-related injury. And the magistrate found that Jordan was currently suffering from age-related degenerative changes in her lumbar spine with chronic pain of unknown etiology. In other words, the magistrate effectively determined that Jordan's 2015 opioid use was not for the purpose of alleviating pain associated with or caused by the 1995 assault; there was no longer a traceable connection between the opioid treatment and the work-related injury. The MCAC gave no weight to the magis-

trate's fact-finding and essentially exercised de novo review. "The MCAC is not empowered to set aside findings merely because alternative findings also could have been supported by substantial evidence on the record." *Omer*, 332 Mich App at 134 (quotation marks and citation omitted).

Furthermore, even if the opioids prescribed to Jordan in 2015 were for the treatment of current pain resulting from or caused by the 1995 work-related assault and injury, the MCAC's conclusion that the opioid prescriptions were reasonable and necessary was problematic. The magistrate, while not expressly indicating that treatment with opioids was unreasonable or unnecessary, agreed with the medical testimony that opioids were not effective, useful, or appropriate for the treatment of chronic pain. There was substantial evidence—indeed strong evidence—to support the magistrate's finding. Once again, the MCAC gave no weight to the magistrate's fact-finding and essentially exercised de novo review, which was improper. *Omer*, 332 Mich App at 133-134. "The MCAC must consider as conclusive the findings of fact made by a workers' compensation magistrate, as long as those facts are supported by competent, material, and substantial evidence on the whole record." *Id*. (quotation marks and citation omitted). The MCAC simply did not adhere to this principle.

Finally, to the extent that opioid addiction or dependency in 2015 can be linked to or developed out of the first use of opioids by Jordan in 1995 in treating her work-related injury, we conclude that an award of workers' compensation benefits would not be proper because the connection between the work-related injury and the disability—possible endless drug addiction—would be much too tenuous, thereby dishonoring the intent of the WDCA.

We reverse and remand for entry of judgment in favor of DHHS consistent with the magistrate's ruling. We do not retain jurisdiction. As the prevailing party, DHHS may tax costs under MCR 7.219.

GADOLA, J., concurred with MARKEY, P.J.

METER, J. (*dissenting*). I respectfully dissent from the majority's conclusion to reverse the determination of the Michigan Compensation Appellate Commission (the MCAC) that plaintiff's opioid prescriptions were reasonable and necessary treatments. I write separately to highlight the highly deferential standard of review in cases involving the MCAC.

"[J]udicial review of a decision by the MCAC is limited . . . ." *Arbuckle v Gen Motors LLC*, 499 Mich 521, 531; 885 NW2d 232 (2016). This Court's "review begins with the [commission's] decision, not the magistrate's." *Omian v Chrysler Group LLC*, 309 Mich App 297, 306; 869 NW2d 625 (2015) (quotation marks and citation omitted; alteration in original). "Findings of fact made or adopted by the [commission] are conclusive on appeal, absent fraud, if there is any competent evidence in the record to support them." *Id*. (quotation marks and citation omitted; alteration in original). In this case, there was competent evidence to support the MCAC's determination that plaintiff's opioid prescriptions were reasonable and necessary: plaintiff and her treating doctors testified that she was prescribed opioids on the basis of her 1995 work-related injury and that at the time of the prescriptions, opioids were a reasonable and necessary treatment for pain. Thus, the MCAC's findings are conclusive on appeal.

Further, contrary to the majority's conclusion, the MCAC did not misconstrue or misapply *Staggs v*

Genesee Dist Library, 197 Mich App 571; 495 NW2d 832 (1992). I agree with the majority's statement that "[t]he principle or proposition that emanated from *Staggs* is that treatment provided in response to a work-related injury, if reasonable or necessary under the circumstances, can create or give rise to a disability causing loss of wage-earning capacity that entitles the employee to workers' compensation benefits, even if the physical injury alone would not have supported an award of benefits." However, I disagree that *Staggs* is inapplicable to this case. Plaintiff's doctors originally prescribed the opioids in direct response to plaintiff's work-related injuries. Despite the factual distinction between this case and *Staggs* regarding the ongoing nature of the relevant treatments, plaintiff's doctors continued to prescribe opioids as a reasonable and necessary treatment for plaintiff's work-related injuries. Because plaintiff's treatment was provided in response to her work-related injury and that treatment caused the loss of her wage-earning capacity, this case falls squarely within *Staggs*. Therefore, I would affirm the MCAC's decision to reverse the magistrate's determination.

PEOPLE v EVANS

Docket No. 343544. Submitted December 8, 2020, at Detroit. Decided December 17, 2020, at 9:00 a.m.

Delilah Evans was tried in the Macomb Circuit Court for murder, MCL 750.316, after she admitted to having stabbed her mother to death. After the stabbing, defendant showered, used bleach to clean blood from surfaces, placed a blanket over her mother's body, and went to a nearby convenience store, where she asked the clerk to call the police. During a custodial interview, defendant admitted that she had stabbed her mother in the back and chest, smothered her with a pillow, and stabbed her in the neck, but she also stated that she believed her mother was a two-headed witch or a dragon who had threatened to kill her, among other seemingly delusional statements. Dr. Meghan Rowland, a psychiatrist at the Center for Forensic Psychiatry, concluded that defendant met the criteria for competency but was legally insane when she murdered her mother, and a second defense expert agreed. The prosecution called no experts but argued, among other things, that defendant's behavior before, during, and after the killing suggested logical and coherent thinking. The jury found defendant guilty but mentally ill of first-degree premeditated murder. The trial court, Richard L. Caretti, J., conducted a sentencing hearing pursuant to *Miller v Alabama*, 567 US 460 (2012), and determined that defendant, who was 17 years old at the time of the murder, should be sentenced to life imprisonment without parole. Defendant appealed, and she also moved the Court of Appeals to remand the case for a hearing regarding the effectiveness of her counsel during the *Miller* and sentencing hearings. The Court of Appeals granted that motion, remanded the case for the appropriate hearings, and retained jurisdiction. During the remand proceedings, the trial court found defense counsel ineffective during the *Miller* hearing and ordered that a new *Miller* hearing be held, to be followed by a resentencing hearing. The parties agreed to stay resentencing proceedings pending the resolution of the issues presented in this appeal.

The Court of Appeals *held*:

1. There was sufficient evidence for a jury to conclude that defendant was not legally insane at the time of the murder. Under MCL 768.21a(3), defendant bore the burden of proving her insanity defense by a preponderance of the evidence, and the prosecutor was not required to present any evidence to prove the failure of this affirmative defense. Further, the jury was entitled to disbelieve the expert witnesses' testimony, even if the testimony was unrebutted or uncontradicted by other expert testimony. A jury could have found defendant guilty of first-degree murder if it determined that, beyond a reasonable doubt, she had committed a willful, deliberate, and premeditated killing, and defendant did not challenge the sufficiency of the evidence related to any of these elements. Viewed in the light most favorable to the prosecution, defendant's statements regarding the crime, combined with the physical evidence, could support a finding that she had deliberately killed her mother.

2. The jury verdict did not contravene the great weight of the evidence. A verdict is against the great weight of the evidence and a new trial should be granted when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. The jury was not compelled to believe the defense experts, and there was evidence to indicate that defendant had planned the crime and attempted to conceal it afterwards. Accordingly, reasonable jurors could naturally and fairly come to different conclusions regarding whether defendant was legally insane.

3. The prosecutor committed misconduct requiring reversal by engaging in an improper cross-examination of Dr. Rowland. On cross-examination, counsel has a right to draw out from the witness and lay before the jury anything that tends or may tend to contradict, weaken, modify, or explain the testimony of the witness on direct examination or that tends or may tend to elucidate the testimony or affect the credibility of the witness. Effective and probing cross-examination of expert witnesses is particularly important in criminal cases when expert testimony plays a pivotal role. However, in a case that turns largely on conflicting expert testimony, a prosecutor must take special steps to avoid misconduct designed to impugn the integrity of the defendant's experts. Invective, ridicule, injection of the prosecutor's belief, and innuendoes are not permissible, and a highly prejudicial attack on a defendant's expert witness without support on the record requires reversal. In this case, the prosecutor repeatedly and gratuitously disparaged Dr. Rowland's qualifications and her intelligence; inaccurately characterized Dr. Rowland's opinions in a sarcastic, mock-

ing, and inaccurate manner; repeatedly accused Dr. Rowland in a badgering fashion of deliberately ignoring or withholding evidence from the jury; and accused her of being unable to distinguish right from wrong. These attacks were without an evidentiary basis. The prosecutor's misconduct seriously affected the fairness, integrity, or public reputation of the trial, and a new trial was necessary to determine defendant's guilt.

Conviction and sentence vacated; case remanded for a new trial.

CRIMINAL LAW — AFFIRMATIVE DEFENSES — INSANITY — BURDEN OF PROOF.

Under MCL 768.21a(3), a criminal defendant bears the burden of proving an insanity defense by a preponderance of the evidence; the prosecution is not required to present any evidence to prove the failure of this affirmative defense.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jean Cloud*, Prosecuting Attorney Pro Tem, *Joshua D. Abbott*, Chief Appellate Attorney, and *Emil Semaan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Lindsay Ponce*) for defendant.

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

GLEICHER, J. Delilah Evans stood trial for the murder of her mother, Sonia Riang. Evans advanced an insanity defense, and two expert witnesses testified on her behalf. The prosecution had no expert. To rebut the defense experts' testimony, the prosecuting attorney relied on cross-examination. The jury found Evans guilty but mentally ill and convicted her of first-degree premeditated murder, MCL 750.316(1)(a).

Cross-examination is a powerful legal engine for discovering the truth. But when it repeatedly trans-

gresses well-established boundaries, an improper cross-examination denies a defendant a fair trial. The prosecutor's interrogation of one of the experts in this case, Dr. Meghan Rowland, crossed the line on multiple occasions. The prosecutor likened Dr. Rowland to a cartoon character, accused her of writing her report in crayon, baselessly accused her of withholding evidence, misrepresented her testimony, and badgered her relentlessly. Counsel's performance denied Evans a fair trial.

Evans's additional challenges to her conviction lack merit. Based on the prosecutor's misconduct, however, we must vacate Evans's conviction and sentence and remand for a new trial.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Evans, age 17, stabbed her mother, Sonia Riang, 124 times with a kitchen knife. Evans then showered, used bleach to clean blood from surfaces, placed a blanket over Riang's body, and left the apartment where she and Riang lived. At a nearby convenience store, Evans asked the clerk to call the police. Evans made several bizarre statements to the arresting officers, including that she had just been held at gunpoint by a different officer who forced her into an act of prostitution and that she had dropped out of high school because her teachers, too, had forced her into prostitution.

During a custodial interview, Evans admitted to killing Riang, but intermittently devolved into delusional rambling. Evans claimed that Riang was not actually her mother, but a witch named Helen who had two heads and had kidnapped Evans when she was a child. Riang cast spells, Evans reported, and could make noodles "boil and pop." Her father was Satan, Evans declared, and had participated in the kidnap-

ping. Evans asserted that she decided to kill Riang because she was a witch (alternatively, a dragon) and had threatened to kill Evans.

Evans admitted that she had stabbed Riang's back and chest, smothered her with a pillow, and, when these efforts did not bring about Riang's death, stabbed her neck. Gnats flew out of Riang's stomach during the attack, Evans maintained. According to the detective who conducted the interview, Evans's description included "rants" about dark angels and voices in her head. She claimed that she had turned herself in because she was "1000 years old." Evans was placed in a single cell in the mental health unit of the Macomb County jail.

This was not the first time that Evans had displayed evidence of mental illness. Two weeks before the murder, Riang brought Evans to a local hospital for a psychiatric evaluation because she was "acting crazy." Evans was discharged after a brief evaluation and was not seen by a psychiatrist.[1] When she was lodged in the Macomb County jail, however, a jail physician placed Evans on suicide preventions and prescribed an antipsychotic medication and an antianxiety drug. According to the jail's director of mental health, Evans was "actively psychotic," was experiencing delusions, and appeared to be responding to "internal stimuli." Other jail notes documented jail staff members' suspicion that Evans was experiencing hallucinations.

Dr. Rowland, the first expert called by the defense, is employed by the Center for Forensic Psychiatry. The Center for Forensic Psychiatry is an independent

[1] Dr. Rowland's report indicates that Evans was "petitioned for mental health evaluation" two weeks before the murder after attempting to stab her brother and "stating she was hearing voices." She was released because the family did not file formal charges.

branch of the state government. *People v Hayes*, 421 Mich 271, 288; 364 NW2d 635 (1984). Dr. Rowland conducted her assessment pursuant to a statute requiring that a defendant asserting an insanity defense undergo an examination by a Center professional.[2] She interviewed Evans for more than six hours, both to assess her competency to stand trial and to determine whether she was criminally responsible. Dr. Rowland concluded that Evans met the criteria for competency but was legally insane when she murdered her mother.

At the time of the interviews, Evans was medicated. She was able to describe to Dr. Rowland what had occurred before, during, and after the murder. She admitted to hiding a knife or knives before and after killing Riang, making an effort to clean the bloody scene, leaving the premises, and putting a cell phone in the snow. The prosecutor relied on these facts to assert that the murder was premeditated and not the product of an insane mind.

Dr. Rowland's 26-page, single-spaced report exhaustively described the records she reviewed and the conversations she had with Evans about the murder and events that preceded and followed it. The report included details that were consistent with Evans's having planned the murder. For example, Evans told Dr. Rowland that on the day she killed Riang, Evans was "playing with knives and . . . thought about stabbing [her] mother." She retrieved several knives and hid one so that her mother could not see what she was doing. Evans described being angry at her mother,

[2] "Upon receipt of a notice of an intention to assert the defense of insanity, a court shall order the defendant to undergo an examination relating to his or her claim of insanity by personnel of the center for forensic psychiatry or by other qualified personnel . . . ." MCL 768.20a(2).

stabbing her repeatedly, and feeling guilt afterwards. The report noted that the results of a personality assessment Rowland administered were "non-valid" as Evans "appeared to answer questions in an attempt to portray herself in a negative manner."

The report is also replete with descriptions of Evans's delusions, including that she (Evans) had "angel wings because my dad suffocated me . . . then I suffocated myself with a pillow when I was watching Aaliyah sing." Her brother was on "Facetime Live," Evans reported, and she (Evans) talked to "Jackie Chan" on Facetime "because he pays for it." She denied making any of the statements about "dark angels" recorded in her interview with the police, yet also quoted her mother as saying "she was the Statue of Liberty" and expressing that her mother had "a dragon head" and was "a witch." When she stabbed her mother in the stomach, Evans recalled, she "was expecting worms to fall out." Evans acknowledged awareness that she had "murdered [her] mother in cold blood" and that she hid a knife in a towel because she knew the police were going to show up.

Dr. Rowland concluded that during the murder, Evans "was experiencing a substantial disorder of thought and mood that significantly impaired her judgment, behavior, capacity to recognize reality and ability to cope with the ordinary demands of life surrounding the time of the alleged offenses." Specifically, Dr. Rowland found that Evans "exhibited tangential and disorganized thought, loose associations with reality, delusional thought content and reported auditory hallucinations that, in this evaluator's opinion, significantly impaired her ability to recognize reality at the time of the alleged offenses." Dr. Rowland premised her conclusion that Evans met the legal definition of insanity on a single and specific prong of

the statutory test: that as a result of mental illness, Evans "lacked the substantial capacity to appreciate the nature and quality" of the situation. Dr. Rowland stressed in her report that Evans likely *did* have "the capacity to conform her conduct to the requirements of the law (i.e., the ability to assess and choose alternate behaviors)" when she committed the crime. Nevertheless, because Evans lacked the ability to appreciate the nature and quality of her acts, Dr. Rowland concluded that Evans met the criteria for legal insanity.[3]

Steven Miller, Ph.D., was retained by Evans's counsel. He, too, opined that Evans was legally insane when she killed Riang. In Dr. Miller's view, Evans suffered from a "schizoaffective disorder, bipolar type," and her disease manifested in paranoia and mood swings. He agreed with defense counsel's statement that Evans's actions before, during, and after the killing of Riang "were acts of a deeply and fundamentally declining dilusional [sic] and irrational motivation on [defendant's] part[.]"

In lieu of calling an expert witness, the prosecutor sought to undermine the opinions of the defense experts through cross-examination. The prosecutor's impeachment primarily relied on three facts: the experts admitted that their opinions regarding legal insanity were "subjective" and that other experts and even laypersons could disagree; Evans's behavior before, during, and after the killing suggested logical and coherent thinking; and Evans had been deliberately

[3] Insanity is an affirmative defense requiring proof that, "as a result of mental illness," the defendant "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct *or* to conform his or her conduct to the requirements of the law." MCL 768.21a(1) (emphasis added). Dr. Rowland relied solely on the first alternative—that Evans was unable to "appreciate" the wrongfulness of her actions.

deceitful by exaggerating her negative symptoms when completing the written psychological test.

The jury found defendant guilty but mentally ill of first-degree premeditated murder. The trial court conducted a sentencing hearing pursuant to *Miller v Alabama*, 567 US 460; 132 S Ct 2455; 183 L Ed 2d 407 (2012), to determine whether Evans should be sentenced to life imprisonment without parole. After two short days of testimony and argument on that issue, the trial court imposed a life-without-parole sentence.

With her brief on appeal, Evans moved this Court to remand the case for a *Ginther*[4] hearing regarding the effectiveness of her counsel during the *Miller* and sentencing hearings. We granted that motion, remanded the case for the appropriate hearings, and retained jurisdiction.[5] During the remand proceedings, the trial court found defense counsel ineffective during the *Miller* hearing and ordered a new one, to be followed by a resentencing hearing. The parties have stipulated to stay resentencing proceedings pending the resolution of the issues presented in this appeal.

II. SUFFICIENCY AND GREAT WEIGHT OF THE EVIDENCE

Evans first contends that insufficient evidence supported that she was not legally insane at the time of the murder. Alternatively, she asserts that the jury's verdict of guilty but mentally ill was against the great weight of the evidence. We must reject these arguments because the jury was entitled to disbelieve the expert witnesses, regardless of the strength of their

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[5] *People v Evans*, unpublished order of the Court of Appeals, entered October 30, 2019 (Docket No. 343544).

testimony, and some evidence of record supported that Evans was legally sane at the time of the killing.

We review de novo the question of evidentiary sufficiency, *People v Henry*, 315 Mich App 130, 135; 889 NW2d 1 (2016), viewing "the evidence in the light most favorable to the prosecutor" to "determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt," *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013) (quotation marks and citation omitted). This standard of review is deferential. We must draw all reasonable inferences and make credibility determinations in favor of the verdict. *People v Bailey*, 310 Mich App 703, 713; 873 NW2d 855 (2015).

Evans posits that no reasonable juror could have concluded that she was legally sane when she murdered her mother because the prosecutor failed to introduce any expert testimony to contradict the defense experts. This argument misses the mark in two respects. First, Evans bore the burden of proving her insanity defense by a preponderance of the evidence. MCL 768.21a(3). Because the law presumes that a defendant is sane, see *People v McRunels*, 237 Mich App 168, 172-173; 603 NW2d 95 (1999), Evans was required to come forward with evidence substantiating that more likely than not she was legally insane when she committed the crime. The prosecutor was not required to present any evidence on this score. See *People v Mette*, 243 Mich App 318, 330; 621 NW2d 713 (2000) ("The prosecution is not shouldered with the burden of proving the failure of an affirmative defense."). And "if a defendant produces sufficient evidence of the elements of [an affirmative] defense, then the question whether the defendant has asserted a valid defense is for the jury to decide." *People v Kolanek*, 491 Mich 382, 411-412; 817 NW2d 528

(2012). Thus, the prosecution's failure to put forward expert testimony did not render the evidence supporting Evans's sanity insufficient as a matter of law.

Second, a jury is entitled to disbelieve an expert witness's testimony, even though the testimony is unrebutted or uncontradicted by other expert testimony. *Estate of Taylor v Univ Physician Group*, 329 Mich App 268, 283; 941 NW2d 672 (2019). This legal principle rests on a longstanding foundation. In *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881), Justice COOLEY explained that despite the absence of any conflicting evidence, the jury "may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment." See also *People v Kanaan*, 278 Mich App 594, 620; 751 NW2d 57 (2008) ("[A] trier of fact is not bound to accept the opinion of an expert.") (quotation marks and citation omitted). The absence of a prosecution expert did not compel the jury to accept Evans's experts' testimony as true.

Constitutionally sufficient evidence of guilt exists where "a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010) (quotation marks and citation omitted). A jury could have found Evans guilty of first-degree murder if it determined that, beyond a reasonable doubt, she had committed a "willful, deliberate, and premeditated killing." MCL 750.316(1)(a). Evans does not challenge the sufficiency of the evidence related to any of these elements. And viewed in the light most favorable to the prosecution, Evans's statements combined with the physical evidence could support that she deliberately killed Riang. Evans admitted that she hid a knife in preparation for

attacking her mother and stabbed her repeatedly before administering the lethal strike. Her description of the crime allowed for time to "take a second look." *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011) (quotation marks and citation omitted). Assuming that the jury found the experts incredible, sufficient evidence supported the verdict.

Evans alternatively argues that the jury's verdict contravened the great weight of the evidence. "A verdict is against the great weight of the evidence and a new trial should be granted when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Solloway*, 316 Mich App 174, 182-183; 891 NW2d 255 (2016) (quotation marks and citation omitted). "Generally, a verdict is against the great weight of the evidence only when it was more likely the result of causes outside the record, such as passion, prejudice, sympathy, or some other extraneous influence." *People v Morris*, 314 Mich App 399, 414; 886 NW2d 910 (2016) (quotation marks and citation omitted).

Evans's great-weight argument has more merit than her sufficiency claim, but nevertheless falls short. As discussed below, the prosecutor's cross-examination of Dr. Rowland was misleading and prejudicial. At its heart, however, Evans's great-weight argument is about credibility. Evans insists that no reasonable juror could have concluded that she was sane in light of the unrebutted expert testimony. As we have explained, the jury was not compelled to believe the experts. Absent their testimony, more than a shred of evidence of record supported that Evans planned the crime and attempted to conceal it afterwards. Accordingly, reasonable jurors could naturally and fairly come

to different conclusions regarding whether Evans was legally insane, and her great-weight argument fails.

III. PROSECUTORIAL MISCONDUCT

Evans next argues that the prosecutor committed misconduct requiring reversal by engaging in an improper cross-examination of Dr. Rowland. Our review confirms that much of the prosecutor's cross-examination of Dr. Rowland was irrelevant, demeaning, and unfairly prejudicial. The pervasiveness of the improper questioning and its inflammatory nature convinces us that prosecutorial misconduct denied Evans a fair trial.

In cases alleging prosecutorial misconduct, issues are "preserved by contemporaneous objections and requests for curative instructions . . . ." *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017) (quotation marks and citation omitted). Although Evans cites two objections by defense counsel during the prosecutor's cross-examination of Rowland, those objections did not state arguments regarding the issues now raised on appeal. Because "an objection on one ground is insufficient to preserve an appellate argument based on a different ground," Evans's claims of prosecutorial misconduct are unpreserved. *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011). Our review, therefore, is for plain error. *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014).

"To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To show that a defendant's substantial rights were affected, there must be "a showing of prejudice, i.e., that

the error affected the outcome of the lower court proceedings." *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, brackets, and citation omitted).[6]

A. GUIDING LEGAL PRINCIPLES

A prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v United States*, 295 US 78, 88; 55 S Ct 629; 79 L Ed 1314 (1935). During a criminal trial, prosecutors "serve truth and justice first. The prosecutor's job isn't just to win, but to win fairly, staying well within the rules." *United States v Kojayan*, 8 F3d 1315, 1323 (CA 9, 1993). The rules at issue here concern cross-examination.

In *Berger*, the United States Supreme Court reversed a conviction on the ground of prosecutorial misconduct stemming from both the prosecutor's argument and the conduct of his examination of witnesses. The Supreme Court listed the ways in which the

[6] Given our resolution of Evans's arguments regarding the cross-examination of Dr. Rowland, we need not address Evans's alternative claims of prosecutorial misconduct. Whether defense counsel was ineffective for failing to properly object to the prosecutorial misconduct has also been rendered moot. We note that reversal and remand for a new trial also could have been premised on the claim of ineffective assistance of counsel for failing to object to the prosecution's disparagement of Dr. Rowland, for many of the same reasons that the prosecutorial misconduct warrants reversal under the plain-error doctrine.

prosecutor had violated his ethical obligations during cross-examination. The prosecutorial misconduct in this case mirrors this compilation:

> [The prosecutor] was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner. [*Berger*, 295 US at 84.]

"Vigorous and searching cross-examination is a powerful instrument for the ascertainment of truth." *D'Aquino v United States*, 192 F2d 338, 369 (CA 9, 1951). Cross-examination is a critical method of testing a witness's credibility and exposing weakness in a witness's account. And it is appropriate that cross-examiners be afforded wide latitude to do their job.

> One of the elementary principles of cross-examination is that the party having the right to cross-examine has a right to draw out from the witness and lay before the jury anything tending or which may tend to contradict, weaken, modify or explain the testimony of the witness on direct examination or which tends or may tend to elucidate the testimony or affect the credibility of the witness. [*People v Dellabonda*, 265 Mich 486, 499-500; 251 NW 594 (1933).]

Effective and probing cross-examination of expert witnesses is particularly important in criminal cases when expert testimony plays a pivotal role. "But invective, ridicule, injection of [the prosecutor's] belief, and innuendoes [are] not permissible . . . and [are] unfair

to the experts and prejudicial to defendant." *People v Cowles*, 246 Mich 429, 432-433; 224 NW 387 (1929).[7] In *People v Tyson*, 423 Mich 357, 376; 377 NW2d 738 (1985), our Supreme Court reversed a defendant's conviction because during closing argument, a prosecutor engaged in a "personal attack on the defendant's expert [that] was intended to, and did, distract the jury from the real issues," including "whether or not defendant was insane." The Supreme Court highlighted that in such cases the ultimate verdict is usually "decided on the basis of which expert the jury chose to believe," and therefore, "it is especially important to protect against prosecutorial misconduct designed to impugn the credibility of the defendant's expert witness." *Id*.

This Court has characterized *Tyson* as reaffirming "the long-standing rule that a highly prejudicial attack [on] a defendant's expert witness without support on the record would require reversal." *People v Miller*, 182 Mich App 482, 486; 453 NW2d 269 (1990). In that case, we observed, the record contained "argument that was filled with innuendos, insults and ridicule." *Id*. And in *People v Williams*, 162 Mich App 542, 549; 414 NW2d 139 (1987), we described *Tyson* as involving arguments that were "clearly injected in an attempt to impeach defendant's claim of insanity." More recently we reiterated that, "in a case that turns largely on conflicting expert testimony, a prosecutor must take special steps to avoid misconduct designed to impugn the integrity of the defendant's experts." *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). We stressed that "[w]hen the expert testimony is relevant to a substan-

[7] *Cowles*, like the other Michigan cases we discuss here, specifically addressed the prosecutor's closing argument and not cross-examination. As discussed in *Berger*, the ethical and legal principles governing argument are consistent with those applicable to cross-examination.

tial, disputed issue in the case, and each expert's testimony is otherwise competent, resolution of the conflict between the experts must be left solely to the finder of fact." *Id*.

Traditionally, cross-examination proceeds in a question-and-answer format. Questions are framed in understandable language. Skilled questioners do not engage in lengthy narrative discourses preceding an inquiry and do not pick fights with witnesses. And a cross-examination must focus on relevant evidence. See MRE 611(c). As the excerpts reproduced in the next part of this opinion elucidate, the prosecutor in this case adhered to none of these conventions. This was a tragic case, to be sure. But that the murder was gruesome does not justify questioning intended to ridicule or debase an expert witness, particularly an expert employed by an independent branch of the state government who performed her evaluation pursuant to her obligations as a state employee. See *People v Hayes*, 421 Mich 271, 288; 364 NW2d 635 (1984).

B. SPECIFIC EXAMPLES OF MISCONDUCT

Dr. Rowland testified on direct examination that Evans was mentally ill (a fact that the prosecution did not challenge) and opined that at the time she committed the crime, Evans "lacked the substantial capacity to appreciate the nature and quality or the wrongfulness of her conduct." This testimony corresponded precisely to the language of MCL 768.21a(1), which permits a jury to find a defendant legally insane based on *either* a lack of "substantial capacity . . . to appreciate the nature and quality or the wrongfulness of his or her conduct" *or* a lack of the "substantial capacity . . . to conform his or her conduct to the requirements of the law." Dr. Rowland emphasized that in

reaching her conclusion she focused on Evans's mental condition at the time Evans committed the crime, repeatedly referring to the statutory provision stating that to establish an insanity defense, a defendant need only prove that he was legally insane at the time he "committed the acts constituting the offense." MCL 768.21a(1).

The following excerpts illustrating the prosecutor's infringements of his ethical and legal obligations fall into several categories. First, the prosecutor repeatedly and gratuitously disparaged Dr. Rowland's qualifications and her intelligence. No evidence supported the prosecutor's snide and derisive comments maligning Dr. Rowland's education and her professional competence. Second, the prosecutor inaccurately characterized Dr. Rowland's opinions in a sarcastic, mocking, and inaccurate manner. This tactic was designed to generate the jury's scorn rather than to shed light on the issues presented by the evidence. Third, the prosecutor repeatedly accused Dr. Rowland in a badgering fashion of deliberately ignoring or withholding evidence from the jury and accused her of being unable to distinguish "right from wrong." No evidence underlay these attacks. We turn to the transcript excerpts illustrating the prosecutor's misconduct.

At the outset of the cross-examination, Dr. Rowland attempted to reiterate that she premised her ultimate opinion on Evans's sanity at the time of the murder, as the statute requires. The prosecutor asked this question:

> So you're saying that immediately—
>
> You are only going to hold her responsible or not responsible for the period of the murder and going to ignore everything she did afterwards?

> Because, see, the law says for me to prove premeditation, I can show before, during and after. And they can use everything she did after in determining whether or not there was a plan.
>
> What you are saying is: No, no, no. I don't have to. All I have to do is show right after the murder, and *I can ignore everything else after that*. *So that my opinion looks rational*. [Emphasis added.]

Defense counsel interjected, "Was that a question[?]" The prosecutor responded, "Yes. I don't have to raise my voice in a raised inflection . . . to make it appear to be [a] question." The witness asked that the "question" be restated. The prosecutor then launched into an argument, tacking on a question at the end:

> The law says this jury can look at everything before, during, and after to make a determination as to whether or not there was premeditation. *You are saying I don't have to do that*. All I have to go [sic] get it before. I can't tell you how long before, *I don't want to*. And during and I can stop with the last stab wound. It is over. I don't have to explain away everything afterwards. Is that what you are telling this jury. [Emphasis added.]

Dr. Rowland reiterated that she was "following [the] statute to form my opinion." The prosecutor returned to this theme—that Dr. Rowland was covering up or deliberately disregarding facts—again and again, despite Dr. Rowland's efforts to direct him to the statutory language.

In another exchange, the prosecutor again focused on Dr. Rowland's decision to limit her opinion to the time the alleged offense occurred instead of Evans's subsequent attempts to hide the knife and a cell phone. The following colloquy occurred:

> *Q. Isn't there something in you at all that recognizes that there is a difference between right and wrong when*

you attempt to cover up a crime? When you realize what are the consequences of what you did is jail.

A. Again, that would not be for me to speak to.

Q. Isn't it? *You have the PhD*. *You have all the training*. *You have done hundreds of these things*. *I mean, explain it to me, Lucy, I don't get it*.

A. Again, it is not for me to be able to say anything about her intent at the time. I'm looking at statute and being able to explain my opinion.

Q. But you must have an opinion. You have 14 people here. We don't have your education. You must have an opinion one way or the other.

Okay. Unless you're going to tell me: *I'm not going to give you my opinion of anything except what is in my report, because they don't need to hear it or it's going to be negative to what I'm attempting to testify to*.

So I'm going to withhold that information from this jury. [Emphasis added.]

Here, the prosecutor not only accused Dr. Rowland of withholding information, he also flagrantly disparaged Dr. Rowland's qualifications and abilities. Calling Dr. Rowland "Lucy" was not an accident or a slip of the tongue. As most adults know, Lucy was a character in the Peanuts comic strip who, in a well-known series of comics, was portrayed as a bumbling and unqualified psychiatrist dispensing useless advice from a lemonade booth. See <https://peanuts.fandom.com/wiki/Lucy%27s_psychiatry_booth> (accessed November 24, 2020) [https://perma.cc/LJF7-SKCG]. Referring to Dr. Rowland as "Lucy" was misconduct, both prosecutorial and ethical.[8] Further, this excerpt illustrates another

[8] The Michigan Rules of Professional Conduct require that lawyers "shall treat with courtesy and respect all persons involved in the legal process" and shall "take particular care to avoid treating such a person discourteously or disrespectfully because of the person's race, gender, or

unsubstantiated insinuation that Dr. Rowland purposefully ignored information because it might "be negative to what [she was] attempting to testify to." Without evidence, the prosecutor again asserted that Dr. Rowland made the conscious effort "to withhold that information from this jury." These allegations did not advance the jury's understanding of the evidence. Nor were they crafted to call Dr. Rowland's credibility into question. Rather, the prosecutor's statements groundlessly denigrated Dr. Rowland's professional abilities and humiliated her.

Shortly after that exchange, Dr. Rowland read aloud from her report's summary in another effort to explain her conclusions. The prosecutor engaged her in a hybrid form of testimony and argument, as follows:

> *Q*. She is mentally ill as the day is long. What I'm saying is additional information between mental illness, the voices, the delusions, the gnats coming out of the stomach versus her ability to understand right from wrong. Okay. That is the point that I'm arguing.
>
> *And with the point I'm arguing with this jury, they get to look at everything greater than what you say you're limited to*.
>
> *Yet you throw all of that in there as sort of afterthought*. So, well, when defense counsel gets this report, I want him to see that I recognize all of it, but I'm not considering it because you go right from saying everything she did that was the difference between right and wrong, into this, yeah, but it is my opinion of insanity without giving a foundation, without giving a psychological reason, without telling me under what condition she is suffering, what it was that caused her to do all of those things and ignore the rest.

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other protected personal characteristic." MRPC 6.5(a). The prosecutor's "Lucy" comment was, in our view, gender-based and utterly inappropriate; we cannot fathom that the same comment would have been made to a male psychologist.

> That is what I want to understand. Where is it in your paragraph, the summary, the psychological rationalization, justification to ignore everything you wrote right above it[?]
>
> *A*. The last paragraph in this entire report just summarize [sic] my findings. The rest of the 26 page[s] in this report details carefully out all of the notes, all of the records, everything I reviewed how I perceived her when meeting with her as well as talked about statute, how I applied all of my information that I found from statute, my clinical training and came to my opinion.
>
> *Q*. So basically what you are saying is she is disorganized up to the point of murder, and organized afterwards, and that *you spent 24 and a half pages talking about what you did and what you saw and blah, blah, blah, but I acknowledge these other things that show the difference between right and wrong, but I'm not going to—*
>
> *I'm not going to consider them*. [Emphasis added.]

The prosecutor's lengthy recitation of his view of the evidence was not a question; it was an unnecessary prop for the criticism of Dr. Rowland he eventually leveled. Further, the prosecutor again alleged, contrary to the testimony, that Dr. Rowland purposely disregarded evidence to bolster her opinion.

The prosecutor turned his attention to evidence that Evans planned to kill Riang by hiding knives. Once again, the prosecutor accused Dr. Rowland of ignoring that part of the evidence so that her opinion of legal insanity was more palatable for the jury, commented negatively on her education,[9] and mocked her testimony:

> *Q*. You're not here to determine intent or whether there was premeditation. You're here to determine whether or

[9] Although the prosecutor referred to Dr. Rowland's degree as a Ph.D.—a Doctor of Philosophy—she actually has a Psy.D., which is a Doctor of Psychology.

not she was able to conform her ability. She says she wants to stab her mother. She takes a knife. She hides it in two separate locations, including location in her mother's bedroom where she can isolate her mother.

That is not an organized thought that you can't, you can't read into that just those behaviors.

None of us have PhDs here. *You got the PhD. You're telling me you can't see that*.

A. Sorry, I'm just reacquainting.—

What she has told me during my evaluation is that she got it out of [another] room and was hiding it in the trash can as well as under the pillow. So that [Riang] wouldn't see what she was doing with the knife. That is what she stated.

Q. Right there "so [Riang] couldn't see what I was doing with the knife".

Why do you think morally she said that? Why do you think legally she said that[?]

A. At the time she didn't want her mother to see what she was doing with the knife.

Q. Okay. *Are we just ignoring the fact here, or you ignoring the fact she wants to kill [Riang]*?

She told you she is thinking about stabbing her mother and she made three actions to do it and *that means nothing to you*. *You are just going to keep hiding behind the fact*: Well, no, no, no. We're playing fair. I'm not going to read into what those behaviors are. [Emphasis added.]

The prosecutor's effort to insult Dr. Rowland's intelligence did not end there. During the prosecutor's questioning regarding Dr. Rowland's insistence that the events after Riang's death were not determinative of whether Evans was sane during the killing itself, the following ensued:

Q. Right up into the last stab, immediately after that, all the, all the organized stuff you are saying is not mental

illness. She is not mentally ill for the next two hours while she is cleaning up?

A. I'm not opining on that.

Q. Okay. Then what are you opining on?

A. The time of the alleged offenses.

Q. But I don't see how you separate the alleged offense from the moment. I don't see how it gets shut on and off like a faucet. Her behavior, her emotions, her understanding. I mean, because part of what I'm saying if you are saying to me she is insane, I guess, *my culture, my stereotypical, my non-informed opinion is there is this significant indifference to it*.

And then all of a sudden, I go into hyper clean, cover up Judo-Christian [sic] and I understand what guilt mode is and then I did wrong.

I don't understand the position. *You can so easily sit there and say: A and B, and C, the queen ain't me*.

A. Can you clarify that? If there is a question.

Q. *Well, you want to play semantics? You understand my question*.

My question is how can you say all of this behavior, all of this behavior and this behavior means nothing because the intellectual capacity stops. The mental illness stopped at that point. *You need me to write it out in Crayon for you*[*?*] [Emphasis added.]

Aside from offering his own opinions and his own "values," the prosecutor accused Dr. Rowland of "play-[ing] semantics" and offered to "write it out in Crayon" so she would better understand his views. The impropriety of this performance requires little elaboration. The gratuitous insults hurled at Dr. Rowland by the prosecutor dripped with hostility, ridicule, and aggression. They violated not only the prosecutor's obligations as a prosecutor, but as an attorney. See MRPC 4.4 ("In representing a client, a lawyer shall not use means

that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.").

In a similar vein, the prosecution implied that Dr. Rowland was being purposely dense when she refused to opine why Evans took a shower after killing Riang. Dr. Rowland stated that she was aware that Evans had showered, but Evans never explained why. In response the prosecutor stated, "Wait, wait, wait, wait, wait, wait. You have a PhD?" At another point Dr. Rowland explained that Evans's moments of lucidity did not change her opinion that Evans was legally insane when she killed Riang. The prosecutor responded with the following diatribe:

> Excuse me, for not having your education. Okay. But it seems to me that if I'm in a full blown episode and I murder my mother because I am insane, then one of three things are going to happen after I murder my mother.
>
> I'm going to still continue with the indifference that I murdered my mother.
>
> I'm going to realize it was, like, a heat of passion situation: Oh, cripe, it was wrong. I better call for medical assistance. I better get help.
>
> Or I'm going to just go a head [sic] and cover it up and clean it all up.
>
> I don't understand. Those would seem to be the most reasonable reaction[s] to something when I'm in a full blown mental state. Why isn't the indifference versus and absolutely hours long effort to clean up and hide items from the crime[?]

In that "question," the prosecutor began by again making a snide remark about Dr. Rowland's education before supplying his own version of how an insane person should or could react to a crime. By injecting his

own irrelevant beliefs into the case, the prosecutor violated the letter and spirit of *Tyson* and *Cowles*.

At another point during cross-examination, the prosecutor asked about Evans having changed tactics in her attempts to kill Riang:

> *Q*. She told you that she stabbed her mother in the lungs, hoping she would die because by stabbing in the lungs she hoped [Riang] would run out of air. That didn't work. Is that not coherent thinking?
>
> *A*. That is one piece of coherent thinking.
>
> *Q*. I know you're only using—
>
> How many pieces do we have for you to throw out my argument and say she is not disorganized. You can give me every detail in the world, I'm never going to say it is organized.
>
> *A*. I'm not trying to argue with you. I'm trying to simply inform the Court of my opinion.
>
> *Q*. I know. I know. So what you are saying is, okay, it was one set of facts that she took the knives out and she hid them and she—
>
> Here is another one.
>
> *A*. Okay.
>
> *Q*. She knows to knock her mother out of the wheelchair because it would further disable her and allow [Evans] to continue stabbing.
>
> That is just one that goes, if we were doing a check mark here, if we had a chalk board here, saying: Okay, one for you. One for me. Would that be one for me or one for you[?]
>
> *A*. I'm not aware that was her intent.
>
> *Q*. Clearly when she knocked a woman that she is stabbing or trying to murder out of a wheelchair and she is paralyzed, would you not think that further makes it so that she is less likely to be able to resist?

A. That could be one reason for it, but I don't know. There could be other reasons for why she fell out of the chair.

When Dr. Rowland again refused to opine regarding defendant's sanity after the murder, the prosecutor stated that he believed she was engaging in "hypocrisy"; specifically, the prosecutor stated: "This is the hypocrisy I'm pointing out to you."

Invective and name-calling have no place in a cross-examination.

After being accused of "withholding" information from the jury, Dr. Rowland attempted to explain that she was trying to conform her testimony to the statutory definition of insanity. Dr. Rowland refused to opine regarding Evans's "intent" because she viewed that subject as "outside my purview." But the prosecutor persisted:

Q. Outside of your expertise. You're here testifying. You are an expert, I agree, forensic psychology. Let's talk about your expertise. Are you telling this jury that those [sic] acknowledgment of all of the things we're going to talk about, the second that she did after the murder, to—

You do not at all in your training have you recognized that those are activities that could show the difference between right and wrong.

A. That could in a certain sense.

Q. Okay. *There we go*. *Is that that hard?* This is what this whole case is about, is it, before during and after. Okay. And as an expert in the area, you can't just simply ignore the reality, can you?

I mean, you may not have put it in the report, but you recognize there are limitations to, then, your opinion based on actions that were taking place that you chose by your reading of the statute, not to include. I mean, let's put it this way. That was a bad question.

This jury, one of the reasons I want the jury to have this, I'm going to point out in closing argument to them what you did at the very end.

A. Okay.

Q. Okay. Starting at the last paragraph on page 25?

A. Yes.

Q. All the way through the last paragraph on page 26?

A. Yes.

Q. You talk about all the things she did afterwards. You talk about despite in the opinion of this evaluator mental illness, day-to-day, several of her behaviors recorded in the records and [her self-report] suggest she retained the capacity to being able to assess and choose alternate behaviors.

And then you go on for a half page and describe everything we have been talking about. Hiding the knife, covering it up, throwing the phone away, taking the clothes, all of that. And you say well all of this—

Here your report is acknowledging all that stuff is in there. But then you don't include any of that in your conclusion. You just simply say:

Despite looking at all of these things which kind of could show that there is some understanding of consequences, I'm not using them.

A. Actually I do mention that in my conclusion. And I could direct you to that last.

Q. Please, please, please. Let's go with it.

A. Okay. So, again, looking at statute I am (indiscernible) my opinion if there is mental illness or intellectual disability. I opine there was mental illness, and therefore, I want to look at the prongs to see if she appreciates the nature of her behavior.

After mischaracterizing Dr. Rowland's report by claiming that she failed to account for facts suggesting premeditation, the prosecutor again expressed his own beliefs in the process of accusing Dr. Rowland of being

uncaring in a "moral" sense. In yet another attempted assassination of her character the prosecutor added:

> *Q. Can you understand the jury's frustration, maybe my frustration. We are dealing black and white here. And you sort of have, like, a rationalization for everything when guilty is moral, but it is not that sort of moral.* It is all moral, morality and understanding and feeling guilty, just sort of fluid, like everything else in your field?
>
> *A.* I'm trying to explain to the best that I can given the questions.[10]

The prosecutor's "frustration" was irrelevant. His comments regarding "morality" were intended to inflame the passions and prejudices of the jury rather than to genuinely explore the subject of Evans's mental state.

C. PLAIN ERROR

In sum, throughout his cross-examination of Dr. Rowland, the prosecutor accused Dr. Rowland of being a hypocrite, engaging in deceit, purposely appearing dense, lacking intelligence, and ignoring or hiding evidence to make her opinion more palatable to the jury. The cross-examination was replete with prosecutorial misconduct. The error in allowing this cross-examination was plain.

Under the plain-error standard, reversal is warranted if "the plain error affected [defendant's] substantial rights." *Carines*, 460 Mich at 763. This requires "a

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[10] Standard 3-6.7(a) of the American Bar Association's *Criminal Justice Standards for the Prosecution Function* (4th ed) provides: "The prosecutor should conduct the examination of witnesses fairly and with due regard for dignity and legitimate privacy concerns, and without seeking to intimidate or humiliate a witness unnecessarily." Available at <https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/>.

showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings" or, alternatively, that the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id*. These plain-error components exist here.

Whether Evans was insane was the sole issue in the case. The prosecution had no expert, and two experts testified on behalf of Evans. The prosecutor's strategy centered on attacking Dr. Rowland *personally* and repeatedly emphasizing that Evans's conduct was consistent with premeditation. As the experts endeavored to explain, however, premeditation is not necessarily antithetical to legal insanity.[11] And both experts pointed to abundant evidence that Evans suffered from persistent delusions, even while medicated. Their description of Evans's mental state at the time of the murder was consistent with a lack of substantial capacity to appreciate the nature and wrongfulness of her acts, and the prosecutor never effectively challenged that evidence.

Absent the prosecutor's brutal and improper cross-examination, there was more than a reasonable likelihood that a reasonable juror would have determined that Evans was legally insane when she murdered her mother. Alternatively stated, the prosecutor's misconduct affected Evans's substantial rights because it likely influenced the jury's verdict. We reiterate this Court's warning in *Unger*, 278 Mich App at 240: "[I]n a case that turns largely on conflicting expert testimony, a prosecutor must take special steps to avoid misconduct designed to impugn the integrity of the defendant's experts." This case exemplifies the rationale for that caution. The behaviors and characteristics of severely

[11] Indeed, Evans at one point asserted that she hid the knives to prevent her family from killing her.

mentally ill teenagers is beyond the ken of most jurors. Mental illness continues to carry a stigma. Overcoming uninformed beliefs and prejudices about mental illness is an uphill battle for a defendant in a case raising the defense of insanity. Maintaining the focus on science rather than emotion is critical to ensuring that a defendant receives a fair trial.

That focus was lost here as a result of the prosecutor's effective effort to cloud the substance of the evidence supporting Evans's insanity with ad hominem attacks on Dr. Rowland. Our Legislature has determined that a mentally ill defendant must be permitted to invoke an insanity defense. As a representative of the Center for Forensic Psychiatry, Dr. Rowland was the state's designated representative regarding the appropriateness of that defense. Although she testified to having performed more than 1,500 evaluations on behalf of the Center (the vast majority of which led to testimony on behalf of the prosecution), the cross-examination dishonorably reduced her opinions and her professional status to ashes.

In addition to finding prejudice, we have no difficulty concluding that the prosecutor's misconduct seriously affected the fairness, integrity, or public reputation of the trial. The prosecutor's unprofessional and unethical conduct led to the first-degree-murder conviction of a mentally ill 17-year-old, and a sentence of life imprisonment without parole. While that may ultimately prove a fair resolution, to safeguard the integrity of the process an untainted jury will have to determine Evans's guilt.

We vacate and remand for a new trial. We do not retain jurisdiction.

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

In re ESTATE OF KEITH NORBERT SCHROEDER
In re ESTATE OF JAMES E. ALMY

Docket Nos. 351011 and 351012. Submitted November 10, 2020, at Lansing. Decided December 17, 2020, at 9:05 a.m.

In Docket No. 351011, Jonathan Schroeder (the petitioner-son) petitioned the Saginaw Probate Court for entry of a protective order under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., claiming, under MCL 700.5401(3)(a) and (b), that his father, Keith N. Schroeder (Mr. Schroeder), was unable to effectively manage his property and business affairs because of physical disability, that his property would be wasted or dissipated unless proper management was provided, and that he was likely to become a permanent resident in a long-term-care facility. The Department of Health and Human Services (DHHS) objected to the petition, arguing that petitioner-son had failed to establish by clear and convincing evidence under MCL 700.5401(3)(b) that Mr. Schroeder's wife, Hedy P. Schroeder (Mrs. Schroeder), needed her husband's interests in assets and the allocated portion of his income. DHHS also argued that Mr. Schroeder needed his assets and income for his own care, but the department did not challenge the allegation under MCL 700.5401(3)(a) that Mr. Schroeder was unable to effectively manage his property and business affairs. The court, Patrick J. McGraw, J., agreed with petitioner-son and granted the protective order, finding that petitioner-son had established by clear and convincing evidence that the order was appropriate under MCL 700.5401(3)(a) and (b). The court transferred Mr. Schroeder's individual and joint interests in assets to Mrs. Schroeder, who was still living in the marital home. The court also required Mr. Schroeder to make support payments to his wife from a portion of his income stream and terminated Mr. Schroeder's spousal rights in regard to any potential future inheritance. In Docket No. 351012, Barbara J. Almy (Mrs. Almy) petitioned the same Saginaw Probate Court for entry of a protective order under EPIC, claiming that under MCL 700.5401(3)(a) and (b), her husband, James E. Almy (Mr. Almy), was unable to effectively manage his property and business affairs because of physical illness, that his property would be wasted or dissipated unless proper manage-

ment was provided, and that he was likely to become a permanent resident in a long-term-care facility. DHHS opposed the petition for the same reasons it opposed the petition appealed in Docket No. 351011. The court, Patrick J. McGraw, J., granted the petition over DHHS's objections, finding that Mrs. Almy had demonstrated by clear and convincing evidence that the protective order was appropriate under MCL 700.5401(3)(a) and (b). The protective order transferred Mr. Almy's individual and joint interests in assets to Mrs. Almy, who was still living in the marital home, required Mr. Almy to make support payments to his wife from a portion of his income stream, and terminated Mr. Almy's spousal rights with respect to any potential future inheritance. In each case, the probate court considered Medicaid regulations and patient-pay amounts when it assessed the needs of the protected individual's spouse for support, care, and welfare. However, the petition for a protective order was filed in each case before a Medicaid application was submitted by or on behalf of Mr. Schroeder or Mr. Almy to cover the costs of long-term-care facilities. The probate court also issued the protective order in each case either before the protected individual filed a Medicaid application or before a Medicaid-eligibility determination was made. DHHS moved for reconsideration in both cases, and the probate court denied the motions. DHHS appealed in both cases, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. MCL 700.5401(1) provides that after a petition has been filed and a hearing has been held, a court may appoint a conservator or make another protective order for cause as provided in that section. Under MCL 700.5401(3), a court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines that the petitioner has established, by clear and convincing evidence, the following: (a) the individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance and (b) the individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money. Thus, a petitioner must establish the requirements of both MCL 700.5401(3)(a) and (b) before a court may issue a protective order. Under MCL 700.5408(1), protective arrangements include payment, delivery,

deposit, or retention of money or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, contract for life care, deposit contract, or contract for training and education; or an addition to or establishment of a suitable trust. Medicaid benefits are provided automatically for individuals who are categorically needy. Medically needy individuals in Michigan become eligible for Medicaid benefits only when their countable income and assets are reduced below $2,000. When a protective order is sought under MCL 700.5401 and the individual is or may be a resident of a long-term-care facility, issues of the cost of care, Medicaid, and patient-pay obligations under Medicaid are also implicated. In making the determination, probate courts have authority to enter orders requiring an institutionalized spouse to provide support for a community spouse. However, EPIC does not give probate courts unfettered discretion to enter an order allowing the community spouse to maintain his or her current lifestyle without regard to the institutionalized spouse's needs and patient-pay obligations under Medicaid. While patient-pay amounts can be estimated before the submission of a Medicaid application and a Medicaid-eligibility determination, there must actually be Medicaid determinations regarding eligibility and patient-pay amounts before a court may assess the "need" for money for a person's support and care under MCL 700.5401(3)(b) on the basis of Medicaid-related circumstances. When a probate court acts to transfer property upon satisfaction of the prerequisites in MCL 700.5401 relative to need, the court must identify the interests being transferred and the value of those interests. Although there is no specific language in EPIC demanding that information, when a court is examining the financial needs of spouses and orders asset transfers on the basis of those needs, a valuation of the assets or interests therein is an inescapable and necessary component of the analysis.

2. In Docket No. 351011, the Court was unable to conclude whether, under MCL 700.5104(3)(a), clear and convincing evidence existed to establish that Mr. Schroeder was unable to manage his property and business affairs effectively because of his spinal cord injury. The allegations in the petition were not evidence, and the assertions of the guardian ad litem, who was not a medical professional, did not appear to constitute clear and convincing evidence. Remand for the probate court to revisit its findings on the issue was necessary. In Docket No. 351012, the probate court did not clearly err by determining, under MCL 700.5104(3)(a), that Mrs. Almy established by clear and convincing evidence that Mr. Almy was unable to manage his property and business affairs effectively because he suffered from dementia, Parkinson's disease,

impaired mobility, and short-term memory impairment. In Docket Nos. 351011 and 351012, the trial court erred by assessing Mr. Schroeder's and Mr. Almy's support and care under MCL 700.5401(3)(b) on the basis of Medicaid-related circumstances because the court issued the protective order in both cases before a Medicaid-eligibility determination had been made for either protected individual. In addition, the probate court failed to value the assets of each protected individual.

Protective orders in Docket Nos. 351011 and 351012 reversed.

1. PROBATE COURTS — ESTATES AND PROTECTED INDIVIDUALS CODE — PROTECTIVE ORDERS — SUPPORT-AND-CARE ASSESSMENTS — MEDICAID DETERMINATIONS REQUIRED BEFORE ASSESSMENTS.

While patient-pay amounts can be estimated before the submission of a Medicaid application and a Medicaid-eligibility determination, courts may not assess the "need" for money for a person's support and care under MCL 700.5401(3)(b) on the basis of Medicaid-related circumstances until actual Medicaid determinations regarding eligibility and patient-pay amounts have been made (MCL 700.1101 *et seq*.).

2. PROBATE COURTS — ESTATES AND PROTECTED INDIVIDUALS CODE — PROTECTIVE ORDERS — TRANSFERS OF INTERESTS AND ASSETS — VALUATION OF INTERESTS AND ASSETS REQUIRED BEFORE TRANSFERS.

When a probate court issues a protective order under the Estates and Protected Individuals Code and acts to transfer property upon satisfaction of the prerequisites in MCL 700.5401 relative to need, the court must identify the interests being transferred and the value of those interests; when a court is examining the financial needs of spouses and orders asset transfers on the basis of those needs, the examination must include a valuation of the assets or interests.

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

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

PER CURIAM. In these consolidated appeals, respondent, the Department of Health and Human Services

(DHHS), appeals by right the probate court's protective orders issued under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*. We reverse and remand in both cases.

I. BRIEF BACKGROUNDS

In Docket No. 351011, Keith Norbert Schroeder, a protected person, was in a rehabilitation and recovery hospital, and his wife, Hedy Pauline Schroeder, was residing in the couple's home when petitioner Jonathan Schroeder, one of their children, petitioned the probate court for a protective order. Petitioner-son alleged that a protective order was needed because his father, Mr. Schroeder, was unable to effectively manage his property and business affairs because of physical disability and was likely to become a permanent resident in a long-term-care facility. Subsequently, over the DHHS's protests, the probate court granted the petition, finding satisfaction of the relevant criteria in EPIC. The court issued a protective order that transferred Mr. Schroeder's individual and joint interests in assets to Mrs. Schroeder, required Mr. Schroeder to make support payments to his wife from a portion of his income stream, and terminated Mr. Schroeder's spousal rights in regard to any potential future inheritance. The DHHS appeals.

In Docket No. 351012, James E. Almy was in a rehabilitation center, and his wife, Barbara J. Almy, was residing in the couple's home when Mrs. Almy petitioned the probate court for a protective order. Mrs. Almy alleged that a protective order was needed because Mr. Almy was unable to effectively manage his property and business affairs because of physical illness and was likely to become a permanent resident in a long-term-care facility. Later, over the DHHS's objec-

tions, the probate court granted the petition, finding satisfaction of the pertinent criteria in EPIC.[1] The court issued a protective order that transferred Mr. Almy's individual and joint interests in assets to Mrs. Almy, required Mr. Almy to make support payments to his wife from a portion of his income stream, and terminated Mr. Almy's spousal rights with respect to any potential future inheritance. The DHHS appeals.

In both cases, the petitions for protective orders were filed before Medicaid applications were submitted by or on behalf of Mr. Schroeder and Mr. Almy to cover the costs of long-term-care facilities. And the probate court issued its protective orders either before Medicaid applications were pursued or before Medicaid-eligibility determinations were made. This panel entered an order sua sponte consolidating the two appeals "to advance the efficient administration of the appellate process." *In re Schroeder*, unpublished order of the Court of Appeals, entered October 16, 2020 (Docket Nos. 351011 and 351012). Details regarding both cases will be discussed in the analysis section of this opinion.

II. LEGAL FRAMEWORK

A. STANDARDS OF REVIEW AND STATUTORY CONSTRUCTION

"Questions of statutory interpretation are . . . reviewed de novo." *In re Vansach Estate*, 324 Mich App 371, 385; 922 NW2d 136 (2018). The *Vansach* panel further observed:

> In comparison, appeals from a probate court decision are on the record, not de novo. We review a trial court's factual findings for clear error, while its dispositional

[1] The same probate court judge issued both protective orders.

> rulings, including a decision to enter a protective order, are reviewed for an abuse of discretion. A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes. A trial court may also abuse its discretion by failing to operate within the correct legal framework. [*Id*. (quotation marks and citations omitted).]

Our role in construing statutory language is to discern the Legislature's intent, which may reasonably be inferred from the statute's words. *Sanford v Michigan*, 506 Mich 10, 14-15; 954 NW2d 82 (2020). This Court's analysis must focus on the express language of the statute because it offers the most reliable evidence of legislative intent. *Id*. at 15. "When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written." *Id*.

B. MCL 700.5401, ASSOCIATED STATUTES, AND EVIDENTIARY BURDEN

The crux of these consolidated appeals concerns the requirements of MCL 700.5401, which provides, in pertinent, as follows:

> (1) Upon petition and after notice and hearing in accordance with this part, the court may appoint a conservator or make another protective order for cause as provided in this section.
>
> * * *
>
> (3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

> (a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.
>
> (b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money.[2]

"After hearing, upon finding that a basis for a conservator's appointment or another protective order is established by *clear and convincing evidence*, the court shall make the appointment or other appropriate protective order." MCL 700.5406(7) (emphasis added). The most demanding standard in civil cases is the clear-and-convincing-evidence standard. *In re Brody Conservatorship*, 321 Mich App 332, 337; 909 NW2d 849 (2017). Evidence is clear and convincing when it produces a firm belief in the truth of the allegations that a party is attempting to establish. *Id*. The standard has also been described as equating to evidence that is as clear, direct, weighty, and convincing as to enable a fact-finder, absent any hesitancy, to come to a definitive conclusion regarding the truth of the precise facts at issue. *Id*.

With respect to the types of financial and property transactions that a probate court is authorized to

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[2] We note that MCL 700.5407(1) states, in part, that "[t]he court shall exercise the authority conferred in this part to encourage the development of maximum self-reliance and independence of a protected individual and shall make protective orders only to the extent necessitated by the protected individual's mental and adaptive limitations and other conditions warranting the procedure."

mandate as part of a protective order issued under MCL 700.5401, MCL 700.5408(1) provides:

> If it is established in a proper proceeding that a basis exists as described in section 5401 for affecting an individual's property and business affairs, the court, without appointing a conservator, may authorize, direct, or ratify a transaction necessary or desirable to achieve a security, service, or care arrangement meeting the protected individual's foreseeable needs. Protective arrangements include, but are not limited to, payment, delivery, deposit, or retention of money or property; sale, mortgage, lease, or other transfer of property; entry into an annuity contract, contract for life care, deposit contract, or contract for training and education; or an addition to or establishment of a suitable trust.

Additionally, MCL 700.5407(2) and (3) list specific powers that a probate court can exercise with respect to a protected individual's estate and business affairs.

C. MEDICAID OVERVIEW

Mr. Schroeder and Mr. Almy allegedly faced the likely prospect of residing permanently in long-term-care facilities when the petitions were filed, and the nursing home aspect of the cases implicated issues about the cost of care, Medicaid, and patient-pay obligations under Medicaid rules. All of these issues affected the probate court's analysis of MCL 700.5401 and its rulings. In *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245-247; 931 NW2d 571 (2019), our Supreme Court recently summarized the general workings of Medicaid, explaining:

> The Medicaid program is governed by a complex web of interlocking statutes, as well as regulations and interpretive documents published by state and federal agencies. The program was created by Title XIX of the Social Security Act of 1965, PL 89-97; 79 Stat 343, codified at 42

> USC 1396 *et seq*. Medicaid is generally a need-based assistance program for medical care that is funded and administered jointly by the federal government and individual states. At the federal level, the program is administered by the Secretary of Health and Human Services through the Centers for Medicare & Medicaid Services (CMS). The *State Medicaid Manual* is published by CMS to help guide states in their administration of the program, including how to determine an applicant's eligibility for benefits. Each participating State develops a plan containing reasonable standards for determining eligibility for and the extent of medical assistance within boundaries set by the Medicaid statute and Secretary of Health and Human Services. In formulating those standards, States must provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, *available* to the applicant.
>
> Medicaid benefits are provided automatically for the "categorically needy[]" . . . . Congress has also enacted an optional program, in which states may elect to participate, for those who are deemed "medically needy." . . . [M]edically needy individuals . . . become eligible for Medicaid benefits only when their incomes and assets are reduced below certain established levels. Michigan has elected to include this optional coverage for the medically needy in its state Medicaid plan. Therefore, Michigan must comply with the requirements imposed by the federal Medicaid statutes. Plaintiffs here fall within the medically needy category for those over the age of 65. Therefore, to be eligible for Medicaid benefits, they were required to reduce their countable incomes and assets to or below $2,000. [Quotation marks, citations, and ellipsis omitted.]

D. THIS COURT'S OPINION IN *VANSACH*

In the consolidated appeals in *Vansach*, each probate court entered a protective order under EPIC that required all of the income of the individual institutionalized in a nursing home and receiving Medicaid ben-

efits to be paid to the respective spouse who remained in the community. *Vansach*, 324 Mich App at 376. The DHHS appealed the protective orders. *Id*. The *Vansach* panel ruled as follows:

> In sum, probate courts have authority to enter orders requiring an institutionalized spouse to provide support for a community spouse. However, EPIC does not give probate courts unfettered discretion to enter an order allowing the community spouse to maintain his or her current lifestyle without regard to the institutionalized spouse's needs and patient-pay obligations. In the cases before us, rather than consider the couples' needs and circumstances as they existed in light of Medicaid, the probate courts disregarded the patient-pay amounts and impoverished the institutionalized spouses so that the community spouses could maintain their standards of living. By failing to properly consider the implications of Medicaid in relation to the spouses' respective needs and circumstances, the probate courts operated under the wrong legal framework and abused their discretion. [*Id*. at 401-402.]

Specific aspects of *Vansach* will be discussed below when relevant to the issues posed in the instant appeals.

III. ANALYSIS

A. MCL 700.5401(3)(a)—CAPACITY TO MANAGE PROPERTY AND BUSINESS AFFAIRS EFFECTIVELY

In Docket No. 351011, the DHHS argues that petitioner-son failed to demonstrate by clear and convincing evidence that Mr. Schroeder was unable to effectively manage his property and business affairs because of physical injury or illness, which, under MCL 700.5401(3)(a), must be established to obtain a protective order. In Docket No. 351012, the DHHS argues, in relationship to MCL 700.5401(3)(a), that there was a lack of clear and convincing evidence showing that Mr.

Almy was unable to effectively participate in the management of his own property and income.

1. MR. SCHROEDER

Petitioner-son was required to prove by clear and convincing evidence that Mr. Schroeder was unable to manage his property and business affairs effectively for reasons such as physical illness or disability. MCL 700.5401(3)(a); MCL 700.5406(7). Mr. Schroeder's son alleged in his petition that his father had suffered a spinal cord injury and was unable to take care of himself. He further asserted that Mr. Schroeder was unable to effectively manage his property and business affairs because of the injury. Mr. Schroeder's court-appointed guardian ad litem (GAL) reported that "[d]ue to his physical disabilities, it is unlikely that Mr. Schroeder will be returning home." The GAL explained that she had visited the Schroeders in Mr. Schroeder's room at the hospital, that she confirmed the assets listed in the petition, which Mr. Schroeder believed to be accurate, and that Mr. Schroeder indicated that he was aware of the petition and did not object to the request for a protective order. The GAL concluded that Mr. Schroeder was in need of a protective order because, in part, he could not "make informed decisions . . . ." The DHHS did not present any evidence to counter the GAL's opinion.

Moreover, at the hearing on the petition for a protective order, counsel for petitioner-son stated that there was a report in the file from Mr. Schroeder's "physician regarding [his] diagnosis of a spinal cord injury." And during its ruling from the bench, the probate court indicated that it had "reviewed the medical reports sent in by Dr. Khan and the GAL . . . ." There are no medical reports in the record presented to

us on appeal, and the DHHS has not produced copies of any medical reports or attempted to have those reports added to our record. Consequently, we cannot conclude, as the DHHS urges, that the medical reports were insufficient to satisfy MCL 700.5401(3)(a). We also note that the DHHS, in its response to the petition for a protective order, did not directly challenge the claim that Mr. Schroeder was unable to effectively manage his property and business affairs because of the spinal cord injury. Not until its motion for reconsideration did the DHHS specifically challenge establishment of MCL 700.5401(3)(a). And when an issue is first raised in a motion for reconsideration, it is not properly preserved. See *Pioneer State Mut Ins Co v Michalek*, 330 Mich App 138, 150; 946 NW2d 812 (2019). Absent the medical reports referred to by the probate court, we are unable to conclude whether clear and convincing evidence existed to establish that Mr. Schroeder was unable to manage his property and business affairs because of the spinal cord injury. The allegations in the petition are not evidence, and the assertions of the GAL, who is not a medical professional, would not appear to constitute clear and convincing evidence. Indeed, the GAL offered somewhat conflicting evidence when she informed the probate court that Mr. Schroeder had been able to confirm the list of assets in the petition and did not object to the request for a protective order. We direct the probate court to revisit this finding on remand, bearing in mind that it is the petitioner's burden to support the need for a protective order by clear and convincing evidence.

2. MR. ALMY

In Mrs. Almy's petition, she alleged that her husband was diagnosed with dementia, Parkinson's dis-

ease, impaired mobility, and short-term memory impairment and that his medical diagnosis rendered him unable to effectively manage his property and business affairs. Mr. Almy's court-appointed GAL opined, following an investigation, that Mr. Almy was unable to make informed decisions and required a protective order. A physician's report filed in the matter supported the GAL's conclusion. The DHHS did not challenge or refute any of this information. In light of the fact that the medical report and the GAL's assessment were unchallenged and indicated that Mr. Almy was unable to effectively handle his financial affairs because of his health issues, we hold that the probate court did not clearly err by determining that MCL 700.5401(3)(a) was satisfied in regard to Mr. Almy.

B. MCL 700.5401(3)(b)—WASTE OR DISSIPATION OF PROPERTY ABSENT PROPER MANAGEMENT AND MONEY NEEDED FOR SUPPORT, CARE, AND WELFARE

As quoted earlier, MCL 700.5401(3)(b) requires a petitioner to show that the debilitated "individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support, and that protection is necessary to obtain or provide money." The DHHS contends that the petitioners in both cases failed to demonstrate by clear and convincing evidence that Mrs. Schroeder and Mrs. Almy actually needed their husbands' interests in assets and the allocated portions of their income. According to the DHHS, Mr. Schroeder and Mr. Almy were in need of their assets and income to cover the costs of their own care. The DHHS argues that the probate court improperly provided Mrs. Schroeder and Mrs. Almy with assets and income so that they could maintain their current

lifestyles without regard to their husbands' needs and obligations relative to long-term care and its costs. The DHHS asserts that instead of viewing Mr. Schroeder's and Mr. Almy's needs in terms of their being responsible for their long-term care and costs, the probate court effectively looked to taxpayers to fund their care through a governmental program—Medicaid—that is intended for the needy, not for persons with assets and income that they can use to pay for their own care.

With respect to Mr. Schroeder, the probate court ordered that his interests in assets that he owned individually and jointly with Mrs. Schroeder were to be transferred to Mrs. Schroeder for his wife's care and support. These assets were valued at $450,000. In regard to Mr. Schroeder's income, which consisted of monthly pension and Social Security benefits totaling approximately $1,387, the probate court ordered the payment of monthly support from those funds to Mrs. Schroeder in the amount of $600, leaving $787 to be applied to Mr. Schroeder's prospective patient-pay amount at a long-term-care facility. In support of its ruling, the probate court explained that Mr. Schroeder had property that would be wasted or dissipated unless proper management was provided and that Mrs. Schroeder was in need of money for her support, care, and welfare. The probate court stated that it had considered both spouses' needs and had examined Mrs. Schroeder's monthly budget that showed expenses of $4,455.[3] The probate court further ruled:

> The Court also has determined the award will not impoverish the institutional spouse or the community spouse and a patient amount is appropriate in this case to insure the institutional spouse has money to pay for part or all of his care. The award to the community spouse hopefully is

[3] Mrs. Schroeder had her own monthly income of $1,453.

> enough to have an appropriate standard of living that does not run out so the community spouse can remain in the community and also not be required to be on state assistance.

With respect to Mr. Almy, the probate court ordered that his interests in the assets he owned individually and jointly with Mrs. Almy were to be transferred to his wife for her care and support. These assets were valued at $500,000. In regard to Mr. Almy's income, which was approximately $2,421 a month, the probate court ordered the payment of monthly support from those funds to Mrs. Almy in the amount of $421, leaving $2,000 for Mr. Almy's monthly care, which was considerably more than his estimated monthly patient-pay amount of $800 for care at a long-term-care facility. The probate court stated that it had considered both spouses' needs, contemplating Mrs. Almy's monthly budget that showed expenses of $3,274 and allowing Mr. Almy to retain sufficient funds to avoid impoverishment.[4] In support of its ruling, the probate court posited that Mr. Almy had property that would be wasted or dissipated unless proper management was provided and that Mrs. Almy was in need of money for her support, care, and welfare.

We find problematic the probate court's consideration of Medicaid and patient-pay amounts in assessing need when no Medicaid-eligibility and patient-pay determinations had been made at the time of the court's rulings. In *Vansach*, 324 Mich App at 394 n 14, this Court observed:

> We emphasize that the petitions in this case were made after the initial Medicaid determinations had been made and the petitions were premised on the assertion that additional income was needed to "support" [the spouses],

[4] Mrs. Almy had her own monthly income of $1,772.

> presumably because [42 USC] 1396r-5(d)(5) recognizes court orders "for the support of the community spouse." Thus, our analysis is focused on the issuance of orders for support under EPIC after an initial Medicaid eligibility determination has been made; we are not concerned with gift-giving beyond what is needed for support, or other attempts to use protective proceedings, *before* the initial Medicaid determination for Medicaid-planning purposes.

We understand and appreciate that patient-pay amounts can be estimated before the submission of a Medicaid application and a Medicaid-eligibility determination. But in assessing the "need" for money for a person's support and care under MCL 700.5401(3)(b) on the basis of Medicaid-related circumstances, there must actually be Medicaid determinations regarding eligibility and patient-pay amounts. Indeed, the *Vansach* panel stated that "[i]n cases in which an institutionalized spouse is receiving Medicaid benefits, weighing *both* spouses' needs and circumstances requires consideration of those needs and circumstances as they actually exist under Medicaid." *Vansach*, 324 Mich App at 396. The probate court here, however, considered needs in the context of Medicaid-related circumstances even though Mr. Schroeder and Mr. Almy were not receiving Medicaid benefits and were awaiting Medicaid-eligibility determinations. A nursing home resident who does not qualify for Medicaid coverage will certainly owe considerably more money to the nursing home than a patient-pay amount in a Medicaid setting. The idiom putting the cart before the horse is aptly applicable to the probate court's analysis. Therefore, reversal is necessary. Circumstances have likely evolved during the pendency of this appeal regarding care and Medicaid coverage. Consequently, on remand and assuming petitioners wish to continue, the probate court shall consider the circumstances as they actually exist.

Finally, we address the DHHS's argument posed in both cases that the probate court only had authority over the estate and assets of the protected individuals, Mr. Schroeder and Mr. Almy, not their spouses, with respect to ordering the transfer of assets. The DHHS contends that in setting the amount or value of transferred assets, a probate court must accurately determine whether the protected individual actually possesses that amount to transfer. The DHHS states in its Almy appellate brief that "[w]hen a probate court order inflates the amount that the protected individual is transferring to an amount that is more than he owns, it will be in conflict with the amounts reported and verified in the filed Medicaid application," and if "the application amounts and the court order cannot be reconciled it creates a conflict in making a Medicaid determination."[5]

The probate court ordered Mr. Schroeder and Mr. Almy to transfer their interests in assets owned individually or jointly with their spouses. With respect to Mr. Schroeder, the probate court valued the asset transfer at $450,000. In the petition, Mr. Schroeder's son claimed that there was $203,400 in real property and $737,000 in personal property for a grand total of $940,000 in assets. With respect to Mr. Almy, the probate court valued the asset transfer at $500,000. In the petition, Mrs. Almy claimed that there was $275,400 in real property and $718,000 in personal property for a grand total of $993,400 in assets. The DHHS did not truly assail the values offered below or offer evidence to the contrary; the issue has essentially been developed on appeal. That said, there was little to

[5] The DHHS argues that courts sometimes use an "inflated" value in their spousal-support orders because it will result in a higher Medicaid community-spouse resource allowance.

no supporting evidence regarding or identifying specific asset interests and values—just conclusory assertions. We hold that when a probate court acts to transfer property upon satisfaction of the prerequisites in MCL 700.5401 relative to need, it is imperative for the court to identify the interests being transferred and the value of those interests. Although there is no specific language in EPIC demanding that information, when a court is examining the financial needs of spouses and orders asset transfers on the basis of those needs, a valuation of the assets or interests therein is an inescapable and necessary component of the analysis. To the extent that asset transfers are again considered on remand, the probate court shall require evidence concerning the nature of the interest held in the particular assets and the value of the interest in the assets.

We reverse the protective orders issued in these cases and remand for proceedings consistent with this opinion. We do not retain jurisdiction. We decline to tax costs under MCR 7.219.

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

PEOPLE v DUPRE

Docket No. 350386. Submitted December 2, 2020, at Grand Rapids. Decided December 17, 2020, at 9:10 a.m. Leave to appeal denied 508 Mich 983 (2021).

Michael D. Dupre was convicted in the Kent Circuit Court of operating while visibly impaired (OWVI), MCL 257.625(3), after he entered a conditional no-contest plea. Before the scheduled trial, defendant had moved for a special jury instruction; he argued that the holder of a registry identification card under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., could not be convicted of OWVI if marijuana was the substance impairing the cardholder. The trial court, Paul Sullivan, J., disagreed that defendant was entitled to a special instruction, and defendant entered the conditional no-contest plea. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

Section 4 of the MMMA, MCL 333.26424, grants broad immunity from prosecution to a qualifying patient who has been issued a medical-marijuana registry identification card. Section 7 of the MMMA, MCL 333.26427, states that the act nonetheless does not permit any person to operate, navigate, or be in actual physical control of a motor vehicle while "under the influence" of marijuana. The operating-while-intoxicated (OWI) statute, MCL 257.625(1), of the Michigan Vehicle Code, MCL 257.1 *et seq*., prohibits a person from operating a motor vehicle if the person is operating while intoxicated, which the statute defines, in relevant part, as being "under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance." The lesser included offense of OWVI prohibits a person from operating a motor vehicle when, "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, the person's ability to operate the vehicle is visibly impaired." To obtain a conviction of OWVI, the prosecution must present evidence to establish beyond a reasonable doubt that consumption of a listed

substance weakened or reduced the defendant's ability to drive such that the defendant drove with less ability than would an ordinary, careful, and prudent driver. Defendant argued that a medical-marijuana cardholder could not be convicted of OWVI if marijuana was the substance at issue because the MMMA requires the prosecution to prove that the defendant was *under the influence* of marijuana when driving, a higher standard than *visibly impaired*. In *People v Koon*, 494 Mich 1 (2013), the Supreme Court examined the interplay between the MMMA and the Michigan Vehicle Code. The Court held that the MMMA was inconsistent with and therefore superseded the zero-tolerance provision of MCL 257.625(8). However, the Court noted that the MMMA did not define what it meant to be "under the influence" of marijuana and that as used in the MMMA the meaning was ambiguous. The *Koon* Court stated that "under the influence" contemplated "something more" than having any amount of marijuana in one's system and required that there be "some effect" on the person. Because the MMMA was adopted by the electorate and not by the Legislature, it cannot be presumed that "under the influence" has the same meaning in the MMMA as when used in the Michigan Vehicle Code. Rather, this phrase as used in the MMMA must be interpreted according to its ordinary and plain meaning as understood by the electors. Under *Koon*, in order to convict a medical-marijuana cardholder of OWVI, the prosecution must show that the person's ingestion of marijuana had some effect such that it lowered their ability to operate a vehicle, that is, that it weakened or reduced the person's ability to drive such that they drove with less ability than would an ordinary, careful, and prudent driver.

Affirmed.

MICHIGAN MEDICAL MARIHUANA ACT — LIMITATIONS ON IMMUNITY FROM PROSECUTION — MICHIGAN VEHICLE CODE — "UNDER THE INFLUENCE."

Section 4 of the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., grants qualifying patients broad immunity from arrest and prosecution, while § 7 of the act lists acts that negate immunity, including operating a motor vehicle while under the influence of marijuana; the operating-while-intoxicated (OWI) statute, MCL 257.625(1), of the Michigan Vehicle Code, MCL 257.1 *et seq*., prohibits a person from operating a vehicle while under the influence of alcohol or a controlled substance; operating while visibly impaired, MCL 257.625(3), is a lesser included offense of OWI; the meaning of "under the influence" in the MMMA is not the same as its meaning in the OWI statute; a person may be considered "under the influence" of

> marijuana within the meaning of the MMMA if the consumption of marijuana had some effect on them, such that it weakened or reduced the person's ability to drive so that they drove with less ability than would an ordinary, careful, and prudent driver.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Kent County Prosecuting Attorney, and *James K. Benison*, Chief Appellate Attorney, for the people.

Bruce Alan Block, PLC (by *Bruce Alan Block*) for Michael Dean Dupre.

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

BORRELLO, J. Defendant, Michael Dean Dupre, appeals by leave granted[1] his conditional no-contest-plea conviction of operating while visibly impaired (OWVI), MCL 257.625(3). On appeal, defendant argues that the trial court erred when it determined that the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., permits a defendant to be convicted of OWVI because the plain language of the MMMA does not allow for such a conviction. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant was charged with one count of operating while intoxicated (OWI), MCL 257.625(1). In advance of trial, defendant moved for special jury instructions, arguing that our Supreme Court has held that

[1] We granted defendant's application for leave to appeal, limiting the issues on appeal to the issues raised in the application and supporting brief. See *People v Dupre*, unpublished order of the Court of Appeals, entered October 9, 2019 (Docket No. 350386).

medical-marijuana[2] cardholders are allowed to drive while internally possessing marijuana provided the driver is not "under the influence."[3] Defendant argued that under the MMMA, a medical-marijuana cardholder cannot be convicted of OWVI if marijuana was the substance impairing him or her. Rather, the MMMA required the prosecution to prove that defendant was *under the influence* of marijuana when he was driving, a higher standard than visibly impaired. The trial court disagreed, and defendant entered a conditional no-contest plea to OWVI. This Court granted leave to appeal on the issue whether the MMMA allows a registered patient to be convicted of OWVI.

II. ANALYSIS

This case involves the interplay between the MMMA and the Michigan Vehicle Code, MCL 257.1 *et seq*. Accordingly, this appeal involves issues of statutory interpretation, which are questions of law that we review de novo. *Braska v Challenge Mfg Co*, 307 Mich App 340, 352; 861 NW2d 289 (2014).

> The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted; the statute must be enforced as written. Regarding voter-initiated statutes such as the MMMA, the intent of the electors governs the

[2] Following our common practice, we will use the spelling "marijuana" unless directly quoting a statute. See *Braska v Challenge Mfg Co*, 307 Mich App 340, 343 n 1; 861 NW2d 289 (2014).

[3] MCL 333.26427(b)(4) states that the MMMA does not permit any person to "[o]perate, navigate, or be in actual physical control of any motor vehicle . . . while under the influence of marihuana."

> interpretation of the statute. The statute's plain language is the most reliable evidence of the electors' intent. [*Id*. (quotation marks and citations omitted).]

In *People v Kolanek*, 491 Mich 382, 393-394; 817 NW2d 528 (2012), our Supreme Court recounted the implementation of the MMMA:

> The MMMA was proposed in a citizen's initiative petition, was elector-approved in November 2008, and became effective December 4, 2008. The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana, and the act declares this purpose to be an "effort for the health and welfare of [Michigan] citizens." To meet this end, the MMMA defines the parameters of legal medical-marijuana use, promulgates a scheme for regulating registered patient use and administering the act, and provides for an affirmative defense, as well as penalties for violating the MMMA. [Quoting MCL 333.26422(c) (alteration in original).]

The *Kolanek* Court explained that, when reviewing the MMMA, the "goal is to ascertain and give effect to the intent of the electorate, rather than the Legislature, as reflected in the language of the law itself." *Kolanek*, 491 Mich at 397.

The *Kolanek* Court set forth the basic principles behind certain sections of the MMMA. For example, § 4 of the MMMA grants a qualifying patient who has been issued or possesses a registry identification card broad immunity from criminal prosecution, civil penalties, and disciplinary actions for the use of marijuana as a medical treatment. *Id*. at 394-396; MCL 333.26424. Section 7 of the MMMA, on the other hand, describes specific acts that negate immunity. *Id*. at 399-400; see MCL 333.26427. More specifically, and as relevant herein, § 7 does not permit any person to " '[o]perate, navigate, or be in actual physical control of any motor vehicle . . . while under the influence of mari-

huana.' " *Kolanek*, 491 Mich at 400, quoting MCL 333.26427(b)(4).[4] As this Court has previously observed,

> [t]he MMMA also contains a broadly worded provision to ensure that qualifying individuals who adhere to the terms of the MMMA do not suffer penalties for their use of marijuana for medicinal purposes. Specifically, MCL 333.26427(e) provides "[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act." Thus, to the extent another law would penalize an individual for using medical marijuana in accordance with the MMMA, that law is superseded by the MMMA. [*Braska*, 307 Mich App at 355, citing *People v Koon*, 494 Mich 1, 8-9; 832 NW2d 724 (2013).]

The Michigan Vehicle Code prohibits individuals from operating motor vehicles under certain circumstances. The OWI statute, MCL 257.625(1), prohibits a person from operating a motor vehicle "if the person is operating while intoxicated." The OWVI statute, MCL 257.625(3), prohibits a person from operating a motor vehicle when, "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, the person's ability to operate the vehicle is visibly impaired." To obtain a conviction of OWVI, "the prosecution must present evidence to establish beyond a reasonable doubt that consumption of [a listed substance] weakened or reduced the defendant's ability to drive such that the defendant drove with less ability

[4] In addition to the immunity granted to qualifying patients in § 4, § 8 of the MMMA states that a patient " 'may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana,' " subject to the limitations in § 7. *Kolanek*, 491 Mich at 396-397, quoting MCL 333.26428(a).

than would an ordinary, careful, and prudent driver." *People v Mikulen*, 324 Mich App 14, 22; 919 NW2d 454 (2018). OWVI is a lesser included offense of OWI. See *People v Lambert*, 395 Mich 296, 305; 235 NW2d 338 (1975).

The *Lambert* Court provided sample jury instructions that trial courts could give to explain the difference between OWI and OWVI:

> The distinction between the crime of driving under the influence of intoxicating liquor and the lesser included offense of driving while ability is visibly impaired is the degree of intoxication which the people must prove.
>
> To prove driving under the influence of intoxicating liquor, the people must prove that defendant's ability to drive was substantially and materially affected by consumption of intoxicating liquor.
>
> To prove driving while ability is visibly impaired, the people must prove that defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person. [*Id*. (quotation marks omitted); see also *Mikulen*, 324 Mich App at 22-23.]

According to the *Mikulen* Court, the Legislature created the offense of OWVI "to address those situations in which a defendant's level of intoxication and resulting impairment does not suffice to establish OWI, yet the defendant still presents a danger to the public because his or her ability to operate the vehicle is visibly impaired." *Mikulen*, 324 Mich App at 22-23 (quotation marks omitted).

In *Koon*, our Supreme Court examined the interplay between the MMMA and the Michigan Vehicle Code. The defendant in *Koon* was charged with operating a motor vehicle with the presence of a Schedule 1 con-

trolled substance—marijuana—in his body under MCL 257.625(8), a zero-tolerance provision.[5] *Koon*, 494 Mich at 3, 5. The defendant argued, however, that the MMMA's immunity provision prevented a registered patient's prosecution unless the patient drove " 'under the influence' " of marijuana. *Id*. at 4, quoting MCL 333.26427(b)(4). The defendant additionally argued that "the MMMA resolves conflicts between all other acts and the MMMA by exempting the medical use of marijuana from the application of any inconsistent act." *Koon*, 494 Mich at 4.

The *Koon* Court held that the MMMA was "inconsistent with, and therefore supersedes," the zero-tolerance provision, MCL 257.625(8). *Koon*, 494 Mich at 8-9. As to the meaning of the phrase "under the influence" in MCL 333.26427(b)(4), the *Koon* Court explained:

> The MMMA, however, does not define what it means to be "under the influence" of marijuana. While we need not set exact parameters of when a person is "under the influence," we conclude that it contemplates something more than having any amount of marijuana in one's system and requires some effect on the person. Thus, taking the MMMA's provisions together, the act's protections extend to a registered patient who internally possesses marijuana while operating a vehicle unless the patient is under the influence of marijuana. In contrast, the Michigan Vehicle

[5] MCL 257.625(8) provides as follows:

> 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 has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(*iv*) of the public health code, 1978 PA 368, MCL 333.7214.

> Code's zero-tolerance provision prohibits the operation of a motor vehicle by a driver with an infinitesimal amount of marijuana in his or her system even if the infinitesimal amount of marijuana has no influence on the driver.
>
> The immunity from prosecution provided under the MMMA to a registered patient who drives with indications of marijuana in his or her system but is not otherwise under the influence of marijuana inescapably conflicts with the Michigan Vehicle Code's prohibition against a person driving with any amount of marijuana in his or her system. When the MMMA conflicts with another statute, the MMMA provides that "[a]ll other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana . . . ." Consequently, the Michigan Vehicle Code's zero-tolerance provision, MCL 257.625(8), which is inconsistent with the MMMA, does not apply to the medical use of marijuana. [*Koon*, 494 Mich at 6-7 (citation and emphasis omitted; alterations and ellipsis in original).]

The *Koon* Court also explained that "under the influence" is a term of art used throughout the Michigan Vehicle Code. *Id*. at 6 n 14. The Court noted that *Black's Law Dictionary* defines "under the influence" as "deprived of clearness of mind and self-control because of drugs or alcohol." *Id*. (quotation marks omitted).[6]

Examination of this Court's decision in *Braska* reveals the use of a similar analytical framework when considering the interplay between statutes and the MMMA. In *Braska*, this Court was tasked with determining whether the MMMA precluded recovery of unemployment benefits by a person who tested positive for marijuana and who also possessed a valid MMMA registration card. As was the case in *Koon*, in *Braska*,

[6] Although the *Koon* Court cited the ninth edition of *Black's Law Dictionary*, the eleventh edition reflects an identical definition. See *Black's Law Dictionary* (11th ed).

the person claiming the benefit of the MMMA was simply found to have marijuana in his system, which at the time constituted a disqualifying event under MCL 421.29(1)(m) of the Michigan Employment Security Act, MCL 421.1 *et seq*. See *Braska*, 307 Mich App at 365. This Court held that in the absence of any evidence that the claimant's use of medical marijuana was not in conformance with the terms of the MMMA, the "denial of the benefits constituted an improper penalty for the medical use of marijuana under the MMMA." *Id*.

The *Koon* and *Braska* Courts made clear that in the absence of any evidence of an impairment as a result of marijuana usage, the MMMA affords certain protections to defendants in criminal cases and to claimants in unemployment cases. The decisions in *Koon* and *Braska* also stand for the proposition that if a statute is inconsistent with the MMMA, the MMMA supersedes that statute. *Koon*, 494 Mich at 8-9; *Braska*, 307 Mich App at 365. In this case, defendant argues that our Supreme Court's holding in *Koon* only permits a conviction of OWI for persons holding a valid MMMA registration card if they are shown to be "under the influence." We do not read *Koon* to compel such a holding.

In order to ascertain whether, in a prosecution for OWI based on the consumption of marijuana, the state must prove that a defendant is "under the influence" of marijuana as that phrase is defined in the Michigan Vehicle Code, we must first determine whether that phrase means the same thing in § 7 of the MMMA, MCL 333.26427(b)(4), as it does in the OWI statute, MCL 257.625(1)(a).

We concur with the state's argument that if the Legislature had enacted the MMMA, defendant's argument would have substantial merit because the Legislature would have presumably known and adopted the

Michigan Vehicle Code's definition of "under the influence." See *Koon*, 494 Mich at 6 n 14 (explaining that "under the influence" is a term of art in the Michigan Vehicle Code); see also *People v Riddle*, 467 Mich 116, 126; 649 NW2d 30 (2002) (explaining that when the Legislature borrows a term of art, "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed"). But the Legislature did not approve the MMMA; the electorate did. *Kolanek*, 491 Mich at 397. Therefore, the MMMA's words must be interpreted through their ordinary and plain meaning as understood by the electors. *Id*. As the disagreement between the parties in this case indicates, the meaning of "under the influence" in the MMMA, MCL 333.26427(b)(4), as the electors would have understood it, is ambiguous. See *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016) (explaining that "[a] statute is ambiguous if . . . the text is equally susceptible to more than one meaning"). Our Supreme Court alluded to this ambiguity in *Koon* when, as we have previously quoted, it stated that "under the influence" means "*something* more than having any amount of marijuana in one's system," but declined to adopt a definition. *Koon*, 494 Mich at 6 (emphasis added). Therefore, further judicial construction is permitted. See *Braska*, 307 Mich App at 352.

Although the *Koon* Court did not define what was specifically required to meet this higher threshold, the Court did state that "under the influence" "requires *some* effect on the person." *Koon*, 494 Mich at 6 (emphasis added). As previously stated, to be convicted of OWVI, the prosecution must prove that a driver had "less ability than . . . an ordinary, careful, and prudent driver" because he or she internally possessed a listed

substance. *Mikulen*, 324 Mich App at 22. In accordance with our Supreme Court's statement in *Koon*, here, in order to obtain a conviction of OWVI, the state must demonstrate that defendant's ingestion of marijuana had *some* effect on him such that it lowered his ability to operate a vehicle. It is also important to note that the *Koon* Court did not use the phrase "substantially and materially affected," which would have mirrored the level of impairment the state must prove to convict a defendant of OWI. See *Koon*, 494 Mich at 6; see also *Lambert*, 395 Mich at 305. This choice of phrase—both explicit and implicit—appears telling as to the *Koon* Court's understanding of the MMMA and its interaction with the Michigan Vehicle Code. When the *Koon* Court stated that "under the influence" requires "some effect on the person" operating the vehicle, it chose not to apply the "substantially and materially" standard that would have indicated an adoption within the MMMA of "under the influence" as defined in the OWI statute. Therefore, although the *Koon* Court held that the plain text of the MMMA reflects the electors' intent to allow registered patients to internally possess marijuana, it did not state—as defendant argues—that the electors intended that a registered patient who internally possesses marijuana be immune from prosecution for OWVI. See *Koon*, 494 Mich at 6-7.

To the contrary, since the approval of the MMMA, our Supreme Court has appeared to adopt the viewpoint that the electors intended for medical marijuana to be treated similarly to alcohol. See *id*. at 8. For example, a person can be convicted of OWVI for alcohol use, MCL 257.625(3), and the zero-tolerance provision, which the *Koon* Court held does not apply to the medical use of marijuana, *Koon*, 494 Mich at 7, does not apply to alcohol. See MCL 257.625(8). Hence, as previously alluded to, defendant's reading of the

MMMA would require this Court to conclude that the electors' intent was to give registered patients internally possessing marijuana greater protections than average citizens internally possessing alcohol. The language of the MMMA is devoid of such language, and defendant presents no evidence that would lead us to conclude this was the electors' intent.

Rather, our reading of § 7 of the MMMA leads us to conclude that the limitations on immunity appear to be situations in which public safety or public health intersect with a registered patient's use of medical marijuana. For example, registered patients cannot smoke marijuana in any public place or on public transportation, MCL 333.26427(b)(3), and they cannot "[u]ndertake any task under the influence of marihuana, when doing so would constitute negligence," MCL 333.26427(b)(1). Because a driver operates a vehicle while visibly impaired if they drive with "less ability than would an ordinary, careful, and prudent driver," the driver puts public safety at risk by doing so. *Mikulen*, 324 Mich App at 22. In short, a driver operating while visibly impaired appears to do so negligently, in violation of MCL 333.26427(b)(1). Therefore, we discern no intent within the MMMA to immunize the visibly impaired driver from prosecution.

This connection mirrors what this Court has held was the Legislature's intent in passing the OWVI statute: to allow the government to protect the public from a driver when his or her "level of intoxication and resulting impairment does not suffice to establish OWI, yet the defendant *still presents a danger to the public* because his or her ability to operate the vehicle is visibly impaired." *Mikulen*, 324 Mich App at 22-23 (quotation marks omitted; emphasis added). Moreover, the MMMA itself declares that its purpose is "to be an 'effort for the

health and welfare of [Michigan] citizens.' " *Kolanek*, 491 Mich at 394, quoting MCL 333.26422(c) (alteration in original).[7] MCL 333.26422(c) appears to be direct evidence that the electors' intent in passing the MMMA was the improvement of the health and safety of *citizens*, not just registered patients. Defendant's theory that the MMMA precludes registered patients from being convicted of OWVI would put ordinary citizens and registered patients alike in danger because registered patients would be allowed to drive with "less ability than . . . an ordinary, careful, and prudent driver" without fear of prosecution. See *Mikulen*, 324 Mich App at 22-23.

In sum, we conclude that the MMMA does not supersede the OWVI statute. "Under the influence" as used in MCL 333.26427(b)(4) is not limited in meaning

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[7] MCL 333.26422 provides as follows:

> The people of the State of Michigan find and declare that:
>
> (a) Modern medical research, including as found by the National Academy of Sciences' Institute of Medicine in a March 1999 report, has discovered beneficial uses for marihuana in treating or alleviating the pain, nausea, and other symptoms associated with a variety of debilitating medical conditions.
>
> (b) Data from the Federal Bureau of Investigation Uniform Crime Reports and the Compendium of Federal Justice Statistics show that approximately 99 out of every 100 marihuana arrests in the United States are made under state law, rather than under federal law. Consequently, changing state law will have the practical effect of protecting from arrest the vast majority of seriously ill people who have a medical need to use marihuana.
>
> (c) Although federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law. The laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.

to how that phrase is understood with regard to the OWI statute, MCL 257.625(1). A person may be considered "under the influence" of marijuana if it can be shown that consumption of marijuana had "some effect on the person," *Koon*, 494 Mich at 6, such that it "weakened or reduced the [person's] ability to drive such that the [person] drove with less ability than would an ordinary, careful, and prudent driver." *Mikulen*, 324 Mich App at 22.

Because we affirm on these grounds, we need not address the prosecution's alternative grounds for affirmance.

Affirmed.

RONAYNE KRAUSE, P.J., and MARKEY, J., concurred with BORRELLO, J.

PEOPLE v TRAPP

Docket No. 345293. Submitted December 8, 2020, at Detroit. Decided December 17, 2020, at 9:15 a.m.

Neil A. Trapp was charged in the Macomb Circuit Court with resisting or obstructing a police officer, MCL 750.81d(1); attempted resisting or obstructing a police officer, MCL 750.81d(1); brandishing a firearm, MCL 750.234e; and disturbing the peace, MCL 750.170. In 2017, police officers went to a trailer park to investigate a complaint about a man with a gun. When the officers arrived, the area was quiet, and the trailer park manager directed the officers to a specific trailer, stating that several intoxicated people were in the trailer (including the man with the gun), that only a woman lived in the trailer, and that a family with children lived in a nearby trailer. One of the four police officers who approached the trailer knocked on the door, shined his flashlight in the face of the woman who opened the door, inquired about who else was inside, and instructed her to step out the door and to have the two males in the home step out one at a time with their hands visible. Another officer pointed a light in defendant's direction when he exited the trailer, and two or more additional uniformed officers stood near the trailer door. One of the officers pulled defendant by the arm to a parked car where he was questioned about the gun. Defendant answered many questions from the officer until he was asked where the gun was located, at which point he questioned repeatedly whether the police had a warrant. In response, the officer pushed defendant against the parked car and ordered him to turn around; defendant resisted the officer and was handcuffed. Defendant moved at the preliminary examination to quash the felony information, arguing that he had rightfully resisted because the arrest was unlawful. The district court denied the motion and bound defendant over on the charged offenses. Defendant renewed the motion in the circuit court, asserting that the arrest was unlawful because defendant left the trailer only when ordered to do so by the police. The court, Richard L. Caretti, J., denied the motion, reasoning that defendant had voluntarily left the trailer when requested by the police, that under *Terry v Ohio*, 391 US 1 (1968), the police had a reasonable suspicion to believe defendant was

armed and dangerous, and that the arrest was lawful. Defendant conditionally pleaded *nolo contendere* under MCR 6.301(C)(2) to the offenses of attempted resisting or obstructing and disturbing the peace and reserved his right to withdraw the plea in the event that he successfully challenged the denial of his motion to quash. The Court of Appeals denied defendant's application for leave to appeal. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted to address (1) whether the constructive-entry doctrine set forth in *United States v Morgan*, 743 F2d 1158 (CA 6, 1984), should be recognized in Michigan and applied to this case and (2) whether, under the circumstances of this case, exigent circumstances justified the police telling the woman in the trailer to tell the others in the trailer to come out.

The Court of Appeals *held*:

1. The Fourth Amendment of the United States Constitution protects people against unreasonable searches and seizures by the government. At its core, the Fourth Amendment protects the right of a person to retreat into their own home and be free from unreasonable searches and seizures. For that reason, absent exigent circumstances, police officers may not enter a person's home or lodging without a warrant. Under the constructive-entry doctrine set forth in *Morgan*, which is adopted in Michigan, police are considered to have entered a home when their conduct coerces a person to leave their home, readily subjecting them to arrest; in other words, a constructive entry accomplishes the same thing as a warrantless arrest. Summoning a person out of their house is not an investigatory stop that is allowed under *Terry*; it is not constitutionally permissible for the police to coerce a person from their home to perform an investigative seizure. In determining whether a constructive entry occurred, the focus is on whether a reasonable person would have believed they were not free to stay in their home. Examples of circumstances that might indicate a seizure occurred include (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) some physical touching of the person of the citizen, and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled. In Michigan, the common law allows a person to resist an unlawful arrest as well as other unlawful invasions of private rights; stated differently, the common-law right to resist the unlawful taking of one's property also encompasses the right to resist the unlawful taking of one's liberty.

2. In this case, at least four armed uniformed officers surrounded the trailer at night, one officer ordered the woman who

lived in the trailer to step outside and effectively ordered the men, through the woman, to present themselves outside with their hands visible. Because the situation was intensely coercive, defendant did not voluntarily exit the trailer, and the police violated the Fourth Amendment by conducting an illegal constructive entry of the trailer by ordering its occupants outside. Exigent circumstances did not exist such that the officer was justified in asking the woman to tell the other occupants to come out; the mere fact that children lived in the trailer park would not have supported a search warrant for the trailer or an arrest warrant for its occupants, particularly given that the police were only investigating a misdemeanor involving the brandishing of a firearm. Regardless of whether defendant was arrested or "seized" for purposes of *Terry* after he left the trailer, the seizure itself, which was triggered by defendant's warrant questions, was unreasonable. In addition, the police could not have arrested defendant for the misdemeanor offense of brandishing a firearm because the alleged offense was not committed in an officer's presence. Accordingly, the arrest of Trapp violated the Fourth Amendment because it was the product of an illegal constructive entry and because the police could not have arrested Trapp for the misdemeanor offense of brandishing a firearm. Because the arrest was unlawful, defendant had a common-law right to resist, and the circuit court should have granted his motion to quash the charge of attempted resisting or obstructing a police officer.

Reversed and remanded.

SWARTZLE, J., concurring in the result only, agreed with the majority in the abstract that Michigan should recognize the constructive-entry doctrine and that, under the facts of this case, exigent circumstances did not exist as a basis for the police to enter the trailer without a warrant. Although it was questionable whether defendant had a legitimate expectation of privacy in the trailer, the officers constructively entered the trailer in violation of the Fourth Amendment. However, the constructive-entry questions should not have been reached because the appeal could have been resolved on the basis that the police did not have probable cause to arrest defendant; nonetheless, because of the Supreme Court's order, the Court was required to address the issues as framed by that Court.

CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEARCH OR SEIZURE — CONSTRUCTIVE-ENTRY DOCTRINE.

Absent exigent circumstances, police officers may not enter a person's home or lodging without a warrant; for purposes of the

Fourth Amendment, the constructive-entry doctrine—which provides that police are considered to have entered a home when their conduct coerces a person to leave their home, readily subjecting them to arrest—applies in Michigan; in determining whether a constructive entry occurred, the focus is on whether a reasonable person would have believed they were not free to leave; consideration of circumstances that might indicate a seizure occurred include (1) the threatening presence of several officers, (2) the display of a weapon by an officer, (3) some physical touching of the person of the citizen, and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled (US Const, Am IV).

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

Excolo Law, PLLC (by *Solomon M. Radner*) for defendant.

Amicus Curiae:

William J. Vailliencourt, Jr., *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

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

GLEICHER, J. Four uniformed police officers responded to a call from a trailer park reporting "[a] man with a gun" on the premises. When the police arrived, the night scene was quiet with no gunman in sight. The trailer park manager told the officers that the man was inside a nearby trailer.

The police ordered the males in the trailer to come outside with their hands visible. Defendant Neil Trapp complied, and within minutes, he was spun around

and handcuffed. Trapp resisted; his efforts resulted in a felony charge. We are tasked with deciding whether Trapp's seizure resulted from a constructive entry conducted in violation of the Fourth Amendment of the United States Constitution. If it did, the common law permitted Trapp to physically oppose and obstruct his arrest.

The police were entitled to investigate whether Trapp presented a danger to the trailer park. But absent a warrant, they could not invade the trailer to seize or search him. The Fourth Amendment likewise prohibited the police from evading the warrant requirement by deliberately coercing Trapp to exit the trailer. Trapp was not subject to arrest before he resisted, and exigent circumstances did not exist to excuse the police officers' conduct. We reverse Trapp's conviction of attempted resisting or obstructing a police officer and remand for further proceedings.

I

The facts surrounding the events at issue are confined to the brief preliminary examination testimony of one of the involved police officers and a grainy, dark dashcam video.

Warren police officer Christopher Wells testified that four uniformed officers were dispatched to a trailer park for "[a] man with a gun complaint." The officers arrived at the scene at 10:36 p.m. No people were in sight as the police drove into the trailer park. The manager approached the officers and told them that there were several intoxicated people in "trailer number six" and that one person had a firearm. Gesturing to a different trailer, the manager stated, "I've got this family over here with kids."

The manager described the man with the firearm as "drunker than hell, pulling his gun out" from the back of his pants, shirtless, and "full of tattoos." He stated that there was "a whole group of kids in there," gesturing toward Trailer No. 6, and declared, "I want 'em all out of my park." The manager and the officers discussed whether the people in Trailer No. 6 actually lived in the trailer or were "trespassers"; some of the conversation is inaudible or garbled. The manager claimed that only a woman lived in the trailer.[1]

The video shows what happened next. The dashcam was aimed in the direction of the police car's travel into the park. The manager had emerged from the left side of the road. Trailer No. 6 was across the road, on the right. The shorter dimension of Trailer No. 6 (the width end) faced the road. This portion of the trailer had a lit window, but no door.

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[1] The prosecution has never taken the position that Trapp lacked an expectation of privacy in the trailer, and no facts of record would support that finding. Our concurring colleague questions whether Trapp had standing to challenge his arrest, but that issue was not raised by the prosecution in the trial court, in this Court when the case first presented itself here, in the Supreme Court when the case landed there, or in this Court on remand. It is likely the prosecution did not raise it on any of these occasions because the prosecution knew that if Trapp was an overnight guest in the trailer, he had a reasonable expectation of privacy. *Minnesota v Olson*, 495 US 91, 96-97; 110 S Ct 1684; 109 L Ed 2d 85 (1990). Regardless, it is too late now to consider Trapp's standing. See *Steagald v United States*, 451 US 204, 209; 101 S Ct 1642; 68 L Ed 2d 38 (1981) ("[T]he Government was initially entitled to defend against petitioner's charge of an unlawful search by asserting that petitioner lacked a reasonable expectation of privacy in the searched home, or that he consented to the search, or that exigent circumstances justified the entry. The Government, however, may lose its right to raise factual issues of this sort before this Court when it has made contrary assertions in the courts below, when it has acquiesced in contrary findings by those courts, or when it has failed to raise such questions in a timely fashion during the litigation.").

After being briefed by the trailer park manager, four officers approached Trailer No. 6. Their object was the trailer door located on the long side of the trailer, which ran perpendicular to the road. Because the camera remained in the parked police car and pointed straight down the road, it did not capture the trailer door or its threshold. Several features of the trailer are nonetheless apparent.

Two or three small steps led to a landing, which appears to wrap around the trailer from the side facing the road. The steps and part of the landing are partially visible in the video, but the door and the threshold are not. The straight-ahead camera angle makes it impossible to see the occupants of the trailer before they exit the residence and, in Trapp's case, descend the steps.

One of the four officers mounted the steps and knocked on the trailer door. When a woman answered, the officer shined a flashlight in her direction. The officer asked her who was in the trailer with her, and she identified the occupants as her brother, her stepbrother, and her two "best friends." The officer stated, "Step out here." The woman complied. The officer then asked, "How many kids are in there?" The woman responded that there were no children present other than her 16-year-old son. The woman is never visible in the video.

The officer then declared, "Have the two males step . . . out one at a time with their hands where we can see 'em." Regarding this command, Officer Wells testified as follows:

> *Q*. When you arrived on scene was Mr. Trapp indoors or outdoors?
>
> *A*. Indoors.
>
> *Q*. And the officers ordered him outdoors to talk to him?

A. I'm sorry?

Q. Officers ordered him to come outdoors to talk to them?

A. Everyone in the trailer number six, yes.

Trapp exited the trailer, and an officer pointed a second light in Trapp's direction. Two or more additional uniformed officers positioned themselves near the trailer door.[2] Immediately after Trapp exited the trailer, one of the officers took Trapp's arm and pulled him toward a parked car, instructing Trapp to "go to that officer over there." Trapp obeyed, commenting "holy shit there's a lot of you" as he moved away from the trailer. He stood facing the trailer with his back to the parked car as he answered the officer's questions. The interrogating officer stood between Trapp and the door to the trailer.

Trapp's answers to the officer's questions exposed Trapp's obvious inebriation. When asked, "What's going on?," Trapp referred to his "company" (presumably houseguests) and began to pivot back toward the trailer. An officer blocked Trapp's path and, in the video evidence, appeared to slightly propel Trapp back toward the patrol car. The officer asked Trapp whether he had "come out here with a gun," and Trapp emphatically replied, "No, hell no!" The officer inquired whether Trapp had his identification on him; Trapp replied affirmatively, and the officer asked to see it. Although it is difficult to discern, Trapp either produced his identification by reaching into a pants pocket or attempted to do so.

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[2] The district court counted nine officers "in view of the camera" when Trapp was being questioned. After the officers threatened to "spray" Trapp, one of them stated, "There are like nine of us here, you're not going to win this fight."

Trapp volunteered that his handgun was registered "to myself." He asked, "What is it with the handgun?," and an officer told him that there had been "a complaint." Trapp expressed that he was "lost" about "the whole handgun thing," and an officer sardonically inquired whether he was "lost" about having "run out here" waving the handgun, with no shirt on. Did someone just "make up" that information, the officer queried. Trapp launched into a monologue about "guys" who had been there that evening. He volunteered, "I'd never pull anything on anyone period." An officer asked if he had "a gun here tonight," and Trapp answered, "Do I have a handgun?" He told the officers that his gun was "legal" and that it was in his car. The officer again inquired where the gun was, and Trapp responded by asking the officer whether he had "a warrant." The officer replied, "I'm asking you where it is." Trapp asked for a second time whether the police had a warrant. When the officer repeated the same question a third time, Trapp responded, "All I asked you is there a warrant?"

The officer forcefully pushed Trapp against the parked car and ordered him to "turn around." Trapp resisted, and a struggle ensued. The officers quickly subdued Trapp. They forced him to the ground, handcuffed him, threatened to "spray" him, and placed him in a police cruiser. The prosecutor charged Trapp with one count of resisting or obstructing a police officer, MCL 750.81d(1), one count of attempted resisting or obstructing a police officer, MCL 750.81d(1), one count of brandishing a firearm, MCL 750.234e, and one count of disturbing the peace, MCL 750.170.

At the preliminary exam, Officer Wells explained that the questioning regarding the handgun was directed to Trapp because Trapp wore blue jeans and a white shirt

and had tattoos; the other male wore black jeans and a black shirt. The testimony continued as follows:

> *Q*. So what . . . I'm asking you is why were you asking where his gun was at? Who cares?
>
> * * *
>
> *The Witness*: Because we were there for a man with a gun complaint.
>
> *Q*. Is that a crime?
>
> *A*. Yeah.
>
> *Q*. What's the crime?
>
> *A*. He's waiving [sic] a gun around, he's intoxicated.
>
> *Q*. So brandishing a firearm?
>
> *A*. Yeah.

Defense counsel moved to quash the felony information, contending that Trapp had rightfully resisted an unlawful arrest. The arrest was unlawful, counsel reasoned, because Officer Wells claimed to have arrested Trapp for brandishing a firearm, but under MCL 764.15, the police did not have authority to arrest him for that offense. The district court denied the motion and bound Trapp over for trial, finding that under *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the officers had reasonable suspicion to believe that Trapp was armed and dangerous.

Trapp renewed his motion in the circuit court, asserting that the district court improperly relied upon *Terry* when it determined that his interaction with the police officers had resulted in a lawful arrest. Trapp urged that *Terry* only applies to *public* interactions and that he was not in a public place when the police officers told him to exit the trailer. Trapp was unlawfully arrested, counsel urged, because he left the trailer only when the police ordered him to do so.

The circuit court denied Trapp's motion, finding the interaction lawful under *Terry* and that Trapp had exited the trailer voluntarily. The circuit court wrote, "It is undisputed defendant voluntarily exited his home upon the request of law enforcement." The court's opinion continued: "Officer Wells'[s] testimony clearly demonstrates officers initially instructed defendant to turn around and place his hands behind his back so they could search his person for a gun. There is no evidence defendant was under arrest at this point in time." And like the district court, the circuit court opined that the police had reasonable suspicion to believe that Trapp was armed and dangerous. Trapp "was truly resisting the officers' attempt to execute a *Terry* search," the court found, and was legally arrested because he was resisting. The court denied reconsideration, noting that Trapp's motion was based on the doctrine of constructive entry. The officers did not engage in coercive conduct, the circuit court determined, because they requested that defendant exit the trailer only a single time.

Trapp entered a conditional plea of *nolo contendere* under MCR 6.301(C)(2) and reserved his right to withdraw the plea in the event that he successfully challenged the denial of his motion to quash. Pursuant to a *Cobbs*[3] agreement, he was sentenced to 12 months' probation.

This Court denied Trapp's application for leave to appeal. *People v Trapp*, unpublished order of the Court of Appeals, entered February 25, 2019 (Docket No. 345293). In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court for consideration as on leave granted, ordering us to address the following:

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[3] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

> (1) whether the constructive-entry doctrine, *United States v Morgan*, 743 F2d 1158 (CA 6, 1984), should be recognized in Michigan and, if so, whether the facts of this case fall within that doctrine; and (2) whether the dispatch report that the police received about an intoxicated man waving a gun around outside a trailer, and the video evidence showing that the police received information when they arrived at the scene about children being present, provided the police with exigent circumstances justifying their action of telling one occupant of the trailer to tell the other occupants to come out. [*People v Trapp*, 504 Mich 979, 979 (2019).]

II

Our task is to place in a legal framework the events of the three minutes that transpired from the officers' arrival at Trailer No. 6 until Trapp's act of resistance. Trapp claims he was arrested by the officers when he was ordered to leave the trailer; the circuit court found that Trapp had voluntarily exited and was merely "seized" pursuant to a *Terry* stop. The video shows and tells us what happened. Because we have watched the video, we need not rely exclusively on the circuit court's factual conclusions. See *People v Kavanaugh*, 320 Mich App 293, 298; 907 NW2d 845 (2017).

When the officers arrived at the scene, there was no evident emergency. The trailer park was dark and quiet. Even though it was nighttime, we assume that the officers were justified in performing a "knock and talk" to investigate whether an armed and dangerous man had taken refuge in Trailer No. 6 and might reemerge to threaten the park's tranquility.[4] Had the

[4] Unlike in *People v Frederick*, 500 Mich 228, 240; 895 NW2d 541 (2017), the events in this case played out before 11:00 p.m. and not in "the middle of the night." A light was on in the trailer when the officers arrived, and the video evidence supports that no one was asleep. The

officers started and ended by gathering information at the trailer's entryway, the Fourth Amendment would not have been implicated at all. *People v Frederick*, 500 Mich 228, 241; 895 NW2d 541 (2017).

But the officers exceeded the permissible scope of an investigative "knock and talk" when they ordered the woman to "step out here." Fourth Amendment activity commenced with this command and continued when the officers instructed the woman to tell the males to exit the trailer. Both orders resulted in seizures implicating the Fourth Amendment. And as we discuss in greater detail below, by ordering the woman and the men to leave the trailer, the officers constructively entered the trailer without a warrant.

Two additional points bear mention. When the police officers arrived at the trailer park, they lacked probable cause to arrest Trapp for anything. Probable cause requires *individualized* suspicion. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Indianapolis v Edmond*, 531 US 32, 37; 121 S Ct 447; 148 L Ed 2d 333 (2000). Until the police ordered the men out of the trailer, they had no reason to suspect Trapp of having committed a crime.

Further, even assuming that legally gathered information identified Trapp as the person who "pull[ed] his gun out," Michigan law prohibited the officers from arresting Trapp for brandishing a firearm. Knowingly brandishing a firearm in public is a misdemeanor "punishable by imprisonment for not more than 90 days[.]" MCL 750.234e(3). Under MCL 764.15(1)(a), an officer lacking a warrant may arrest a person for a

officers were justified in approaching the trailer to gather information about what had transpired regarding the armed man who had been brandishing a gun on the trailer park premises.

felony or a misdemeanor committed in the officer's presence, or under MCL 764.15(1)(d), if the officer "has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days . . . has been committed and reasonable cause to believe the person committed it."[5] Trapp was not subject to arrest for anything he had done before the police arrived.

A

The Michigan Supreme Court first addressed the constructive-entry doctrine in *People v Gillam*, 479 Mich 253; 734 NW2d 585 (2007), but the majority did not reach a conclusion regarding its general applicability. *Gillam* supplies our standard of review:

> The scope of the constructive entry doctrine and whether the police conduct . . . constituted a constructive entry of defendant's dwelling raises Fourth Amendment implications. Issues of constitutional dimension are reviewed de novo. A trial court's factual findings are generally reviewed for clear error. [*Id*. at 260 (citations omitted).]

B

Because they had no warrant and no exceptions to the warrant requirement apply, the officers could not have entered Trailer No. 6 to seize any of its occupants for questioning, or to search for a weapon. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold

[5] The prosecution's brief on appeal suggests that the police had probable cause to arrest Trapp for "felonious assault." The facts reported by the trailer park manager do not support that anyone was assaulted, nor do any other record facts. Officer Wells testified that the crime under investigation was brandishing a firearm. Neither he nor the prosecutor who handled the preliminary exam mentioned an assault.

may not reasonably be crossed without a warrant." *Payton v New York*, 445 US 573, 590; 100 S Ct 1371; 63 L Ed 2d 639 (1980). Indeed, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed[.]" *United States v US Dist Court for the Eastern Dist of Mich*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972). The warrantless physical invasion of a home, "by even a fraction of an inch," contravenes the Fourth Amendment. *Kyllo v United States*, 533 US 27, 37; 121 S Ct 2038; 150 L Ed 2d 94 (2001) (quotation marks and citation omitted). At the Fourth Amendment's "very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v Jardines*, 569 US 1, 6; 133 S Ct 1409; 185 L Ed 2d 495 (2013) (quotation marks and citation omitted). Our Supreme Court recently emphasized that "[e]ven when based on probable cause, . . . a warrantless search or seizure inside a suspect's home is presumptively unreasonable." *People v Hammerlund*, 504 Mich 442, 452; 939 NW2d 129 (2019).

Rather than entering the trailer, the officers began their investigation by ordering the female occupant to step outside. The officer issued this order under the color of his authority as a police officer. The woman was not given the option of staying inside or asked whether she wished to cooperate. Because the police lacked any reasonable suspicion that the woman had committed or was about to commit a crime, they had no authority to seize her by telling her to "step outside." Once divested of the safety and security of her home, the woman was instructed to tell the males to come outside with their hands positioned so that they would be visible to the officers. The woman complied.

We cannot accept the trial court's characterization of Trapp's exit pursuant to the officer's directions, filtered through the woman, as "voluntary." At least four armed uniformed officers had surrounded the trailer at night, extracted the woman who lived there, and ordered the men to present themselves outside with their hands visible. Officer Wells had no difficulty in agreeing with counsel's characterization of the officer's communication to the men in the trailer as an "order." The video supports that the "order" and accompanying circumstances had the features of a coercive seizure:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. [*United States v Mendenhall*, 446 US 544, 554; 100 S Ct 1870; 64 L Ed 2d 497 (1980) (opinion by Stewart, J.).]

Given the presence of four or more armed officers around the trailer's entrance at night combined with the language and tone of the involved officer's voice, a reasonable person in Trapp's position would not have felt free to ignore the officer's instruction and simply close the door.

But we need not linger on whether Trapp was "seized" in a legal sense before he stepped out of the trailer because the video makes it clear that he was *physically* seized a second or two later when an officer pulled him from the landing and propelled him toward the parked car. There was nothing voluntary about Trapp's movement away from the trailer. And without question, at that point Trapp was not free to leave.

Did the actions of the police officers conform to the Fourth Amendment? For two reasons, we hold that they did not. First, the police conducted an illegal constructive entry of the trailer by ordering its occupants outside. In answer to the Supreme Court's inquiries on this subject, we hold that the constructive-entry doctrine, as described in *United States v Morgan*, 743 F2d 1158 (CA 6, 1984), should be adopted and that the facts of this case fall within that doctrine. Second, the police formally arrested Trapp when he repeatedly asked if they had a warrant. That arrest was without probable cause. Accordingly, Trapp had a common-law right to resist, *People v Moreno*, 491 Mich 38, 41; 814 NW2d 624 (2012), and his conviction of attempted resisting or obstructing an officer should have been quashed.

C

We begin by discussing the constructive-entry doctrine and, in particular, the Sixth Circuit for the United States Court of Appeals case brought to our attention by the Michigan Supreme Court: *United States v Morgan*, 743 F2d 1158 (CA 6, 1984). The constructive-entry paradigm flows from the United States Supreme Court's holding in *Payton v New York* that absent exigent circumstances, the police may not enter a home to effect an arrest unless armed with a warrant. *Payton*, 445 US at 590. Courts adopting the doctrine hold that when the police coerce the residents of a home to leave so that they are readily subject to arrest, that action similarly contravenes *Payton*. *Morgan* provides a classic example.

The police suspected John Henry Morgan of having shot automatic weapons in a public park and of possessing illegal guns. *Morgan*, 743 F2d at 1160. Officers followed Morgan's car to his mother's residence where

an officer saw several people "take an assortment of weapons into the Morgan home." *Id*. At least nine officers surrounded the house, flooded it with spotlights, and "summoned Morgan from his mother's home with the blaring call of a bullhorn." *Id*. at 1161. Morgan appeared at the front door with a pistol in his hand. He was ordered to put the gun down, and he did so. When he stepped outside, Morgan was formally arrested. *Id*.

The Sixth Circuit held that "[v]iewed objectively," Morgan was arrested without a warrant "at the moment the police encircled the Morgan residence." *Id*. at 1164. The arrest violated *Payton*, the Court held, because no warrant had been obtained and "[t]he police show of force and authority was such that a 'reasonable person would have believed he was not free to leave.' " *Id*., quoting *Mendenhall*, 446 US at 554 (opinion by Stewart, J.). The Court elaborated:

> Nine police officers and several patrol cars approached and surrounded the Morgan residence in the dark. The officer in charge strategically positioned his car in the driveway in front of the Morgan home blocking any movement of his car. The police then called for Morgan to come out of the house. These circumstances surely amount to a show of official authority such that a reasonable person would have believed he was not free to leave. Viewed objectively, Morgan was placed under arrest, without the issuance of a warrant, at the moment the police encircled the Morgan residence. [*Morgan*, 743 F2d at 1164 (quotation marks and citations omitted).]

The Sixth Circuit characterized the events leading to Morgan's arrest as a "constructive entry" that "accomplished the same thing" as a warrantless arrest. *Id*. at 1166. In adopting this doctrinal concept, the Court stressed that "[a] contrary rule would undermine the constitutional precepts emphasized in *Payton*." *Id*. That

reasoning undergirds our recommendation that the constructive-entry doctrine be recognized in Michigan.

Also relevant here, the Sixth Circuit forcefully rejected the government's argument that Morgan's arrest was constitutionally permissible because it followed a "brief investigatory stop" sanctioned by *Terry*. Morgan posed a threat to the officers when he appeared armed at the doorway, the government contended, permitting the officers to perform a "cursory safety check" that developed into an arrest. *Id*. at 1162-1164. The Sixth Circuit disagreed, noting that Morgan presented no danger to the police or anyone else until the police surrounded his home. *Id*. at 1163. "Police officials . . . are not free to create exigent circumstances to justify their warrantless intrusions," the Court reasoned, removing the case from *Terry*'s ambit. *Id*.

The Sixth Circuit again applied the constructive-entry doctrine in *United States v Saari*, 272 F3d 804 (CA 6, 2001). There, the police responded to a call reporting "shots fired" at the home of Saari's ex-wife. Before arriving at the home, however, the officers determined that the shots had not actually been fired. *Id*. at 806. Rather, Saari was seen standing in the window "with what appeared to be a pistol in his hand." *Id*. The ex-wife told the police that Saari "was armed at all times." *Id*. Another source informed the officers that Saari possessed explosives, belonged to a militia group, and was "heavily armed." *Id*.

Four officers deployed to Saari's second-floor apartment. Two positioned themselves on a landing outside Saari's front door; another held a shotgun in a "low ready position," and yet another held a service weapon. *Id*. (quotation marks omitted). The officers "knocked forcefully" on the apartment door and identified themselves as police officers. *Id*. at 807. With their weapons

pointed at Saari, the officers ordered him to emerge. When he did so, he was arrested. Saari moved to suppress evidence of illegal weapons found in the apartment. *Id*.

The government argued that the officers were "merely attempting to interview Defendant in furtherance of the investigation" and that they reasonably protected themselves by drawing their weapons. *Id*. Further, the government contended, Saari "voluntarily exposed himself to the public by opening his door to the police." *Id*. The district court determined "that as a practical matter," Saari "was under arrest from the inception of his encounter with the officers." *Id*. at 808 (quotation marks omitted). The Sixth Circuit affirmed, finding the case "in all relevant respects, indistinguishable from *Morgan*[.]" *Id*. In both cases, the officers "summoned" the defendants to exit their homes by employing a "show of authority" with which the defendants reasonably believed they had to comply. *Id*. at 809. As in *Morgan*, the police constructively entered Saari's home and accomplished a warrantless arrest. *Id*.

Saari echoed *Morgan*'s rejection of the government's contention that "the officers . . . were simply conducting an investigative stop." *Id*. The Court held in *Saari* that officers had conducted "a constructive entry and in-home arrest rather than an investigatory stop," pointing out that *Payton* applied "regardless of whether the officers at issue were conducting an arrest or an investigatory detention." *Id*. The Court cogently elucidated the flaws in the government's analogy to *Terry* as follows:

> [I]f the Court accepted the Government's legal argument, it would have the effect of providing lesser protection to individuals in their homes when the police do not have probable cause to arrest. It would defy reason to hold, as

> the Government suggests, that a warrantless in-home seizure is authorized to further an investigation, but that either a warrant or exigent circumstances are necessary when officers have the probable cause and intent to arrest.
>
> Furthermore, contrary to the Government's argument, summoning a person out of his or her home in the manner described in this case cannot be characterized as an investigative stop. The *Terry* court authorized a departure from the usual warrant procedures when, unlike the circumstances of this case, the police are responding to their own on-the-spot observations.
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> * * *
>
> . . . Here, the police did not observe Defendant doing anything suspicious. [*Id*. at 809-810.]

In Trapp's case, the prosecutor draws our attention to *United States v Thomas*, 430 F3d 274 (CA 6, 2005), in which the Sixth Circuit held that a constructive entry had *not* occurred. The facts of this case mirror those in *Thomas*, the prosecution insists. But in *Thomas*, the district court found that the police officers had "asked" the defendant to come out of a home, and that "[n]o testimony . . . indicate[d] drawn weapons, raised voices, or coercive demands on the part of the police." *Id*. at 278 (quotation marks and citation omitted; alterations in original). The Sixth Circuit rejected that a constructive entry had occurred, noting, "Thomas responded to a simple knock and request, not an order to emerge or the threat of firearms." *Id*.

Unlike in *Thomas*, we have testimony from an officer on the scene affirming that Trapp was "ordered" out of the trailer. Moreover, the video evidence substantiates that the scene was intensely coercive. At least four uniformed and armed officers surrounded a small trailer home at night and began the encounter by ordering the only woman present to come outside. The

tone of voice readily audible in the video supports that the officer did not politely invite the woman to exit or merely suggest that the men emerge "with their hands where we can see 'em"; he demanded that they do so. "Opening the door to one's home is not voluntary if ordered to do so under color of authority." *United States v Reeves*, 524 F3d 1161, 1167 (CA 10, 2008). We do not discern anything in the interaction at the trailer supporting that the police gave Trapp a choice about coming outside. A reasonable person in Trapp's position would have concluded that the officer's order was, as Officer Wells testified, an order. The circuit court's conclusion that Trapp exited voluntarily is simply unsupportable on this record.

The Fourth Amendment safeguards the "right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures[.]" US Const, Am IV. The constructive-entry doctrine hinges on the notion that the security promised by the Fourth Amendment is destroyed not only by a physical invasion of governmental actors, but also by official conduct calculated to compel the occupants of a home to submit to their own extraction. "[T]he desire to enjoy the privacy of the home is manifested by staying inside, rather than leaving that home." Dow, *Muddling Through the Problem of Constructive Entry: Comments on* United States v. Allen*, 813 F.3d 76 (2d Cir. 2016), and Warrantless Doorway Arrests*, 79 U Pitt L Rev 243, 258 (2017). While determining whether a suspect has been "seized" depends in part on whether the suspect felt free to leave, Professor Dow summarizes that "a seizure in a home is interference with one's freedom to stay." *Id*.

Trapp and the other occupants of the trailer were not at liberty to simply ignore the police presence and

stay inside. We are persuaded by the Sixth Circuit's decision in *Morgan* that absent a warrant, *Payton* prohibited the police from either entering the trailer or coercively forcing its inhabitants to abandon the security of the residence and expose themselves to a public arrest.[6]

D

The circuit court rejected that Trapp was under arrest when he resisted the officers, finding instead that he had unlawfully resisted a *Terry* stop. The circuit court's reasoning is inapt for two reasons.

First, because *Payton* does not contemplate a warrantless in-home arrest, we cannot fathom why it would be constitutionally permissible for the police to coerce someone from his home to perform an investigative seizure. Second, even were we to reject the constructive-entry doctrine, we would have no difficulty concluding that Trapp was unreasonably seized by the officers shortly after he stepped outside the trailer door. The video documents that the officer conducting the questioning physically moved Trapp away from the trailer and into the nearby parking area. This conduct went far beyond *Terry* and into the realm of an arrest. But for the purpose of ascertaining whether Trapp was entitled to resist the officers, what matters is whether the detention was unreasonable, and not whether, post-*Terry*, we deem it an "arrest."

The backdrop for our discussion is the "well-established" common-law right to resist not only an

[6] Courts other than the Sixth Circuit have explicitly adopted the constructive-entry doctrine. See *United States v Maez*, 872 F2d 1444, 1451 (CA 10, 1989); *United States v Al-Azzawy*, 784 F2d 890, 892 (CA 9, 1985); *State v Dahl*, 323 Ore 199, 207-209; 915 P2d 979 (1996).

unlawful arrest, but "other *unlawful* invasions of private rights[.]" *Moreno*, 491 Mich at 46-47. Michigan's recognition of this right traces back to 1888, when the Supreme Court described that "a debtor" whose "only team, wagon, and harness, worth less than $250" had been unjustly seized by the sheriff was not "compelled to submit to such trespass without reasonable resistance." *People v Clements*, 68 Mich 655, 658; 36 NW 792 (1888). Without that protection, the Court admonished, "every poor debtor would be at the mercy of the sheriff and constabulary of the county, and the statutory benefits intended by the exemption would be of little avail. No officer can be legally authorized to invade private rights in any such manner." *Id*.

In addition to the right to resist the illegal seizure of property, the common law explicitly recognized the right to resist an unlawful arrest. See *People v Krum*, 374 Mich 356, 361; 132 NW2d 69 (1965) ("While one may use such reasonable force as is necessary to prevent an illegal attachment and to resist an illegal arrest, the basis for such preventive or resistive action is the illegality of an officer's action, to which defendant immediately reacts.") (citations omitted); *People v De Meaux*, 194 Mich 18, 28; 160 NW 634 (1916) ("He was in his own home when the effort was made to serve the warrant upon him, and if the officer was not armed with a good and sufficient warrant he had the right to order him out of the house and to use all the force reasonably necessary to put him out if he did not go."). In *Moreno*, the Supreme Court acknowledged this strand of the common law and held that courts must apply it. *Moreno*, 491 Mich at 58.

Terry stops were unknown to the common law, of course. As *Moreno* instructs, the common law focused on "invasions of privacy" rather than technical distinc-

tions between arrests and other forms of seizure. *Id*. at 46-47. As the above-quoted caselaw demonstrates, the common-law right to resist the unlawful taking of one's *property* also encompasses the right to resist the unlawful taking of one's *liberty*. That is why we need not embark on a protracted analysis of whether Trapp was arrested or merely "seized" under *Terry*. The point is that the seizure, whatever its label, was unreasonable.

Terry contemplated only a limited intrusion—a pat-down for weapons—based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 US at 21. A *Terry* stop and inquiry permit a limited seizure "reasonably related in scope to the justification for [its] initiation." *Id*. at 29. "*Terry* itself involved a limited, on-the-street frisk for weapons." *Dunaway v New York*, 442 US 200, 210; 99 S Ct 2248; 60 L Ed 2d 824 (1979). The United States Supreme Court has repeatedly emphasized that *Terry*'s "scope" is "narrow." *Id*. It is precisely because a *Terry* stop is relatively nonintrusive that probable cause for an investigative detention is not required. *Id*. at 210-211.

Most of the Supreme Court's *Terry* jurisprudence involves situations markedly different from this one—on-the-street encounters prompted by on-the-spot observations. In such circumstances, officers ask questions and use the answers to determine whether further investigation is needed. "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v Royer*, 460 US 491, 497-498; 103 S Ct 1319; 75 L Ed 2d 229 (1983)

(opinion by White, J.) (citations omitted). Here, Trapp obeyed the officers' directions, made no threatening moves or gestures, and answered the officer's questions until he decided that unless the police had a warrant, he was finished with the discussion. Nothing about the encounter suggested that Trapp posed a danger necessitating the invasive force that followed Trapp's inquiries about a warrant.

"Admittedly, *Terry*, *Dunaway*, *Royer*, and *Place*,[7] considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest." *United States v Sharpe*, 470 US 675, 685; 105 S Ct 1568; 84 L Ed 2d 605 (1985). In this case, though, the video and the testimony establish that Trapp's seizure, however designated, was unreasonable. Until he was spun around and handcuffed, the officers made no effort to pat Trapp down, despite having pulled him from the landing and then restricting his movement when he attempted to walk back in the trailer's direction. It appears that the officers allowed him to reach into his pants to pull out his wallet. The legal basis for detaining Trapp, at that point, eludes us.

The "constitutional validity" of an arrest

> depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether

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[7] *United States v Place*, 462 US 696, 705-706; 103 S Ct 2637; 77 L Ed 2d 110 (1983), involved whether the Fourth Amendment permits law enforcement authorities to temporarily detain a traveler's luggage so that it can be exposed to a trained narcotics detection dog. The Court held that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of *Terry* and its progeny would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." *Id*. at 706.

> at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense. [*Beck v Ohio*, 379 US 89, 91; 85 S Ct 223; 13 L Ed 2d 142 (1964).]

See also *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). If the officers' conduct had been consistent with a *Terry* stop at its outset—a proposition with which we disagree—it devolved into an arrest lacking probable cause triggered by Trapp's "warrant" questions. Accordingly, Trapp had a common-law right to resist.

III

The Supreme Court directed us to additionally consider whether exigent circumstances—specifically, information relayed by the trailer park manager about "children" being present on the park premises—justified the officer "telling one occupant of the trailer to tell the other occupants to come out." The exigent-circumstances exception to the warrant requirement contemplates the existence of an actual emergency. No evidence of an actual emergency exists on this record.

The exigency exception to the warrant requirement allows the police to

> enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises, and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. The police must further establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or

(3) prevent the escape of a suspect. [*In re Forfeiture of $176,598*, 443 Mich 261, 271; 505 NW2d 201 (1993) (citation omitted).]

When the police arrived at the trailer park, there were no signs of children or unrest. It was after 10:30 p.m. and the park appeared dark and quiet. If any children had been in danger when the manager called the police, the danger was over. The crime—a minor misdemeanor—was also complete. See *Welsh v Wisconsin*, 466 US 740, 750; 104 S Ct 2091; 80 L Ed 2d 732 (1984) ("Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor. . . . When the government's interest is only to arrest for a minor offense, that presumption of unreasonableness is difficult to rebut, and the government usually should be allowed to make such arrests only with a warrant issued upon probable cause by a neutral and detached magistrate.").

The mere fact that children lived in the trailer park was not enough to have supported a search warrant for the trailer or an arrest warrant for its occupants. The police were investigating a misdemeanor involving the possession of a firearm. That a firearm might have been located within the trailer, standing alone, did not give rise to an emergency.

IV

Because they did not have a warrant, the police could not enter the trailer. Nor were they constitutionally authorized to constructively enter the trailer by ordering the occupants outside. The arrest of Trapp that followed violated the Fourth Amendment because it was the product of an illegal constructive entry and

because the police could not have arrested Trapp for the misdemeanor offense of brandishing a firearm. Trapp's resistance to his arrest was justified under Michigan common law, requiring us to reverse the circuit court and to vacate Trapp's conviction of attempted resisting or obstructing an officer.

We reverse Trapp's attempted resisting-or-obstructing conviction and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, J., concurred with GLEICHER, J.

SWARTZLE, P.J. (*concurring in the result*). I concur in the result only. During oral argument, defense counsel rhetorically asked whether we can be safe from warrantless entry in "our" homes. I have serious doubts whether defendant was in "his" home or that he otherwise had a legitimate expectation of privacy in the trailer where he encountered the officers. Even setting this aside, the appeal should be resolved on the basis of existing law, rather than reaching a novel question of constitutional law. Given the posture of this appeal, however, I cannot dissent.

At the time of sentencing, the judgment of sentence listed defendant's residence as being on Doepfer Road in Warren, while the address of the trailer identified during the preliminary examination was on Ready Road, a little over 2½ miles away. Though it is possible that defendant moved residences between the dates of arrest and sentencing, there is nothing in the appellate record confirming that defendant actually resided on Ready Road on the date of arrest.

Prior to approaching the trailer, the officers had information that a male with a firearm had caused a disturbance earlier in the evening and that the male

might be a trespasser. The park manager told the officers that the only person who lived in the trailer was a female. Thus, whether defendant was a trespasser, a mere short-term/transient guest, or, instead, a social/overnight guest who had a legitimate expectation of privacy in the trailer, depends on "the totality of the circumstances." *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996); 68 Am Jur 2d, Searches and Seizures, § 11, pp 112-113. It is the defendant's burden to show that he had a legitimate expectation of privacy to challenge a warrantless entry under the Fourth Amendment. *Lombardo*, 216 Mich App at 505. With all that said, the prosecutor did not challenge defendant's standing to raise the Fourth Amendment defense.

Our Supreme Court ordered this Court on remand to answer three specific questions, as the majority notes. I agree with the majority that, in the abstract, the constructive-entry doctrine should be recognized in Michigan, and I further agree that there were not exigent circumstances when officers commanded the occupants to exit the trailer. As to whether the facts of this case fall within the doctrine, I reiterate my doubts on whether defendant had a legitimate expectation of privacy in the trailer. These officers had reason to believe that there was an armed trespasser in or near the premises, and they issued a simple, relatively calm command to the male occupants to exit the trailer—a far cry from the shows of force and "overbearing tactics" found in other constructive-entry situations. *United States v Thomas*, 430 F3d 274, 277 (CA 6, 2005) (collecting cases). Nonetheless, these officers did issue a command, not a request, and assuming arguendo that defendant had a legitimate expectation of privacy in the trailer, I agree with my colleagues that the officers constructively entered the trailer.

I would have preferred not to have reached the constructive-entry question, however, because as the majority recognizes, the arrest was without probable cause in any event. A court should not address novel questions of constitutional law when the case can be resolved on settled law, see *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004), rev'd on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010), but our Supreme Court ordered this Court to address specific questions, so the questions must be addressed.

Accordingly, I concur in the result only.

PEOPLE v ROGERS

Docket No. 336000. Submitted November 4, 2020, at Grand Rapids. Decided December 17, 2020, at 9:20 a.m.

Tyrone Rogers was convicted of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b), involving TC, his biological daughter. Defendant's parental rights to TC had been terminated when she was an infant; Stanley Cunningham, Sr., and Christine Cunningham adopted TC when she was 18 months old. TC testified that she reached out to defendant in 2014 to establish a relationship, and Christine permitted her to visit defendant on occasion. TC visited defendant in May 2015; she later asserted that during this visit defendant had thrown her to the ground and inserted his penis into her vagina and that this was the second time that defendant had sexually assaulted her. TC claimed that she first disclosed the May 2015 assault to her older half-sister, DR, who also testified at trial. DR testified that defendant had also sexually assaulted her when she was younger. Two experts testified for the prosecution; one testified that TC's medical examination was normal but that she suspected pediatric sexual abuse, and the other described the theory of a child's delayed disclosure when an assault occurs. Defendant had been charged with two counts of CSC-I involving TC. The jury convicted defendant of one count but acquitted him of the other. The trial court, Timothy G. Hicks, J., sentenced defendant as a fourth-offense habitual offender to a term of 29 to 48 years in prison. Defendant moved for a new trial or an evidentiary hearing, arguing that he received ineffective assistance of trial counsel. The trial court held a hearing and allowed defendant's trial counsel to testify. The trial court subsequently denied the motion. Defendant appealed and moved for a remand so that he could seek a new trial based on newly discovered evidence. He supported his motion with, among other things, an affidavit by TC in which she recanted her allegations of sexual assault. In an unpublished order entered on September 18, 2018, the Court of Appeals, BOONSTRA, P.J., and O'CONNELL and TUKEL, JJ., granted the motion and remanded the matter so that defendant could seek a new trial or other relief from judgment. At an evidentiary hearing on remand, Stanley and Christine Cunningham testified

that TC had accused Stanley and their son, Kawan, of having sexually assaulted her. Those allegations had been investigated, and no further action was taken. James Rogers, a pastor of a local church, testified that defendant was his older brother and that TC called his nephew, Robert, to ask whether she could be picked up from the home where she was staying. Pastor James testified that when TC got into the backseat of his SUV, she apologized to him for lying about her dad. Pastor James asked for her permission to make a videorecording of her statement, and she agreed. The trial court found that TC was unavailable to testify as a witness and admitted the videorecording of her statement as well as a sworn affidavit of her recantation. According to Pastor James, TC told him that DR had put her up to accusing defendant of rape and indicated that DR had threatened her. The trial court procured TC's testimony only after it had her arrested on a material-witness warrant. TC denied that DR had threatened her to set up defendant on a sexual-assault charge and denied that she lied at defendant's criminal trial. She testified that she lied in the videorecording and in the affidavit, explaining that she was homeless and pregnant at the time and believed that the only way she would receive help was if she said that defendant did not rape her. Finally, TC admitted that she had lied when she accused Stanley and Kawan of sexually assaulting her and when she told authorities that Kawan had pushed her out of a car. TC explained that she had made these false allegations against the Cunninghams because she had a fight with Christine. Defendant subsequently filed a renewed motion for a new trial, arguing that the court should grant him relief under MCL 770.1, MCR 6.431, or MCR 6.502 because the new evidence showed that there had been a miscarriage of justice and that he was actually innocent. The trial court issued an opinion and order denying defendant's motion. Defendant appealed.

The Court of Appeals *held*:

Under MCR 6.431(B), a trial court may grant a defendant's motion for 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. In the context of a criminal defendant's request for a new trial based on newly discovered evidence, the four-part standard set forth in *People v Cress*, 468 Mich 678 (2003), applies: a defendant who seeks a new trial based on newly discovered evidence must satisfy each of the following four conditions: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence,

have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. Generally speaking, the request for a new trial must be grounded on the recent discovery of evidence of an asserted thing or event—i.e., a proposed fact—that existed or took place before the conclusion of the trial. Things or events that came into existence or took place after trial do not generally qualify as grounds for a new trial because they could not have been the subject of testimony at trial. In this case, defendant relied on evidence of several proposed facts in support of his motion for a new trial: (1) evidence that TC lied during her trial testimony about defendant raping her, (2) evidence that TC lied to authorities about her brother pushing her from a car, and (3) evidence that TC lied to authorities about her adoptive father and brother raping her while her adoptive mother knowingly acquiesced. Of the three, only those first two were about alleged things or events that existed or occurred before the conclusion of the trial, i.e., false testimony during trial and being pushed from a car before the date that the trial concluded. Evidence that TC lied about her adoptive father and brother raping her, and her adoptive mother's knowing acquiescence, did not qualify as newly discovered evidence for purposes of defendant's motion for a new trial. TC's admission that she lied about her brother pushing her from a car had little relevance to defendant's motion for a new trial; other than showing the bare fact that TC was willing to lie about a family member, this particular evidence involving the brother did not make a determination of whether defendant sexually assaulted TC more or less probable than it would be without the evidence. As for the recantation evidence, courts have traditionally considered recantation evidence with suspicion. However, discovery that testimony introduced at trial was perjured may be grounds for ordering a new trial. In this case, defendant's newly discovered evidence consisted mainly of impeachment evidence, which can be a sufficient basis for a new trial as long as the four-part test from *Cress* is applied. Applying the *Cress* test to this case, the first three conditions were met. One, TC's statements in the video and sworn affidavit, and her alleged recantation statements to others, all were made after the trial and therefore were newly discovered. Two, although TC's credibility was attacked by defense counsel at trial, there was nothing in the form of recantation statements that could have been used for impeachment, and therefore the impeachment evidence was not merely cumulative. And three, there was nothing to suggest that TC recanted her allegations before or during the trial, and therefore the impeachment evidence could not have been discovered using reasonable diligence and used at trial. Turning to the fourth condition, it was an open question whether

the recantation evidence alone would be sufficient to warrant a new trial. But in analyzing the fourth condition, it is important to recognize two points: (1) the trial court is not acting as the ultimate fact-finder, but must instead consider whether a reasonable juror could find the evidence credible on retrial, and (2) the evidence that must be taken into consideration when assessing a claim of newly discovered evidence is not simply the evidence presented at the original trial but also the evidence that would be presented at a new trial, including all of the record evidence that has come to light that could be used at the retrial. In this case, the trial court erred in two respects. With respect to its credibility determinations, the trial court did not distinguish between what a reasonable juror might make of the testimony versus what the trial court might decide were it the ultimate fact-finder. The trial court reconciled conflicting testimony and concluded that TC had a particular motivation for making recanting statements—to get help for herself and her baby—but it did not consider what a reasonable juror could make of the conflicting testimony. The trial court also erred by failing to consider the evidence of false allegations against the Cunninghams. Were defendant to be retried, there is little doubt that defense counsel would seek to undermine TC's credibility with the evidence of her false allegations against the Cunninghams, including her sworn testimony admitting that the allegations were false. TC's testimony admitting that she lied could be used not just for impeachment purposes but as a "prior statement of witness" under MRE 801(d)(1)(A); the testimony could also be used as substantive evidence of motive and scheme, plan, or system under MRE 404(b). Judged from the perspective of the time of retrial, there would seem little reason to keep this evidence out. Thus, the trial court should have considered TC's false allegations against the Cunninghams together with the newly discovered impeachment evidence and the evidence used at the original trial to determine whether defendant was entitled to a new trial. On retrial, a different result is probable. A reasonable juror could conclude that, in fact, TC told the truth in the recanting statements or, at a bare minimum, a reasonable juror could conclude that TC was willing to lie on multiple occasions about the central issue of this case. While a reasonable juror could conclude, as did the trial court, that TC lied in the video and affidavit to get help for herself and her baby, a reasonable juror could instead conclude that TC's recanting statements were true, similar to how she recanted her false allegations against the Cunninghams. Because a reasonable juror could find the recanting evidence and admissions of false accusations credible (which would undermine TC's credibility with respect to her trial testimony), the impact that this

evidence would have on retrial had to be considered. Given the lack of other eyewitness testimony or clear physical evidence of rape, the case against defendant came down to TC's credibility as a witness. The required exculpatory connection for recanting impeachment evidence existed between TC's recanting statements (defendant did not rape her) and her inculpatory trial testimony (defendant did rape her). Moreover, this impeachment evidence would likely undermine TC's credibility. Additionally, TC's explanation for why she made the recanting statements was itself evidence that should be considered. Her explanation that she lied to get help from defendant's family was evidence that undermined her credibility because it demonstrated that she was willing to lie about serious matters to get what she wanted from others. TC's credibility with respect to her trial testimony was further undermined when her false allegations against the Cunninghams were considered. Her allegations against defendant and those against the Cunninghams shared several material features: (1) both involved family members; (2) both involved similar physical acts; (3) both involved a female partner who purportedly knew that an assault was occurring; and (4) as a possible motive for lying, TC was said to have been angry with a family member around the time of the alleged assaults. This evidence would likely be used not just for impeachment purposes but also to show that TC had a motive for falsely accusing defendant. Considering all the evidence that could be used at retrial—including the evidence from the original trial, TC's recanting statements, TC's explanations for why she made the recanting statements, and the evidence of false accusations against the Cunninghams—a different result on retrial is probable. Accordingly, the trial court abused its discretion when it denied defendant's motion for a new trial.

Reversed and remanded for a new trial.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Charles F. Justian*, Chief Appellate Attorney, for the people.

Laurel K. Young for defendant.

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

SWARTZLE, J. A criminal defendant bears a heavy burden when seeking a new trial based on newly

discovered evidence. This is especially the case when the newly discovered evidence consists of recanting statements that are largely hearsay, and even more so when the recanting statements are themselves recanted. But, a heavy burden does not mean an impossible one.

A jury convicted defendant of one count of sexual assault against the complainant, his teenage biological daughter. The trial came down to a "he said/she said" credibility contest. The complainant subsequently recanted her testimony on multiple occasions, including in a video, but she later testified that her recanting statements were lies. The complainant did, however, admit under oath that she made similar allegations of sexual assault against her adoptive father and brother and that those allegations were false. We conclude that a reasonable juror could find the new evidence credible and that when all of the available record evidence is considered, a different outcome on retrial is probable. We therefore reverse the trial court's denial of defendant's motion for new trial and remand for further proceedings, as more fully explained below.

I. BACKGROUND

A. INITIAL TRIAL AND APPELLATE PROCEEDINGS

Defendant was tried by jury on two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b), involving TC. Defendant is TC's biological father, but his parental rights to her were terminated when she was an infant. Stanley Cunningham, Sr., and Christine Cunningham adopted TC when she was 18 months old. TC has an older half-sister, DR, who also testified at trial (they have the same biological mother). Given the number of witnesses in this case who

share the same last names, we will often use a first name when referring to a particular adult witness.

TC testified that she reached out to defendant in 2014 to establish a relationship, and Christine permitted her to visit defendant on occasion. In May 2015, when TC was 15 years old, she spent time with defendant while Christine was at a church conference. TC did not recall what she was wearing, but she did remember that during this visit, defendant removed her "bottom clothing"; defendant removed his "bottom clothing"; and both defendant and TC were naked from the waist down. Defendant then held her by the neck, threw her to the ground, and inserted his penis into her vagina. Defendant purportedly said something to TC about having his children, which would be TC's biological siblings. TC could not recall whether the assault lasted "a few seconds" or "a matter of minutes," and she did not remember whether she screamed during the assault or where it occurred in the house. TC testified that she did not visit defendant again after this May 2015 assault.

TC subsequently clarified that this was actually the second time that defendant had sexually assaulted her. As to the alleged earlier assault, TC did not recall when it took place or whether defendant took her clothes off. TC initially testified that she did not recall whether defendant's girlfriend, Tara Rainwater, was present, but then TC clarified that Tara was there and that defendant told Tara to go into another room before he assaulted TC. TC testified that she did not call for help because Tara "knew it was going on," but as to other details, TC could "barely remember" anything about the assault. When asked again about what defendant told her regarding siblings, she could not recall whether he said this during the first or second assault.

TC claimed at trial that she first disclosed the May 2015 assault to DR. Although she did not recall precisely when she told DR, she knew that it was before she told Christine in August 2015. TC explained that she did not disclose the assault immediately because she was afraid of defendant. He purportedly threatened her and was "[t]alking about doing something to [her] family." She could not recall, however, whether defendant made these threats after the first or second assault.

DR also testified at trial. She claimed that her biological mother dated defendant in the mid-1990s when DR was six or seven years old. In August 2015, TC disclosed something to her about defendant that made her upset. DR explained, "I been through the same thing and I never wanted her to go through any of that." Specifically, DR testified that, when she was younger, defendant sexually assaulted her. She could not recall how many times defendant did this, though at least "[o]nce for sure." She testified that she reported the abuse to the Child Abuse Council. (Although not brought out at trial, a family court judge had found the allegations of sexual abuse not credible.)

The prosecutor called Christine to the stand. She confirmed that TC told her that defendant had sexually assaulted her, and she told the police the next day. According to Christine, TC suffered from reactive attachment disorder (RAD) from the time she was an infant. TC took medication for RAD, but when she missed her medication, TC engaged in "wild behavior" and was loud and uncontrollable. When she testified at trial, TC admitted that she had not taken her medication for several days.

Two experts also testified for the prosecution. Dr. Yvonne Mallon, a child-abuse pediatrician at the Ottawa County Children's Advocacy Center, testified as an

expert in child-abuse pediatrics. Dr. Mallon obtained TC's medical history and performed a medical examination on her. TC described penile-vaginal penetration, though she did not mention bleeding or pain. The medical examination was normal; there was a "small notch" or "divot" on TC's hymen, but this was "nonspecific"—it could have been from a sexual injury or just normal development. Based on the history provided by TC, Dr. Mallon testified that she suspected pediatric sexual abuse. In addition, Dianne Adams, a psychotherapist, testified as an expert in child-sexual abuse. She explained to the jury the theory of delayed disclosure and testified that she did not notice any "red flags" during her forensic interview of TC.

Defendant called Tara to testify in his defense. The two were no longer dating, but she recalled that when they were together, TC would call defendant every few weeks and she visited him several times. Tara denied knowing anything about a sexual assault of TC or that defendant told her to leave the room when he was with TC.

After the close of proofs, the jury convicted defendant of one count of CSC-I, though it acquitted him of the other. The trial court sentenced defendant as a fourth-offense habitual offender to a term of 29 to 48 years in prison. Soon after, defendant moved for a new trial or an evidentiary hearing, arguing that he received ineffective assistance of trial counsel. The trial court held a hearing and allowed defendant's trial counsel to testify. The trial court subsequently denied the motion.

Defendant appealed as of right. While on appeal, defendant moved for a remand so that he could seek a new trial based on newly discovered evidence. He supported his motion with, among other things, an

affidavit by TC in which she recanted her allegations of sexual assault. In September 2018, this Court granted the motion and remanded the matter so that defendant could seek a new trial or other relief from judgment. *People v Rogers*, unpublished order of the Court of Appeals, entered September 18, 2018 (Docket No. 336000).

B. TRIAL-COURT PROCEEDINGS ON REMAND

On remand, defendant moved for a new trial or other relief from judgment. The prosecutor opposed the motion, noting that there were inconsistencies in TC's affidavit and suggesting that the affidavit was the result of undue influence. The trial court held a hearing on the motion in November 2018 and determined that it would need to take additional evidence. The trial court's proceedings lasted until July 2020. It appears from the record that TC's refusal to cooperate caused most, if not all, of the delay. In fact, the trial court procured TC's testimony only after it had her arrested on a material-witness warrant.

1. FIRST EVIDENTIARY HEARING

The first day of hearings took place in March 2019. Both Stanley and Christine testified. Christine explained to the trial court that, shortly after defendant's criminal trial, TC accused Stanley and their son, Kawan, of having sexually assaulted her. TC claimed that Christine stood by the door and listened while Stanley raped TC. When she made these allegations, TC was in jail for domestic violence against the Cunninghams. The allegations were investigated, and no further action was taken. Sometime after this, the Cunninghams told TC that she could not live with them any longer.

James Rogers, pastor of a local church, testified that defendant was his older brother. He stated that his nephew, Robert Lee Howell, called him sometime after the trial and asked him to come over to his home. (In a subsequent hearing, Robert testified that his name is "Robert Rogers.") When Pastor James arrived, Robert was on the phone, and he indicated that he was speaking with TC. Robert said that TC had to leave the home where she was staying and asked whether they could pick her up. Pastor James agreed but asked Robert to go with him because he did not want to be alone with TC.

Pastor James testified that, as TC got into the backseat of his SUV, she apologized to him for " 'lying on my dad.' " Pastor James said that he asked for permission to record her statement. The trial court found that TC was unavailable to testify as a witness and admitted the videorecording of her statement. In the video, TC tells her uncle that she had been "influenced" and "misled" by DR and that her allegations that defendant choked and raped her were lies. After being prompted by her uncle, TC also agrees that she brought this up when she got into the SUV and consented to be videotaped.

Pastor James testified that he called defense counsel right away and arranged for TC to meet with counsel approximately two weeks later. TC signed the affidavit filed in support of defendant's motion on the day that she met with counsel. According to Pastor James, TC told him that DR put her up to accusing defendant of rape and indicated that DR had threatened her. TC also told him that she had trouble on the witness stand because she was trying to remember what DR had told her to say.

Pastor James explained that he took TC to stay at the home of Robert's sister, but it was only "four or five hours" before he received a call because a person at the home did not want TC staying there. Pastor James then picked up TC and drove her to the home of his sister, Patricia Rogers. TC lived with Patricia for a short time, but Patricia eventually asked TC to leave because they could not get along. Pastor James's wife arranged for TC to move into a homeless shelter.

Patricia and Melanie Albring, a member of Pastor Rogers's church, also testified. They both claimed that TC recanted her criminal trial testimony. Patricia further testified that TC blamed her false testimony on DR's threats against her.

2. INTERIM PROCEEDINGS

In April 2019, defendant moved for an *in camera* review of Child Protective Services (CPS) records involving TC. Defendant alleged that the records would show that TC made allegations of sexual abuse against her biological mother, which CPS had investigated and determined to be meritless.

The trial court held a hearing on the motion, and defense counsel represented that CPS had investigated TC's biological mother based on TC's claims of sexual abuse. Counsel further represented that a judge had determined that TC's allegations were meritless and that TC could not be believed.

In analyzing whether to allow discovery of the CPS records, the trial court recognized that defendant's argument for a new trial had expanded to encompass all the evidence indicating that TC had made false allegations of sexual abuse. The trial court determined that defendant should be allowed another day to present his evidence and held that it would review the CPS

records *in camera* to determine whether any portion of the records should be disclosed to the defense. The trial court also expressed concern that the parties had not been able to produce TC to testify. It opined that it might be necessary to issue a material-witness warrant for TC. The trial court subsequently ordered that one record from the CPS records had to be released to the defense—in this record, TC admitted to a trial-court referee that she had made a false allegation of physical abuse against Kawan.

3. CONTINUED EVIDENTIARY HEARING

The trial court continued the evidentiary hearing in May 2019. At the start of the hearing, the trial court heard that TC was avoiding testifying in court. Robert testified at the hearing, and his testimony was consistent with Pastor James's earlier testimony. Defendant's sister, Earnestine Gaines, and niece, Connie Sullivan, also testified, and they both said that TC recanted her allegations of sexual assault against defendant.

Defense counsel called Tara Rainwater to testify. She recalled that about the same time when TC accused defendant of raping her, TC came to their home for a visit. During the visit, TC became upset about not getting her way on some matter. She then packed her things and became loud and angry. Tara said that she and defendant decided that TC needed to leave and told her so. According to Tara, on the drive back to the Cunninghams' home, TC became angry again because someone had called CPS to report that she was living with DR instead of living with the Cunningham family.

After Tara testified, the trial court discussed the efforts to find TC and stated that TC was the "indis-

pensable link" in the matter. The trial court was reluctant to have TC arrested, but it felt that a material-witness warrant might be needed.

4. MORE INTERIM PROCEEDINGS

On July 25, 2019, defendant moved to adjourn the next evidentiary hearing. Defense counsel asserted that TC was talking with the Cunningham family again, and Christine was not cooperating with efforts to find TC. Defense counsel also complained that Kawan had been avoiding service. Defense counsel sought to subpoena Christine, Kawan, and TC; after hearing from a private investigator, the trial court signed a material-witness warrant for TC.

The trial court held another hearing in September 2019. Defense counsel informed the trial court that she had sent a subpoena to TC and had spoken to her on the phone. She stated that TC told her that she would appear at the hearing; however, TC did not appear. Pastor James then testified generally about his efforts to contact TC and get her to appear in court. He related that he had not been able to contact TC in approximately a year. He stated that she had become upset with him and had stopped talking to him. The last he had heard was that TC was again living with Christine.

The next hearing was held in October 2019. At that hearing, defense counsel asserted that she was "95 percent certain" that TC was staying with Christine. She stated that both Christine and TC had failed to comply with the subpoenas for them to appear at the previous hearing. The prosecutor opined that it spoke volumes that TC was no longer cooperating with defendant's family when she was earlier willing to tell just about everybody that she lied. Defense counsel

responded that she agreed but came to the opposite conclusion: "If she has nothing to hide, why isn't she here?"

5. TC'S TESTIMONY

In December 2019, the trial court held an evidentiary hearing the day after it learned that TC had been arrested on the material-witness warrant. The trial court appointed an attorney to represent TC and ensured that she was advised of her Fifth Amendment rights before testifying under oath.

TC denied that DR had threatened her to set up defendant on a sexual-assault charge. She also denied that she had lied at defendant's criminal trial, and she generally denied or did not recall telling defendant's family members and others that she lied at the trial. Although she acknowledged making the video with Pastor James and later signing the sworn affidavit—in both of which she recanted her trial testimony and allegations of rape against defendant—she explained that she lied in both instances. She reaffirmed her trial testimony that defendant sexually assaulted her.

With respect to the video, TC explained that she was homeless at the time and that Pastor James was helping her. Eventually, she came to believe that the only way he would continue helping her was if she would say that defendant did not rape her. She claimed that she was pregnant and did not want to be on the street. As soon as she informed Pastor James that she would not testify in court, he dropped her off at a homeless shelter. TC claimed that she refused to go to court because she did not want to accuse DR of doing things that DR did not do. She explained: "I just know I wasn't fittin to come up here on this stand and lie and say that this man didn't rape me when I was 14 years

old." TC stated that all of the other family members who testified at previous hearings lied on the witness stand. After this brief period of questioning, the trial court placed TC on a tether and scheduled another hearing.

During the final hearing, TC denied that she had testified at a court hearing and accused Kawan of throwing her out of a moving car. She further denied that she had told anyone that she had lied about Kawan throwing her out of a car because her parents took her phone. She did not recall relating the story about Kawan to a trial-court referee.

After obtaining immunity with regard to her accusations against the Cunningham family, TC admitted that, shortly after defendant's trial, she had reported to police officers that Stanley had entered her bedroom and sexually assaulted her. She admitted that she had told police officers that Christine had leaned against the door and listened while Stanley sexually assaulted her. But she confirmed that those allegations were not true. Regarding Kawan, TC admitted that she told police officers that he sexually assaulted her on two occasions. During the first, he allegedly choked her while raping her; during the second, he allegedly threw her to the floor, pinned her arms, and raped her. TC likewise confirmed that neither of these allegations was true. TC explained that she had made these false accusations against the Cunninghams because she had a fight with Christine, who had called the police, resulting in TC's arrest for domestic violence.

With respect to her earlier recantations involving defendant, TC agreed that she had spoken to defense counsel and told her that DR and DR's boyfriend had threatened to kill her or "pimp" her out if she did not falsely accuse defendant of rape. But TC denied at the

hearing that this was a true statement. TC claimed that DR did not force her to do anything and that she loved DR. TC further denied that she had told Pastor James in her recorded statement that DR had threatened her. (In the video, TC claims that DR "influenced" her into "lying" about the sexual assault.)

TC testified that she agreed to sign the affidavit because she was pregnant and had nowhere to go. She said that no one told her explicitly that they would not help her unless she helped get defendant out of prison, but it was clear to her that this was the case. Pastor James and others testified again and offered a version of events at odds with TC's testimony.

6. THE RENEWED MOTION AND DECISION

Defendant subsequently filed a renewed motion for a new trial. In his renewed motion, defendant noted that there was a considerable amount of new evidence that the jury in his criminal trial had not heard and that the new evidence implicated TC's credibility. Namely, TC admitted in an affidavit and other statements that she had lied when she testified that defendant had sexually assaulted her. Defendant noted as well that TC claimed that DR and DR's boyfriend had threatened to kill her or force her into prostitution if she did not accuse defendant. Defendant made an offer of proof that DR had since been convicted of accepting the earnings of a prostitute and that DR's boyfriend had been killed in a gunfight with police officers during a raid by the FBI's child-exploitation task force.

Defendant argued that the trial court should grant him relief under MCL 770.1, MCR 6.431, or MCR 6.502, because the new evidence showed that there had been a miscarriage of justice and that he was actually innocent. He maintained that TC's statements that she

had lied were credible and, in light of the weakness of her trial testimony, that he was entitled to a new trial under *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), and *People v Johnson*, 502 Mich 541; 918 NW2d 676 (2018). He also cited evidence that TC had accused other family members of sexually assaulting her, which accusations were found to be not credible and, in fact, TC had admitted were lies. Defendant argued that TC's other false accusations were remarkably similar to the accusations that she made against defendant. Finally, he noted that TC had refused to come forward and was only in court because a private investigator found her living with DR and she was arrested on a material-witness warrant. Defendant asked that the trial court grant his motion for a new trial.

On July 14, 2020, the trial court issued an opinion and order denying defendant's motion. The trial court noted that defendant's motion relied on two broad categories of evidence: (1) the evidence that TC had made statements accusing others of physically or sexually assaulting her; and (2) the evidence that TC had told others that she lied when she testified that defendant had sexually assaulted her. The trial court analyzed these categories separately.

The trial court first noted that TC's allegations of sexual assault by the Cunninghams occurred after defendant's criminal trial. Because that evidence did not exist prior to the trial's conclusion, the trial court determined that the evidence could not support a motion for new trial based on newly discovered evidence. As the trial court explained, "The *Cress* framework simply does not apply to them." The trial court agreed that TC had made her statement about lying about her brother throwing her out of a car before

defendant's criminal trial, but it concluded that defendant could have discovered that evidence with reasonable diligence. The trial court also questioned whether the evidence involving the car would be admissible but, in any event, the evidence would not make a different result probable on retrial. More specifically, the trial court found it compelling that the jury had acquitted defendant on one count of CSC-I, which demonstrated that the jury had "evaluated TC's testimony critically."

The trial court next addressed TC's statements after defendant's trial in which she told others that she had lied at trial. The trial court recognized that such recanting statements are traditionally viewed with suspicion. Moreover, the evidence ranked low, in the trial court's estimation, because it was "not even the victim's own recantation. It [was] someone else saying that she [was] recanting." The trial court found that TC had made the recanting statements, but it further explained that these statements could be "reconciled" with TC's testimony to the contrary—in the trial court's view, TC "was saying what she thought she needed to say to obtain help for herself and her baby." Similarly, the trial court concluded, "The court believes the victim's testimony, that she was willing to do or say what she felt she needed to do, true or not true, to get the assistance she needed." The trial court further concluded that defendant had failed to produce TC for over a year. It was also skeptical that TC's post-trial statements would be admissible at a new trial.

With respect to our Supreme Court's decision in *Johnson*, the trial court found TC's testimony at trial not inherently weak, and so the trial court did not believe that the decision was on point. The trial court also distinguished *Johnson* because that case involved a motion for relief from judgment, rather than a motion

for new trial. Finally, the trial court determined that trial counsel's failure to discover the evidence that TC purportedly told a trial-court referee that she lied about her brother throwing her from a car did not amount to ineffective assistance of counsel.

Following the trial court's denial of the motion on remand, the case returned to this Court on direct appeal.

II. ANALYSIS

On appeal, defendant raises several claims of error, including ineffective assistance of trial counsel and evidentiary errors. We need not reach these claims, however, because the trial court abused its discretion in denying defendant's motion for new trial based on newly discovered evidence.

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision on a motion for a new trial. *Johnson*, 502 Mich at 564. A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable outcomes. *Id*. This Court reviews for clear error the factual findings underlying the trial court's application of the law. *Id*. at 565. A finding is clearly erroneous when this Court is left with the definite and firm conviction that the trial court erred. *Id*.

B. MOTION FOR A NEW TRIAL

This Court granted defendant's motion to remand this case to the trial court so that he could move for a new trial based on newly discovered evidence. *People v Rogers*, unpublished order of the Court of Appeals, entered September 18, 2018 (Docket No. 336000). On

remand, defendant moved for a new trial under MCL 770.1, MCR 6.431, or MCR 6.502 on the ground that he had discovered evidence that TC had committed perjury at his original trial.

Under MCL 770.1, a trial court "may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." Although MCL 770.1 allows a trial court to grant a new trial "when it appears to the court that justice has not been done," this Court previously interpreted the trial court's authority under that statute to be limited to "those circumstances where the defendant has been denied a fair trial." *Wayne Co Prosecutor v Recorder's Court Judge*, 148 Mich App 320, 324; 384 NW2d 47 (1985), remanded by *People v Butler*, 429 Mich 893 (1988).[1] This Court explained that a trial court cannot use MCL 770.1 to accomplish indirectly what it could not accomplish directly. *Wayne Co Prosecutor*, 148 Mich App at 325. Additionally, this Court has held that our Supreme Court superseded MCL 770.1 with the adoption of MCR 6.431. See *People v McEwan*, 214 Mich App 690, 693 n 1; 543 NW2d 367 (1995). Under MCR 6.431(B), a trial court may grant a defendant's motion for 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." Consequently, the proper inquiry is whether the trial court abused its discretion when it denied

[1] Decisions published before November 1, 1990, are not binding on this Court. See MCR 7.215(J)(1). Those decisions, however, are entitled to deference and should not be casually disregarded. See *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019).

defendant's motion for a new trial under MCR 6.431(B), premised on newly discovered evidence.

A brief note before proceeding further. Because defendant moved for a new trial under MCR 6.431(B), the trial court stated that it would focus on caselaw involving motions "styled as motions for new trials," rather than motions for relief from judgment under MCR 6.502. This statement is a bit unclear, as several of the binding and relevant opinions of this Court and our Supreme Court involve requests for new trial made in a motion for relief from judgment. There are certainly differences between a motion for new trial under MCR 6.431 and a motion for relief from judgment under MCR 6.502, including, among other things, additional procedural prerequisites for obtaining relief under the latter.

With that said, in the context of a criminal defendant's request for a new trial based on newly discovered evidence, the four-part standard set forth by our Supreme Court in *Cress*, 468 Mich at 692, applies to that request, whether it is made in a motion for new trial under MCR 6.431 or a motion for relief from judgment under MCR 6.502. Compare *People v Rao*, 491 Mich 271, 279-281; 815 NW2d 105 (2012) (applying *Cress* to the defendant's motion for new trial), with *People v Grissom*, 492 Mich 296, 319; 821 NW2d 50 (2012) (applying *Cress* to the defendant's request for a new trial made in a motion for relief from judgment). Likewise, cases interpreting and applying *Cress*'s four-part standard are relevant to the question in this case—whether defendant is entitled to a new trial based on newly discovered evidence—regardless of whether the particular case involved a motion for new trial or motion for relief from judgment.

The only relevant difference, under the facts of this case, between a motion for a new trial under MCR 6.431 and a motion for relief from judgment under MCR 6.502 is procedural. Defendant could not file a motion for relief from judgment because his claims were still on appeal in this Court. See MCR 6.501; MCR 6.508(D)(1). The proper procedure was to ask this Court for the opportunity to file a motion for a new trial in the trial court. See MCR 6.431(A)(2); MCR 7.208(B); MCR 7.211(C)(1). Defendant did that, and this Court granted the request.

C. WHAT CONSTITUTES "NEWLY DISCOVERED EVIDENCE"?

Returning to the matter at hand, our Supreme Court has long recognized that a new trial may be warranted on the basis of newly discovered evidence. See *Rao*, 491 Mich at 279. Requests for a new trial have traditionally been looked at with disfavor, however, because courts do not want the parties to submit evidence in "installments." As the *Rao* Court explained, "The policy of the law is to require of parties care, diligence, and vigilance in securing and presenting evidence." *Id*. at 280 (cleaned up). Accordingly, the cases where a reviewing court "has held that there was an abuse of discretion in denying a motion based on such grounds are few and far between." *Id*. (cleaned up).

And yet, a judicial avenue must remain open for the rare case where, after new evidence is discovered, justice necessitates a new trial. In *Cress*, our Supreme Court set forth the roadmap for courts to travel when considering whether justice requires a new trial. Under *Cress*, a defendant who seeks a new trial based on newly discovered evidence must satisfy each of the following four conditions: "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the

newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692 (cleaned up).

The first matter to resolve on appeal is what constitutes "newly discovered evidence" for purposes of defendant's motion for new trial. Generally speaking, the request for new trial must be grounded upon the recent discovery of evidence of an asserted thing or event—i.e., a proposed fact—that existed or took place *prior* to the conclusion of the trial. Things or events that came into existence or took place *after* trial do not generally qualify as grounds for a new trial because they could not have been the subject of testimony at trial. See *Bishop v Gaudio*, 266 Mich 267, 270; 253 NW 292 (1934) (concluding that the findings from a medical examination after trial did not constitute a "showing . . . of newly discovered evidence"); *People v Burton*, 74 Mich App 215, 222-223; 253 NW2d 710 (1977) (recognizing that newly discovered evidence must be evidence that existed at the time of the trial but that could not have been discovered with reasonable diligence); see also *United States v Hall*, 324 F3d 720, 723 (CA DC, 2003) (concluding that events and transactions occurring after trial could not justify a new trial under FR Crim P 33); *United States v Beran*, 546 F2d 1316, 1319 n 1 (CA 8, 1976) (same); *United States v Bolden*, 355 F2d 453, 461 (CA 7, 1965) (same).

Here, defendant relies on evidence of several proposed facts in support of his motion for new trial: (1) evidence that TC lied during her trial testimony about defendant raping her; (2) evidence that TC lied to authorities about her brother pushing her from a car; and (3) evidence that TC lied to authorities about her

adoptive father and brother raping her while her adoptive mother knowingly acquiesced. Of the three, only (1) and (2) are about alleged things or events that existed or occurred prior to the conclusion of the trial, i.e., false testimony during trial and being pushed from a car prior to the date that the trial concluded. We agree with the trial court that evidence that TC lied about her adoptive father and brother raping her, and her adoptive mother's knowing acquiescence, does not qualify as "newly discovered evidence" for purposes of defendant's motion for new trial. TC did not make the allegations about these purported events until after the trial concluded, and there is nothing to suggest that TC claimed that these purported events occurred prior to the trial's conclusion. In other words, nothing about these false allegations could have conceivably been the subject of testimony at trial. See *Burton*, 74 Mich App at 222-223. But, as explained later, this does not mean that evidence of (3) is irrelevant to the *Cress* analysis.

With respect to (2), we also agree with the trial court that TC's admission that she lied about her brother pushing her from a car has little relevance to defendant's motion for new trial. The subject matter of the trial (sexual assault) and the new evidence (pushed from a car) conceptually share almost nothing in common, and the subject of each allegation is different (biological father versus adopted brother). Other than showing the bare fact that TC was willing to lie about a family member, this particular evidence involving the brother does not make a determination of whether defendant sexually assaulted TC more or less probable than it would be without the evidence.

Our focus turns then to evidence that TC lied during her trial testimony about defendant assaulting her,

i.e., evidence that TC recanted her story. Traditionally, courts have considered recantation evidence with suspicion. As our Supreme Court explained nearly a hundred years ago: "There is no form of proof so unreliable as recanting testimony. In the popular mind it is often regarded as of great importance. Those experienced in the administration of criminal law know well its untrustworthy character." *People v Van Den Dreissche*, 233 Mich 38, 46; 206 NW 339 (1925) (cleaned up). This Court recently reiterated this suspicion: "As a rule, the court is not impressed by the recanting affidavits of witnesses who attempt to show that they perjured themselves at the trial." *People v Norfleet*, 317 Mich App 649, 661; 897 NW2d 195 (2016) (cleaned up). Nevertheless, the "discovery that testimony introduced at trial was perjured may be grounds for ordering a new trial." *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); see also *People v Smallwood*, 306 Mich 49, 54-55; 10 NW2d 303 (1943); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

In current form, defendant's recantation evidence consists largely of hearsay statements. The testimony by family members and others of what TC allegedly told them is classic hearsay under MRE 801. The video was admitted into evidence by the trial court because TC was unavailable at that particular hearing, but it is uncertain whether the video could be introduced as substantive, nonhearsay evidence at a future retrial. See, e.g., MRE 803(5) and (24); MRE 804(b)(3) and (7). And the sworn affidavit is not a "prior statement" for purposes of MRE 801(d)(1), *Barnett v Hidalgo*, 478 Mich 151, 160; 732 NW2d 472 (2007), nor is it an "admission by a party-opponent" for purposes of MRE 801(d)(2), *People v Carson*, 87 Mich App 163, 169; 274 NW2d 3 (1978). As it was with the trial court, it is not

clear to this Court how defendant's evidence, in its current form, could be used as substantive evidence of recantation at retrial. At best, it seems that this evidence could be used to impeach TC's "recantation of her recantation," similar to how it was used during the remand hearing. See *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995) ("The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement."); see also 3 Wright, King & Klein, Federal Practice & Procedure (3d ed), § 557.1, p 579 ("In that instance [when the witness recants her recantation statement,] the recantation statement would be merely impeaching evidence, rather than substantial evidence in the defendant's favor."). With respect to the remand hearing, TC's testimony during the hearing could be used as substantive evidence at a subsequent retrial if it meets the requirements of MRE 801(d)(1) (prior statement of witness) or MRE 804(b)(1) (declarant unavailable/former testimony), although the testimony mainly consisted of TC admitting that she made recanting statements but then asserting that those statements were lies, i.e., the statements were used to impeach TC's credibility.

Prior to *Grissom*, some courts considered impeachment evidence insufficient to support a motion for new trial based on newly discovered evidence. As the Supreme Court put it in *Barbara*, "Generally, too, where the new evidence is useful only to impeach a witness, it is deemed merely cumulative." *Barbara*, 400 Mich at 363. This changed with *Grissom*, however, where our Supreme Court made clear that impeachment evidence alone can be a sufficient basis for a new trial as long as the four-part test from *Cress* is satisfied. *Grissom*, 492 Mich at 321. Thus, the fact that defendant's newly discovered evidence consists of impeachment evidence

is not a bar to appellate relief; therefore, we need to consider this impeachment evidence within the framework of *Cress*.

D. *ALL* OF THE EVIDENCE THAT WOULD BE AVAILABLE AT RETRIAL

We have little trouble concluding that the first three conditions of *Cress* are met here. One, TC's statements in the video and sworn affidavit, and her alleged recantation statements to others, all were made after the trial and therefore were newly discovered. Two, although TC's credibility was attacked by defense counsel at trial, there was nothing in the form of recantation statements that could have been used for impeachment, and therefore the impeachment evidence is not merely cumulative. And three, there is nothing to suggest that TC recanted her allegations prior to or during the trial, and therefore the impeachment evidence could not have been, using reasonable diligence, discovered and used at trial.

With respect to the fourth condition, we leave as an open question whether the recantation evidence alone would be sufficient for a new trial. We are mindful that, as explained earlier, recantation evidence is usually (and correctly) met with skepticism when considering a request for a new trial. And here, we have recantation-within-recantation, as TC admitted on remand that she made recanting statements in the video and sworn statement, but adamantly asserted that those recanting statements were themselves lies. If the statements of TC recanting—compared with the evidence offered at the original trial and TC's testimony on remand disavowing the recanting statements—were all that this Court had to consider on defendant's request for new trial, then it is quite likely that the motion would fail. But under our Supreme Court's recent opinion in

Johnson, defendant is not limited to this evidence, contrary to the trial court's decision below.

In *Johnson*, our Supreme Court clarified two important points about how motions for new trial based on newly discovered evidence are to be analyzed. First, the trial court is not acting as the "ultimate fact-finder," because the question is not whether to dismiss the criminal case but whether to retry the defendant. *Johnson*, 502 Mich at 567. Given this, when analyzing the evidence offered for retrial, the trial court must consider "whether a *reasonable juror* could find the [evidence] credible on retrial." *Id*. While it remains within the trial court's discretion to evaluate a witness's credibility on a motion for new trial, *Cress*, 468 Mich at 692, the trial court must do so while "contemplating a future trial and the role of a future fact-finder," *Johnson*, 502 Mich at 568. As the Court explained, "[I]f a witness is not patently incredible, a trial court's credibility determination must bear in mind what a reasonable juror might make of the testimony, and not what the trial court itself might decide, were it the ultimate fact-finder." *Id*.

Second, and of particular importance here, the *Johnson* Court elaborated a subtle, but material, expansion of the evidence that must be considered under the fourth *Cress* condition. Prior to *Johnson*, the evidence that had to be considered on a motion for new trial based on newly discovered evidence consisted of two distinct classes: (1) evidence presented at the original trial; and (2) the newly discovered evidence. See, e.g., *Grissom*, 492 Mich at 321; *id*. at 342 (MARKMAN, J., concurring) ("Any evidence that falls outside these classes is plainly beyond the scope of the *Cress* process."); but see *id*. at 365 & n 54 (ZAHRA, J., concurring in part and dissenting in part) (noting that the limitation

to the two classes of evidence was at odds with Justice MARILYN KELLY's concurring opinion as well as *Cress*, where the trial court granted the prosecutor's motion to reopen proofs on the defendant's motion for new trial).

In *Johnson*, however, our Supreme Court expanded the second class of evidence beyond just the "newly discovered evidence" to now include *all* of "the evidence that would be presented on *retrial*." *Johnson*, 502 Mich at 571. As the *Johnson* Court clarified, "Thus, the evidence that must be taken into consideration when assessing a claim of newly discovered evidence is not simply the evidence presented at the original trial, but also the evidence that would be presented at a new trial." *Id*. This includes, but importantly is not limited to what, strictly speaking, would qualify as "newly discovered evidence" to support a motion for new trial.

To illustrate how this clarification expands the second class of evidence, consider *Johnson* itself. As explained earlier, "newly discovered evidence" for purposes of a motion for new trial is evidence about some purported thing or event that existed or took place prior to the original trial's conclusion. Recantation evidence falls within this category because it is evidence of false testimony given during the trial. Similarly, new, previously unknown eyewitness testimony falls within this category because it is evidence about an event (i.e., the crime) that occurred before the trial. In *Johnson*, the defendant offered both of these types of "newly discovered evidence" in support of the request for new trial.

In addition, however, the prosecutor in *Johnson* argued, and the trial court had agreed, that the new eyewitness was not credible based, in part, on that witness's conviction for perjury. The perjured testimony and subsequent conviction occurred in an unre-

lated case years after the defendant's original trial. Strictly speaking, therefore, the perjury conviction was not "newly discovered evidence" for purposes of the defendant's request for a new trial. And yet, if the defendant were granted a retrial, there was little doubt that the prosecutor would have attacked the credibility of the new eyewitness with the perjury conviction. Given this, the *Johnson* Court acknowledged that it was appropriate for the trial court to consider this evidence of a post-trial fact when evaluating the defendant's request for new trial. See *id*. at 570. Accordingly, both the description of the standard and how the standard was actually used in *Johnson* makes clear that, when evaluating a motion for new trial based on newly discovered evidence, the court must consider the evidence admitted at the original trial and *all* of the *record* evidence that has come to light to-date that could be used at the retrial. Cf. *id*. at 577 n 17 (noting that one of the defendants could not use the recanting evidence "as an *independent* ground for relief" because he had raised it in an earlier motion for relief from judgment, but the evidence could be considered by the court "*in the context of* the claim [the defendant] is now raising"); see also *Williams v United States*, 500 F2d 105, 108 (CA 9, 1974) (reversing the district court and granting a new trial by reason of tainted testimony of a witness who was subsequently convicted of perjury involving similar circumstances); *United States v Segelman*, 83 F Supp 890, 893 (WD PA, 1949) (granting a new trial where the key witness had been convicted of perjury at the time of trial, but his appellate rights had not yet been extinguished at that time, and therefore defense counsel was not permitted to impeach the witness with the conviction; the appellate rights were extinguished subsequent to the defendant's conviction).

Applying *Johnson* to the current case, we conclude that the trial court erred in two respects. With respect to its credibility determinations, the trial court did not distinguish between "what a reasonable juror might make of the testimony" versus "what the trial court might decide, were it the ultimate fact-finder." *Johnson*, 502 Mich at 568. The trial court reconciled conflicting testimony and concluded that TC had a particular motivation for making recanting statements—to get help for herself and her baby—but it did not consider what a reasonable juror could make of the conflicting testimony.

The trial court also erred by failing to consider the evidence of false allegations against the Cunninghams. Were defendant to be retried, there is little doubt that defense counsel would seek to undermine TC's credibility with the evidence of her false allegations against the Cunninghams, including her sworn testimony admitting that the allegations were false. TC's testimony admitting that she lied could be used not just for impeachment purposes, but as a "prior statement of witness" under MRE 801(d)(1)(A); the testimony could also be used as substantive evidence of motive and scheme, plan, or system under MRE 404(b). See *Grissom*, 492 Mich at 316.

And judged from the perspective of the time of retrial, there seems little reason to keep this evidence out. The evidence is not subject to the rape-shield statute. *People v Jackson*, 477 Mich 1019 (2007). In fact, it has long been recognized by Michigan courts that, in defense against a charge of sexual assault, "the defendant should be permitted to show that the complainant has made false accusations of rape in the past." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Even though TC made the false accusations against the Cunninghams after the purported assault

by defendant, the accusations will have occurred prior to TC's anticipated testimony at a future retrial. We agree with Justice MARILYN KELLY's observation in her concurring opinion in *Grissom* about the relevant timing on this issue:

> The dispositive question regarding the timing of a past false rape accusation and its admissibility is not when a false rape allegation occurred relative to the case at bar. Rather, given a defendant's Sixth Amendment right to confrontation, it is sufficient that any prior false allegation occurred *before a complainant testifies at trial*. To hold otherwise would lead to unjust results. [*Grissom*, 492 Mich at 328 n 13 (MARILYN KELLY, J., concurring) (emphasis added).]

Thus, the trial court should have considered TC's false allegations against the Cunninghams together with the newly discovered impeachment evidence and the evidence used at the original trial to determine whether defendant was entitled to a new trial.

E. ON RETRIAL, A DIFFERENT RESULT IS PROBABLE

Over the span of a year, the trial court heard several days of testimony from multiple witnesses. TC made recanting statements in a video and sworn affidavit, she admitted that she made the statements, and, after being given immunity, she admitted that she made false allegations of sexual assault against the Cunninghams. The trial court found that TC was a credible witness in certain respects during these hearings, i.e., she was not patently incredible, and the record supports this. Given the record, we decline to return the matter to the trial court for further proceedings, see *Johnson*, 502 Mich at 548, 565, and we now consider whether a reasonable juror could find the new evidence credible and, if so, whether a different result is probable on retrial.

We need not factor in the hearsay testimony by Pastor Rogers and others to conclude that a reasonable juror could find much of the new record evidence credible. TC admitted in sworn testimony that she made recanting statements in the video and affidavit, but she explained that those statements were actually lies. A reasonable juror could conclude that, in fact, TC told the truth in the recanting statements or, at a bare minimum, the reasonable juror could conclude that TC was willing to lie on multiple occasions about the central issue of this case. TC further admitted under oath that she made false allegations of similar sexual assaults against the Cunninghams, and from this a reasonable juror could conclude that TC was willing to falsely accuse family members of rape because she was angry with them. While a reasonable juror could conclude, as did the trial court, that TC lied in the video and affidavit to get help for herself and her baby, a reasonable juror could instead conclude that TC's recanting statements were true, similar to how she recanted her false allegations against the Cunninghams.

Because a reasonable juror could find the recanting evidence and admissions of false accusations credible (which would undermine TC's credibility with respect to her trial testimony), we consider the impact that this evidence would have on retrial. The original trial was a classic "he said/she said" credibility contest between TC and defendant. There were no other eyewitnesses who testified about the alleged assault, and the physical evidence was inconclusive.[2] DR did bolster TC's allegations with her own allegations of an earlier

[2] Dr. Mallon testified that TC's examination was "nonspecific" but then asserted that she confirmed suspected pediatric sexual abuse. This testimony was likely improper because a physician cannot opine that there was a sexual assault on the basis of a patient's history alone. See *People v Thorpe*, 504 Mich 230, 261-263; 934 NW2d 693 (2019).

assault by defendant, but the testimony about that earlier assault was vague and not without its own credibility problems.

With respect to TC's trial testimony, she asserted that defendant assaulted her on two separate occasions. Her testimony about the first alleged assault was particularly weak and vague, and the jury acquitted defendant of one charge of CSC-I. As to the second alleged assault, TC's testimony was more specific, identifying details about how defendant removed part of her clothes, how he held her down by the neck, and the like. But even this testimony was not without its weaknesses. For example, TC did not recall what she was wearing and did not know if she screamed during the assault or even where it occurred in the house. What she did recall was that defendant threw her to the ground and raped her while making lewd comments that her children would be her siblings. Given the lack of other eyewitness testimony or clear physical evidence of rape, the case against defendant came down to TC's credibility as a witness.

As to the recanting impeachment evidence, there must be an "exculpatory connection" between the heart of a witness's testimony and the newly discovered impeachment evidence. *Grissom*, 492 Mich at 319. There clearly is a connection between TC's recanting statements (defendant did not rape her) and her inculpatory trial testimony (defendant did rape her). See *id*. at 317; see also *Barbara*, 400 Mich at 363-364 (stating that newly discovered evidence that a witness committed perjury is particularly significant when the only evidence that an offense was committed was founded on the testimony of the individual whose credibility had been put into question). Moreover, this impeachment evidence would likely undermine TC's credibility. Even

setting aside the hearsay statements that she purportedly told to others, TC asserted during her testimony that she lied in the video and lied in a sworn affidavit. Admissions of lying about the central issue—whether the rape actually occurred—would *ceteris paribus* undermine any witness's credibility to some extent.

Additionally, TC's explanation for why she made the recanting statements is itself evidence that should be considered. See *Johnson*, 502 Mich at 572. TC claimed that she lied to Pastor James and Robert, and lied in her affidavit, because, in her view, defendant's family would not help her unless she made the statements. She conceded that no one told her this, yet she believed this to be the case. An inference could be made that she was willing to make false statements to manipulate others into giving her what she wanted. Stated another way, her explanation that she lied to get help from defendant's family was itself evidence that undermined her credibility because it demonstrated that she was willing to lie about serious matters to get what she wanted from others.

TC's credibility with respect to her trial testimony is further undermined when her false allegations against the Cunninghams are considered. Her allegations against defendant and those against the Cunninghams share several material features: (1) both involve family members (TC's biological father, on the one hand; TC's adoptive father and brother, on the other hand); (2) both involve similar physical acts (e.g., thrown down and then sexually assaulted); (3) both involve a female partner who purportedly knew that an assault was occurring (Tara, on the one hand; Christine, on the other hand); and (4) as a possible motive for lying, TC was said to have been angry with a family member around the time of the alleged assaults. This evidence would

likely be used not just for impeachment purposes, but would also likely be used to show that TC had a motive for falsely accusing defendant—according to Tara, TC became angry when defendant told TC that she needed to leave his house and again shortly thereafter when TC learned that someone had told CPS that she was not living with the Cunninghams. See *Hackett*, 421 Mich at 348 (explaining that evidence of a motive to make a false charge of sexual assault is admissible). Moreover, the evidence might also be admissible to show that TC had a scheme, plan, or system of making false allegations of sexual assault as retribution against a family member with whom she became angry. As the Supreme Court observed in *Grissom*: "If the witness were prepared to admit on the stand that a prior accusation of similar nature was false, it is hard to imagine good reason for excluding the evidence. Prior admitted lies of the same kind in similar circumstances could powerfully discredit the witness." *Grissom*, 492 Mich at 317 (cleaned up).

When we consider all of the evidence that could be used at retrial—including the evidence from the original trial, TC's recanting statements, TC's explanations for why she made the recanting statements, and the evidence of false accusations against the Cunninghams—we conclude that a different result on retrial is probable. Simply put, the case against defendant rests largely, if not wholly, on TC's credibility, and the evidence that was presented on remand discredits TC to a significant extent. If her testimony on this score is not credible, then the case against defendant collapses.

Accordingly, the trial court abused its discretion when it denied defendant's motion for a new trial.

III. CONCLUSION

As one commentator observed, "No court wishes a defendant to remain in jail if he has discovered evidence showing that he is not guilty, but after a man has had his day in court, and has been fairly tried, there is a proper reluctance to give him a second trial." Wright, King & Klein, § 557, pp 540-541. Trials are not to be tried by the installment method, and, therefore, parties must use "care, diligence, and vigilance in securing and presenting evidence" at trial. *Rao*, 491 Mich at 280 (cleaned up). And yet, a judicial avenue must remain open for the rare case when, after new evidence is discovered, justice necessitates a new trial.

As explained here, justice necessitates that defendant have the right to be retried. The case against him rested almost entirely on the credibility of the complainant. A reasonable juror could find the new evidence credible, and when all of the available record evidence is considered, a different outcome on retrial is probable.

Accordingly, we reverse the trial court's denial of defendant's motion for new trial and remand for a new trial. Given our decision today, we need not reach defendant's remaining claims for appellate relief. We do not retain jurisdiction.

SAWYER, P.J., and M. J. KELLY, J., concurred with SWARTZLE, J.

PEOPLE v ABCUMBY-BLAIR

Docket No. 347369. Submitted December 8, 2020, at Detroit. Decided December 22, 2020, at 9:00 a.m. Leave to appeal denied 508 Mich 945 (2021).

Jeremiah D. Abcumby-Blair was convicted by a jury in the Oakland Circuit Court of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*); possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*); possession of less than 25 grams of fentanyl, MCL 333.7403(2)(a)(*v*); carrying a concealed weapon, MCL 750.227(2); being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; five counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and operating a motor vehicle with a suspended license, second offense, MCL 257.904(3)(b). Police officers were surveilling a suspected drug house on Seward Street in Pontiac and observed defendant pull up in a car, approach the porch and pause briefly as if using a key for entry, enter the house for a few minutes, and then leave. The officers then observed defendant drive to a nearby party-store parking lot known for drug trafficking and engage in a hand-to-hand transaction with the occupant of another vehicle. One of the officers, Charles Janczarek, confronted defendant in the parking lot, and defendant admitted that he was in possession of marijuana. Janczarek searched defendant's pockets and found marijuana, cocaine, two cell phones, and a key for the house on Seward Street. Defendant was arrested. An officer then found a loaded firearm in defendant's car. One of defendant's cell phones rang, and Janczarek answered the call, pretending to be defendant. The officers obtained a search warrant for the house and seized marijuana, cocaine, heroin, fentanyl, ammunition, cash, equipment commonly used in drug manufacturing, and mail in a bedroom that was addressed to defendant at the Oakland County Jail. The jury convicted defendant of all charges. The court, Michael Warren, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 9 to 30 years' imprisonment for his convictions of possession with intent to deliver cocaine, possession with intent

to deliver heroin, carrying a concealed weapon, and felon-in-possession; 9 to 15 years' imprisonment for his convictions of possession with intent to deliver marijuana and possession of fentanyl; two years' imprisonment for each felony-firearm conviction; and 278 days in jail, time served, for operating with a suspended license. Defendant appealed.

The Court of Appeals *held*:

1. To establish a *Brady*[1] violation, a defendant must show that (1) the prosecution has suppressed evidence (2) that is favorable to the accused and (3) that is material. To establish materiality, a defendant must 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. In this case, defendant contended that the prosecution had a duty under *Brady* to disclose that in a previous case in the Oakland Circuit Court, Janczarek had made a false statement in a search-warrant affidavit. That Janczarek had testified untruthfully in that case was evidence favorable to defendant that was within the prosecution's control, and defendant was not required to exercise due diligence to obtain this information from another source. Accordingly, the prosecution had a duty to disclose this evidence to defendant. However, although the prosecution violated its duty to disclose this evidence, there was no *Brady* violation because defendant did not establish the materiality of the evidence with respect to the instant case. Defendant did not identify in the trial court, nor did he identify in his appellate brief, any factual challenges to the search-warrant affidavit in this case. Officers other than Janczarek collected information that led to defendant's arrest and the issuance of the search warrant; specifically, other officers witnessed the hand-to-hand drug exchange and observed defendant enter the house on Seward Street. Because defendant did not identify any specific infirmity in the search-warrant affidavit potentially traceable to Janczarek, defendant's contention that information regarding Janczarek's untruthfulness in a previous case would have resulted in a finding of no probable cause to issue the warrant in this case was unconvincing. Given the physical items, photographs, and the testimony of multiple witnesses that constituted case-specific evidence of defendant's guilt, suppression of evidence regarding Janczarek's untruthfulness in a separate case did not undermine confidence in the verdict in this case. Accordingly, there was no *Brady* violation.

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[1] *Brady v Maryland*, 373 US 83 (1963).

2. To establish that newly discovered evidence requires a new trial, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. In this case, defendant argued that an unpublished opinion in a previous case holding that Janczarek had made a false statement in a search-warrant affidavit was newly discovered evidence necessitating a new trial. However, defendant failed to make any connection between the holding regarding Janczarek's untruthfulness in the unpublished opinion and the search-warrant affidavit or trial testimony in this case. Defendant did not identify any specific portion of the affidavit potentially tainted by Janczarek's input, and defendant did not offer either evidence or argumentation that the holding in the unpublished case made it probable that the trial court in this case would find the warrant invalid and suppress the evidence collected pursuant to the warrant. In light of the evidence presented at the trial in case, the holding in the unpublished opinion would not make a different outcome in defendant's trial probable. Accordingly, defendant failed to establish that he was entitled to a new trial.

3. To establish the right to a new trial premised on ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. Defendant asserted that Janczarek violated his Fourth Amendment rights when Janczarek opened defendant's cell phone, answered it, and impersonated defendant to arrange a heroin transaction with the caller and that trial counsel was ineffective for failing to move to suppress or to object to Janczarek's testimony regarding the phone call. The United States Supreme Court in *Riley v California*, 573 US 373 (2014), held that in the context of searches of cell phone data, officer safety and the need to prevent destruction of evidence do not justify applying the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. *Riley* also emphasized the importance of providing clear guidance to law enforcement through categorical, workable rules. Accordingly, an arrestee has a reasonable expectation of privacy in his or her cell phone, and the government's act of answering the phone without the arrestee's consent and without a warrant constitutes a search under the

Fourth Amendment. In this case, Janczarek's answering defendant's ringing cell phone constituted a search under the Fourth Amendment. Accordingly, Janczarek's testimony regarding the phone call was inadmissible, and trial counsel's failure to move to suppress the evidence or to object to it constituted objectively deficient performance. However, defendant did not demonstrate prejudice from trial counsel's deficient performance. Given the other evidence presented at trial, Janczarek's testimony regarding the phone call was unnecessary to prove beyond a reasonable doubt that defendant was involved in the drug-trafficking operation at the house on Seward Street. Accordingly, defendant failed to show that, but for his attorney's failure to object to Janczarek's testimony about the cell phone call, there was a reasonable probability of a different outcome. Defendant's second claim of ineffective assistance—that his trial counsel erroneously advised him that his prior convictions could be used to impeach him and thus that he was deprived of his right to testify in his own defense—also failed because defendant did not establish the factual predicate of his claim; he produced no evidence that trial counsel made any such statements. Defendant's third and final claim of ineffective assistance of counsel also failed. Defendant argued that his trial counsel should have objected when the officers testified that mail found at the house on Seward Street was addressed to defendant at the Oakland County Jail because that testimony was inadmissible and highly prejudicial in that it informed the jury that defendant had previously been incarcerated. However, trial counsel's failure to object could reasonably have been a strategic choice to get on the record testimony suggesting that defendant did not reside at the Seward Street address, and the jury would have inferred from defendant's stipulation that he had been convicted of a felony that rendered him ineligible to possess a firearm that defendant had previously been incarcerated. Accordingly, defendant's claims of ineffective assistance of counsel failed.

4. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. Defendant argued that the trial court erred by excluding as inadmissible hearsay Janczarek's testimony regarding whether defendant's name was on the lease for the house on Seward Street. However, in light of Janczarek's testimony that defendant's registered address was in Detroit and the physical and testimonial evidence linking defendant to the house on Seward Street, defendant failed to establish that omission of Janczarek's testimony regarding

whether defendant's name was on the lease for the house on Seward Street more probably than not resulted in a miscarriage of justice.

5. A trial court's departure from the advisory sentencing guidelines is reviewed for an abuse of discretion. A departure sentence is reviewed for reasonableness, and a reviewing court examines whether the trial court adequately explained why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. Factors to consider when determining whether a departure sentence is more proportionate than a sentence within the guidelines range include (1) whether the guidelines accurately reflect the seriousness of the crime, (2) factors not considered by the guidelines, and (3) factors considered by the guidelines but given inadequate weight. In this case, the trial court concluded that an upward departure of 32 months was reasonable and proportional to the offense and the offender considering that the advisory sentencing guidelines did not adequately account for the extensiveness of defendant's criminal record, the frequency and rate of defendant's recidivism, and defendant's apparent resistance to rehabilitation. Additionally, in light of the trial court's decision not to exercise its statutory authority to impose consecutive sentences, the court's imposition of a sentence less than midway between the maximum of the guidelines minimum range and what it could have imposed through consecutive sentencing was not unwarranted.

Affirmed.

CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEARCHES AND SEIZURES — CELL PHONES — GOVERNMENT'S ACT OF ANSWERING A CELL PHONE.

An arrestee has a reasonable expectation of privacy in his or her cell phone, and the government's act of answering the phone without the arrestee's consent and without a warrant constitutes a search under the Fourth Amendment (US Const, Am IV; Const 1963, art 1, § 11).

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

State Appellate Defender (by *Michael R. Waldo*) for defendant.

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

PER CURIAM. This case arises from police surveillance of a suspected drug house. Defendant, Jeremiah Dejuan Abcumby-Blair, appeals as of right his jury-trial convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*); possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*); possession with intent to deliver less than 5 kilograms of marijuana, MCL 333.7401(2)(d)(*iii*); possession of less than 25 grams of fentanyl, MCL 333.7403(2)(a)(*v*); carrying a concealed weapon, MCL 750.227(2); being a felon in possession of a firearm (felon-in-possession), MCL 750.224f; five counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and operating a motor vehicle with a suspended license, second offense, MCL 257.904(3)(b). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 9 to 30 years' imprisonment for his convictions of possession with intent to deliver cocaine, possession with intent to deliver heroin, carrying a concealed weapon, and felon-in-possession; 9 to 15 years' imprisonment for his convictions of possession with intent to deliver marijuana and possession of fentanyl; two years' imprisonment for each felony-firearm conviction; and 278 days in jail, time served, for operating with a suspended license. Finding no errors requiring reversal, we affirm.

I. BACKGROUND

On April 13, 2018, Oakland County Sheriff's Deputy Ruben Garcia was participating in a surveillance of a suspected drug house on Seward Street in Pontiac.

Garcia observed defendant pull up in a car, approach the porch and pause briefly as if using a key for entry, enter the house for a few minutes, and then leave. Garcia observed defendant drive to a nearby party-store parking lot known for drug trafficking. Defendant maneuvered his car alongside another car and engaged in a hand-to-hand transaction with the occupant, which Garcia believed was a drug sale. As Garcia watched from his surveillance location, Oakland County Sheriff's Deputy Charles Janczarek was summoned to confront defendant in the parking lot and advise him of their investigation, at which time defendant admitted that he was in possession of marijuana.[1] Janczarek searched defendant's pockets and found, among other things, a baggie of marijuana; a baggie of what appeared to be crack cocaine, which Garcia field-tested and found to be positive; two cell phones; and a house key that turned out to be for the suspected drug house on Seward Street. Deputies arrested defendant. Garcia opened defendant's driver's side car door and found in the side pocket a firearm with a bullet in the chamber. Deputies obtained a search warrant for the house and seized marijuana, cocaine, heroin, fentanyl, ammunition, cash, equipment commonly used in drug manufacturing, and mail in a bedroom that was addressed to defendant at the Oakland County Jail. The jury convicted defendant of all charges. Defendant now appeals.

II. *BRADY* VIOLATION/NEWLY DISCOVERED EVIDENCE

Defendant argues that the prosecution violated his right to due process by failing to disclose that Janczarek had, according to defendant, "a documented

[1] The event occurred before Michigan legalized recreational marijuana use.

history of making false statements pertaining to his investigations, and specifically pertaining to his affidavits for search warrants involving drug investigations." Defendant contends that the prosecution had a duty under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), to disclose this information and that failure to do so undermines confidence in the jury's verdict. While impeachment evidence should have been disclosed, for the reasons explained in this opinion we conclude that reversal of defendant's convictions is not required.

Defendant did not preserve this issue for appellate review because he did not move in the trial court for a new trial or for relief from judgment. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Therefore, our review is for plain, i.e., clear or obvious, error affecting defendant's substantial rights. *People v Dickinson*, 321 Mich App 1, 15; 909 NW2d 24 (2017). A defendant's substantial rights are affected if the plain error "affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763-764 (quotation marks, citation, and brackets omitted).

To establish a *Brady* violation, a defendant must show that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Chenault*, 495 Mich 142, 150; 845 NW2d 731 (2014). The Michigan Supreme Court has explained each of these requirements as follows:

> The government is held responsible for evidence within its control, even evidence unknown to the prosecution, *Kyles v Whitley*, 514 US 419, 437; 115 S Ct 1555; 131 L Ed 2d 490 (1995), without regard to the prosecution's good or bad faith, *United States v Agurs*, 427 US 97, 110; 96 S Ct 2392; 49 L Ed 2d 342 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). Evidence is favorable to the defense when it is either exculpatory or impeaching. *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972) ("When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule [of *Brady*]."), quoting *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). To establish materiality, a defendant must 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." *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985). This standard "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal . . . ." *Kyles*, 514 US at 434. 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*. In assessing the materiality of the evidence, courts are to consider the suppressed evidence collectively, rather than piecemeal. *Id*. at 436. [*Chenault*, 495 Mich at 150-151.]

Before turning directly to our analysis of defendant's *Brady* claim, some background information is required. Defendant's claim arises primarily from a prosecutor's statement made during a hearing in a case we remanded to the trial court, *People v Williamson*, unpublished order of the Court of Appeals, entered September 27, 2017 (Docket No. 331075). Our remand

was based on what had transpired in another case, *People v Dukes*, Oakland Circuit Court Case No. 15-255948-FH. It came to light in *Dukes* that Janczarek had made false statements relative to a search warrant. As this Court explained:

> Janczarek testified that he had placed a GPS tracking device on Duke's [sic] vehicle pursuant to a warrant and that the device provided inculpatory information. Defense counsel advised the court that he had never been informed about the use of a GPS device and had never been provided a copy of the warrant permitting the tracking. After argument, the *Dukes* trial court declared a mistrial and scheduled an evidentiary hearing to determine, *inter alia*, whether the warrant Janczarek testified existed had in fact ever been issued and to thereafter consider whether the mistrial would be with prejudice. [*People v Williamson*, unpublished per curiam opinion of the Court of Appeals, issued September 5, 2019 (Docket No. 331075), p 3.]

While *Dukes* was unfolding, Williamson's appeal of a 2015 conviction was pending in this Court. When evidence of Janczarek's conduct in *Dukes* came out, Williamson filed a motion in this Court seeking remand to the trial court. Williamson argued that had the trial court considered the *Dukes* evidence, there was a reasonable probability that the court would have upheld the challenge he lodged to the search warrant Janczarek obtained in his case. Williamson had challenged Section 7(E) of Janczarek's sworn search-warrant affidavit, which stated, " 'During a period of time covering over the past thirty days the informant has provided information that has led to the issuance of one search warrant by a judge of the 50th District Court.' " *Williamson*, unpub op at 2. This Court remanded the matter for the trial court to consider the challenged statement in light of the *Dukes* evidence. On remand, the prosecutor conceded in the trial court

that Janczarek's statement in Section 7(E) "was an 'inaccurate statement' and that actually the confidential informant had never previously provided information that led to the issuance of a search warrant." *Id*. at 3. It appears to be this statement that the present defendant asserts the prosecutor in his case had a duty to disclose under *Brady*.

Meanwhile, the *Dukes* case reached its end. By the time *Williamson* returned to the circuit court on remand,

> the trial court in *Dukes* had held a hearing and determined that Janczarek's testimony at the evidentiary hearing in that case was not credible and found that no warrant had been issued despite Janczarek's testimony that one had been issued. At the hearing in *Dukes*, Janczarek testified that he had obtained a search warrant for the tracking device, but he could not produce the signed warrant or a copy of it. At one point he testified that he had saved it on a computer "thumb drive" but that he could not locate the device. He also testified that the warrant was in the "arrest packet" he provided to the prosecutor's office and further that he discussed the warrant with an assistant prosecutor whom he named. The assistant prosecutor testified to the contrary, stating that the warrant was not in the arrest packet and that she had not had any discussion with Janczarek regarding such a warrant. The court found that the prosecutor's testimony was credible, that Janczarek's testimony was not credible and that the search warrant he testified he obtained had in fact never existed. [*Id*. at 3-4.]

The present defendant argues on appeal that the prosecutor in his case should have disclosed the concession the prosecutor had made on remand in *Williamson* that Janczarek had made a false statement in his search-warrant affidavit. However, it is not clear to us that the prosecutor's statement in *Williamson* was necessarily *Brady* material, especially because the trial

court, after taking testimony from Janczarek, determined that Section 7(E) of the affidavit was inaccurate but that the deputy had not intended to make a false statement. *Id*. The significance of the prosecutor's statement emerged only two years later, when this Court found the trial court's factual determination to be clear error and held that the search-warrant-affidavit statement challenged in *Williamson* was "objectively untrue" and that Janczarek had "knowingly and intentionally made a false statement in the search warrant affidavit . . . ." *Id*. at 5-6.

Defendant is on more solid ground when he implies that the prosecutor also had a duty under *Brady* to reveal that the trial court had found Janczarek's testimony in *Dukes* not credible. That Janczarek had testified untruthfully in *Dukes*, as determined by an Oakland Circuit Court judge, was evidence favorable to defendant that was within the prosecution's control, *Chenault*, 495 Mich at 150, and defendant was not required to exercise due diligence to obtain the information from another source, *id*. at 152. Accordingly, the prosecution had a duty to disclose this evidence to defendant. Nevertheless, although the prosecution violated its duty to disclose this evidence, we find no *Brady* violation because defendant has not established the materiality of the evidence with respect to the instant case. See *id*. at 150-151.

As previously indicated, "[t]o establish materiality, a defendant must 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." *Chenault*, 495 Mich at 150 (quotation marks and citation omitted). The question with regard to materiality 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, quoting *Kyles*, 514 US at 434. Defendant contends that had the prosecutor informed him of Janczarek's untruthfulness, he could have used the information to successfully challenge the search warrant issued for the house on Seward Street and to impeach Janczarek's credibility. We are unpersuaded that, in the absence of the suppressed evidence, defendant's trial verdict was unworthy of confidence.

Defendant did not identify in the trial court, nor does he identify in his appellate brief, any factual challenges to the search-warrant affidavit in this case. In a motion filed in the trial court to suppress the evidence seized pursuant to the warrant, defendant did not attack any specific portions of the affidavit; rather, he argued that, taken as a whole, the affidavit did not support a finding of probable cause. In denying defendant's motion, the trial court stated that the information in the affidavit was "specific, [and] ha[d] multiple layers . . . providing information to a neutral arbiter, the district court judge, that would give rise to the standard that needs to be met, which is that there is a substantial basis for a finding of probable cause." On appeal, defendant attempts to undermine the reliability of the affidavit by stating that, although Oakland County Sheriff's Deputy Brandon Scruggs drafted the search-warrant affidavit, he based it on Janczarek's investigation. Contrary to defendant's assertion, however, the affidavit indicates that Garcia played an equally, if not more, important role in collecting the information that led to defendant's arrest and the discovery of drugs in his pockets. It was Garcia who observed defendant appear to use a key to enter the house on Seward Street and who saw defendant engage in a hand-to-hand suspected drug transaction in the parking lot of the nearby party store.

Whereas the defendant in *Williamson* challenged a specific factual statement in the search-warrant affidavit sworn to by Janczarek, the present defendant does not identify any specific infirmity in the search-warrant affidavit potentially traceable to Janczarek.[2] In light of this, we find unconvincing defendant's assertion that information regarding Janczarek's untruthfulness in *Williamson* and *Dukes* would have resulted in a finding of no probable cause to issue the warrant or in the suppression of the evidence obtained pursuant to the warrant. Defendant implies that a different outcome would have been probable because the alleged *Brady* information would have "alerted the defense to scrutinize aspects of the investigation that

[2] In the search-warrant affidavit, Scruggs avers that he learned from Janczarek that Janczarek and another officer surveilled the house on Seward Street within 30 days of the incident at issue. In a motion to remand filed in this Court, defendant's appellate counsel attests in an affidavit that Freedom of Information Act (FOIA) requests produced no reports of previous surveillance at the Seward Street house. This is not surprising. Janczarek testified at trial that he and the other officer had surveilled the house within the last 30 days as part of their general observation of the area but did not write any reports of their activity. Further, the testimony of all three deputies indicated that they understood "surveillance" to encompass everything from "sitting in a scout car with a pair of binoculars all the way to sitting on houses . . . ." Defendant's appellate counsel also notes that the report of the incident written by Janczarek states that the person to whom Janczarek spoke when he answered defendant's cell phone (which will be discussed later in this opinion) was "detained," but the FOIA request produced no record indicating that the person had been arrested. Janczarek testified at trial that after the caller arrived at the house on Seward Street, Janczarek told the caller "to walk down to the party store because I was trying to get him away." The caller then walked an estimated 70 yards to the party store, where he was "detained." While "detained" can mean "arrested," there is nothing in Janczarek's testimony to suggest that officers intended to or did arrest the caller. So, again, the fact that there are no arrest records is not surprising. Defendant's appellate counsel challenged none of the other information the affiant attributed to Janczarek.

may otherwise have been taken for granted, such as the validity of the prior surveillance or the legitimacy of the alleged call." Presumably, defendant alludes to his appellate counsel's discovery that no reports of prior surveillance had been filed and no record of the caller's arrest existed. As discussed in note 2 of this opinion, however, neither of these facts is alarming in light of the record, nor do they support a reasonable probability that, had Janczarek's untruthfulness been disclosed to defendant, the result of the proceeding would have been different. See *Chenault*, 495 Mich at 150.

Regarding the trial, the most important factual issue the jury had to decide was whether defendant had connections to the house on Seward Street sufficient to establish his constructive possession of the drugs and drug paraphernalia recovered from the house. Constructive possession of narcotics may "be proven by the defendant's participation in a 'joint venture' to possess a controlled substance." *People v Wolfe*, 440 Mich 508, 521; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (quotation marks and citation omitted). Evidence that a residence appears to be solely used for the manufacture and distribution of crack cocaine and that a defendant possesses a key that opens the lock to the residence has been deemed sufficient to establish the defendant's constructive possession of the drugs found therein. See *Wolfe*, 440 Mich at 518-519.

As already noted, Garcia testified that he observed defendant briefly enter the house on Seward Street, where defendant appeared to open the door with a key, before proceeding to a nearby parking lot, where defendant made a hand-to-hand exchange with the driver of another car. Janczarek placed defendant under

arrest, searched his pockets, and found 26.5 grams of marijuana, 2.7 grams of crack cocaine, and a house key, all of which was entered into evidence at trial. Upon executing the search warrant for the house on Seward Street, deputies determined that the key found in defendant's pocket opened the handle lock and the deadbolt. Scruggs testified that in one of the bedrooms he found a case for a laptop computer that contained two cards addressed to defendant, a piece of mail addressed to defendant, and receipts and a "certificate of completion" that contained defendant's name. This evidence, if believed, was sufficient to establish defendant's constructive possession of the drugs at the house on Seward Street. *Id*.

Defendant contends that the alleged *Brady* evidence could have been used to impeach Janczarek at trial. However, the trial transcripts show that the bulk of Janczarek's testimony concerned his identification for the jury of the physical evidence seized from the house on Seward Street, his identification of photographs taken at the house, and his expert testimony regarding street-level drug trafficking.[3] Defendant's connection to the house on Seward Street was established through the testimony of Garcia and Scruggs and physical evidence, including a key to the house found in defendant's pocket and items in the house linked to defendant. Evidence that Janczarek made false statements regarding search warrants in prior cases generally impeaches his credibility, but it does not undermine the physical evidence connecting defendant to the house on Seward Street or the testimony of Garcia and

[3] In his brief on appeal, defendant admits that there "is no dispute that the house [on] Seward contained drugs and items consistent with delivering drugs." In other words, defendant does not claim that Janczarek could have been impeached with the evidence found in the house.

Scruggs. Given the physical items, photographs, and the testimony of multiple witnesses that constituted case-specific evidence of defendant's guilt, we cannot say that suppression of evidence regarding Janczarek's untruthfulness in other cases undermines confidence in the verdict in this case. Thus, even though the prosecutor suppressed impeachment evidence within her control, defendant's claim of a *Brady* violation fails because he has not established the materiality of the suppressed evidence. See *Chenault*, 495 Mich at 150.

In the alternative, defendant argues that this Court's unpublished opinion in *Williamson* constitutes newly discovered evidence. To establish that newly discovered evidence requires a new trial, a defendant must show that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotation marks and citation omitted).

As previously indicated, this Court held in *Williamson* that Janczarek's statement in Section 7(E) of his search-warrant affidavit was "objectively untrue" and that Janczarek had offered no "credible explanation from which to conclude that he did not intentionally place false information in the affidavit." *Williamson*, unpub op at 5. In light of this newly discovered evidence, defendant urges this Court to at least remand the case to the trial court to allow the court to reassess defendant's motion to suppress the evidence obtained by the search warrant. However, defendant fails to make any connection between this Court's holding regarding Janczarek's untruthfulness

in *Williamson* and the search-warrant affidavit or trial testimony in this case. Neither in the trial court nor in this Court has defendant pointed to any specific portion of the affidavit potentially tainted by Janczarek's input, nor has he offered either evidence or argumentation that would lead us to believe that this Court's holding in *Williamson* makes it probable that the trial court would find the warrant invalid and suppress the evidence collected pursuant to the warrant. Nor, in light of the evidence presented at trial, are we persuaded that the *Williamson* holding would make a different outcome in defendant's trial probable. For these reasons, we conclude that defendant has failed to establish that he is entitled to a new trial based on this newly discovered evidence. See *Cress*, 468 Mich at 692.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant raises several claims of ineffective assistance of counsel. He preserved this issue for appellate review by filing in this Court a motion for remand to the trial court for a *Ginther*[4] hearing. We denied defendant's motion. *People v Abcumby-Blair*, unpublished order of the Court of Appeals, entered February 7, 2020 (Docket No. 347369). Therefore, our review is for errors apparent on the record. *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004) (quotation marks and citation omitted). Findings of fact "are reviewed for clear error," while "constitutional determinations are reviewed de novo." *Id*. A finding is clearly erroneous if this Court is

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

"left with a definite and firm conviction that the trial court made a mistake." *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted).

In order to establish the right to a new trial premised on ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. See *Smith v Spisak*, 558 US 139, 149; 130 S Ct 676; 175 L Ed 2d 595 (2010); *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant's first claim of ineffective assistance of counsel pertains to testimony from Janczarek that when a "flip-style" cell phone Janczarek seized from defendant's pocket began to ring, Janczarek answered it. Janczarek further testified that it was "a common practice for us to monitor those cell phones for text and/or phone calls . . . ." He explained:

> I spoke to the person on the other line and he asked for 20 of dog, which is common street slang for heroin. . . . I kind of played a game with him on the phone for a little bit, and he showed up over at Seward.
>
> * * *
>
> Initially, he went to the back door and knocked. We called him back and told him to go to the front door. He knocked there. Then I told him to walk down to the party store because I was trying to get him away. It kind of

> helped us out knowing that there wasn't anybody else in the house. He walked away. We detained him, and then we were able to determine [that] the phone number that he called on was the phone in his possession.[5]

Defendant asserts that Janczarek violated his Fourth Amendment right to be free from unreasonable searches and seizures when he opened defendant's cell phone, answered it, and impersonated defendant to arrange a heroin transaction with the caller and that trial counsel was ineffective for failing to move to suppress or to object to Janczarek's testimony regarding the phone call. Defendant relies on *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014). In *Riley*, the United States Supreme Court held that in the context of searches of cell phone data, officer safety and the need to prevent destruction of evidence do not justify applying the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. The prosecution argues, contrariwise, that *Riley* does not apply to this case because Janczarek did not scroll through the contents of defendant's flip phone; he merely answered an incoming call and spoke to the caller. In light of the Supreme Court's assessment in *Riley* of the balancing of interests between an individual's right to privacy and the need for the promotion of legitimate governmental interests when it comes to cellular telephones and the search-incident-to-arrest doctrine,[6] we believe that defendant has the better argument.

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley*, 573 US at 381 (quo-

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[5] It is apparent from Janczarek's testimony that Janczarek opened defendant's cell phone and either answered a call from it or used it to call one of defendant's connections three times.

[6] See *Riley*, 573 US at 385.

tation marks and citation omitted). A search occurs under the Fourth Amendment when "the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v United States*, 533 US 27, 33; 121 S Ct 2038; 150 L Ed 2d 94 (2001).

Neither party provides authority directly addressing whether, after the Supreme Court's analysis of the unique nature of cell phones in *Riley*, answering an arrestee's cell phone without the arrestee's consent constitutes a search under the Fourth Amendment.[7]

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[7] In *Riley*, the Supreme Court analyzed two cases when ascertaining whether the search-incident-to-arrest doctrine applies to searching digital content on a cell phone. *Riley*, 573 US at 378. Although it concluded that absent exigent circumstances "the search incident to arrest exception does not apply to cell phones," it was focused on accessing digital content as compared to answering a defendant's cell phone. *Id*. at 401-402.

David Riley was arrested following a routine traffic stop for driving with expired registration plates, and it was discovered that his license had been suspended. *Id*. at 378. The police officer searched Riley incident to his arrest and seized a "smart phone" from Riley's pants pocket. *Id*. at 378-379. The officer accessed information on the phone, presumably from Riley's text messages or contacts, that led to his being suspected of gang involvement. *Id*. at 379. Two hours after Riley's arrest, an officer who specialized in gangs searched Riley's phone again, and among the data he viewed, he looked at Riley's photos and videos. *Id*. Riley was ultimately charged with and convicted of multiple counts associated with gang involvement and a prior shooting, and testimony and evidence at trial included information gleaned from Riley's phone. *Id*.

The companion case involved defendant Brima Wurie. A police officer performing routine surveillance observed Wurie make an apparent drug sale from a car. *Id*. at 380. Officers arrested Wurie and took him to the police station, where they seized two cell phones from Wurie's person. One phone, a "flip phone," kept receiving calls, and the front display noted that the calls were coming from "my house." *Id*. When the officers opened the phone, they saw a picture of a woman and a baby. By pressing one button, they accessed the phone's call log and obtained a phone number associated with "my house," which they entered into an online phone directory to discover the associated address, ultimately

Defendant analogizes the act to conducting a search of the phone's contents, and the prosecution invokes *Commonwealth v Santana*, 92 Mass App 1107; 94 NE3d 435 (2017). In *Santana*, the Massachusetts Appeals Court seemed to suggest that the mere answering of an incoming cell phone call (initiated by another officer) did not constitute a search, but the court ultimately declined to resolve the question, concluding that even if the police officer's answering the defendant's cell phone constituted a search, any error in admitting evidence obtained from the call was harmless. However, in a recently published decision, the same court observed that a police officer's authority to seize an arrestee's cell phone "does not extend to manipulating the phone" and that "[a]nswering a ringing phone constitutes a search." *Commonwealth v Barrett*, 97 Mass App 437, 440; 148 NE3d 1217 (2020). In addition, the Pennsylvania Supreme Court has held that accessing *any* information from a cell phone without a warrant contravenes the United States Supreme Court's decision in *Riley*. *Commonwealth v Fulton*, 645 Pa 296, 302; 179 A3d 475 (2018); see also *id*. at 316-317 (observing that the *Riley* Court held "that in the absence of an applicable exception, any search of a cell phone requires a warrant. This is because, like one's home, an individual's expectation of privacy is in the cell phone itself, not in each and every piece of information stored therein").[8] "While the deci-

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leading them to defendant's home. *Id*. A search warrant was obtained, and defendant's apartment was searched, leading to drug charges and subsequent convictions. *Id*. at 381. In other words, the Supreme Court did not directly address in either Riley's or Wurie's case whether answering and using a cell phone seized from someone's person constitutes a search under the Fourth Amendment.

[8] In *Fulton*, the Pennsylvania Supreme Court concluded that the investigating detective conducted three distinct searches of the defen-

sions of lower federal courts and other state courts are not binding on this Court, they may be considered as persuasive authority." *People v Walker*, 328 Mich App 429, 444-445; 938 NW2d 31 (2019) (quotation marks and citation omitted).

In *Riley*, the Supreme Court rejected the idea of government-agency protocols as a way to balance privacy interests with what information on a person's cell phone would be considered within the proper scope of a search incident to arrest. *Riley*, 573 US at 398. Instead, it held that "our general preference [is] to provide clear guidance to law enforcement through categorical rules. If police are to have workable rules, the balancing of competing interests . . . must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers." *Id*. (quotation marks, citation, and brackets omitted). With that clean-line approach in mind, in the present case, we are persuaded that an arrestee has a reasonable expectation of privacy in his or her cell phone and that the government's act of answering the phone without the arrestee's consent and without a warrant constitutes a search under the Fourth Amendment.

Prior to *Riley*, various courts that had concluded that "a person does not have a legitimate expectation of privacy in [incoming] calls to his telephone . . . rested that conclusion on the ground that a person does not have a privacy interest in conversations to which he is

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dant's cell phone without a warrant by engaging in the following actions: (1) powering on the defendant's flip phone, which the court likened to opening the door to a home; (2) obtaining the phone's assigned number; and (3) monitoring incoming calls and text messages, including answering one of the calls. *Fulton*, 645 Pa at 318-319. The court concluded that "[t]he rule created by *Riley*/*Wurie* is exceedingly simple: if a member of law enforcement wishes to obtain information from a cell phone, get a warrant." *Id*. at 319.

not a party." *United States v De La Paz*, 43 F Supp 2d 370, 372 (SD NY, 1999). This is true for one of the cases on which the prosecution relies, *People v Lucas*, 188 Mich App 554; 470 NW2d 460 (1991). In *Lucas*, this Court held that an officer did not violate the defendant's Fourth Amendment rights when he answered the defendant's car phone without a search warrant because the defendant "has no reasonable expectation of privacy with regard to conversations in which he did not participate." *Id*. at 577. However, as one federal district court has pointed out, this reasoning "confuses the privacy interest invaded by a search alone with the interest in whatever is uncovered by a search." *De La Paz*, 43 F Supp 2d at 372. Related to this is the pervasiveness of cell phones in contemporary society, their intimate association with their users, and their technological capabilities.

Regarding a person's privacy interest in an incoming call, a federal district court explained in *De La Paz*:

> [A]sserting that a defendant has no privacy interest in the substance of a conversation between a law enforcement agent and a caller does not resolve whether the defendant has a privacy interest in whether that conversation should occur in the first place. The relevant question is not whether a search necessarily uncovers something of a personal or private nature, but rather whether it might—and whether one must invade a legitimate privacy interest in order even to find out. [*Id*.]

In the case at bar, regardless of the privacy interest defendant may or may not have had in the conversation that ensued when Janczarek answered the cell phone, defendant had a legitimate privacy interest in the fact that he received a call on his phone and in the identity of the caller. See *id*. This is particularly true given the intimate association of cell phones with individual users, who can keep track of a significant

range and amount of private information on even the most basic of cell phones. See, e.g., *Riley*, 573 US at 395 (noting that "[a]ccording to one poll, nearly three-quarters of [smartphone] users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower"). Just monitoring and answering a "flip-style" phone like defendant's reveals not only the defendant's contacts but also information that a defendant might have added to his contacts, including a photograph, name, or other identifying information. See *Fulton*, 645 Pa at 319. Thus, simply answering defendant's phone gave Janczarek access to more than the caller; it provided him with private information that he did not have before.[9]

In light of the personal nature and significant capabilities of today's cell phones, we find persuasive the foregoing arguments of federal courts and the courts of sister states and conclude that Janczarek's answering defendant's ringing cell phone constituted a search under the Fourth Amendment. Consequently, we also conclude that Janczarek's testimony regarding the phone call was inadmissible, and no strategic motive can explain trial counsel's failure to object to that testimony. Accordingly, trial counsel's failure to move

[9] Acknowledging that its decision would affect law enforcement's ability to combat crime, the Supreme Court noted in *Riley* that "[p]rivacy comes at a cost." *Riley*, 573 US at 401. But it also pointed out that information on a cell phone is not immune from a search, just that "a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." *Id*. "Our cases have historically recognized that the warrant requirement is an important working part of our machinery of government, not merely an inconvenience to be somehow weighed against the claims of police efficiency. Recent technological advances . . . have . . . made the process of obtaining a warrant itself more efficient." *Id*. (quotation marks and citations omitted).

to suppress the evidence or to object to it constituted objectively deficient performance. See *Trakhtenberg*, 493 Mich at 51.

However, even if defendant has proved the first prong of this claim of ineffective assistance of counsel, he has not proved the second. Defendant has not demonstrated prejudice from trial counsel's deficient performance. Given the other evidence presented at trial, Janczarek's testimony regarding the phone call was unnecessary to prove beyond a reasonable doubt that defendant was involved in the drug-trafficking operation at the house on Seward Street. Thus, defendant has failed to show that, but for his attorney's failure to object to Janczarek's testimony about the phone call, there is a reasonable probability of a different outcome. See *id*. Having failed to meet his burden to establish both prongs of his ineffective-assistance-of-counsel claim, defendant's claim must fail. See *id*.

Defendant next argues that he received ineffective assistance from his trial attorney when she erroneously advised him that his prior convictions could be used to impeach him and thus argues that he was deprived of his right to testify in his own defense. Defendant has failed to establish the factual predicate of his claim. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). He has produced no evidence that trial counsel made such statements, and the existing record provides no reason to infer that she did. In addition, defendant has not identified any exculpatory evidence that he would have introduced through his testimony. Therefore, assuming arguendo that trial counsel gave defendant objectively deficient advice about the wisdom of testifying in his own defense, defendant has failed to show that, but for counsel's

advice, there is a reasonable probability that the outcome of the proceedings would have been different. Accordingly, this claim of ineffective assistance of counsel must fail.

For his final claim of ineffective assistance, defendant argues that his trial counsel performed deficiently by failing to object when deputies testified that mail found at the house on Seward Street was addressed to defendant at the Oakland County Jail. One of the jury questions submitted to Scruggs after his testimony was how Scruggs knew that defendant resided at the house on Seward Street. The deputy noted, among other things, that mail addressed to defendant was found at the house. Following up on the deputy's reply, the court asked, "Do you recall how the Defendant's mail was addressed?" Scruggs replied, "It was addressed to Mr. Abcumby-Blair and I believe the address was—I believe the Oakland County Jail." Later, Janczarek was called on to explain why documents addressed to defendant at an address other than Seward Street were significant enough to be taken into evidence. The deputy's explanation implied that letters addressed and delivered to defendant "in the jail" but found at the house on Seward Street likely were brought there by defendant. Defendant contends that this testimony was inadmissible and highly prejudicial because it informed the jury that defendant had been incarcerated prior to the instant allegations, and defendant argues that trial counsel rendered ineffective assistance by failing to object or, at the very least, to request a limiting instruction.

Under the objective-reasonableness prong of the *Strickland* test, "[t]here is a presumption that counsel was effective, and a defendant must overcome the strong presumption that counsel's challenged actions

were sound trial strategy." *People v Cooper*, 309 Mich App 74, 80; 867 NW2d 452 (2015); see also *Strickland*, 466 US at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]"). This standard requires a reviewing court "to affirmatively entertain the range of possible 'reasons . . . counsel may have had for proceeding as they did.' " *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012), quoting *Cullen v Pinholster*, 563 US 170, 196; 131 S Ct 1388; 179 L Ed 2d 557 (2011) (quotation marks and citation omitted). In the instant case, the theory of defense was that defendant was insufficiently connected to the house on Seward Street to establish his constructive possession of the narcotics found there during the search. Scruggs's testimony that defendant's mail was addressed to him at the Oakland County Jail, rather than at the house on Seward Street, arguably supported that theory. In addition, the defense stipulated that defendant had been convicted of a specified felony that rendered him ineligible to possess a firearm. Given the defense strategy of dissociating defendant from the house on Seward Street and the likelihood that the jury would have inferred from defendant's stipulation that defendant had previously been incarcerated, trial counsel's failure to object to Scruggs's testimony might reasonably have been a strategic choice to get on the record testimony suggesting that defendant did not reside at the Seward Street address. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Even if trial counsel did render deficient performance by failing to object, defendant has not shown prejudice in light of his stipulation that

he previously had been convicted of a felony. Accordingly, this claim of ineffective assistance of counsel also fails.

IV. HEARSAY

Defendant next contends that the trial court erred by excluding as inadmissible hearsay Janczarek's testimony regarding whether defendant's name was on the lease for the house on Seward Street. We find any error to have been harmless.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). A trial court abuses its discretion only when "that decision falls outside the range of principled outcomes." *Id*. at 252 (quotation marks and citation omitted). "Preserved nonconstitutional errors are subject to harmless-error review under MCL 769.26 . . . ." *Id*. Under harmless-error review, a "defendant has the burden of establishing a miscarriage of justice under a 'more probable than not' standard." *Id*. (citation omitted).

On the second day of trial, after establishing that investigators obtained a copy of the lease for the house on Seward Street, defense counsel asked Janczarek whether defendant's name was on the lease. When asked by the trial court if what was on the lease was "being offered to assert a matter for the truth," counsel agreed that she was offering the deputy's testimony for the truth of the matter asserted regarding whether defendant's name was on the lease. The prosecution objected, arguing that whether a given individual is a tenant constitutes "specific content contained within the lease agreement" and is a matter asserted by the lease. The prosecution opined that counsel should have

called the landlord as a witness and sought to admit the lease as a business record. The trial court sustained the prosecution's objection.

As an initial matter, we note that the prosecution's argument, the trial court's ruling, and defendant's argument on appeal do not seem to align completely with defense counsel's argument in the trial court. At trial, counsel stated that she was not seeking to admit the lease into evidence. Rather, she was seeking testimony from Janczarek regarding his personal knowledge of the lease; specifically, whether he, during the course of his investigation, saw defendant's name on the lease. On appeal, defendant argues that the trial court erred by excluding the lease. To the extent the trial court deemed the lease inadmissible hearsay, defendant is correct. Contractual documents with legal effect independent of the truth of any statements contained in the documents are admissible. 31A CJS, Evidence, § 378; see also 2 McCormick, Evidence (6th ed), § 249, p 133 ("When a suit is brought for breach of a written contract, no one would think to object that a writing offered as evidence of the contract is hearsay[.]").

Assuming for the sake of argument that the trial court's exclusion of Janczarek's testimony was error,[10] our review of the record convinces us that the error was harmless. The testimony defense counsel sought was minimally probative of whether defendant had an actual connection with the property and constructive possession of the drugs found in the kitchen. Janczarek had testified the previous day that defendant's regis-

[10] It is not even clear that Janczarek could have answered the question put to him from personal knowledge. He testified that his partner was the one who obtained the lease but said nothing about whether he actually saw it.

tered address was in Detroit, not at the house on Seward Street, and that it was common for people involved in the manufacture and sale of drugs to register at an address different from the one where the drug activity occurred. Further, as already recounted, there was ample testimony and evidence linking defendant to the house on Seward Street. In light of the deputy's testimony that defendant's registered address was in Detroit and the physical and testimonial evidence linking defendant to the house on Seward Street, defendant has failed to establish that omission of Janczarek's testimony regarding whether defendant's name was on the lease for the house on Seward Street more probably than not resulted in a miscarriage of justice. See *Thorpe*, 504 Mich at 252.[11]

V. SENTENCING

Lastly, defendant argues that resentencing is required because the trial court unreasonably departed from the advisory guidelines minimum sentence range. He contends that because he had never been sentenced to more than one year in jail, a sentence within the calculated guidelines minimum range of 19 to 76 months would have provided sufficient punishment and that his criminal record did not justify an upward departure of 32 months. We disagree.

We review a trial court's departure from the advisory sentencing guidelines for an abuse of discretion. *People v Steanhouse*, 500 Mich 453, 471; 902 NW2d 327 (2017).

[11] Defendant argues in the alternative that trial counsel rendered constitutionally ineffective assistance by failing to lay the foundation for admission of the lease as a business record in accordance with MRE 803(6). Even if we assumed for the sake of argument that defense counsel rendered deficient performance, for the reasons explained earlier, defendant has not established that he was prejudiced thereby.

When reviewing a departure sentence for reasonableness, we examine whether the trial court adequately explained "why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (quotation marks and citation omitted). Factors to consider when determining "whether a departure sentence is more proportionate than a sentence within the guidelines range . . . include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight." *Id*. (citations omitted). A trial court abuses its discretion when it imposes a sentence that is not " 'proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *Steanhouse*, 500 Mich at 474, quoting *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), abrogated on other grounds as recognized in *People v Steanhouse*, 500 Mich 453 (2017).

At the sentencing hearing, the trial court summarized the context for its sentencing decision as follows:

> I have reviewed the Presentence Investigative Report. I'm familiar with the facts and circumstances of the case where those surround the Defendant. Be advised the guideline range in this case is 19 to 76 months. He is 28 years of age. He was convicted at trial. He has seven prior felonies, 17 misdemeanors. It takes a lot of effort to get that many when you're only 28.
>
> The drugs in this case were valued at approximately 14 to $15,000 [sic]. The firearm that was recovered had a round in the chamber. I do have the authority to sentence him consecutively for the major controlled substance offense one and three. I guess I could double and make consecutive. I don't intend to do that, but I do think that's important that I do have that discretion.

The court next provided an overview of defendant's substantial criminal history:

> His criminal history begins in 2008 with a minor . . . no valid operator's license, some disorderly conducts, things like that, and then a drug crime in 2012. Then it really escalates in 2011 for a controlled substance possession, cocaine, heroin, or another narcotic less than 25 grams, and controlled substance possession of marijuana and driver's license suspended. He received one year of [Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*.] probation, which is about as easy as you can get. Unfortunately, he violated that, . . . and HYTA [probation] was revoked.
>
> Quickly thereafter, in 2012, another controlled substance possession case, another lenient sentence of probation and jail. He violated that, [and was] sentenced to 300 days in jail. Then in 2014, failure to stop at scene of personal injury accident and operating [with] a license suspended, revoked, denied, second offense, another one year in jail.
>
> Then in 2017, [he was] convicted of controlled substance, delivery/manufacture less than 50 grams, habitual third; another controlled substance, delivery/manufacture less than 50 grams, habitual third; controlled substance possession of analogs, habitual third; controlled substance possession of analogs, another habitual third; and controlled substance second double penalty, habitual third, as well as driver's license suspended. He was given a very lenient [sentence] there, one year in the jail. With the Cognitive Behavior Program, he was released [November 13, 2017].

Lastly, the court explained why it thought an upward departure was reasonable:

> The Court finds that the mild upward deviation is reasonable and proportional in light of the following: His [Prior Record Variables], as the People have noted, are off the charts. They were 110 with a maximum of 75. He has had similar crimes in the past that the Court has elabo-

> rated. He was released from Oakland County Jail approximately five months before for similar offenses, and here we are again.

Thus, the court concluded that an upward departure of 32 months was reasonable and proportional to the offense and the offender considering that the advisory sentencing guidelines did not adequately account for the extensiveness of defendant's criminal record, the frequency and rate of defendant's recidivism, and defendant's apparent resistance to rehabilitation. This Court has affirmed upward departure sentences when the guidelines minimum sentence range did not adequately account for a defendant's prolific criminal history, recidivism, and poor prospects for rehabilitation. See *People v Odom*, 327 Mich App 297, 315-316; 933 NW2d 719 (2019).

Defendant argues that even if the trial court explained its reasons for an upward departure, it did not justify the 32-month magnitude of the departure it imposed. This argument has some merit. The trial court did not expressly explain why a 32-month departure sentence was more fitting than a departure of some greater or lesser amount. However, the court found it important to note that it had discretion under MCL 333.7401(3) to impose a consecutive sentence for both of defendant's convictions under MCL 333.7401(2)(a). Had the court exercised its discretion and imposed consecutive sentences, defendant could have received consecutive within-guidelines minimum sentences of 76 months for possession with intent to deliver less than 50 grams of cocaine and possession with intent to deliver less than 50 grams of heroin, effectively resulting in a minimum term of 152 months' imprisonment rather than the 108 months to which he was sentenced. In light of the trial court's decision not

to exercise its authority to impose consecutive sentences, and considering the court's stated reasons for departing upward from the guidelines minimum sentence range, we conclude that the court's imposition of a sentence less than midway between the maximum of the guidelines minimum range and what it could have imposed through consecutive sentencing was not unwarranted.

Affirmed.

SWARTZLE, P.J., and BECKERING and GLEICHER, JJ., concurred.

STERLING HEIGHTS PAIN MANAGEMENT, PLC v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN

Docket No. 350979. Submitted December 8, 2020, at Detroit. Decided December 22, 2020, at 9:05 a.m.

Sterling Heights Pain Management, PLC, filed an action against Farm Bureau General Insurance Company of Michigan in the Oakland Circuit Court to recover payment for medical services rendered to defendant's insured, Hiba Abdulrazzaq. Abdulrazzaq was injured in a motor vehicle crash and received medical treatment from plaintiff. Abdulrazzaq executed an assignment of personal protection insurance benefits in favor of plaintiff, and plaintiff later filed an action against defendant for nonpayment for the medical services rendered to Abdulrazzaq. Defendant moved for summary disposition under MCR 2.116(C)(10) on the basis that plaintiff had not lawfully rendered treatment to Abdulrazzaq because plaintiff was incorporated in violation of the Michigan Limited Liability Company Act (MLLCA), MCL 450.4101 *et seq*. Plaintiff's articles of incorporation stated that it was organized for the sole purpose of rendering medical services by a licensed physician, but according to defendant, plaintiff's 2019 Department of Licensing and Regulatory Affairs (LARA) annual report listed two nonphysicians as members or managers, contrary to the MLLCA's requirement that all members and managers of a professional-limited-liability company be licensed to render the same professional service as the corporate entity. The court, Cheryl A. Matthews, J., concluded on the basis of the LARA annual report that plaintiff had failed to show that its services had been lawfully rendered, and the court granted defendant's motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

Under the no-fault act, MCL 500.3101 *et seq*., a no-fault insurer is required to pay benefits for lawfully rendered medical treatment of its insured for accidental bodily injury covered by personal protection insurance. Plaintiff was incorporated under the MLLCA as a professional-limited-liability company (PLC).

Under MCL 450.4904(2), if a PLC renders professional services, all of its members and managers must be licensed or legally authorized in Michigan to render the same professional service. Because neither of the two members and managers named in plaintiff's LARA annual report were physicians, defendant argued that the treatment rendered to Abdulrazzaq was unlawful and, therefore, not compensable. However, in *Miller v Allstate Ins Co*, 481 Mich 601 (2008), the Supreme Court held that an insurer lacked statutory standing to challenge a medical provider's corporate status under the Business Corporation Act (BCA), MCL 450.1101 *et seq*. The *Miller* Court rejected the insurer's argument that the provider had not lawfully rendered treatment because it was improperly incorporated under the BCA rather than the now-repealed Professional Services Corporation Act, MCL 400.221 *et seq*. The Court relied on MCL 450.1221, which stated that filing the documents required for incorporation is conclusive evidence that all conditions precedent required to be performed under the act have been fulfilled and that the corporation has been formed under the act, except in an action or special proceeding by the attorney general. The Court reasoned that the statute created an irrebuttable presumption of proper incorporation once the articles of incorporation were filed, and the only exception to this rule was through the statute's grant of authority to the Attorney General to challenge whether a company was properly incorporated under the BCA. *Miller* was controlling in this case because MCL 450.4202(2) of the MLLCA is identical with the provision from the BCA relied on by the Court in *Miller*. Under MCL 450.4202(2), the filing of the required incorporation documents was conclusive evidence that plaintiff met the conditions precedent for formation of a PLC, including the requirement that all members and managers be licensed in the professional services rendered by the company. Only the Attorney General had standing to challenge that presumption. Because defendant lacked standing to argue that plaintiff was not properly incorporated under the MLLCA, there was no need to reach the substantive issue of whether the alleged violation of the MLLCA rendered the treatment to Adulrazzaq unlawful. Further, defendant's reliance on caselaw holding that treatment is not lawfully rendered unless the provider was properly licensed was misplaced and irrelevant, because there was no evidence that plaintiff was not licensed to provide the type of treatment rendered to Abdulrazzaq, nor did

defendant dispute that licensed physicians provided the treatment to Abdulrazzaq.

Reversed and remanded.

MICHIGAN LIMITED LIABILITY COMPANY ACT — ALLEGED INCORPORATION VIOLATIONS — STATUTORY STANDING.

Under MCL 450.4202(2) of the Michigan Limited Liability Company Act, MCL 450.4101 *et seq*., filing the required incorporation documents for an organization is conclusive evidence that all conditions precedent required to be performed under the act have been fulfilled and that the company is formed under the act; this provision creates an irrebuttable presumption of legality under *Miller v Allstate Ins Co*, 481 Mich 601 (2008), and only the Attorney General has authority under the act to challenge the presumption.

Gary R. Blumberg, PC (by *Elizabeth J. Ollgaard* and *Gary R. Blumberg*) for Sterling Heights Pain Management, PLC.

Novara Tesija & Catenacci, PLLC (by *Brian R. Meyer*) for Farm Bureau General Insurance Company of Michigan.

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

SHAPIRO, J. This is an action to recover personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*. Defendant insurance company moved for summary disposition on the ground that plaintiff healthcare provider was incorporated in violation of the Michigan Limited Liability Company Act (MLLCA), MCL 450.4101 *et seq*., and so plaintiff's services were not "lawfully rendered" to defendant's insured. Consistently with *Miller v Allstate Ins Co*, 481 Mich 601; 751 NW2d 463 (2008), we hold that defendant lacks standing to challenge whether plaintiff was properly incorporated or organized. Accordingly, we reverse the trial court's decision to grant defendant summary disposition.

I. BACKGROUND

This case arises out of injuries sustained by Hiba Abdulrazzaq in a motor vehicle crash. At the time of the crash, defendant was Abdulrazzaq's no-fault insurer. Abdulrazzaq received medical treatment from plaintiff for injuries arising from the crash and executed an assignment of no-fault benefits in plaintiff's favor. Plaintiff then filed an action against defendant for nonpayment of the medical services rendered to Abdulrazzaq.

Defendant moved for summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact), arguing that plaintiff had not lawfully rendered treatment to Abdulrazzaq. Plaintiff's articles of organization state that it was organized for the sole purpose of rendering medical services by a licensed physician. Defendant argued that because plaintiff's 2019 Department of Licensing and Regulatory Affairs (LARA) annual report listed Kristy Coleman and Jonathan Maffia as plaintiff's members or managers—neither of whom are licensed physicians—plaintiff violated the MLLCA's requirement that all members and managers of a professional limited liability company (PLC) be licensed to render the same professional service as the corporate entity. See MCL 450.4904(2). In response, plaintiff argued that defendant did not have standing to challenge whether plaintiff was properly incorporated or organized and that all treatment rendered to Abdulrazzaq was performed by licensed physicians.

In an opinion and order, the trial court determined that defendant had standing to argue that plaintiff had violated the MLLCA. On the basis of the LARA annual report, the trial court concluded that plaintiff failed to show that its services were lawfully rendered and

granted defendant's motion for summary disposition. Plaintiff appeals that decision.

II. ANALYSIS

We agree with plaintiff that defendant does not have statutory standing to challenge whether an entity is properly incorporated or organized under the MLLCA.[1]

The no-fault act entitles claimants to PIP benefits, which include "[a]llowable expenses consisting of reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). "[A] physician, hospital, clinic, or other person that *lawfully renders* treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the treatment or training." MCL 500.3157(1) (emphasis added). Thus, an insurer is required to pay benefits only for treatment lawfully rendered. *Psychosocial Serv Assoc, PC v State Farm Mut Auto Ins Co*, 279 Mich App 334, 338; 761 NW2d 716 (2008).

Plaintiff is incorporated as a PLC under the MLLCA. Because plaintiff was formed to provide services in a learned profession, it was required to comply with Article 9 of the Act, MCL 450.4901 to MCL 450.4910. See MCL 450.4201. Article 9 provides, in

[1] We review de novo a trial court's decision to grant summary disposition. *Richardson v Allstate Ins Co*, 328 Mich App 468, 471; 938 NW2d 749 (2019). "Whether a party has standing is a question of law subject to review de novo." *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 661; 939 NW2d 454 (2019) (quotation marks and citation omitted). Questions of statutory interpretation are also reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

relevant part, that if a PLC renders a professional service covered by the public health code, as plaintiff does, "then all members and managers of the company must be licensed or legally authorized in this state to render the same professional service." MCL 450.4904(2).

Defendant argues that the treatment plaintiff rendered to Abdulrazzaq was unlawful and therefore not compensable because neither of the two members and managers listed in plaintiff's most recent annual report to LARA are licensed physicians. Relying on *Miller*, 481 Mich 601, plaintiff argues that defendant lacks statutory standing to make that argument.

In *Miller*, the defendant insurance company argued that the healthcare provider did not lawfully render treatment because it was improperly incorporated under the Business Corporation Act (BCA), MCL 450.1101 *et seq*., rather than the Professional Services Corporations Act (PSCA).[2] *Id*. at 605. The Supreme Court did not reach the defendant's substantive argument, however, because it held that the insurer lacked statutory standing[3] to challenge the provider's corporate status under the BCA. *Id*. at 604, 608. The Court primarily relied on the BCA provision providing that " '[f]iling is conclusive evidence that all conditions precedent required to be performed under this act have been fulfilled and that the corporation has been formed under this act, except in an action or special proceeding by the attorney general.' " *Id*. at 610, quoting MCL 450.1221. The Court reasoned that this statutory pro-

[2] The PSCA, MCL 450.221 *et seq*., was repealed effective January 2, 2013. 2012 PA 569. The BCA now contains a chapter pertaining to professional corporations. See MCL 450.1281 *et seq*.

[3] A statutory-standing inquiry asks whether the Legislature authorized the injured party to sue the other party for the alleged statutory violation. See *Miller*, 481 Mich at 608.

vision precluded anyone besides the Attorney General from challenging an entity's corporate status under the BCA:

> This statute indicates that once articles of incorporation under the BCA have been filed, such filing constitutes "conclusive evidence" that (1) all the requirements for complying with the BCA have been fulfilled and (2) the corporation has actually been formed in compliance with the BCA. Thus, the statute generally creates an irrebuttable presumption of proper incorporation once the articles of incorporation have been filed. The statute then creates a single exception to this general rule by granting the Attorney General the sole authority to challenge whether a corporation has been properly incorporated under the BCA. That is, only the Attorney General is not affected by the irrebuttable presumption in favor of legality. By naming only the Attorney General in this respect, the Legislature has indicated that the Attorney General alone has the authority to challenge corporate status . . . . [*Id*. at 611.]

Because "only the Attorney General may pursue a claim that a corporation . . . improperly incorporated under the BCA," the Court reversed the grant of summary disposition to the insurer. *Id*. at 612. Although the Court's holding rested solely on statutory interpretation, it also noted that "Michigan courts have long held that the state possesses the sole authority to question whether a corporation has been properly incorporated under the relevant law." *Id*. at 615.

Defendant contends that *Miller* does not govern this case because defendant does not challenge plaintiff's corporate status but instead argues that plaintiff is organized in violation of the MLLCA. We conclude that, for purposes of determining statutory standing, this is a distinction without a difference. The MLLCA

contains a provision that is identical to the one relied on in *Miller*. MCL 450.4202(2) provides, in part:

> Filing is conclusive evidence that all conditions precedent required to be performed under this act are fulfilled and that the company is formed under this act, except in an action or special proceeding by the attorney general.

The filing of the required documents of incorporation was conclusive evidence that plaintiff met the conditions precedent for formation of a PLC, including the requirement that all members and managers be licensed persons. Only the Attorney General has standing to contest that presumption. Therefore, although the alleged incorporation defect is different than the one alleged in *Miller*, defendant lacks statutory standing for the reasons stated in that opinion. As in *Miller*, because defendant does not have standing to argue that plaintiff is improperly incorporated or organized under the MLLCA, we need not reach the substantive issue of whether the alleged violation of the MLLCA rendered the treatment to Abdulrazzaq unlawful.

Defendant's reliance on caselaw holding that treatment is not lawfully rendered unless the provider was properly licensed is misplaced. See *Life Skills Village, PLLC v Nationwide Mut Fire Ins Co*, 331 Mich App 280, 287; 951 NW2d 724 (2020) ("In order for treatment to be lawfully rendered and, thus, recoverable under the no-fault act, a healthcare provider must be in compliance with licensing requirements."). In *Healing Place at North Oakland Med Ctr v Allstate Ins Co*, 277 Mich App 51, 58; 744 NW2d 174 (2007), for instance, this Court held that because the plaintiffs were not licensed to provide the services rendered, they were not lawfully rendering treatment under MCL 500.3157(1). In contrast, defendant does not argue, and there was no evidence presented, that

plaintiff as an institution was not licensed to provide the type of treatment rendered to Abdulrazzaq. Nor does defendant dispute that licensed physicians provided the actual treatment rendered to Abdulrazzaq. Accordingly, the caselaw requiring compliance with licensing requirements is irrelevant. Defendant's argument that plaintiff was organized in violation of the MLLCA is squarely controlled by *Miller*, which held on the basis of an identical statutory provision to one found in the MLLCA that only the Attorney General has standing to bring claims alleging incorporation defects.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, as the prevailing party, may tax costs. MCR 7.219(A).

CAVANAGH, P.J., and JANSEN, J., concurred with SHAPIRO, J.

TYRRELL v UNIVERSITY OF MICHIGAN

Docket No. 349020. Submitted October 6, 2020, at Detroit. Decided December 22, 2020, at 9:10 a.m. Application for leave to appeal dismissed 507 Mich 990 (2021).

Lana Tyrrell filed a complaint against the University of Michigan and university employees in the Washtenaw Circuit Court alleging discrimination and retaliation in violation of the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. Defendants moved for summary disposition under MCR 2.116(C)(4) and (C)(7), arguing that plaintiff's suit should be dismissed because in order to maintain a claim against a state university and its employees, plaintiff had to comply with the requirements of MCL 600.6431(1) in the Court of Claims Act (COCA), MCL 600.6401 *et seq*. The court, Carol A. Kuhnke, J., denied defendants' motion. Although defendants failed to properly appeal the circuit court's order by appealing as of right rather than by applying for leave to appeal, the Court of Appeals exercised its discretion to treat the appeal as on leave granted.

The Court of Appeals *held*:

1. Although defendants moved for summary disposition under MCR 2.116(C)(4) as well as MCR 2.116(C)(7), they did not contest the circuit court's jurisdiction to hear this case, so the only question on appeal was whether defendants were entitled to summary disposition under MCR 2.116(C)(7). Defendants appealed as of right the court's order denying summary disposition under MCR 2.116(C)(7); however, an order denying summary disposition under MCR 2.116(C)(7) is appealable to the Court of Appeals as of right under MCR 7.202(6)(a)(v) and MCR 7.203(A)(1) only if the order denied governmental immunity to a governmental party. When they filed their appeal, defendants relied on *Progress Mich v Attorney General*, 324 Mich App 659 (2018) (*Progress I*), in support of their argument that plaintiff's failure to comply with MCL 600.6431(1) implicated governmental immunity. *Progress I* held that a defendant's assertion that the plaintiff had failed to comply with MCL 600.6431(1) constituted a claim that the defendant was entitled to governmental immunity. However, the Michigan Supreme Court reversed *Progress I* in

Progress Mich v Attorney General, 506 Mich 74 (2020) (*Progress II*), when it questioned the analysis of the Court of Appeals regarding whether failure to comply with MCL 600.6431 implicated governmental immunity, although it declined to decide the issue. In *Progress II*, the Court reasoned that whether compliance with MCL 600.6431 was properly considered a question of immunity or of compliance with the rules of the forum was a question of "no moment" because the plaintiff in that case was required to comply with the COCA either way. Although the *Progress II* Court did not expressly overrule the governmental-immunity analysis in *Progress I*, its reasoning effectively mooted the question, rendering the discussion in *Progress I* of whether MCL 600.6431 implicated governmental immunity to be without precedential value. Therefore, following *Progress II*, the question of whether a plaintiff's failure to comply with MCL 600.6431 was properly considered a question of immunity or of compliance with the rules of the forum was undecided. The state is immune from suit unless and only to the extent that it consents to be sued. The Legislature abrogated the state's sovereign immunity in the PWDCRA by consenting to suit on the basis of a violation of the law against the state and all governmental entities or agencies. Defendants asserted that despite this waiver, they were immune to suit under the PWDCRA because plaintiff failed to comply with MCL 600.6431. In the PWDCRA, the Legislature waived governmental immunity without establishing any conditions precedent to expose a state defendant to liability. In *Fairley v Dep't of Corrections*, 497 Mich 290, 297 (2015), the Supreme Court held that MCL 600.6431 did not confer governmental immunity. Therefore, because the Legislature waived immunity in the PWDCRA and the PWDCRA does not require compliance with MCL 600.6431 for a plaintiff to proceed with a claim against a state defendant, plaintiff's failure in the instant case to comply with MCL 600.6431 did not implicate governmental immunity. In light of this, the court's denial of defendant's motion under MCR 2.116(C)(7) was not appealable as of right because it was not an order denying governmental immunity to a governmental party, MCR 7.202(6)(a)(v), and was therefore not a final judgment appealable as of right pursuant to MCR 7.203(A)(1). Because the court's order was not a final order, defendants were required to appeal the order by leave granted, MCR 7.203(B)(1), which they failed to do. Therefore, the Court of Appeals did not have jurisdiction over the appeal. Nevertheless, the issue raised on appeal, i.e., whether a plaintiff who files an action in the circuit court against a state defendant is required to comply with MCL 600.6431, presented a matter of continuing public interest; there-

fore, for the sake of judicial economy, the Court of Appeals exercised its discretion to treat the appeal as on leave granted.

2. A plaintiff must comply with MCL 600.6431 when filing a claim against a state defendant in the Court of Claims. At issue in this case was whether a plaintiff must also comply with MCL 600.6431 when filing a claim against a state defendant in the circuit court. Before this question could be reached, however, it first had to be determined whether plaintiff was required to comply with MCL 600.6431 in order to pursue her claims against the defendants in this case—a state university and its employees. Under *Pike v Northern Mich Univ*, 324 Mich App 683 (2019), plaintiff was not required to comply with MCL 600.6431 with respect to her claims against state employees, regardless of where her claims were filed. However, *Pike* did not determine whether a plaintiff was required to comply with MCL 600.6431 with respect to their claims against a state institution. While MCL 600.6431 creates a condition precedent for bringing a claim against the state, the COCA, when read as a whole, and the placement of MCL 600.6431 in the statutory scheme suggested that the Legislature intended for MCL 600.6431 to apply only to claims brought in the Court of Claims. The sections immediately preceding and following MCL 600.6431 address powers and requirements that apply exclusively to the Court of Claims; it follows that the Legislature intended for MCL 600.6431 to be a notice requirement that applies only to claims filed in the Court of Claims. Further, the conclusion that MCL 600.6431 does not implicate governmental immunity supported the conclusion that MCL 600.6431 was limited to claims brought in the Court of Claims. Absent the Legislature's conditioning its consent to be sued on compliance with the COCA, compliance with the COCA, including MCL 600.6431, was a question of compliance with the rules of the forum; i.e., MCL 600.6431 requires compliance only for claims brought against state defendants in the Court of Claims. Therefore, a plaintiff who properly brought an action in circuit court against the state or a state defendant to whom MCL 600.6431 is applicable was not required to comply with MCL 600.6431 in order for their claim to proceed in that court.

Affirmed.

1. CIVIL ACTIONS — PERSONS WITH DISABILITIES CIVIL RIGHTS ACT — STATE DEFENDANTS — COURT OF CLAIMS ACT — GOVERNMENTAL IMMUNITY.

MCL 600.6431, a provision of the Court of Claims Act, MCL 600.6401 *et seq*., does not confer governmental immunity, although if the Legislature conditions the state's waiver of immu-

nity on a plaintiff's compliance with MCL 600.6431, then governmental immunity is implicated; the Legislature expressly waived governmental immunity for claims brought under the Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*., and it did not establish any conditions precedent to expose a state defendant to liability, such as compliance with MCL 600.6431; therefore, a plaintiff's failure to comply with MCL 600.6431 when bringing a PWDCRA claim does not implicate governmental immunity.

2. CIVIL ACTIONS — COURT OF CLAIMS ACT — STATE DEFENDANTS — CIRCUIT COURTS.

MCL 600.6431, a provision of the Court of Claims Act, MCL 600.6401 *et seq*., creates conditions precedent for bringing a claim against the state, but these conditions apply only to claims brought in the Court of Claims; unless the Legislature conditions its consent to be sued on compliance with MCL 600.6431, compliance with the Court of Claims Act is required only for claims brought against state defendants in the Court of Claims; therefore, a plaintiff who properly brings a claim in the circuit court against the state or a state defendant is not required to comply with MCL 600.6431 in order for the claim to proceed in the circuit court.

NachtLaw, PC (by *David A. Nacht* and *Adam M. Taub*) for Lana Tyrrell.

Thomas L. Kent for the University of Michigan.

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

O'BRIEN, J. At issue in this appeal is whether a plaintiff who files an action in circuit court against a state defendant is required to comply with MCL 600.6431(1) of the Court of Claims Act (COCA), MCL 600.6401 *et seq*. This, in turn, requires us to address whether compliance with MCL 600.6431(1) is a question of governmental immunity or a question of compliance with the rules for proceeding in the Court of Claims. For the reasons explained in this opinion, we conclude that compliance with MCL 600.6431(1) both

(1) does not implicate governmental immunity absent the Legislature conditioning its consent to be sued on compliance with the COCA, and (2) is only necessary for claims proceeding in the Court of Claims. We therefore affirm.

I. BACKGROUND

Plaintiff filed a complaint against defendants in circuit court alleging discrimination and retaliation in violation of Michigan's Persons with Disabilities Civil Rights Act (PWDCRA), MCL 37.1101 *et seq*. Defendants moved for summary disposition under MCR 2.116(C)(4) and (7), arguing that in order to maintain her claim against a state university and its employees, plaintiff had to comply with the requirements in MCL 600.6431(1), which plaintiff failed to do. According to defendants, plaintiff's failure to comply with MCL 600.6431(1) required dismissal of her claims. The trial court denied defendants' motion, and they now appeal.

II. JURISDICTION

Though defendants moved for summary disposition in part under MCR 2.116(C)(4), they do not contest the circuit court's jurisdiction to hear this case.[1] In fact, they concede on appeal that "the Court of Claims and the circuit courts have concurrent jurisdiction over statutory civil rights claims" like plaintiff's. See, e.g., *Doe v Dep't of Transp*, 324 Mich App 226, 238-239; 919 NW2d 670 (2018) (holding that because the plaintiff had a right to a jury trial in her civil rights claim

[1] In their reply brief on appeal, defendants contend that the Court of Claims had exclusive jurisdiction over some of plaintiff's claims, but we decline to address those arguments because, having been first raised in a reply brief, they are not properly before this Court. *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

against the state defendant, the circuit court retained jurisdiction by way of MCL 600.6421(1), while the Court of Claims had concurrent jurisdiction by way of MCL 600.6419). Therefore, the only question on appeal is whether defendants were entitled to summary disposition under MCR 2.116(C)(7).

Defendants appealed as of right the trial court's denial of their motion under MCR 2.116(C)(7). An order denying summary disposition under MCR 2.116(C)(7) is appealable to this Court as of right only if the order denied governmental immunity to a governmental party.[2] MCR 7.202(6)(a)(v); MCR 7.203(A)(1).

When defendants filed their appeal, they understandably believed that plaintiff's failure to comply with the requirements of MCL 600.6431(1) implicated governmental immunity. In *Progress Mich v Attorney General*, 324 Mich App 659, 666; 922 NW2d 654 (2018) (*Progress I*), rev'd *Progress Mich v Attorney General*, 506 Mich 74; 954 NW2d 475 (2020) (*Progress II*), this Court held that "[the] defendant's assertion that [the] plaintiff failed to comply with MCL 600.6431(1) does constitute a claim that [the] defendant was entitled to governmental immunity." This holding was the basis for defendants' appeal as of right.

Our Supreme Court, however, recently reversed *Progress I*. The *Progress II* Court questioned this

[2] A party can move for summary disposition under MCR 2.116(C)(7) for a number of reasons besides governmental immunity, including "release, payment, prior judgment, . . . statute of limitations, statute of frauds, an agreement to arbitrate or to litigate in a different forum, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." MCR 2.116(C)(7). In their brief on appeal, defendants at one point refer to the issue they raised in their dispositive motion as "a statute of limitations . . . challenge," which we assume is a mistake because a denial of such a motion is not appealable to this Court as of right.

Court's analysis of whether failure to comply with MCL 600.6431 implicated governmental immunity, but declined to decide the issue. In doing so, the *Progress II* Court reasoned, "Whether compliance with [MCL 600.6431] is properly considered a question of immunity or a question of compliance with the rules of the forum is a question of no moment because [the] plaintiff was required to comply with the COCA either way." *Progress II*, 506 Mich at 89. Though the Supreme Court did not expressly overrule the *Progress I* Court's holding that a failure to comply with MCL 600.6431(1) implicates governmental immunity, its reasoning effectively mooted the question and rendered this Court's discussion of whether MCL 600.6431 implicated governmental immunity to be without precedential value. See *Dunn v Detroit Auto Inter-Ins Exch*, 254 Mich App 256, 266; 657 NW2d 153 (2002) (holding that a Supreme Court decision reversing the Court of Appeals on a dispositive issue effectively "moot[s] any further question regarding" the issue and renders "any discussion" of the mooted question "by the Court of Appeals to be without precedential value").

Therefore, in light of *Progress II*, it is undecided whether a plaintiff's failure to comply with MCL 600.6431 of the COCA "is properly considered a question of immunity or a question of compliance with the rules of the forum . . . ." *Progress II*, 506 Mich at 89. Addressing this issue, we conclude that plaintiff's failure to comply with MCL 600.6431 in this case did not implicate governmental immunity, so the trial court's denial of defendants' motion under MCR 2.116(C)(7) was not appealable as of right.

A court is, at all times, required to question sua sponte its own jurisdiction. *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999). Whether this

Court has jurisdiction to hear an appeal is a question of law reviewed de novo. *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

"[T]he state is immune from suit unless, and only to the extent that, it consents to be sued[.]" *Progress II*, 506 Mich at 87. Our Supreme Court explained the reasoning for this in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 598; 363 NW2d 641 (1984), stating:

> From statehood forward, Michigan jurisprudence recognized that the sovereign (the state) was immune from *all* suits, including suits for tortious injuries which it had caused. The rationale for sovereign immunity was never grounded in a belief that the state could do no wrong. Rather, sovereign immunity existed in Michigan because the state, as creator of the courts, was not subject to them or their jurisdiction. As the Supreme Court stated in *Michigan State Bank v Hastings*, 1 Doug 225, 236 (Mich, 1844):
>
> > The principle is well settled that, while a state may sue, it cannot be sued in its own courts, unless, indeed, it consents to submit itself to their jurisdiction. * * * [A]n act of the legislature, conferring jurisdiction upon the courts in the particular case, is the usual mode by which the state consents to submit its rights to the judgment of the judiciary.
>
> Thus, 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. [Quotation marks omitted; alterations in original.]

"The Legislature can, and has, abrogated the state's sovereign immunity by enacting legislation consenting to suit." *Progress II*, 506 Mich at 87. As relevant to this case, the Legislature abrogated the state's sovereign immunity for claims brought under the PWDCRA by consenting in the text of the statute to suit against the

state and all governmental entities or agencies. The PWDCRA prohibits employers from taking certain discriminatory actions against persons with disabilities, see MCL 37.1202; the act defines "employer" as "a person who has [one] or more employees," MCL 37.1201(b); and the act defines "person" to include "this state, or any other legal, commercial, or governmental entity or agency," MCL 37.1103(g). Thus, the Legislature in the PWDCRA expressly waived governmental immunity for claims brought under the statute. See *In re Bradley Estate*, 494 Mich 367, 393 n 60; 835 NW2d 545 (2013) (explaining that the Legislature "expressly waiv[ed] governmental immunity" in the PWDCRA).

Despite the Legislature's having expressly waived governmental immunity for claims brought under the PWDCRA, defendants contend that they were immune from suit because plaintiff failed to comply with the requirements of MCL 600.6431. When plaintiff filed her complaint, MCL 600.6431(1) provided:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms, or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.[3]

In determining whether plaintiff's failure to comply with MCL 600.6431 implicates governmental immu-

[3] MCL 600.6431 was amended by 2020 PA 42, effective March 3, 2020, but that amendment did not change the pertinent language of the statute and, at any rate, is not relevant to this appeal.

nity, we find instructive *Fairley v Dep't of Corrections*, 497 Mich 290; 871 NW2d 129 (2015). In *Fairley*, the plaintiffs brought tort claims against governmental agencies, which implicated the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. *Fairley*, 497 Mich at 293-297. Under the GTLA, governmental agencies are broadly shielded from tort liability absent an exception. MCL 691.1407(1). The plaintiffs alleged that their claims were authorized under the GTLA because they fell within the motor vehicle exception in MCL 691.1405. *Fairley*, 497 Mich at 297. MCL 691.1410(1) of the GTLA provides, "Claims against the state authorized under this act shall be brought in the manner provided in [the Revised Judicature Act]," which includes MCL 600.6431. See *Fairley*, 497 Mich at 297. In this context, the *Fairley* Court explained that "while MCL 600.6431 does not confer governmental immunity, it establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431." *Id*. (quotation marks omitted). In other words, the *Fairley* Court explained that the plaintiffs' failure to comply with MCL 600.6431 implicated governmental immunity because the Legislature consented to suit under the GTLA only if the plaintiffs complied with MCL 600.6431.

In contrast to the GTLA, the PWDCRA does not incorporate MCL 600.6431. Instead, the Legislature in the PWDCRA waived governmental immunity without establishing any conditions precedent to successfully expose a state defendant to liability. As *Fairley* made clear, MCL 600.6431 does not itself confer governmental immunity. This makes sense because MCL 600.6431 is a notice provision, *McCahan v Brennan*, 492 Mich 730, 732; 822 NW2d 747 (2012), and as such "is a procedural rather than substantive rule," *Rusha v*

Dep't of Corrections, 307 Mich App 300, 310-311; 859 NW2d 735 (2014). If, as in *Fairley*, the Legislature conditions the state's waiver of immunity on a plaintiff's compliance with MCL 600.6431, then governmental immunity is implicated. If, however, the Legislature does not condition the state's waiver of immunity on a plaintiff's compliance with MCL 600.6431, then governmental immunity is not implicated.

Because the Legislature expressly waived governmental immunity in the PWDCRA, see *In re Bradley Estate*, 494 Mich at 393 n 60, the PWDCRA does not require compliance with MCL 600.6431 for a plaintiff to proceed with his or her claim against a state defendant, and "MCL 600.6431 does not confer governmental immunity," *Fairley*, 497 Mich at 297 (quotation marks omitted), plaintiff's failure to comply with MCL 600.6431 when bringing her PWDCRA claim does not implicate governmental immunity.[4] Therefore, the trial court's denial of defendants' motion for summary disposition under MCR 2.116(C)(7) was not "an order denying governmental immunity to a governmental party," MCR 7.202(6)(a)(v), and was therefore not a final judgment appealable as of right, MCR 7.203(A)(1). Because the trial court's order was not a

[4] This conclusion does not appear to be inconsistent with the *Progress I* Court's conclusion that failure to comply with MCL 600.6431 in a suit brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., implicates governmental immunity. See *Progress I*, 324 Mich App at 671. The Legislature in the FOIA requires a party proceeding against a state defendant to proceed in the Court of Claims, MCL 15.240(1)(b), and a party proceeding in the Court of Claims must comply with the COCA. Because the Legislature made compliance with the COCA a condition precedent to proceeding with a FOIA claim against a state defendant, compliance with the COCA in a FOIA action would seem to implicate governmental immunity, as the *Progress I* Court held. Despite this observation, we offer no opinion on whether this conclusion is correct because the FOIA is not at issue in this case and the *Progress II* Court mooted this portion of the *Progress I* Court's holding.

final order, defendants were required to appeal the order by leave granted, MCR 7.203(B)(1), which they failed to do. Accordingly, this Court does not have jurisdiction over this appeal. See *Detroit v Michigan*, 262 Mich App 542, 545; 686 NW2d 514 (2004).

Despite defendants' failure to properly appeal the trial court's order, the issue raised on appeal—whether a plaintiff proceeding in circuit court against a state defendant is required to comply with MCL 600.6431—presents a matter of significant public interest. Therefore, for the sake of judicial economy, we exercise our discretion to treat this appeal as on leave granted. See *Detroit*, 262 Mich App at 546.

III. MCL 600.6431

Though MCL 600.6431 does not necessarily implicate governmental immunity, the question remains whether a plaintiff must always comply with MCL 600.6431 when filing a claim against a state defendant. Obviously, a plaintiff must comply with MCL 600.6431 when filing a claim against a state defendant in the Court of Claims. See, e.g., *Progress II*, 506 Mich at 89. At issue in this case is whether a plaintiff must comply with MCL 600.6431(1) when filing a claim against a state defendant *in circuit court*. We conclude that the requirements in MCL 600.6431 do not apply to claims properly filed in circuit court.

A. *PIKE v NORTHERN MICH UNIV*

Before reaching this issue, however, it is necessary to address whether plaintiff needed to comply with MCL 600.6431 to pursue her claims against the type of defendants in this case—a public university and its employees—in light of this Court's opinion in *Pike v*

Northern Mich Univ, 327 Mich App 683; 935 NW2d 86 (2019). In *Pike*, the plaintiff was injured while climbing a rock wall blindfolded under the instruction of Peter Bosma, an employee of Northern Michigan University (NMU). *Id*. at 687-688. The plaintiff brought suit against NMU and Bosma. *Id*. at 688. The Court of Claims granted summary disposition to Bosma because the plaintiff failed to satisfy the requirements in MCL 600.6431. *Id*. at 689-690. This Court reversed, holding that the plaintiff was not required to comply with the requirements in MCL 600.6431 when pursuing her claim against Bosma, a state employee, because MCL 600.6431 did not apply to such claims. *Id*. at 698.

Pursuant to *Pike*, plaintiff was not required to comply with MCL 600.6431 for her claims against the state-employee defendants in this case, regardless of where her claims were filed. *Pike*, however, did not address whether the plaintiff was required to comply with MCL 600.6431 for her claims against NMU—a state "institution" under MCL 600.6431. See *Pike*, 327 Mich App at 698. Therefore, *Pike* is not dispositive of whether plaintiff here was required to comply with MCL 600.6431 with regard to her claims against defendant University of Michigan (U of M), a state institution.

We note, however, that certain statements from *Pike* could be construed as providing that the requirements of MCL 600.6431 apply only to claims against "the State of Michigan" to the exclusion of claims against any other state-related entity, such as claims against a state institution. See, e.g., *Pike*, 327 Mich App at 697 ("By referring to first 'the state' and then its various subdivisions, the Legislature clearly intended that a claim against 'the state' be something different than a claim against a department, commission, board, insti-

tution, arm, or agency of the state."); *id*. at 698 ("Although it might seem improbable that the Legislature intended MCL 600.6431 to only apply to claims against 'The State of Michigan,' [i]f this is not what the Legislature intended by its use of different terms in the two provisions, it is up to the Legislature to amend accordingly and it is not a matter for this Court.") (some quotation marks and citation omitted; alteration in original). To the extent that statements from *Pike* suggest that a plaintiff need not comply with MCL 600.6431 for a claim against a state institution, the statements are clearly obiter dictum. "It is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta and lack the force of an adjudication." *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 558; 25 NW2d 613 (1947) (quotation marks and citation omitted). The *Pike* Court only decided whether a plaintiff was required to comply with the requirements in MCL 600.6431 when filing a claim against a state employee; "any statements and comments" in *Pike* concerning whether a plaintiff was required to comply with the requirements in MCL 600.6431 when filing a claim against any of the state's departments, commissions, boards, institutions, arms, or agencies were not necessarily involved or essential to its holding and were therefore obiter dictum. See *McNally*, 316 Mich App at 558.

Turning back to the case now before us, we need not resolve the issue left open by *Pike*, and we note only that *Pike* is not dispositive of the issue in this case. Rather, we hold that regardless of whether a plaintiff needs to comply with the requirements of MCL 600.6431 to pursue a claim against any of the state's

departments, commissions, boards, institutions, arms, or agencies when proceeding *in the Court of Claims*, a plaintiff does not need to comply with the requirements of MCL 600.6431 when proceeding against such defendants *in circuit court*.

B. COMPLIANCE WITH THE COCA IN CIRCUIT COURT

As stated earlier in this opinion, when plaintiff filed her claims, MCL 600.6431(1) provided:

> No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms, or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

The question before us is whether plaintiff was required to comply with MCL 600.6431(1) when filing her claim against U of M, a state institution, in circuit court. This requires us to interpret MCL 600.6431(1). Issues of statutory interpretation are reviewed de novo. *Farris v McKaig*, 324 Mich App 349, 352-353; 920 NW2d 377 (2018).

To properly interpret a statute, we must discern and give effect to the Legislature's intent. *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 631; 563 NW2d 683 (1997). The most reliable evidence of the Legislature's intent is the language used in the statute itself. *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). If the words of the statute are unambiguous, no judicial interpretation is permitted.

Id. But if the words are ambiguous, a court may "go beyond the words of the statute to ascertain legislative intent." *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "When considering the correct interpretation, the statute must be read as a whole," *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012), giving consideration to the statute's "placement and purpose in the statutory scheme," *Sun Valley Foods*, 460 Mich at 237 (quotation marks and citation omitted).

The language in MCL 600.6431 providing that "[n]o claim may be maintained against the state unless" the claimant adheres to the listed procedural requirements clearly creates a condition precedent for bringing a claim against the state. See *Fairley*, 497 Mich at 292. Yet it is unclear from the text of MCL 600.6431 whether the Legislature's intent was that no claim may be maintained against the state *in any court in the state* unless the listed conditions were met, or whether the Legislature's intent was that no claim may be maintained against the state *in the Court of Claims* unless the conditions were met.

The COCA, when read as a whole, and the placement of MCL 600.6431 in the statutory scheme suggest that the Legislature intended for MCL 600.6431 to apply only to claims brought in the Court of Claims. The section immediately preceding MCL 600.6431 is MCL 600.6428, which grants the Court of Claims the same power to subpoena witnesses and punish for contempt as circuit courts. The section immediately following MCL 600.6431 is MCL 600.6434, which establishes the pleading and service requirements for claims filed in the Court of Claims. It follows that the Legislature intended for MCL 600.6431—the section between MCL 600.6428 (addressing certain powers of

the Court of Claims) and MCL 600.6434 (addressing requirements applicable to *the Court of Claims*)—to be a notice requirement that applies to claims filed in *the Court of Claims*. Indeed, the notice required by MCL 600.6431 must be filed "in the office of the clerk of the court of claims." MCL 600.6431(1). It also bears noting that it would make little sense for the Legislature to intend for a law placed in the middle of the "the court of claims act," MCL 600.6401, and sandwiched between two Court-of-Claims-specific laws, to be applicable to claims filed *in any court in the state*. As our Supreme Court has observed, "We do not rewrite statutes, but it is elementary that the rules of common sense shall apply to the construction of statutes." *Attorney General ex rel Connolly v Reading*, 268 Mich 224, 230; 256 NW 432 (1934).

Moreover, on the basis of our earlier conclusion that compliance with MCL 600.6431 does not implicate governmental immunity in this case, it follows that MCL 600.6431 is limited to claims brought in the Court of Claims. As explained before, the premise of governmental immunity is that the sovereign, having created the courts, is not subject to their jurisdiction absent consent. *Ross*, 420 Mich at 598. In keeping with this concept, the sovereign can place conditions on the suits it permits to be brought against itself. See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212; 731 NW2d 41 (2007). See also *Garrett v United States*, 640 F2d 24, 26 (CA 6, 1981) ("A corollary to this doctrine of governmental immunity is that, when the United States consents to be sued, Congress may define the conditions under which suits will be permitted."). The Legislature in the PWDCRA expressly consented to suit, see *In re Bradley Estate*, 494 Mich at 393 n 60, but it did not condition that consent on compliance with MCL 600.6431. Yet MCL 600.6431 *does* create a condi-

tion precedent for bringing a claim against certain state defendants. See *Fairley*, 497 Mich at 292. It does not, however, confer governmental immunity. See *id*. at 297. Then what does compliance with MCL 600.6431 implicate? Absent the Legislature's conditioning its consent to be sued on compliance with the COCA, see, e.g., *id*. at 297-298, compliance with the COCA, including MCL 600.6431, is "a question of compliance with the rules of the forum," *Progress II*, 506 Mich at 89, meaning that MCL 600.6431 requires compliance only for those claims brought against state defendants *in the Court of Claims*.

This conclusion—that MCL 600.6431 does not apply to claims filed in circuit court—finds support in *Doe*, 324 Mich App 226. In that case, the plaintiff filed her claim in circuit court in 2015. *Id*. at 228. In 2017, the defendant filed a notice of transfer to the Court of Claims, which automatically transferred the case. *Id*. On the same day, the defendant moved for summary disposition in the Court of Claims, arguing that dismissal was required because plaintiff had failed to follow the requirements in the COCA for filing a claim against a state defendant. See *id*. The plaintiff, in response, requested transfer back to the circuit court, and the Court of Claims granted plaintiff's transfer request. *Id*. The question in *Doe* was whether the Court of Claims erred by transferring the case back to the circuit court, and this Court concluded that it did not. *Id*. at 229, 239. In a footnote, this Court addressed the defendant's argument that the plaintiff had failed to follow the requirements of the COCA, stating, "Because the Court of Claims properly transferred the case back to the circuit court, [the] defendant's argument that [the] plaintiff did not follow the procedures necessary to proceed in the Court of Claims is moot and this Court need not address it." *Id*. at 239 n 4. While

not dispositive, this suggests the conclusion that a plaintiff need not comply with the requirements in the COCA to proceed with a claim against the state or a state agency in circuit court.

In sum, absent the Legislature's conditioning its consent to suit on compliance with the COCA, a plaintiff properly bringing a claim in circuit court against the state or a state defendant to which MCL 600.6431 applies is not required to comply with MCL 600.6431 for his or her claim to proceed in that court.

IV. CONCLUSION

For the reasons explained in this opinion, plaintiff's failure to comply with MCL 600.6431 did not implicate governmental immunity, and therefore the trial court's order denying defendants' motion for summary disposition under MCR 2.116(C)(7) was not appealable as of right. Despite defendants' failure to appeal the trial court's order by leave granted, we consider defendants' argument that plaintiff was required to comply with MCL 600.6431 to proceed with her claim in circuit court. On that issue, we hold that absent the Legislature's conditioning its consent to be sued on compliance with the COCA, a plaintiff bringing a claim in circuit court against a state defendant is not required to comply with MCL 600.6431.

Affirmed.

GADOLA, P.J., and RONAYNE KRAUSE, J., concurred with O'BRIEN, J.

In re JANKOWSKI

Docket No. 348760. Submitted November 10, 2020, at Lansing. Decided November 19, 2020. Approved for publication December 29, 2020, at 9:00 a.m.

The Department of Licensing and Regulatory Affairs (LARA), through its Bureau of Professional Licensing, filed an administrative complaint against David P. Jankowski, D.O., asserting that he violated MCL 333.16221(a) (negligence or failure to exercise due care), (b)(*i*) (incompetence), (b)(*vi*) (lack of good moral character), and (c)(*iv*) (prescribing or administering drugs for other than lawful diagnostic or therapeutic purposes). LARA asserted in the complaint that respondent's prescribing practices, patient treatments, and documentation practices violated those provisions of the Public Health Code, MCL 333.1101 *et seq*., specifically with regard to respondent's treatment of chronic-pain patients with controlled substances. The parties' experts disagreed on the applicable standard of care for treating patients with chronic pain. Both the pharmacy specialist who investigated respondent's practices and LARA's expert physician testified about the 2016 guideline established by the Centers for Disease Control and Prevention (CDC) for prescribing opioids for chronic pain (the CDC Guideline). According to LARA's expert physician, the CDC Guideline was the relevant voluntary standard of care for primary care physicians prescribing controlled substances, and respondent did not meet that applicable standard of care. According to respondent's expert, the CDC Guideline was merely a guide for primary care physicians, not the applicable standard of care; instead, the standard involved patient treatment and management on an individualized basis, and respondent's treatment of patients fell within that minimal standard. In his proposal for decision, the administrative law judge (ALJ) found that respondent had committed the charged offenses, reasoning that although the experts disagreed regarding the applicable standard of care, the CDC Guideline was, in fact, the correct standard of care for the relevant period. The disciplinary subcommittee of the Board of Osteopathic Medicine and Surgery, operating within LARA's Bureau of Processional Licensing, adopted the ALJ's proposal for decision and suspended respondent's medical license for three years, in addition to requiring him to apply for reinstatement of his license after the suspension lapsed

and to pay a fine before seeking reinstatement. Respondent appealed.

The Court of Appeals *held*:

A disciplinary subcommittee may rely on its own expertise in determining violations of the Public Health Code. Therefore, a disciplinary subcommittee does not require expert testimony to determine that a respondent was negligent or lacking in good moral character when the conduct at issue lacks basic elements of professional integrity. MCL 333.16221(c)(*iv*) prohibits the selling, prescribing, giving away, or administering of drugs for other than lawful diagnostic or therapeutic purposes. Failing to meet the minimal standard of care for prescribing and related care constitutes "other than lawful diagnostic or therapeutic purposes"; accordingly, a finding of bad intent or ill-gotten gain is not required to establish a violation of Subdivision (c)(*iv*). In this case, the combined testimony of LARA's experts supported a conclusion that the CDC Guideline was the accepted standard of care for prescribing pain medication at the relevant time, including for pain-management physicians. A totality of the evidence established that respondent failed to meet that standard of care in his practice and with regard to certain patients. That determination was not disturbed because the ALJ's finding involved a credibility determination and courts do not generally disturb such findings. A review of the totality of the evidence established that there was sufficient competent, material, and substantial evidence on the record to support the ALJ's and the disciplinary subcommittee's ruling that respondent violated MCL 333.16221(a), (b)(*i*), (b)(*vi*), and (c)(*iv*).

Affirmed.

1. ADMINISTRATIVE LAW — PUBLIC HEALTH — LICENSED PROFESSIONALS — DISCIPLINARY SUBCOMMITTEES.

A disciplinary subcommittee may rely on its own expertise to determine whether the Public Health Code has been violated; a disciplinary subcommittee does not require expert testimony to determine that a respondent was negligent or lacking in good moral character when the conduct at issue lacks basic elements of professional integrity (MCL 333.1101 *et seq*.; MCL 333.16221(a) and (b)(*vi*)).

2. ADMINISTRATIVE LAW — PUBLIC HEALTH — LICENSED PROFESSIONALS — "LAWFUL DIAGNOSTIC OR THERAPEUTIC PURPOSES" — REQUIREMENTS — STANDARD OF CARE — INTENT NOT A REQUIRED ELEMENT.

MCL 333.16221(c)(*iv*) prohibits the selling, prescribing, giving away, or administering of drugs for other than lawful diagnostic

> or therapeutic purposes; failing to meet the minimal standard of care for prescribing and related care constitutes "other than lawful diagnostic or therapeutic purposes"; a finding of bad intent or ill-gotten gain is not required to establish a violation of Subdivision (c)(*iv*).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Jennifer Fitzgerald* and *Timothy C. Erickson*, Assistant Attorneys General, for petitioner.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*) for respondent.

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

PER CURIAM. Respondent appeals as of right a final order issued by the Board of Osteopathic and Surgical Medicine Disciplinary Subcommittee, which operates under the Bureau of Professional Licensing within the Michigan Department of Licensing and Regulatory Affairs (LARA). The disciplinary subcommittee concluded that respondent violated MCL 333.16221(a) (negligence or failure to exercise due care), (b)(*i*) (incompetence), (b)(*vi*) (lack of good moral character), and (c)(*iv*) (prescribing or administering drugs for other than lawful diagnostic or therapeutic purposes), all of which are provisions of the Public Health Code, MCL 333.1101 *et seq*. As a result, the subcommittee fined respondent $25,000 and suspended his license to practice medicine for three years. We affirm.

I. BACKGROUND

In June 2017, the Bureau of Professional Licensing filed an administrative complaint against respondent, a licensed osteopathic physician. The complaint alleged that respondent's prescribing practices, patient

treatments, and documentation practices violated the Public Health Code. More specifically, the four-count complaint indicated that the Michigan Automated Prescription System (MAPS), a database used to track controlled substances, reflected that from January 1, 2015, through June 19, 2017, respondent wrote 23,906 controlled-substance prescriptions, more than 70% of which were for certain commonly abused and diverted controlled substances, and he dispensed nearly 21% of the prescriptions he wrote in 2016 and nearly 17% in 2017. The complaint further outlined observations made following a review of the records regarding respondent's care of nine specific patients during the same time frame, and it alleged that defendant had committed the outlined violations.

Several witnesses testified at hearings held between August 2017 and August 2018. Pharmacy specialist investigator Janice Waldmiller, who was involved in the investigation into respondent's prescribing practices, testified that of the over 50,000 prescribers in Michigan, respondent was the 73rd highest prescriber of all controlled substances in 2015 and was 58th in 2016. Waldmiller further testified that "highly abused and diverted medications," including oxymorphone, OxyContin, oxycodone-acetaminophen, alprazolam, Clonazepam, Hydrocodone, Percocet, and Norco, comprised over 75% of respondent's overall controlled-substance prescribing in 2015 and over 71% in 2016 through August 25. Waldmiller also noted instances of patients receiving controlled substances from multiple physicians, the amount of medications prescribed, and drug-screen results that were inconsistent with medications the patients received from pharmacies. Waldmiller explained that these practices were inconsistent with a guideline issued by the Centers for Disease Control and Prevention (CDC) in 2016, which "indicated that less

than 15 morphine equivalent dosing [(MED)] was appropriate. But anything greater than 90 [MED], the practitioner should weigh . . . the risks and benefits . . . because that's where we get into potential overdose due to respiratory depression." Waldmiller also noted that the number of prescriptions respondent wrote for abused and diverted drugs decreased after an investigation was started.

David Cooke, M.D., was certified by the American Board of Internal Medicine and spent "approximately two-thirds of [his] time in general internal medicine primary care practice and approximately one-third of [his] time in specialty pain management care through the University of Michigan Anesthesia Back and Pain Center." He acknowledged that he was not a member of the American Pain Society or the American Academy of Pain Medicine and that he did not practice interventional pain medicine. Dr. Cooke indicated that the 2016 CDC guideline—titled the Guideline for Prescribing Opioids for Chronic Pain (the CDC Guideline)—was "currently the most authoritative statement" in regard to a standard of care for prescribing controlled substances in Michigan for the period at issue. He explained that the CDC was not the first organization to make the recommendations, but was the most recent; that the CDC Guideline memorialized what had been the standard of care for prescribing controlled substances for at least the previous five years; and that the principles underlying the CDC Guideline had also been previously published in leading medical journals. He suggested that the CDC Guideline contained voluntary rather than prescriptive standards based on emerging evidence, and he recognized that it was intended for primary care physicians treating patients with chronic pain in outpatient settings. He was not aware of whether the CDC Guideline had been adopted by

LARA, the Michigan Board of Medicine, the Michigan Board of Osteopathic Medicine and Surgery, the American Pain Society, the American Academy of Pain Medicine, the American Society of Anesthesiologists, or the Federation of State Medical Boards. Moreover, Dr. Cooke agreed that one of the recommendations in the CDC Guideline was that a primary care physician consult with a pain-management specialist before prescribing controlled substances exceeding 90 MED.

Dr. Cooke indicated that, generally, prescribers should be cautious about escalating to higher doses of opioids because increased doses placed patients at higher risk and that a physician should avoid prescribing benzodiazepines with opioids and other respiratory depressants. He testified that the CDC Guideline indicated that a doctor should rarely prescribe amounts exceeding 90 MED and should do so only after careful consideration and documentation of the reasons. Dr. Cooke explained that a physician must carefully consider and document the risks and benefits of, and the patient's response to, the medications. He further explained that studies had shown a clear relationship between opioid risk and death and relationships between the use of multiple respiratory suppressants and death. He also stated: "The risk to the patient is much higher when a patient is taking both a benzodiazepine and an opioid in combination. They both depress the drive to breathe. When you start adding in higher doses of multiple drugs from each class . . . , the risk goes up exponentially." He clarified that the "[r]isk of death increases as MED increases as well as the number and doses of other respiratory depressants such as Xanax, Soma, and others are added in. They all progressively increase risk and that is true whether the patient is tolerant or not."

Dr. Cooke opined that respondent did not meet the applicable standard of care for prescribing pain medication. More specifically, he found some of respondent's initial and subsequent evaluations of the nine patients insufficient, and he did not see evidence of comprehensive treatment plans. Moreover, he opined that respondent prescribed opioids in very high and potentially fatal doses that were above the recommended limits in the CDC Guideline and failed to properly document the rationale for the prescriptions. Also, he expressed concern about the combination of drugs that respondent was prescribing or that his patients were otherwise taking, noting that nearly all the subject patients were receiving at least three different controlled substances and, in some cases, five or six different prescriptions. He was concerned that there was no documentation showing that respondent and the patient recognized the risks of combining the prescribed medications. However, Dr. Cooke also observed that between 2015 and June 2017, there was a "substantial decrease" in the amount of benzodiazepine and carisoprodol prescriptions issued by respondent. He further noted that in several cases, although he did not see evidence that the patients had improved in a meaningful way, medications were continued or escalated. Dr. Cooke testified that he would have expected to see documented reasons for changing medications when that occurred. Also, he noted that several patients had instances in which drug-screen results were not consistent with what had been prescribed or showed the presence of illicit drugs.

Respondent's expert, Thomas Nabity Jr., M.D., had practiced pain medicine and physical medicine rehabilitation since 2006 and was board-certified in physical medicine and rehabilitation and in the subspecialty of pain medicine. He worked for the Michigan Neurol-

ogy Association, where about 90% of his patients had pain complaints. He testified that he was familiar with the medical literature and research regarding the treatment and care of patients with chronic pain and explained that in treating a chronic-pain patient, a physician had to consider how to combat a patient's pain while taking into consideration issues of misuse and addiction. According to Dr. Nabity, this process included identifying patients who had painful disorders, whether through trauma or occurring over time; identifying a diagnosis; working through the risks and benefits of the prescription for the patient; and incorporating drug therapy into a comprehensive plan that considered behavioral therapy, interventional pain, procedures, nonopiate alternative pain medication, and lifestyle changes. Dr. Nabity noted that because of the subjective nature of pain, physicians had little evidence to guide them about dosing strategies for prescribing opioids for chronic-pain therapy.

Dr. Nabity testified that he was familiar with different recommendations as to limiting dosages, such as those identified by the American Society of Interventional Pain Physicians (ASIPP), the American Pain Society, the CDC Guideline, and different insurance companies. He indicated that ASIPP's recommendation of 300 MED was the highest dose, while the CDC Guideline's recommendation of 90 MED was the lowest. However, he indicated that there was disagreement about the importance or validity of the MED standard, and he opined that the standard of care for treating chronic pain did not have a high dose limit. He indicated that when he first began practicing medicine, the standard was that opiates were the last line of treatment and that a physician would start by prescribing low doses and titrate upward until the pain was controlled, but that over time there had been a

change in the standard of care with regard to MED levels, and continuing to escalate dosages of opiates until pain relief was achieved was no longer the standard of care. He claimed that the absolute MED limit was still being debated. He also opined that the standard of care allowed use of benzodiazepines on a long-term basis in chronic-pain patients.

Dr. Nabity suggested that the CDC Guideline and the standard of care were not the same thing; the CDC Guideline consisted merely of recommendations based on a review of a large number of patients in large numbers of situations, whereas the standard of care was an acceptable practice regarding how *an individual* was treated and his or her pain managed. He noted that the CDC Guideline was a voluntary recommendation rather than a prescriptive standard and that the guideline was intended for primary care physicians. He suggested that the CDC Guideline was merely a guide for the change in prescribing practices.

According to Dr. Nabity, respondent's treatment for each of the nine patients and his documentation in the patient charts fell within the standard of care applicable during the time of care. He described the nine patients as "very complicated" cases, all involving chronic pain, and he stated that all but one of the patients had suffered traumatic injuries. He noted that each of the patients had a history of multiple surgeries and that chronic-pain patients often also experienced anxiety and depression. He further noted that the patient records contained lab tests, drug screens, diagnostic imaging, neuropsychological exams, and referrals to various specialists. He opined that this information suggested that respondent was following a comprehensive treatment plan, including a full exploration of available treatment options, and was not

simply prescribing medications to his patients. Dr. Nabity also noted that respondent regularly checked reports from MAPS before patients were started on opiates.

Dr. Nabity also testified that respondent's controlled-substance agreement form contained informed-consent information discussing the fact that his treatments were performed to assist in pain control, that there were risks associated with treatment, and that patients were required to comply with certain expectations to maintain their pain-medication prescriptions. He opined that this was sufficient evidence to support a conclusion that respondent's patients were aware of potential risks. Dr. Nabity stated that, in his opinion, there was no evidence presented that any of respondent's patients had experienced respiratory depression or overdose, and there was evidence that only one patient showed addictive behavior, which respondent addressed by terminating care. Dr. Nabity further noted that within the previous year, respondent had worked to bring prescription levels down and had also sought additional consultations to assist individual patients. Dr. Nabity opined that it was reasonable for respondent to make changes to medications after considering the patients' conditions; he stated that finding a balance that worked for each patient was more important than the level of MED prescribed.

Dr. Nabity testified that a pain-management physician should stop prescribing controlled substances when there are inconsistencies in drug-screen results if the provider believes that the harm outweighs the benefit derived from the prescription. Moreover, he indicated that when a drug screen identifies an illicit drug, the appropriate response is a discussion with the patient and a referral to a substance-abuse specialist.

On the basis of his review of the medical records, Dr. Nabity opined that respondent met the minimal standards of care. Dr. Nabity disagreed with Dr. Cooke's suggestion that respondent's initial history taking for the patients was deficient and with Dr. Cooke's assessment that the records lacked clinical rationales and decisions. He opined that the charting was sufficient to assess whether the patients had received functional benefit from controlled substances. He also noted that respondent had recommended neuropsychological and surgical consultations when appropriate.

Following the hearings, the administrative law judge (ALJ) issued his proposal for decision, concluding that respondent was subject to discipline under MCL 333.16221(a) (negligence or failure to exercise due care), (b)(*i*) (incompetence), (b)(*vi*) (lack of good moral character), and (c)(*iv*) (prescribing or administering drugs for other than lawful diagnostic or therapeutic purposes). The ALJ made specific findings of fact with respect to each of the nine patients. With regard to the standard of care, the ALJ recognized the differing expert opinions but stated, "The CDC Guideline and the underlying studies reference[d] therein reflect the standard of care for a pain management doctor during the same time periods relevant to this case." The ALJ found that respondent had "made significant changes in his prescribing practices starting in September 2016 through September 2017, during which time he wrote fewer prescriptions for controlled substances and reduced dosages for some patients." The ALJ specifically determined that respondent violated MCL 333.16221(a) and (b)(*i*), but not solely for writing prescriptions that exceeded 90 or 120 MEDs; rather, the violation was for failing to document his underlying rationale for exceeding those thresholds and for writing combination prescriptions. The ALJ noted that all nine patients had also

been prescribed a benzodiazepine along with the opioids, and none of the medical records included documentation about the inherent risk of this combination. According to the ALJ, this "strongly supports" a conclusion that respondent violated the standard of care requiring documented reasoning for both prescribing chronic opioid therapy in high doses, along with benzodiazepines, and in some cases multiple other controlled substances. The ALJ noted that as of 2010, and certainly after March 2016, the literature was well established regarding the dangers of MEDs greater than 120, with or without other controlled substances.

The ALJ further concluded that "the totality of the evidence" supported a finding that respondent lacked good moral character because he ranked in the top 30 prescribers statewide for several commonly abused and diverted controlled substances while only working 25 to 30 hours per week. And in 2015, respondent wrote an average of approximately 200 controlled-substance prescriptions each week. The ALJ noted that respondent prescribed opioids and benzodiazepines for a relative without assessing him for substance abuse, reviewing his MAPS reports, or administering urine drug screens, and injected him with testosterone without testing to determine a need for the treatment. Finally, the ALJ concluded that the high doses of opioids with benzodiazepines and other dangerous combinations of drugs were not for legitimate therapeutic purposes. This conclusion was based on respondent's persistent disregard of the risks inherent in his prescribing practices and the lack of documentation regarding those risks or their disclosure to his patients.

The disciplinary subcommittee entered a final order adopting the ALJ's proposal for decision. In addition to

suspending respondent's medical license for three years for violating MCL 333.16221(a), (b)(*i*), (b)(*vi*), and (c)(*iv*), the subcommittee required that respondent apply for reinstatement of his license and pay a $25,000 fine before doing so. This appeal followed.

II. STANDARD OF REVIEW

This Court reviews a final order in a disciplinary case under the Public Health Code as follows:

> "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." [*Dep't of Community Health v Risch*, 274 Mich App 365, 371; 733 NW2d 403 (2007), quoting Const 1963, art 6, § 28.]

"When reviewing whether an agency's decision was supported by competent, material, and substantial evidence on the whole record, a court must review the entire record and not just the portions supporting the agency's findings." *Risch*, 274 Mich App at 372. Evidence is substantial if a reasonable mind would accept it as "sufficient to support a conclusion." *Id*. Substantial evidence requires "more than a scintilla of evidence," but "may be substantially less than a preponderance." *Id*. (quotation marks and citation omitted). However, this Court generally will not disturb administrative findings of fact, especially when they are based on credibility determinations, "because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Id*.

Indeed, this Court "may not set aside factual findings supported by the evidence merely because alternative findings could have been supported by evidence on the record . . . ." *Id*. at 373. "Moreover, an appellate court must generally defer to an agency's administrative expertise." *Dep't of Community Health v Anderson*, 299 Mich App 591, 598; 830 NW2d 814 (2013).

III. ANALYSIS

Respondent first argues that the disciplinary subcommittee's final order should be reversed because absent any expert testimony or evidence as to "the actual, relevant and applicable standard of care and how that standard was breached, there was no competent, material, and substantial evidence on which the Disciplinary Subcommittee could have ruled that [respondent] violated the Public Health Code in any way." The crux of respondent's argument is that the CDC Guideline and other literature cited by Dr. Cooke as the applicable standard of care apply to primary care physicians and not chronic-pain-management practitioners like respondent. This argument is unavailing.

We first note that the CDC Guideline was not admitted at any time during these proceedings. Nonetheless, neither party disputes that it is intended for primary care physicians. The issue at hand, therefore, is whether it also applies to pain-management physicians with respect to the prescribing of pain medication.

All information relevant to the CDC Guideline was presented via testimony. Dr. Cooke indicated that the CDC Guideline was not the first or only recommendation, but was the most recent. He further indicated that the CDC Guideline memorialized what had been the standard of care for prescribing controlled sub-

stances for at least the previous five years and that the principles underlying the CDC Guideline had also been previously published in leading medical journals. Moreover, Dr. Cooke recognized that although other guidelines existed, it was clear that prescribers should be cautious about escalating to higher doses of opioids because increased doses placed patients at higher risk, and that a physician should avoid prescribing both benzodiazepines and opioids or other respiratory depressants. Dr. Cooke testified that the CDC Guideline indicated that a doctor should rarely prescribe amounts exceeding 90 MED and should do so only after careful consideration and documentation of the reasons. He also explained that a physician must carefully consider and document the risks, benefits, and patient's response to medications. Additionally, throughout these proceedings, pharmacy specialist Waldmiller testified that the CDC Guideline served as a guide when she reviewed prescribing practices of physicians. The combined testimony of Dr. Cooke and Waldmiller supports a conclusion that the CDC Guideline was the accepted standard of care regarding prescribing pain medication at the relevant time.

On the other hand, Dr. Nabity testified that he was aware of the CDC Guideline and the industry's evolution toward caps on pain medication. Nonetheless, he suggested that the Guideline was not in place during respondent's treatment of the nine patients whose records he reviewed. He described a standard of care that followed very loose guidelines and allowed virtually unlimited doses of pain relief as well as drug combinations.

The ALJ recognized the differing expert opinions but stated, "The CDC Guideline and the underlying studies reference[d] therein reflect the standard of care for

a pain management doctor during the same time periods relevant to this case." This conclusion indicated that the ALJ found Dr. Cooke's and Waldmiller's testimony credible in terms of what standard was applicable during the relevant time frame. As already noted, this Court generally will not disturb administrative findings when they are based on credibility determinations "because it is not the function of a reviewing court to assess witness credibility or resolve conflicts in the evidence." *Risch*, 274 Mich App at 372.

Our review of the ALJ's determination reflects that the ALJ's analysis was consistent with the use of the CDC Guideline as a benchmark to evaluate respondent's conduct. Following his review of the record and testimony, the ALJ determined that respondent did not adequately justify concurrent prescriptions, did not adequately address the risk of abuse or diversion with patients, and failed to justify the high level of medications he prescribed. Those conclusions are supported by Dr. Cooke's testimony. Moreover, a disciplinary subcommittee may rely on its own expertise in determining whether the Public Health Code has been violated. *Anderson*, 299 Mich App at 600. In that regard, this Court has previously concluded that a disciplinary subcommittee does not require expert testimony to determine that a respondent was negligent or lacking in good moral character when the conduct at issue lacked basic elements of professional integrity. *Sillery v Bd of Med*, 145 Mich App 681, 688-689; 378 NW2d 570 (1985). Therefore, even without Dr. Cooke's testimony, the disciplinary subcommittee could have determined, using its own expertise, that the evidence demonstrated that respondent engaged in violations of the Public Health Code. The subcommittee's decision was supported by competent, material, and substantial evidence on the record.

Respondent argues that the final order is not supported by competent, material, and substantial evidence to establish that he violated MCL 333.16221(a) or (b)(*i*) through negligence and incompetency because the record amply supports that respondent exercised due care in treating his patients and in documenting their care. We disagree.

MCL 333.16221(a) provides:

> 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.

"Negligence is a well-recognized legal concept which describes conduct that falls below a standard of reasonable or due care. A failure to exercise due care contemplates an abdication of responsibilities or carelessness in executing one's duties." *Sillery*, 145 Mich App at 686 (citation omitted). Further, MCL 333.16221(b)(*i*) authorizes disciplinary action for incompetence. "Incompetence" is defined as "a departure from, or failure to conform to, minimal standards of acceptable and prevailing practice for a health profession, whether or not actual injury to an individual occurs." MCL 333.16106(1).

The crux of respondent's argument is that the standard of care adopted by the ALJ was incorrect. On that basis, respondent argues that Dr. Nabity's testimony about the ways in which respondent met the standard of care was sufficient to establish that respondent was not negligent or incompetent. However, as noted earlier, this Court defers to the ALJ's credibility determi-

nation. Furthermore, Dr. Cooke presented significant testimony regarding various concerns regarding respondent's failure to adequately justify concurrent prescriptions, to address the risk of abuse or diversion with patients, and to justify changes and high levels of medications prescribed. Dr. Cooke's testimony, coupled with the ALJ's own conclusions, establishes that sufficient competent evidence was presented to establish that respondent violated MCL 333.16221(a) and (b)(*i*), so as to support the subcommittee's final order.

Respondent further argues that the final order is not based on sufficient competent evidence to establish that he lacked good moral character, thereby violating MCL 333.16221(b)(*vi*). "Good moral character" means "the propensity on the part of the person to serve the public in the licensed area in a fair, honest, and open manner." MCL 338.41(1). Respondent asserts that the ALJ's conclusion that he lacked good moral character was based only on statistical data that respondent ranked in the top 30 prescribers statewide for several commonly abused and diverted controlled substances. Respondent asserts that this fact does not support the ALJ's conclusion because a pain-management physician would be more likely than other providers to prescribe controlled substances and treat a population with significant medical conditions. However, this argument ignores the ALJ's conclusion that respondent demonstrated a lack of good moral character when he prescribed opioids and benzodiazepines to his relative without assessing for substance abuse, reviewing MAPS, or administering drug screens. Further, the ALJ noted that respondent injected his relative with testosterone without testing to determine the need for the injection and that he continued to prescribe medications to patients despite numerous inconsistent urine drug-screen results showing the medications

were not being taken. The ALJ concluded that respondent "demonstrate[d] a pattern of prescribing practices, lack of documentation, and a disregard for the significant risks to his patients" that demonstrated a lack of openness and honesty. Given the ALJ's multiple reasons for concluding that respondent lacked good moral character and the support in the medical records for these reasons, we hold that the ALJ's conclusion was supported by sufficient competent evidence.

Lastly, respondent argues that competent, material, and substantial evidence did not establish that he violated MCL 333.16221(c)(*iv*). MCL 333.16221(c)(*iv*) identifies violations of the Public Health Code that include "selling, prescribing, giving away, or administering drugs for other than lawful diagnostic or therapeutic purposes." Respondent argues that there is no proof that he acted for some illicit purpose beyond treating his patients. We disagree.

Once again, the crux of respondent's argument is that a violation of an incorrect standard of care is insufficient to establish a violation of the Public Health Code. However, as already noted, the ALJ did not err by adopting the CDC Guideline as the relevant standard of care. Nonetheless, while it was indeed undisputed by both experts that the patients at issue had severe, chronic pain, there was significant testimony presented by Dr. Cooke regarding the frequency at which respondent prescribed medications without a documented discussion regarding the associated risks and benefits. In that regard, the record supports a conclusion that respondent frequently prescribed a high level of substances without documenting any justification and, on some occasions, without any prior testing to confirm the need for the medications. Additionally, on several occasions, respondent continued to

prescribe these substances despite having received drug-screen results that were inconsistent for the medications prescribed, and he prescribed medications to a relative without reviewing MAPS or requiring drug screens. These acts were sufficient to establish a violation of the relevant standard of care.

In sum, we conclude that when viewed as a whole, the record before this Court contains sufficient competent, material, and substantial evidence to support the ALJ's and the disciplinary subcommittee's ruling that respondent was negligent, was incompetent, lacked a good moral character, and dispensed medications for other than legitimate or therapeutic purposes.

Affirmed.

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

TECHNICAL, PROFESSIONAL AND OFFICEWORKERS ASSOCIATION OF MICHIGAN v RENNER

Docket No. 351991. Submitted December 8, 2020, at Lansing. Decided January 7, 2021, at 9:00 a.m. Leave to appeal granted 510 Mich ___ (2022).

Daniel L. Renner filed a charge in the Michigan Employment Relations Commission (MERC) against the Technical, Professional and Officeworkers Association of Michigan (respondent), alleging that respondent's refusal to represent Renner in a disciplinary dispute with his employer unless Renner paid respondent a fee for its services violated the public employment relations act (PERA), MCL 423.201 *et seq*. Renner, who worked for Saginaw County, was part of a bargaining unit represented by respondent; in 2017, Renner opted out of union membership. In 2018, Renner filed a complaint against a coworker that his employer concluded was false. The employer issued a warning to Renner, stating that any further incidents would lead to progressive disciplinary action. Renner appealed that decision by filing a Step 1 grievance opposing the reprimand and notified respondent of the filing. Respondent informed Renner that under its pay-for-services procedure for nonmembers, Renner would have to pay for any requested direct labor representation services—i.e., any representation of a bargaining-unit member in an individual capacity—regarding the grievance. Respondent explained to Renner that the only way to pursue a grievance covered by the collective-bargaining agreement (CBA) was through respondent's representation because the employer could not directly deal with an individual employee of the bargaining unit about a grievance covered by the CBA. Respondent instructed Renner that he could, however, pursue an individual grievance under MCL 423.211. Renner's employer denied the appeal on two alternative bases: (1) the grievance was improper because it was covered by a CBA, and the employer did not think Renner could use the CBA grievance procedure and (2) even though Renner did not follow the correct procedure, the original disciplinary action was warranted. Renner did not pay respondent the fee it requested to assist him in the grievance process, and respondent did not help him with the process. In the MERC proceeding, respondent admitted Renner's factual allegations and

moved for summary disposition, arguing that the pay-for-services procedure did not violate any PERA provisions and that its actions were consistent with *Janus v American Federation of State, Co, & Muni Employees*, 585 US ___; 138 S Ct 2448; 201 L Ed 2d 924 (2018). The administrative law judge denied the motion, reasoning that the pay-for-services procedure violated MCL 423.210(2)(a) because it unlawfully discriminated against nonunion members and restrained the nonunion members from exercising their right under MCL 423.209 to refrain from joining or assisting a labor organization. MERC rejected respondent's exceptions to the administrative law judge's decision and affirmed the order. Respondent appealed.

The Court of Appeals *held*:

1. Decisions of the National Labor Relations Board (NLRB) regarding provisions of the National Labor Relations Act (NLRA), 29 USC 151 *et seq*., that are comparable to PERA provisions are persuasive authority when interpreting PERA. Because PERA is patterned after the NLRA, PERA impliedly imposes on labor organizations representing public-sector employees a duty of fair representation, which is similar to the duty imposed by the NLRA on labor organizations representing private-sector employees. Under MCL 423.209, public employees are free to organize or join collective-bargaining units or, conversely, to refrain from doing so. In turn, MCL 423.210(1)(a) prohibits a public employer from interfering with, restraining, or coercing public employees in the exercise of their rights guaranteed in MCL 423.209. While MCL 423.210(2)(a) prohibits labor organizations from restraining or coercing public employees in the exercise of their rights under MCL 423.209, the provision does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership. Consistently with the identical language in the NLRA, the language in MCL 423.210(2)(a) that gives a union the right to prescribe rules refers to rules that govern the admission or expulsion of employees from the union. However, a rule might also violate MCL 423.210(2)(a) if it impermissibly restrains or coerces employee rights under MCL 423.209 or otherwise frustrates the purpose of PERA. To protect the rights of public employees, MCL 423.210(3) provides that an individual cannot be required as a condition of obtaining or continuing public employment to do the following: (1) refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative, (2) become or remain a member of a labor organization or bargaining representative, (3) pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor

organization or bargaining representative, or (4) pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative. In turn, MCL 423.211 imposes on the representative a corresponding duty of fair representation owed all members of the bargaining unit.

2. In this case, respondent's pay-for-services procedure contained language restricting a nonmember's right to join the union during the pendency of an employment-related issue but allowing the nonunion member to join after the issue was resolved. Thus, the primary purpose of the procedure was to require nonunion employees who were members of the collective-bargaining unit to pay for direct representation services. Read in context, the procedure furthered the union's purpose by preventing a nonmember from avoiding payment for requested services by joining the union when the need for direct representation services arose. In so doing, it advanced the purpose of restraining or coercing nonmember employees in the exercise of their statutory rights. Even if the pay-for-services procedure could be seen as a rule regarding acquisition of membership under MCL 423.210(2)(a), MERC could have determined that it was unenforceable under PERA if it impermissibly restrained or coerced employee rights under MCL 423.209 or otherwise frustrated the purpose of PERA. Thus, respondent's procedure violated MCL 423.210(2)(a) because it discriminated against nonmembers by restraining them from exercising their MCL 423.209 rights by refusing to do anything respecting nonmembers' grievances and thereby making it impossible for a nonmember to pursue a grievance unless fees for services were paid. The pay-for-services procedure also violated the general rule of fair representation for all members of the collective-bargaining unit because respondent was the exclusive representative of Renner's bargaining unit and it negotiated the grievance process that controlled Renner's bargaining unit and his employer—i.e., the process that allowed only the union to pursue a member's grievance. Respondent's negotiated grievance process, coupled with its pay-for-services procedure, resulted in unfair, discriminatory treatment of nonunion members, which was at odds with respondent's duty of fair representation. Respondent's reliance on *Janus* was misplaced because that case did not involve an alleged breach of the union's duty of fair representation or restraint of a nonunion employee's statutory rights; furthermore, the United States Supreme Court did not hold that a union could unilaterally fashion a policy or procedure imposing fees for services on nonunion members of a collective-bargaining unit. Thus, re-

spondent's reliance on *Janus* as support for its position was misplaced, and MERC properly relied on NLRB precedent concerning the general duty of fair representation. Accordingly, MERC properly struck down respondent's pay-for-services procedure as violating MCL 423.210(2)(a).

3. It is implicit under the First Amendment of the United States Constitution that in addition to the right to engage in activities protected by that amendment is the right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. Conversely, the right to forgo association for expressive purposes is also protected. To that end, forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints. In this case, although MERC incorrectly treated respondent's freedom-of-association argument as though respondent had sought to avoid association with nonunion members entirely, the commission reached the correct result by rejecting respondent's expressive-associational-right argument. Respondent engaged in expressive activity because it engaged in speech regarding matters of substantial public concern given the nature of its role in the collective-bargaining process, and because of this, it was generally entitled to expressive-associational rights. However, respondent's avowed expressive message and viewpoint reflected in the pay-for-services procedure—i.e., to not associate with the nonmember under circumstances that mandate, to the detriment of the membership, free direct representation services to nonmembers—was not a message but was, instead, a reframing of the rationale underlying the procedure and did not transform it into a message. Accordingly, respondent's representation of nonunion members in grievance matters was not the type of forced inclusion protected by the First Amendment.

Affirmed.

Frank A. Guido and *Christopher Tomasi* for the Technical, Professional and Officeworkers Association of Michigan.

Before: O'BRIEN, P.J., and M. J. KELLY and REDFORD, JJ.

REDFORD, J. Respondent, the Technical, Professional and Officeworkers Association of Michigan, appeals as

of right the Michigan Employment Relations Commission's (MERC) decision and order affirming an administrative law judge's (ALJ) decision and recommended order. The ALJ found that respondent's pay-for-services procedure violated respondent's duty of fair representation and § 10(2)(a)[1] of the public employment relations act (PERA), MCL 423.201 *et seq*., by unlawfully discriminating against charging party Daniel Renner, a nonunion member, and restraining him from exercising his § 9[2] statutory rights by refusing to represent him in a disciplinary dispute with the employer unless he paid respondent a fee for its services. MERC considered respondent's exceptions to the ALJ's decision and ruled that they lacked merit. MERC found that respondent's pay-for-services procedure violated § 10(2)(a) by discriminating against nonunion employees, that the procedure restrained them from exercising their § 9 statutory right to refrain from joining or assisting a labor organization, and that respondent breached its duty of fair representation by refusing to file or process Renner's grievance unless he paid a fee for its services. We affirm.

I. BACKGROUND

Renner, an employee of Saginaw County's grounds department, opted out of union membership in 2017 as permitted under §§ 9 and 10(3) of PERA. On September 6, 2018, Renner sent an e-mail to the Saginaw County Director of Maintenance, Bernard G. Delaney, Jr., regarding another employee smoking around Renner and the effect it had on his health. On September 19, 2018, Delaney responded in writing to

[1] MCL 423.210(2)(a).

[2] MCL 423.209.

Renner. In his response, Delaney concluded that Renner had made false claims against fellow employees and he provided Renner a written warning that included a caution that "Any further incidents will lead to progressive disciplinary action, up to and including discharge." On September 20, 2018, Renner filed a document with Delaney, which Renner described as a grievance procedure in accordance with "Saginaw County Policy Category 300, number 337" and "Policy 6.1.1" filing an appeal to his department head. Likewise, on September 20, 2018, Renner advised the president of the union local that he had submitted a grievance. On September 21, 2018, the business agent of the local union advised Renner that if he needed assistance in the grievance he would have to pay fees to the local.

On September 26, 2018, Delaney responded to Renner in writing, stating:

> First, it should be noted that the grievance was filed in accordance with County Policy Number 337, Grievance Procedure. In section 6.1 of the policy, it indicates that regular full time and regular part-time employees not covered by a collective bargaining agreement shall have the right to use this grievance procedure. As your position is a part of [the Technical, Professional and Officeworkers Association of Michigan], I do not believe you can use this procedure as you are covered by a collective bargaining agreement. Therefore, I believe the grievance should be denied for that reason.
>
> However, even though I believe the grievance was not filed in accordance with the correct procedure, I am still providing the following response to the grievance:
>
> I have reviewed the information provided by the grievant and believe the disciplinary action taken is still warranted. As such, the grievance is denied.

As indicated, after receiving the written reprimand in 2018, Renner submitted a Step 1 grievance opposing the reprimand. He also sent an e-mail to respondent, asking for the forms needed to complete a Step 2 grievance. Although Renner remained a member of the bargaining unit after opting out of union membership, respondent took the position that it owed Renner no duty to provide "direct representation services" unless he complied with the document titled "UNION OPERATING PROCEDURE: NONMEMBER PAYMENT FOR LABOR REPRESENTATION SERVICES" that the union adopted by resolution on July 23, 2018, which required nonmember employees to pay for requested direct representation services.

On September 27, 2018, respondent, through legal counsel, advised Renner that "the only process allowed to pursue a grievance, through the CBA [collective-bargaining agreement] steps, is via the Union," because the county could not directly deal with an individual employee of the bargaining unit in a grievance covered by the CBA. Respondent told Renner that "pursuit of an individual grievance is allowed under section 11 of PERA[.]" The e-mail referred to the "Union Operating Procedure," which it called its "pay-for-services procedure." Respondent's pay-for-services procedure states that a nonmember of the union "shall pay for the services to be rendered, in advance of the receipt of services . . . ." The resolution adopting the pay-for-services procedure distinguished between "direct labor representation services" and "collective labor representation services." According to the resolution, "direct labor representation services involve representation of a bargaining unit member in an individual capacity, in employment related issues including, but not limited to, critical incidents, investigatory interviews, grievance representation and arbitration, and administrative rep-

resentation," whereas "collective labor representation services involve representation of the bargaining unit employees collectively, in circumstances such as collective bargaining, compulsory interest arbitration and certain unfair labor practice proceedings[.]" No payment is required for collective labor representation services.

Renner did not tender the $1,290 required by the union to assist him in the grievance process. The union took no further steps to assist Renner in the grievance process.

In October 2018, Renner filed a PERA charge with MERC, alleging that respondent had violated its duty of fair representation by demanding a fee in exchange for representation. Respondent admitted the factual grounds of Renner's charge but asserted that it could lawfully require payment for services under its procedure in light of the Supreme Court's decision in *Janus v American Federation of State, Co, & Muni Employees*, 585 US ___; 138 S Ct 2448; 201 L Ed 2d 924 (2018). Respondent sought summary disposition of the charge, arguing that its procedure did not violate any provision of PERA and that it constituted action consistent with *Janus* and a decision of the Nevada Supreme Court that found a similar pay-for-services procedure permissible in the context of an analogous right-to-work statutory scheme.[3]

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[3] Respondent relied on a Nevada case, *Cone v Nevada Serv Employees Union/SEIU Local 1107*, 116 Nev 473; 998 P2d 1178 (2000), in which the Nevada Supreme Court concluded that a fee-for-service arrangement that charged the nonunion members for the union's representation of them in grievance proceedings was permissible. In that case, however, the nonunion employees were free to either represent themselves or have a lawyer represent them in any grievance proceeding. In the matter at bar, an employee, whether a union member or not, may only proceed with the grievance process provided for in the CBA with union representation.

The ALJ denied respondent's motion and found that the pay-for-services procedure violated § 10(2)(a) by unlawfully discriminating against nonunion members and restraining them from exercising their § 9 right to refrain from joining or assisting a labor organization. Respondent filed exceptions to the ALJ's decision, which MERC rejected. Respondent now appeals.

II. STANDARDS OF REVIEW

Our review of MERC decisions is guided by Const 1963, art 6, § 28, and MCL 423.216(e). *Van Buren Co Ed Ass'n v Decatur Pub Sch*, 309 Mich App 630, 639; 872 NW2d 710 (2015). "MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole." *Id.*, quoting *Branch Co Bd of Comm'rs v Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003) (quotation marks omitted). "An agency charged with executing a statute is entitled to respectful consideration of its construction of that statute and should not be overruled absent cogent reasons; however, an agency's interpretation cannot bind the courts or conflict with the Legislature's intent as expressed in the statutory language." *Wayne Co v AFSCME Local 3317*, 325 Mich App 614, 634; 928 NW2d 709 (2018). In other words, although MERC's interpretation of PERA is entitled to "respectful consideration," we review de novo legal issues such as statutory interpretation. *Van Buren Co Ed Ass'n*, 309 Mich App at 639. Similarly, we review de novo questions of constitutional law. *Saginaw Ed Ass'n v Eady-Miskiewicz*, 319 Mich App 422, 450-451; 902 NW2d 1 (2017). " 'MERC's legal determinations may not be disturbed unless they violate a constitutional or statu-

tory provision or they are based on a substantial and material error of law.' " *Van Buren Co Ed Ass'n*, 309 Mich App at 639, quoting *Branch Co Bd of Comm'rs*, 260 Mich App at 193.

" 'The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language.' " *Van Buren Co Ed Ass'n*, 309 Mich App at 643, quoting *Krohn v Home-Owners Ins Co*, 490 Mich 145, 156; 802 NW2d 281 (2011). Absent ambiguity in the statutory language, we must enforce the statute as written, "without any additional judicial construction." *Wayne Co*, 325 Mich App at 634. We must also strive to "give effect to every word, phrase, and clause in a statute, avoiding a construction that would render any part of the statute nugatory or surplusage." *Id*. Decisions of the National Labor Relations Board (NLRB) regarding provisions of the National Labor Relations Act (NLRA), 29 USC 151 *et seq*., that are comparable to PERA provisions serve as persuasive authority respecting the interpretation of PERA. *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 53; 214 NW2d 803 (1974); *Saginaw Ed Ass'n*, 319 Mich App at 447 n 4.

III. ANALYSIS

Respondent first argues that MERC erred by concluding that the pay-for-services procedure violates PERA. We disagree.

PERA governs public employee labor relations, "reflecting legislative goals to protect public employees against [unfair labor practices] and to provide remedial access to a state-level administrative agency with specialized expertise in [unfair labor practices]." *Wayne Co*, 325 Mich App at 619. Under § 9, public employees are free to organize or join collective-

bargaining units or, conversely, to refrain from doing so. *Saginaw Ed Ass'n*, 319 Mich App at 429. Section 10(1)(a) "prohibits a public employer from interfering with, restraining, or coercing public employees 'in the exercise of their rights guaranteed in section 9.' " *Id.*, quoting MCL 423.210(1)(a). Section 10(2)(a) prohibits labor organizations from restraining or coercing public employees in the exercise of their § 9 rights, but it " 'does not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership.' " *Saginaw Ed Ass'n*, 319 Mich App at 429, quoting MCL 423.210(2)(a).

To protect public employees' rights, § 10(3) provides:

> [A]n individual shall not be required as a condition of obtaining or continuing public employment to do any of the following:
>
> (a) Refrain or resign from membership in, voluntary affiliation with, or voluntary financial support of a labor organization or bargaining representative.
>
> (b) Become or remain a member of a labor organization or bargaining representative.
>
> (c) Pay any dues, fees, assessments, or other charges or expenses of any kind or amount, or provide anything of value to a labor organization or bargaining representative.
>
> (d) Pay to any charitable organization or third party any amount that is in lieu of, equivalent to, or any portion of dues, fees, assessments, or other charges or expenses required of members of or public employees represented by a labor organization or bargaining representative. [MCL 423.210(3).]

In this case, MERC determined that respondent's pay-for-services procedure violated § 10(2)(a) by unlawfully discriminating against nonmembers of the union and restraining employees from exercising their § 9 right to refrain from joining or assisting a labor

organization. Respondent argues that MERC erred in this regard because nothing in PERA prohibits the pay-for-services procedure and that § 10(2)(a) explicitly authorizes a union to implement internal rules of the sort at issue in this case. We disagree.

Respondent maintains that its pay-for-services procedure falls squarely within the § 10(2)(a) proviso allowing a labor organization to "prescribe its own rules with respect to the acquisition or retention of membership." MCL 423.210(2)(a). The plain language of the statute, however, cannot be read as respondent contends. Further, despite repeatedly insisting that this language applies, respondent has not explained how charging nonunion employees for direct representation services can be construed as a rule concerning the "acquisition or retention of membership." The NLRA contains identical language regarding a labor organization's right to prescribe rules "with respect to the acquisition or retention of membership," 29 USC 158(b)(1), and courts have interpreted that language as referring to rules that govern admission or expulsion of employees from the union. *Pattern Makers' League of North America v Nat'l Labor Relations Bd*, 473 US 95, 109; 105 S Ct 3064; 87 L Ed 2d 68 (1985). In this case, respondent's pay-for-services procedure applies only to nonunion employees and has no connection to the admission of a member to the union or expulsion of a member from the union.

We note that ¶ 9 of respondent's pay-for-services procedure restricts a nonmember's right to join the union "during the pendency of an employment related issue" and permits the nonmember to opt in to dues-paying union membership after the employment-related issue has been concluded. Nevertheless, the primary purpose of respondent's pay-for-services pro-

cedure is to require nonunion employees who are members of the collective-bargaining unit to pay for direct representation services. Paragraph 9 of respondent's pay-for-services procedure, when read in the context of the entire operating procedure, furthers the union's purpose by preventing a nonmember from avoiding payment for requested services by joining the union when the need for direct representation services arises. In so doing, it advances the purpose of restraining or coercing nonmember employees in the exercise of their statutory rights.

A rule that "invades or frustrates an overriding policy of the labor laws" cannot be enforced without violating the NLRA's prohibition against restraining or coercing employees in the exercise of their statutory rights. *Scofield v Nat'l Labor Relations Bd*, 394 US 423, 429; 89 S Ct 1154; 22 L Ed 2d 385 (1969). See also *In re Complaint of McLeodUSA Telecom Servs, Inc*, 277 Mich App 602, 609; 751 NW2d 508 (2008) ("Statutory language should be construed reasonably, keeping in mind the purpose of the act.") (quotation marks and citation omitted). Michigan has applied similar reasoning to PERA. Indeed, in *Saginaw Ed Ass'n*, 319 Mich App at 443-447, this Court agreed with MERC's conclusion that a policy limiting resignation from a union to a one-month period each year violated the "obvious intent" of the right-to-work amendment, which was designed to protect "public employees against barriers to acting on the desire to discontinue union affiliation or support." Thus, even if respondent's pay-for-services procedure could be viewed as a rule regarding acquisition of membership under § 10(2)(a), MERC properly could determine that respondent's pay-for-services procedure is unenforceable under PERA if it impermissibly restrained or coerced employee rights under § 9 or otherwise frustrated the purpose of PERA.

Respondent also emphasizes that, on the issue of fees, PERA only bars charges that are required as a "condition of obtaining or continuing public employment . . . ." MCL 423.210(3). Respondent reasons that its pay-for-services procedure does not run afoul of this prohibition because the procedure does not call for denial or termination of employment if an employee declines to pay for direct representation services. Respondent's contention in this regard, while alluring, is not persuasive because respondent's pay-for-services procedure affects nonmembers' exercise of statutory rights that have a direct impact on continuing public employment. MERC explained:

> Contrary to Respondent's argument, however, we believe that grievance handling is fundamental to a union's duty as the exclusive bargaining agent to represent all members of the bargaining unit without discrimination. Because a union's decision not to represent a unit member in a grievance or disciplinary matter has a clear impact on that unit member's terms or conditions of employment and the terms and conditions of other members of the bargaining unit, it is not merely an internal union matter. Moreover, by requiring non-member payment for representation services, a union interferes with an employee's § 9 right to refrain from union activities. As we noted in *Amalgamated Transit Union, Local 26*, 30 [Mich Pub Emp Rep] 22 (2016) [(Case No. CU16 D-026)], the language of § 10(2)(a) does not permit a union to deny an employee the rights provided by § 9, regardless of whether the union's actions have an impact on conditions of employment.

Respondent argues that by considering whether its pay-for-services procedure affects "terms or conditions of employment," MERC misapplied concepts used to determine mandatory subjects of collective bargaining.[4]

[4] Section 15(1) of PERA provides:

We disagree because MERC did not focus on a violation of § 10(3)(c) for its decision to strike down the pay-for-services procedure. MERC's decision clarified that "§ 10(2)(a) does not permit a union to deny an employee the rights provided by § 9, regardless of whether the union's actions have an impact on conditions of employment," because unions may not restrain or coerce employees in the exercise of their statutory rights. MERC correctly concluded that respondent's pay-for-services procedure violated § 10(2)(a) by discriminating against nonmembers by restraining them from exercising their § 9 rights by refusing to do anything respecting nonmembers' grievances and thereby making it impossible for a nonmember to pursue a grievance unless fees for services are paid.

Section 11[5] of PERA provides that "[r]epresentatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall be the exclu-

> A public employer shall bargain collectively with the representatives of its employees as described in section 11 and may make and enter into collective bargaining agreements with those representatives. Except as otherwise provided in this section, for the purposes of this section, *to bargain collectively is to perform the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to* wages, hours, and *other terms and conditions of employment*, or to negotiate an agreement, or any question arising under the agreement, and to execute a written contract, ordinance, or resolution incorporating any agreement reached if requested by either party, but this obligation does not compel either party to agree to a proposal or make a concession. [MCL 423.215(1) (emphasis added).]

"The subjects included within the phrase 'wages, hours, and other terms and conditions of employment' are referred to as 'mandatory subjects' of bargaining." *Central Mich Univ Faculty Ass'n v Central Mich Univ*, 404 Mich 268, 277; 273 NW2d 21 (1978), quoting MCL 423.215.

[5] MCL 423.211.

sive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment or other conditions of employment, and shall be so recognized by the public employer[.]" Substantially identical language in the NLRA has been interpreted as imposing on the representative a corresponding duty of fair representation owed to all members of the bargaining unit. *Ford Motor Co v Huffman*, 345 US 330, 337; 73 S Ct 681; 97 L Ed 1048 (1953). As explained in *Wallace Corp v Nat'l Labor Relations Bd*, 323 US 248, 255-256; 65 S Ct 238; 89 L Ed 216 (1944):

> The duties of a bargaining agent selected under the terms of the [NLRA] extend beyond the mere representation of the interests of its own group members. By its selection as bargaining representative, it has become the agent of all the employees, charged with the responsibility of representing their interests fairly and impartially. Otherwise, employees who are not members of a selected union at the time it is chosen by the majority would be left without adequate representation.

Our Supreme Court has explained that, because PERA is patterned after the NLRA, "PERA impliedly imposes on labor organizations representing public sector employees a duty of fair representation which is similar to the duty imposed by the NLRA on labor organizations representing private sector employees." *Goolsby v Detroit*, 419 Mich 651, 661 n 5; 358 NW2d 856 (1984). Respondent does not dispute this well-settled interpretation of PERA and, in fact, recognizes that its duty of fair representation extends to all members of the bargaining unit, regardless of whether they are also dues-paying union members. Respondent, however, contends that this general rule does not apply because nonunion members are treated equally for collective-bargaining purposes. We disagree.

"Mandatory subjects of collective bargaining are comprised of issues that 'settle an aspect of the relationship between the employer and employees[.]' " *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 551; 581 NW2d 707 (1998), quoting *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 178; 92 S Ct 383; 30 L Ed 2d 341 (1971). Among other recognized topics, mandatory subjects include grievance procedures, *St Clair Intermediate Sch Dist*, 458 Mich at 551, and disciplinary procedures, *Pontiac Police Officers Ass'n v Pontiac*, 397 Mich 674, 677; 246 NW2d 831 (1976). As the exclusive representative of Renner's bargaining unit, respondent negotiated a grievance process that governed Renner's employer and all members of the bargaining unit. Although the CBA has not been produced in this case, respondent confirmed that the grievance process must be pursued by the union. An individual employee cannot take advantage of the negotiated process in his or her own right. In other words, respondent secured a valuable right for all members of the bargaining unit, including Renner, but, through its pay-for-services procedure, it effectively foreclosed a nonunion employee's ability to use the grievance process absent payment for services.

Respondent asserts that this outcome did not involve discrimination in violation of its duty of fair representation because: (1) § 11[6] provides a method for

[6] Section 11 specifies that the designated representatives "shall be the exclusive representatives of all public employees in a" collective-bargaining unit regarding pay, wages, hours, and other conditions of employment,

> and shall be so recognized by the public employer: Provided, That any individual employee at any time may present griev-

nonunion members who are unwilling to pay for direct representation to pursue grievances with the employer directly and (2) union members also pay for direct representation, albeit through their membership dues. Respondent's first rationale is unpersuasive considering the background of this case. When Renner attempted to pursue a grievance outside of the process outlined in the CBA, his employer, through his supervisor, indicated that the county's standard grievance procedure applied only to employees who were not covered by a CBA and told him that his grievance had been reviewed and denied. Thus, Renner exercised his § 11 rights to no avail, could not invoke his employer's standard grievance procedure applicable only to persons not members of the bargaining unit, and, as an employee member of a bargaining unit covered by a CBA, could not exercise the bargained-for right to the grievance procedure under the CBA. Renner, therefore, found himself in the position of either paying respondent for direct representation services under respondent's pay-for-services procedure to permit him to pursue the grievance, or refusing to pay and forfeiting his contractual right to pursue a grievance under the CBA grievance procedure.

Respondent's second rationale also demonstrates the problematic nature of the pay-for-services procedure. To fully reap the benefits of the CBA, all members of the bargaining unit must pay something, either in the form of membership dues or service fees for direct representation services that are necessary to

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ances to his employer and have the grievances adjusted, without intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, provided that the bargaining representative has been given opportunity to be present at such adjustment. [MCL 423.211.]

enforce rights afforded by the CBA. In this case, respondent told Renner that he must pay up front $1,290, the estimated initial cost of processing Renner's grievance through Step 4. If he did not or could not pay in full, respondent would not take any action on his behalf. Additional fees would be required if the matter cost more or proceeded beyond Step 4. Even the preliminary estimate could be cost-prohibitive for many workers, especially considering the short time frame within which union action must occur as required under the CBA grievance procedure. Faced with that economic reality, employees who would otherwise exercise their § 9 right to decline union membership could feel compelled to join the union, if only to avoid the risk of forfeiting pursuit of a meritorious grievance. Given the effect of the pay-for-services procedure, MERC's decision and order did not involve a substantial and material error of law. MERC's decision properly interpreted and applied applicable law.

Next, respondent argues that MERC failed to appreciate the significance of the United States Supreme Court's *Janus* decision, which it contends negated the rationale of the older NLRB decisions relied on by MERC. Respondent also argues that, in the wake of *Janus*, MERC should have relied on the reasoning stated by the Nevada Supreme Court in *Cone v Nevada Serv Employees Union/SEIU Local 1107*, 116 Nev 473; 998 P2d 1178 (2000), which upheld a comparable pay-for-services procedure. We disagree.

In *Janus*, 585 US ___; 138 S Ct 2448, the United States Supreme Court considered whether an Illinois statute that authorized unions to assess nonunion public employees "agency fees" to cover their proportionate share of union dues attributable to union activities

conducted on behalf of nonunion members of the collective-bargaining unit violated the First Amendment. The Court held the state law unconstitutional and overruled its earlier decision in *Abood v Detroit Bd of Ed*, 431 US 209; 97 S Ct 1782; 52 L Ed 2d 261 (1977), which had held that nonmembers could be charged the portion of union fees attributable to collective-bargaining issues. *Janus*, 585 US at ___; 138 S Ct at 2460. *Abood* justified its countenance of agency-fee arrangements by relying on the governmental interest in labor peace and avoiding "the risk of free riders . . . ." *Abood*, 431 US at 224 (quotation marks omitted). The Court noted that the first rationale had been based on an unfounded assumption that interunion rivalries would foster dissension within the workforce and force employers to face conflicting demands from different unions. The Court found no historical factual support for that assumption. *Janus*, 585 US at ___; 138 S Ct at 2465. Concerning the latter of these justifications, the *Janus* Court determined that avoiding free-rider concerns was not a sufficiently compelling interest to overcome First Amendment objections. *Id*. at ___; 138 S Ct at 2466. The Court concluded that forcing public employees to subsidize a union whose positions they object to and that they chose not to join violated "the free speech rights of nonmembers by compelling them to subsidize private speech on matters of substantial public concern." *Id*. at ___; 138 S Ct at 2459-2460.

The Court acknowledged that supporters of agency fees characterized them as unique because unions owe a duty of fair representation to all members of the bargaining unit, regardless of union membership. *Id*. at ___; 138 S Ct at 2467. The Court considered that one could argue "that a State has a compelling interest in requiring the payment of agency fees because (1) unions would otherwise be unwilling to represent

nonmembers or (2) it would be fundamentally unfair to require unions to provide fair representation for nonmembers if nonmembers were not required to pay." *Id*. at ___; 138 S Ct at 2467. The Court, however, found neither argument sound and explained:

> First, it is simply not true that unions will refuse to serve as the exclusive representative of all employees in the unit if they are not given agency fees. As noted, unions represent millions of public employees in jurisdictions that do not permit agency fees. No union is ever compelled to seek that designation. On the contrary, designation as exclusive representative is avidly sought. . . . Why is this so?
>
> Even without agency fees, designation as the exclusive representative confers many benefits. As noted, that status gives the union a privileged place in negotiations over wages, benefits, and working conditions. Not only is the union given the exclusive right to speak for all the employees in collective bargaining, but the employer is required by state law to listen to and to bargain in good faith with only that union. Designation as exclusive representative thus "results in a tremendous increase in the power" of the union.
>
> In addition, a union designated as exclusive representative is often granted special privileges, such as obtaining information about employees, and having dues and fees deducted directly from employee wages. The collective-bargaining agreement in this case guarantees a long list of additional privileges.
>
> These benefits greatly outweigh any extra burden imposed by the duty of providing fair representation for nonmembers. What this duty entails, in simple terms, is an obligation not to "act solely in the interests of [the union's] own members."
>
> What does this mean when it comes to the negotiation of a contract? The union may not negotiate a collective-bargaining agreement that discriminates against nonmembers, but the union's bargaining latitude would be

little different if state law simply prohibited public employers from entering into agreements that discriminate in that way. And for that matter, it is questionable whether the Constitution would permit a public-sector employer to adopt a collective-bargaining agreement that discriminates against nonmembers. To the extent that an employer would be barred from acceding to a discriminatory agreement anyway, the union's duty not to ask for one is superfluous. It is noteworthy that neither respondents nor any of the 39 *amicus* briefs supporting them—nor the dissent—has explained why the duty of fair representation causes public-sector unions to incur significantly greater expenses than they would otherwise bear in negotiating collective-bargaining agreements.

What about the representation of nonmembers in grievance proceedings? Unions do not undertake this activity solely for the benefit of nonmembers—which is why Illinois law gives a public-sector union the right to send a representative to such proceedings even if the employee declines union representation. Representation of nonmembers furthers the union's interest in keeping control of the administration of the collective-bargaining agreement, since the resolution of one employee's grievance can affect others. And when a union controls the grievance process, it may, as a practical matter, effectively subordinate "the interests of [an] individual employee . . . to the collective interests of all employees in the bargaining unit."

In any event, whatever unwanted burden is imposed by the representation of nonmembers in disciplinary matters can be eliminated "through means significantly less restrictive of associational freedoms" than the imposition of agency fees. Individual nonmembers could be required to pay for that service or could be denied union representation altogether. . . . Thus, agency fees cannot be sustained on the ground that unions would otherwise be unwilling to represent nonmembers. [*Id*. at ___; 138 S Ct at 2467-2469 (citations omitted; alterations in original).]

Respondent's support of its pay-for-services procedure is premised on the final paragraph of this passage and a footnote to that paragraph. *Id*. at ___ n 6; 138 S Ct at 2469 n 6.[7] Respondent maintains that, via this dictum, the Court provided instructional guidance regarding a union's duty to nonmembers respecting direct representation services and established that the duty of fair representation does not extend to individualized services. According to respondent, MERC erred by denying the significance of *Janus* and relying on outdated NLRB decisions. Close reading of the paragraph and the footnote, within the context of the preceding paragraphs, however, does not support respondent's contention.

MERC correctly understood and properly interpreted *Janus* by recognizing that the case did not involve allegation of a breach of the union's duty of fair representation or restraint of a nonunion employee's statutory rights. Further, MERC correctly concluded that in the quoted passage, "the Supreme Court was only expressing its belief that a state statute could be enacted or modified to address a perceived 'free rider' concern that would allow a public sector union to charge a non-member for processing his or her grievance without violating the non-member's First Amend-

[7] In *Janus*, 585 US at ___ n 6; 138 S Ct at 2469 n 6, the Supreme Court stated:

> There is precedent for such arrangements. Some States have laws providing that, if an employee with a religious objection to paying an agency fee "requests the [union] to use the grievance procedure or arbitration procedure on the employee's behalf, the [union] is authorized to charge the employee for the reasonable cost of using such procedure." *E.g.*, Cal. Govt. Code Ann. § 3546.3 (West 2010); cf. Ill. Comp. Stat., ch. 5, § 315/6(g) (2016). This more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights. [Alteration in original.]

ment rights." The Supreme Court did not hold that a union could unilaterally fashion a policy or procedure imposing fees for services on nonunion members of a collective-bargaining unit and did not authorize that action.

This conclusion is buttressed by the Court's citation of state statutes as "precedent for such arrangements." *Janus*, 585 US at ___ n 6; 138 S Ct at 2469 n 6. The Supreme Court cited Cal Gov't Code 3546.3 (West 2010) as its primary example and compared it to the Illinois statute, 5 Ill Comp Stat 315/6(g) (West 2016). The California statute provided that an employee who objects to joining or financially supporting a labor organization on religious grounds cannot be required, as a condition of employment, to join or support the organization. Importantly, the California statute also specified that if the employee "requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using such procedure." Cal Gov't Code 3546.3 (West 2010). According to *Janus*, "[t]his more tailored alternative, if applied to other objectors, would prevent free ridership while imposing a lesser burden on First Amendment rights." *Janus*, 585 US at ___ n 6; 138 S Ct 2469 n 6. Thus, *Janus* contemplated state legislative action to create a less restrictive method for responding to the "unwanted burden . . . imposed by the representation of nonmembers in disciplinary matters" but did not endorse or instruct unions to unilaterally impose fees upon nonunion employees within collective-bargaining units in which the union is the exclusive bargaining agent for the bargaining units. *Id*. at ___; 138 S Ct at 2468.

The Michigan Legislature has not enacted a provision in PERA that authorizes respondent's pay-for-services procedure. As explained previously, respondent's procedure has a coercive effect on an employee's § 9 right to decline union membership in violation of § 10(2)(a). Further, even if we accepted respondent's reading of *Janus* as implicitly removing the duty of direct representation services from the scope of a union's duty of fair representation, the specific procedure adopted in respondent's pay-for-services procedure undermines respondent's fair representation of nonunion members. Grievance procedures are a mandatory subject of collective bargaining, *St Clair Intermediate Sch Dist*, 458 Mich at 551, and the subject CBA plainly so provides. Respondent conceded below that Renner was entitled to all benefits of the CBA, yet only the union could pursue a grievance under the terms of the CBA. Respondent's duty of fair representation in collective bargaining would be rendered meaningless if it could lawfully secure equal employment rights for all members of the bargaining unit during the collective-bargaining process, only to later implement a policy placing potentially prohibitive restrictions on a nonunion member's access to those rights. The combined effect of the negotiated grievance process and respondent's pay-for-services procedure results in unfair, discriminatory treatment of nonunion members—an end at odds with respondent's duty of fair representation. *Janus* does not stand for that proposition.

Considering these implications, respondent's contention that MERC erred by relying on NLRB precedent concerning the general duty of fair representation lacks merit. Respondent's repeated reliance on *Cone* is similarly unpersuasive. *Cone* is clearly distinguishable because nonunion members were not *re-*

quired to use, and thus pay for, union representation to pursue grievance matters. *Cone*, 116 Nev at 475.

Lastly, respondent argues that MERC's decision violated respondent's First Amendment right to freedom of association. We disagree.

As part of this claim of error, respondent also asserts that MERC misunderstood the nature of respondent's argument regarding this issue. Respondent's exceptions to the ALJ's decision and recommended order included a complaint that requiring respondent to provide direct representation to nonmembers free of charge "is tantamount to compelling the Union to associate with the non-member in circumstances that are diametrically opposed to the expressive message and viewpoint of the Union, as reflected in the Union's Operating Procedure." In pertinent part, respondent continued, "While the Union recognizes and accepts the non-member for associational purposes in labor representation matters that are 'collective' in nature, i.e., collective bargaining and class action grievances/unfair labor practice proceedings, the expressive message and viewpoint of the Union is to not associate with the non-member under circumstances which mandate, to the detriment of the membership, free direct representation services be given to the non-member." MERC incorrectly treated respondent's exception as though respondent sought to avoid association with nonunion members entirely.

Turning to the merits of respondent's First Amendment argument, the constitutional underpinnings of the freedom of association have been aptly summarized as follows:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group

> effort toward those ends were not also guaranteed. According protection to collective effort on behalf of shared goals is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority. Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. [*Roberts v US Jaycees*, 468 US 609, 622; 104 S Ct 3244; 82 L Ed 2d 462 (1984) (citations omitted).]

Conversely, "[t]he right to eschew association for expressive purposes is likewise protected." *Janus*, 585 US at ___; 138 S Ct at 2463.

Respondent relies on *Boy Scouts of America v Dale*, 530 US 640; 120 S Ct 2446; 147 L Ed 2d 554 (2000), to support its constitutional claim. In that case, the petitioner claimed that requiring it to reinstate the respondent—a former member who had been expelled from the organization because of his homosexuality and role as a gay-rights activist—as a member of the organization violated the petitioner's right of expressive association. *Id*. at 644. The Supreme Court agreed. *Id*. The Court explained that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints." *Id*. at 648.

As an initial matter, we find respondent's reliance on *Boy Scouts of America* misplaced because respondent's representation of nonunion members in grievance matters is not the type of "forced inclusion" at issue in that case. As explained more fully below, a public-accommodations law barring discrimination on the basis of sexual orientation violated the petitioner's expressive-associational rights because reinstating the

respondent's membership in the organization conveyed a message that the petitioner condoned the respondent's homosexuality, in direct conflict with the petitioner's organizational belief that homosexual conduct did not constitute "a legitimate form of behavior." *Id*. at 653.

This sort of message-attribution theory does not apply in this case. Respondent does not suggest that by representing a nonunion member in grievance proceedings, it is somehow endorsing that individual's personal beliefs on any particular subject. And even if union representation implied support of the employee's factual basis for pursing a grievance, rather than mere protection of CBA rights, it is evident that respondent is not concerned about the risk of message or viewpoint attribution in this context. This is evidenced by respondent's willingness to represent nonunion members, as long as they pay union-defined fees.

Even if respondent's position fit within the framework of the Court's analysis in *Boy Scouts of America*, respondent's position is still unpersuasive. The Supreme Court began its analysis by determining whether the petitioner was protected by the First Amendment's expressive-associational right, which only extends to groups that "engage in some form of expression, whether it be public or private." *Id*. at 648. The petitioner described itself as a private, nonprofit organization engaged in "helping to instill values in young people and, in other ways, to prepare them to make ethical choices over their lifetime in achieving their full potential." *Id*. at 649, 666 (quotation marks omitted). It carried out this mission by having adult leaders spend time with youth members through various recreational activities while instructing the youth members both expressly and by example. *Id*. at 649-650. The Court found that, by conveying a system of

values to its youth members, the petitioner undoubtedly engaged in expressive activity. *Id*. at 650.

In this case, there can be little doubt that, as a general matter, respondent engages in expressive activity. A union representing public employees necessarily engages in speech regarding matters of substantial public concern given the nature of its role in the collective-bargaining process. *Janus*, 585 US at ___; 138 S Ct at 2474-2475. It negotiates subjects like wages, benefits, and terms and conditions of public employees' employment that have a great impact on governmental spending. *Id*. at ___; 138 S Ct at 2474-2475. Nor is it uncommon for unions to engage in political, public relation, or lobbying activities outside of collective bargaining. Because respondent engages in expressive activity, it is generally entitled to expressive-associational rights. *Boy Scouts of America*, 530 US at 648.

In *Boy Scouts of America*, the Court next considered whether the state action significantly affected the petitioner's ability to advocate its viewpoints. *Id*. at 650. In doing so, the Court first explored the nature of the expressive message at issue. The petitioner premised its constitutional challenge on its belief that homosexuality was inconsistent with the values the group represented, such as maintaining a "morally straight" and "clean" lifestyle, and the petitioner argued that it did not want to "promote homosexual conduct as a legitimate form of behavior." *Id*. at 650-651 (quotation marks omitted). The Court accepted the petitioner's assertion regarding its message and indicated that it did not need to make further inquiry into the nature of the petitioner's message. *Id*. at 651. Nonetheless, the Court reviewed various statements the petitioner made regarding the issue and opined that the petitioner sincerely held its stated

belief. *Id*. at 651-653. Considering this expressive message, the Court found merit in the petitioner's argument, agreeing that inclusion of the respondent in the organization "would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior." *Id*. at 653.

In this case, respondent claims that MERC's decision interferes with the expressive message and viewpoint reflected in its pay-for-services procedure, which is to "not associate with the nonmember under circumstances which mandate, to the detriment of the membership, free direct representation services be given to the nonmember." This is different from the circumstances involved in *Boy Scouts of America*, where the petitioner's message related to the core values the organization set out to instill in its young members. Although the Court noted that a group "do[es] not have to associate for the 'purpose' of disseminating a certain message," there must be "expressive activity that could be impaired in order to be entitled to protection." *Id*. at 655. Respondent's position is flawed because its characterization of the expressive message allegedly impaired by MERC's decision is not a "message" at all. Respondent has merely reframed the rationale underlying its procedure, without conveying any sort of recognizable ideal, belief, or viewpoint. Simply restating the purpose for a procedure does not transform it into a message. See, e.g., *Parks v Columbus*, 395 F3d 643, 651 (CA 6, 2005)[8] (rejecting a city's contention that the collective message of the council organizing an art fair was "to bring visual and performing artists to the

[8] "Lower federal court decisions are not binding on state courts, but may be persuasive." *Vanderpool v Pineview Estates LC*, 289 Mich App 119, 124 n 2; 808 NW2d 227 (2010).

City to be enjoyed by those who wish to go to the festival," reasoning that "[t]his is not an expressive message, but merely a purpose for the event") (quotation marks omitted). Accordingly, we reject respondent's argument that representation of nonunion members free of charge violates its right to expressive association.

We conclude that MERC's findings of fact in this case were supported by competent, material, and substantial evidence on the record considered as a whole. Further, its decision does not violate a constitutional or statutory provision and does not constitute a substantial and material error of law.

Affirmed.

O'BRIEN, P.J., and M. J. KELLY, J., concurred with REDFORD, J.

PEOPLE v ZITKA
PEOPLE v HERNANDEZ-ZITKA

Docket Nos. 349491 and 349494. Submitted November 9, 2020, at Lansing. Decided December 10, 2020. Approved for publication January 7, 2021, at 9:05 a.m.

Bruce H. Zitka and Susan K. Hernandez-Zitka were each charged in the Ingham Circuit Court with three counts of conducting an unlicensed gambling operation, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). Defendants owned and operated three Internet cafés in Muskegon County: The Landing Strip, The Lucky Mouse, and Fast Lane. The Michigan Gaming Control Board investigated defendants' cafés to determine whether illegal gambling was taking place at those businesses, but the board halted its investigation when the Norton Shores Police Department began its own investigation of alleged gambling activities at The Landing Strip. Following that investigation, the Norton Shores city attorney brought a civil nuisance-abatement action in the Muskegon Circuit Court against The Landing Strip, alleging violations of the local zoning code. Defendants and the city attorney stipulated to the charges being dismissed in exchange for defendants agreeing to operate The Landing Strip without violation of any applicable gambling laws or ordinances "as it is currently operating." The board then resumed its investigation of all three cafés before later filing criminal charges against defendants in the Ingham Circuit Court. The court, William E. Collette, J., dismissed the charges, holding that the prosecution was collaterally estopped from bringing the criminal charges because the Attorney General could have intervened in the earlier civil litigation but chose not to do so. The prosecution appealed, and the Court of Appeals, METER, P.J., and GADOLA and TUKEL, JJ., reversed that decision and remanded the case to the trial court, holding that the Attorney General was not in privity with the Norton Shores city attorney, that MCL 432.218(1)(a) was a general-intent crime, and that defendants' defenses of mistake of law and entrapment by estoppel were not applicable. 325 Mich App 38 (2018). On remand, defendants moved to admit evidence of the Norton Shores investigation and the results of that civil

lawsuit. The circuit court, Rosemarie E. Aquilina, J., denied defendants' motion, ruling that the evidence was not admissible in light of the Court of Appeals' decision in the prosecution's appeal. 325 Mich App 38. Following a joint jury trial, the jury found both defendants guilty of the charges. Defendants appealed.

The Court of Appeals *held*:

1. A defendant has a constitutionally guaranteed right to present a defense; however, this right is not absolute. The right to present a defense extends only to relevant and admissible evidence. In this case, defendants argued that the trial court's exclusion of evidence of the Norton Shores civil litigation violated their right to present a defense. The threshold question was whether the circumstances or outcome of the Norton Shores civil litigation was probative of any fact that was of consequence to the determination of the criminal action. The Court of Appeals' previous decision in *People v Zitka*, 325 Mich App 38, established that this challenged evidence was not relevant. *Zitka* held that conducting a gambling operation without a license is a general-intent crime, and therefore a mistake-of-law defense was not available to the charge of conducting a gambling operation without a license because defendants' alleged belief that they were operating their establishments in compliance with the law was immaterial to a determination of whether they committed this offense. Because the evidence was not relevant, the trial court's exclusion of this evidence did not violate defendants' right to present a defense. Furthermore, when discussing the additional charges of using a computer to commit a crime, *Zitka* held that defendants could not rely on the statement of the Norton Shores city attorney in the civil suit to defend their state criminal charges. To obtain a conviction under MCL 752.796, the prosecution was required to prove that defendants specifically intended to use a computer program, computer, computer system, or computer network to commit, attempt to commit, conspire to commit, or solicit another person to commit the general-intent crime of conducting a gambling operation in which wagering is used or to be used without a license issued by the board. The specific intent necessary to commit this offense is the intent to use a computer to conduct a gambling operation without a license, which constitutes a crime. The prosecution was not required to prove that defendants used the computer with the specific intent or knowledge that the gambling operation they were conducting was illegal, which would effectively convert the underlying offense into a specific-intent crime. Accordingly, the Norton Shores

investigation and the settlement in that civil lawsuit would be no more relevant to determining defendants' guilt or innocence for the crime of unlawful use of a computer than for the underlying crime of conducting the gambling operation. The trial court did not err when it precluded defendants from introducing evidence of the civil lawsuit to show that defendants lacked the specific intent necessary to support a conviction of using a computer to commit a crime.

2. To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. In this case, defendants argued that defense counsel was ineffective for failing to seek introduction of the stipulation order in the civil case to rebut the prosecution's introduction of evidence that defendants knew what they were doing was illegal. The Court of Appeals' previous decision in *Zitka* and the trial court's subsequent ruling established that evidence of the Norton Shores litigation was immaterial to a determination of whether defendants committed the offense of conducting an unlicensed gambling operation. Accordingly, defense counsel's decision to refrain from again moving to admit that evidence was not objectively unreasonable.

3. MRE 404(a)(1) permits the accused to introduce evidence of a pertinent character trait. A pertinent trait must relate to the charged crime. In this case, Hernandez-Zitka argued that the trial court abused its discretion by precluding her from offering character witnesses to testify regarding her character and reputation for being a law-abiding citizen. However, her truthfulness or general reputation for adhering to the law had no bearing on whether she intended to operate the cafés in a manner that met the definition of a gambling operation. Because Hernandez-Zitka sought to introduce this evidence only to make an irrelevant point, the trial court did not err by excluding the evidence.

4. The doctrines of res judicata and collateral estoppel share the common element of privity. Under either doctrine, the proponent must demonstrate the existence of privity in connection with the earlier action. The Court of Appeals in *Zitka* determined that the prosecutor in this case and the Norton Shores city attorney in the civil case were not in privity, despite the Attorney General's ability to intervene in the civil case under MCL 14.28 and MCL 14.101. Accordingly, Hernandez-Zitka could not show that res judicata barred her convictions in this case or that she was entitled to relief under the doctrine of entrapment by estoppel.

5. MRE 704 provides that testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. However, an expert witness may not express an opinion regarding the defendant's guilt or whether the defendant had a culpable state of mind, and an expert witness may not testify about the requirements of law that apply to the particular facts in the case or phrase an opinion in terms of a legal conclusion. In this case, Hernandez-Zitka challenged the testimony of two witnesses who testified that defendants' cafés were illegal gambling operations. The first witness testified that an Internet café was an "illegal casino," but the trial court struck the term "illegal" from the witness's response when defense counsel objected. The response that the Internet cafés were illegal casinos was improperly phrased in terms of a legal conclusion; however, the trial court adequately cured this error by quickly striking the objectionable portion of the witness's response, and defense counsel assented to this remedy. The second witness also testified that the cafés were "illegal gambling operations," but the trial court again clarified that the jury would make that decision. The second witness also testified about a website that was operating illegally, but that was not improper expert testimony because the witness testified about his opinion concerning the website, not defendants' cafés. Therefore, Hernandez-Zitka was not entitled to relief.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Daniel Ping* and *Geofrey C. M. Bilabaye*, Assistant Attorneys General, for the people.

John G. Zevalking for Bruce H. Zitka.

Ronald D. Ambrose for Susan K. Hernandez-Zitka.

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

PER CURIAM. Defendants, Bruce H. Zitka and Susan K. Hernandez-Zitka,[1] each appeal as of right their convictions, following a joint jury trial, of three counts

[1] We will refer to defendant Bruce H. Zitka as "Zitka" and to defendant Susan K. Hernandez-Zitka as "Hernandez-Zitka."

of conducting an unlicensed gambling operation, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). The trial court sentenced both defendants to five years' probation, with one year to be served in jail, subject to suspension upon successful completion of probation. In both appeals, we affirm.

This case was previously before this Court when the prosecution appealed an order granting defendants' motion to quash and dismissing all charges. The trial court, relying on the outcome of an earlier civil lawsuit brought by the Norton Shores city attorney in a civil nuisance-abatement action, ruled that the prosecution was collaterally estopped from bringing this criminal action. This Court reversed that decision and remanded the case to the trial court. *People v Zitka*, 325 Mich App 38, 53; 922 NW2d 696 (2018). This Court's prior decision provides the following summary of the relevant background facts that led to the civil litigation:

> Defendants own and operate three Internet lounges located in Muskegon County: The Landing Strip, The Lucky Mouse, and Fast Lane. At these establishments, customers can open accounts to wager on and play games online, including slot and lottery-type games. On April 14, 2015, the Michigan Gaming Control Board (MGCB) began an investigation to determine whether illegal gambling activities were taking place at the lounges. The MGCB interrupted this investigation, however, when the Norton Shores Police Department began its own independent investigation of allegations that unlawful gambling activities were taking place at The Landing Strip. The city attorney for Norton Shores subsequently filed in the Muskegon Circuit Court a civil-nuisance-abatement action against The Landing Strip under the local zoning code. The parties ultimately agreed to dismissal of that case, and the court entered a stipulated order of dismissal on January 28, 2016, stating in part, "Defendants agree to

operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances *as it is currently operating*." (Emphasis added.)

Following the conclusion of the civil lawsuit, the MGCB resumed its investigation of the three lounges in February 2016. As a result of this investigation, defendants were each charged with three counts of conducting a gambling operation without a license, MCL 432.218(1)(a), and three counts of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e). The amended information alleges an offense period extending from February 1, 2016, through October 31, 2016. The district court conducted a two-day preliminary examination and, on January 27, 2017, issued an opinion and order determining that probable cause supported the charges and binding over the cases to the Ingham Circuit Court. In reaching this conclusion, the district court determined that the offense of using a computer to commit a crime, MCL 752.796 and MCL 752.797(3)(e), is a specific-intent crime, while conducting a gambling operation without a license, MCL 432.218(1)(a), constitutes a general-intent crime. With respect to the Muskegon Circuit Court's stipulated order of dismissal, the district court was "not persuaded that the . . . [order], in a civil proceeding, is particularly helpful here in relation to the probable cause standard."

In the Ingham Circuit Court, defendants filed identical motions to quash, arguing that the district court erred by determining that the offense of conducting a gambling operation without a license was a general-intent crime as opposed to a specific-intent crime. Defendants further asserted that because the stipulated order dismissing the civil case reflected a judicial determination that defendants were operating legally, defendants were acting under a mistake of law that negated the *mens rea* elements of both offenses. The circuit court granted defendants' motions to quash and stated on the record as follows:

> My opinion is based upon the fact that the Attorney General of this state, in part, has the authority to intervene in any litigation that they want to that

> would be something that relates to state law, I believe they could have gone back to the circuit judge in this case and asked to intervene and have this reargued in some fashion as to its applicability.
>
> This appears to be a situation where apparently the Attorney General's office and their other agencies were so aggrieved by these poor people that they felt it necessary to investigate for months and months as to whether they existed. They could have walked right in and seen. But in my opinion, when a circuit judge of—is it Muskegon?
>
> * * *
>
> . . . [The Muskegon Circuit Court judge] has the right to make these rulings and put these rulings in effect. But as I have seen in my cases, I have been chastised. I have been appealed. I have even had people come in here and consent to things and your office appealed that because the consent was wrong. I am just amazed. These cases are dismissed. [*Zitka*, 325 Mich App at 41-43.]

On appeal, this Court held that the circuit court abused its discretion by determining that the state's criminal charges were barred by collateral estoppel. *Id*. at 47. This Court reasoned that the two proceedings were not substantially similar and that the state attorney general was not in privity with the city attorney. *Id*. at 45-47. It also stated that the purposes of the two proceedings were " 'fundamentally different,' " which is a recognized basis for declining to apply collateral estoppel. *Id*. at 47 (citation omitted).

In its analysis of the relevant statutes, this Court stated that the language of MCL 432.218(1)(a) indicated that conducting an unlicensed gambling operation was a general-intent crime, as opposed to a specific-intent crime. *Id*. at 50-51. This Court then held that defendants' defenses of mistake of law and

entrapment by estoppel were not applicable. *Id*. at 52. This Court specifically held that defendants' mistake-of-law argument had "no effect" on the charges of conducting an unlicensed gambling operation because it was a general-intent crime. *Id*. In particular, this Court concluded that "[d]efendants . . . need not have intended to violate the law but rather simply have intended to perform the act of 'conducting' an unlicensed gambling operation" and that "defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial to a determination of whether they committed this offense." *Id*. This Court also held that defendants' argument was "equally unavailing with respect to the specific-intent charges brought under MCL 752.796 and MCL 752.797(3)(e)." *Id*. This Court noted that entrapment by estoppel and mistake of law "both require that the alleged reliance on a public official's representation be 'reasonable' or 'justified' " and that "[d]efendants are unable to meet this requirement." *Id*. at 52-53. Accordingly, this Court reversed the trial court's dismissal order and remanded for further proceedings. *Id*. at 53.

On remand, defendants moved to admit evidence of the Norton Shores investigation and the results of that civil lawsuit. Defendants argued that this evidence was necessary to defend against the charges, even though this Court had ruled that MCL 432.218(1)(a) was a general-intent crime and that it was unnecessary to show that defendants intended to violate the law. The trial court denied defendants' motion, ruling that the evidence was not admissible in light of this Court's decision in *Zitka*. Following a joint jury trial, the jury found both defendants guilty of three counts each of conducting an unlicensed

gambling operation and three counts of using a computer to commit a crime. Defendants now appeal.

I. ADMISSIBILITY OF THE CIVIL LITIGATION

Defendants argue that the trial court abused its discretion and violated their constitutional right to present a defense by excluding evidence related to the previous civil lawsuit at their criminal trial. In particular, they argue that the dismissal order in the civil lawsuit was admissible to show that they believed they were acting in compliance with the law. We disagree.

"The decision whether to admit evidence is within a trial court's discretion." *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes." *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018) (quotation marks and citation omitted). "A trial court also necessarily abuses its discretion when it makes an error of law." *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). "To the extent that a trial court's ruling . . . involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014) (quotation marks and citation omitted). Likewise, "[t]his Court reviews de novo whether defendant suffered a deprivation of his constitutional right to present a defense." *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009). Whether the law-of-the-case doctrine applies is a question of law that we also review de novo. *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

"A defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses." *People v Yost*, 278 Mich App 341, 379;

749 NW2d 753 (2008). "But this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id*. (quotation marks and citation omitted); see also *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998) ("A defendant's interest in presenting [reliable] evidence may thus bow to accommodate other legitimate interests in the criminal trial process.") (quotation marks and citation omitted). For example, under our rules of evidence, "the right to present a defense extends only to relevant and admissible evidence." *People v Solloway*, 316 Mich App 174, 198; 891 NW2d 255 (2016) (quotation marks and citation omitted). " 'Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." ' " *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008), quoting *Scheffer*, 523 US at 308, in turn quoting *Rock v Arkansas*, 483 US 44, 56; 107 S Ct 2704; 97 L Ed 2d 37 (1987).

In considering defendants' argument that the trial court's exclusion of the challenged evidence violated their right to present a defense, the threshold question is whether the circumstances or outcome of the Norton Shores civil litigation was probative of any fact that was of consequence to the determination of the criminal action. As a general rule, "relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." MRE 402. " 'Relevant evidence' [has a] tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "[A] material fact need not be an element of a crime or cause of action or defense but it

must, at least, be 'in issue' in the sense that it is within the range of litigated matters in controversy." *People v Mills*, 450 Mich 61, 68; 537 NW2d 909 (1995) (quotation marks and citation omitted). This Court's prior decision in *Zitka* establishes that the challenged evidence was not relevant, and therefore, the trial court did not abuse its discretion by excluding the evidence.

A. RELEVANCY OF THE CIVIL LAWSUIT TO THE GAMBLING-OPERATION CHARGE

This Court held in *Zitka*, 325 Mich App at 50-51, that conducting a gambling operation without a license is a general-intent crime. " '[U]nder the doctrine of the law of the case, if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal question will not be differently determined in a subsequent appeal in the same case where the facts remain materially the same.' " *Ingham Co v Mich Co Rd Comm Self-Ins Pool*, 329 Mich App 295, 303; 942 NW2d 85 (2019), quoting *Bennett v Bennett*, 197 Mich App 497, 499; 496 NW2d 353 (1992). The binding nature of the doctrine typically "applies without regard to the correctness of the prior determination." *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994) (quotation marks and citation omitted). However, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice." *People v Phillips (After Second Remand)*, 227 Mich App 28, 33; 575 NW2d 784 (1997). An "injustice" may occur when there has been an intervening change in the law, see *People v Spinks*, 206 Mich App 488, 496-497; 522 NW2d 875 (1994), or when "the prior opinion was clearly erroneous," *Phillips*, 227 Mich App at 34, citing *People v Wells*, 103 Mich App 455, 463; 303 NW2d 226 (1981).

Accordingly, this Court explained that a mistake-of-law defense was not available to the charge of conducting a gambling operation without a license because the offense is a general-intent crime. *Zitka*, 325 Mich App at 51-52. This Court stated:

> Defendants therefore need not have intended to violate the law but rather simply have intended to perform the act of "conducting" an unlicensed gambling operation. See *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). Accordingly, *defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial* to a determination of whether they committed this offense. [*Zitka*, 325 Mich App at 52 (emphasis added).]

Furthermore, when discussing the additional charges of using a computer to commit a crime, this Court held that defendants could not rely on the statement by the Norton Shores city attorney in the civil suit to defend their state criminal charges, stating:

> Entrapment-by-estoppel and mistake-of-law defenses both require that the alleged reliance on a public official's representation be "reasonable" or "justified." Defendants are unable to meet this requirement. They claim reliance on the Norton Shores city attorney's agreement in the stipulated order that operations at The Landing Strip were in compliance with applicable gambling laws and ordinances. It cannot be said that a statement by a city attorney in a civil suit involving a local ordinance could be authoritative on a matter of criminal state law such that reliance on it was reasonable. The statement was not made by the attorney general's office, by the MGCB, or by a county prosecutor. [*Id*. at 52-53.]

This Court's analysis in *Zitka* demonstrates that the trial court did not abuse its discretion by not allowing defendants to present evidence of the Norton Shores civil litigation at their criminal trial. We are bound by

the earlier decision in *Zitka* under the law-of-the-case doctrine and because this Court's prior decision is published. See MCR 7.215(C)(2) ("A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis.").

Defendants wanted to introduce the evidence of the civil dismissal order because it contained the parties' stipulation that "[d]efendants agree to operate the Landing Strip LLC without violation of any applicable gambling laws or ordinances as it is currently operating[.]" Defendants maintain that this evidence was relevant to show that they believed they were operating their businesses in compliance with the law. Even if defendants held this belief, however, this Court's decision in *Zitka* establishes that defendants' alleged belief that they were operating their establishments in compliance with the law is immaterial to whether they were "conducting" an unlicensed gambling operation. *Zitka*, 325 Mich App at 52. Defendants argue that this Court's prior decision did not totally foreclose this evidence for all purposes and that a relevant issue in this case was whether they "intended to perform the act of 'conducting' an unlicensed gambling operation." *Id*. They maintain that the stipulated civil order was relevant to that issue because it indicated that they did not intend to conduct "an unlicensed gambling operation." However, this Court's discussion in *Zitka* of the *mens rea* required for conducting an unlicensed gambling operation emphasized that the focus of this inquiry is whether defendants intended to "operate" what amounts to a gambling operation. This Court made it clear that its holding rested on the volitional character of the word "conducting," not on the intent to cause the outcome that their "conduct" set in motion. *Zitka*, 325 Mich App at 50 ("[T]he statute's use of the term 'conducting' evidences an intention that the *mens*

rea element of MCL 432.218(1)(a) be the intent to perform the act of 'conducting.' ").

Defendants are essentially taking the position that the prosecution needed to prove that defendants specifically intended to operate an *illegal* gambling operation or to prove that defendants were operating a gambling operation knowing that it was illegal. This position is not supported by this Court's decision in *Zitka*, in which this Court held that the prosecution was only required to prove that the manner in which defendants intended to operate their cafés constituted a gambling operation within the meaning of the statute. MCL 432.218(1)(a), as enacted by 1997 PA 69, provides that a person is guilty of a felony for "[c]onducting a gambling operation where wagering is used or to be used without a license issued by the board." "Board" is defined as the "Michigan gaming control board." MCL 432.202(f), as enacted by 1997 PA 69. "Gambling operation" refers to "the conduct of authorized gambling games in a casino." MCL 432.202(w), as enacted by 1997 PA 69. MCL 432.202(v), as enacted by 1997 PA 69, defines the term "gambling game" as

> any game played with cards, dice, equipment or a machine, *including any mechanical, electromechanical or electronic device which shall include computers and cashless wagering systems, for money, credit, or any representative of value*, including, but not limited to, faro, monte, roulette, keno, bingo, fan tan, twenty one, blackjack, seven and a half, klondike, craps, poker, chuck a luck, Chinese chuck a luck (dai shu), wheel of fortune, chemin de fer, baccarat, pai gow, beat the banker, panguingui, slot machine, any banking or percentage game, or any other game or device approved by the board, but does not include games played with cards in private homes or residences in which no person makes money for operating the game, except as a player. [Emphasis added.]

Therefore, while evidence concerning whether defendants' operation met the statutory requirements for a gambling operation involving "gambling games" was relevant, evidence of whether defendants specifically intended their operation to be an unlicensed gambling operation or specifically intended to violate MCL 432.218(1)(a) was not relevant. Accordingly, the trial court did not abuse its discretion by excluding this evidence. Further, because the evidence was not relevant, the trial court's exclusion of this evidence did not violate defendants' right to present a defense.

Zitka also argues that this evidence should have been allowed after the prosecution introduced evidence that defendants knew that their businesses were operating illegally, such as cease-and-desist letters defendants saw in connection with other investigations. The record discloses that the prosecution cross-examined defendants about their knowledge in response to defendants' claims that they did not know that what they were doing was illegal. Arguably, the trial court could have prevented defendants from introducing their lack of knowledge of the legality of their operations because their subjective beliefs were not relevant. However, because the trial court allowed defendants to introduce limited testimony about their knowledge, the prosecution did not act improperly by cross-examining them on that subject to challenge the credibility of their testimony. Thus, we reject Zitka's claim that defendants should have been allowed to introduce additional irrelevant evidence in rebuttal.

B. RELEVANCY OF THE EVIDENCE TO THE UNLAWFUL-USE-OF-A-COMPUTER CHARGES

With respect to the charge of using a computer to commit a crime, MCL 752.796 provides:

> (1) 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.
>
> (2) This section does not prohibit a person from being charged with, convicted of, or punished for any other violation of law committed by that person while violating or attempting to violate this section, including the underlying offense.
>
> (3) This section applies regardless of whether the person is convicted of committing, attempting to commit, conspiring to commit, or soliciting another person to commit the underlying offense.

In the prior appeal, this Court characterized the offense of using a computer to commit a crime as a specific-intent crime. See *Zitka*, 325 Mich App at 52. However, this Court did not explain what specific intent is necessary for a conviction under MCL 752.796. The language of MCL 752.796 prohibits the use of a computer to "commit a crime." The alleged crime in this case was "[c]onducting a gambling operation in which wagering is used or to be used without a license issued by the board." MCL 432.218(1)(a). " '[I]n order to commit a specific intent crime, an offender would have to subjectively desire *or know that the prohibited result will occur*, whereas in a general intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result.' " *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997), quoting *People v Lerma*, 66 Mich App 566, 569-570; 239 NW2d 424 (1976) (emphasis added). Thus, as applied to this case, to obtain a conviction under MCL 752.796, the prosecution was required to prove that defendants specifically intended to "use a computer program, computer, computer system, or computer network to com-

mit, attempt to commit, conspire to commit, or solicit another person to commit" the general-intent crime of "[c]onducting a gambling operation in which wagering is used or to be used without a license issued by the board." The specific intent necessary to commit this offense is the intent to use a computer to conduct a gambling operation without a license, which constitutes a crime. Contrary to what defendants suggest, the prosecution was not required to prove that defendants used the computer with the specific intent or knowledge that the gambling operation they were conducting was illegal. This would effectively convert the underlying offense into a specific-intent crime, contrary to this Court's decision in *Zitka*. Accordingly, the Norton Shores investigation and the settlement in that civil lawsuit would be no more relevant to determining defendants' guilt or innocence for the crime of unlawful use of a computer than for the underlying crime of conducting the gambling operation. Therefore, the trial court did not err when it precluded defendants from introducing evidence of the civil lawsuit to show that defendants lacked the specific intent necessary to support a conviction of using a computer to commit a crime.

C. INEFFECTIVE ASSISTANCE

Zitka also argues that defense counsel was ineffective for failing to seek introduction of the evidence of the order in the civil case to rebut the prosecution's repeated introduction of evidence that defendants knew what they were doing was illegal. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation " 'fell below an objective standard of reasonableness' " and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would

have been different. *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012), quoting *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. The defendant must "overcome the strong presumption that counsel's performance was born from a sound trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012).

This Court had already determined that evidence of the Norton Shores litigation was "immaterial to a determination of whether [defendants] committed [the offense of conducting an unlicensed gambling operation]." *Zitka*, 325 Mich App at 52. Despite this ruling, defense counsel endeavored to obtain a ruling allowing the evidence, but the trial court concluded that the evidence was not admissible. Given this Court's prior decision in *Zitka* and the trial court's subsequent ruling disallowing the evidence, Zitka cannot show that counsel's decision to refrain from again moving to admit this evidence was objectively unreasonable. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

II. CHARACTER WITNESSES

Hernandez-Zitka argues that the trial court abused its discretion by granting the prosecution's motion to preclude her from offering character witnesses to testify regarding her character and reputation for being a law-abiding citizen. We disagree.

MRE 404(a)(1) permits the accused to introduce evidence of a "pertinent" character trait, and a pertinent trait must relate to the charged crime. Accord-

ingly, a defendant has a "right to introduce evidence of his character to prove that he could not have committed the crime." *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986); see also *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009) ("Under MRE 404(a)(1) a defendant may offer evidence that he or she has a character trait that makes it less likely that he or she committed the charged offense."). One example of a pertinent trait would be a defendant's character for peacefulness in a crime involving alleged violent conduct. *Id*. at 93-96. As another example, our Supreme Court has held that evidence of "the truthfulness of a person" is admissible "in an action for defamation of the person's allegedly 'untruthful' character." *People v Harris*, 458 Mich 310, 318; 583 NW2d 680 (1998).

Hernandez-Zitka fails to explain how her truthful character would have made her less likely to have committed the offense of conducting an unlicensed gambling operation. Her truthfulness or general reputation for adhering to the law has no bearing on whether she intended to operate the cafés in a manner that met the definition of a gambling operation, particularly when this Court had already determined that defendants' intent to "break the law" was not relevant to the illegal-gambling charges. Because Hernandez-Zitka sought to introduce this evidence only to make an irrelevant point, the trial court did not err by excluding the evidence.

III. RES JUDICATA AND ENTRAPMENT BY ESTOPPEL

Hernandez-Zitka also argues that res judicata and entrapment by estoppel are valid defenses to her convictions in this case. She recognizes that this Court previously ruled that entrapment by estoppel did not apply, but she claims that the prior decision was made

without all the necessary facts. We review de novo whether res judicata bars a subsequent action. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). Whether entrapment by estoppel applies is a question of law that we review de novo. *People v Fyda*, 288 Mich App 446, 456; 793 NW2d 712 (2010).

Although the doctrines of res judicata and collateral estoppel are distinguishable, they share the common element of privity. In *Zitka*, 325 Mich App at 44, this Court discussed the doctrine of collateral estoppel as follows:

> The doctrine of collateral estoppel generally precludes relitigation of an issue in a subsequent proceeding when that issue has previously been the subject of a final judgment in an earlier proceeding. *Porter v Royal Oak*, 214 Mich App 478, 485; 542 NW2d 905 (1995). Collateral estoppel applies when the following three conditions are satisfied: "(1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full [and fair] opportunity to litigate the issue; and (3) there must be mutuality of estoppel." *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004) (quotation marks and citations omitted; alteration in original). Mutuality of estoppel requires that the party seeking to invoke the doctrine establish that his or her adversary was either a party to, or in privy with a party to, the previous action. *Id*. at 684. [Alteration in original.]

In contrast, res judicata operates to bar a second action when "(1) the first action was decided on the merits, (2) the matter contested in the second action was or could have been resolved in the first, and (3) both actions involve the same parties or their privies." *Dart v Dart*, 460 Mich 573, 586; 597 NW2d 82 (1999). Res judicata is broadly applied in Michigan, barring not only claims already litigated but also every claim arising from the same transaction that could have been

brought by exercising reasonable diligence. *Id*. The burden of establishing res judicata is on the party asserting that doctrine. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Under either doctrine, the proponent must demonstrate the existence of privity in connection with the earlier action. *Id*.; *Monat*, 469 Mich at 684.

In the context of collateral estoppel, this Court determined in the prior appeal that the prosecutor in this case and the Norton Shores city attorney in the civil case were not in privity, despite the Attorney General's ability to intervene in the civil case under MCL 14.28 and MCL 14.101. Thus, for the purpose of deciding whether res judicata could apply to this case, we are bound by our previous determination. Accordingly, Hernandez-Zitka cannot show that res judicata barred her convictions in this case.

Hernandez-Zitka also argues that this Court erroneously decided that entrapment by estoppel was not available as a defense in her criminal case. Again, we are bound to follow this Court's decision in *Zitka*, 325 Mich App at 51-53, rejecting the availability of entrapment by estoppel in this case. The only new argument Hernandez-Zitka offers is that the circuit court's approval of the earlier settlement should have allowed her to rely on the legality of her prior actions. However, she does not discuss how the circuit court's decision to permit the Norton Shores settlement was a binding determination regarding whether defendants' operation of The Landing Strip was a violation of MCL 432.218(1)(a), much less a decision concerning other businesses not involved in the lawsuit. Accordingly, Hernandez-Zitka's claim that she is entitled to relief under the doctrine of entrapment by estoppel is not persuasive.

IV. OPINION TESTIMONY

Hernandez-Zitka also argues that the trial court erred when it allowed prosecution witnesses to provide opinion testimony regarding whether illegal gambling was being conducted at defendants' establishments. We review the trial court's decisions regarding the admission of evidence for an abuse of discretion. *Katt*, 468 Mich at 278.

MRE 701 permits the admission of lay opinion testimony and provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 702 permits the admission of expert testimony and provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 704 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Nevertheless, there are limits on an expert's opinion testimony. An expert witness may not "express[] an opinion regarding the defendant's guilt or whether the defendant had a

culpable state of mind," *People v McFarlane*, 325 Mich App 507, 523; 926 NW2d 339 (2018), or "testify about the requirements of law which apply to the particular facts in the case or to phrase his opinion in terms of a legal conclusion," *People v Drossart*, 99 Mich App 66, 75; 297 NW2d 863 (1980).

Hernandez-Zitka challenges the testimony of two witnesses who testified that defendants' cafés were illegal gambling operations. Mark Laberge, a regulations officer with the MGCB, was asked to explain, in his words, what an Internet café was. He replied, "An illegal casino." After defense counsel objected, the trial court struck the term "illegal" from his response.[2] Later, after Laberge discussed his visit to Fast Lane, how he was given a café user account and access to the sweepstopia.com website, and how he was able to obtain cash from the café when he won games on the website, he was asked what he looked for to determine whether gambling was occurring. Laberge replied, "Was there consideration, was there chance, and was there a prize." He then testified that he found all these elements in this case. When defense counsel objected, the trial court stated that counsel would be able to cross-examine Laberge about this opinion.

Laberge's initial response that Internet cafés are *illegal* casinos was improperly phrased in terms of a legal conclusion. However, the trial court adequately cured this error by quickly striking the objectionable portion of his response. Defense counsel assented to this remedy. Thus, Hernandez-Zitka cannot now claim that this remedy was insufficient. See *People v Buie*, 491 Mich 294, 312; 817 NW2d 33 (2012) (explaining that a defendant should raise objections at a time when

[2] The trial court later instructed the jury not to consider any testimony that was excluded or struck.

the trial court can correct them and that a defendant is not permitted to "harbor error as an appellate parachute") (quotation marks and citations omitted). With respect to the later testimony, Laberge's statement that the Fast Lane operation shared the characteristics of consideration, a game of chance, and a prize with other gambling establishments was not an improper comment on the ultimate question of Hernandez-Zitka's guilt. While this testimony supported a finding that defendants' cafés were gambling operations, this question was left to the jury to determine. As with the first comment, defense counsel was also permitted to cross-examine the witness regarding the bases for his conclusions that the characteristics of a gambling operation existed. Therefore, Hernandez-Zitka is not entitled to relief.

Hernandez-Zitka also argues that the prosecution improperly elicited similar testimony from John Lessnau, the manager of the criminal investigation section for the MGCB. Lessnau was qualified as an expert witness in the field of illegal gambling. After discussing the same three elements of consideration, chance, and a prize, Lessnau also discussed sweepstopia.com, stating that it did not have a gambling license. He then testified about his investigation into the Internet sites accessed by the customers at defendants' cafés and stated that roughly 80% of the traffic went to sweepstopia.com. Over defense counsel's objection, Lessnau was then asked about his opinion of sweepstopia.com, and he testified that the website was operating illegally. This was not improper expert testimony because Lessnau testified about his opinion concerning the website, not defendants' cafés. This answer could have led the jury to find that because a majority of defendants' customers visited this website, the cafés were also conducting illegal gambling opera-

tions. However, Lessnau did not provide this legal conclusion about defendants' cafés or their guilt.

After explaining sweepstakes and how they differ from a lottery—as well as that Michigan does not have an exception for "internet sweepstakes café" operations from the general ban on unlicensed gambling—Lessnau was asked his opinion about defendants' operations.

> *Q*. Okay. Having been to both—to all three locations here, were they internet sweepstakes cafés in your opinion?
>
> *A*. They were illegal gambling operations.

Defense counsel immediately objected, stating: "Your Honor, if the court could clarify that the jury is going to make the ultimate decision. That this is one witness' [sic] opinion, if the court would clarify that for the jury." The trial court replied that it had already so instructed the jury twice and that the jury would receive further instructions about its duty to determine the weight and credibility of all the evidence. The trial court later provided such an instruction.

As with Laberge's testimony, the remedy that defense counsel sought was sufficient to cure any prejudice. See *Buie*, 491 Mich at 312. The court's instructions made it clear to the jury that it would ultimately decide whether defendants' businesses were illegal gambling operations. "Jurors are presumed to follow their instructions," and jury instructions are presumed to "cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

Affirmed.

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

KELLEY v GENERAL MOTORS LLC

Docket No. 344005. Submitted January 15, 2020, at Lansing. Decided January 14, 2021, at 9:00 a.m.

Ira O. Kelley sought a hearing before the Workers' Compensation Board of Magistrates, alleging that his former employer, General Motors LLC, had used a formula that reduced his worker's compensation benefits by considering his Social Security Disability Insurance (SSDI) payments in violation of MCL 418.354(11), which governs the coordination of benefits. Plaintiff had been awarded workers' compensation benefits in 1990, and he retired in 1992 as a result of disability. At the time, a 1990 letter of agreement, which was incorporated into the parties' collective-bargaining agreement (CBA), barred coordination of benefits; however, in 2009, a new letter of agreement subjected all retirees who retired before January 1, 2010, to coordination of benefits, regardless of their date of retirement or injury. The 2009 agreement contained a formula for computing the amount of benefit reduction that capped the amount by which benefits could be reduced but also included consideration of an employee's SSDI benefits. The magistrate, Jane S. Columbo, ruled that defendant's formula for coordinating benefits violated MCL 418.354(11) and ordered defendant to reimburse plaintiff the amount by which his payments had been reduced. Defendant appealed before what was then the Michigan Compensation Appellate Commission, which reversed the magistrate's order. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 418.354(11) provides that SSDI benefits shall be coordinated, but only if 42 USC 424a—a provision of the federal Social Security Act—has been revised so that a reduction of SSDI benefits is not made because of an employee's receipt of worker's compensation benefits. Because Congress has never amended this provision of the Social Security Act in the manner that would trigger the contingency in the statute, MCL 418.354(11) was without operative effect and did not mandate coordination of SSDI benefits.

2. Plaintiff's case was materially indistinguishable from *Arbuckle v Gen Motors LLC*, 499 Mich 521 (2016), which involved

the same letter of agreement and the same CBA. Although the *Arbuckle* Court did not reach the merits of the argument regarding MCL 418.354(11), it did hold that, as a threshold matter, it must be determined whether a plaintiff's claim of entitlement to uncoordinated workers' compensation is actually a claim under § 301 of the federal Labor Management Relations Act (LMRA), 29 USC 185, and therefore preempted by federal law. *Arbuckle* adopted a two-part test for determining whether § 301 preemption occurs: first, the court examines whether proof of the state-law claim requires interpretation of a CBA's terms; second, it ascertains whether the right claimed by the plaintiff is created by the CBA or by state law. If application of the test reveals a right that both arises from state law and does not require contractual interpretation, then there is no preemption. However, if a state-law claim fails either of these two requirements, it is preempted by § 301.

3. The United States Supreme Court has interpreted § 301 of the LMRA as requiring that the relationships created by a CBA be defined by application of an evolving federal common law grounded in national labor policy in order to avoid the possibility that individual contract terms might have different meanings under state and federal law, thereby exerting a disruptive influence on both the negotiation and the administration of collective agreements. The Supreme Court has read § 301 as preempting state-law claims if the heart of the claim is a clause in the CBA. Thus, although plaintiff claims a state cause of action under MCL 418.354(11) for breach of contract on the part of defendant, § 301 preempts that claim. The *Arbuckle* Court noted that in order to determine whether defendant was authorized to coordinate plaintiff's workers' compensation benefits with his disability pension benefits, it was necessary to interpret the 1990 letter of agreement and the 1990 CBA as well as the parties' subsequent agreements permitting benefit coordination, which were incorporated into the then-existing CBAs. Accordingly, the *Arbuckle* Court held that the plaintiff's claim failed the first prong of the federal preemption test and was therefore preempted by § 301. Because plaintiff's claim in this case relied on precisely the same agreements that were at issue in *Arbuckle*, his claim was also preempted by § 301 and thus was controlled by federal law.

4. Plaintiff retired in 1992, during a time when the 1990 letter of agreement prohibiting coordination of benefits was in effect, which placed plaintiff on the same legal footing as the plaintiff in *Arbuckle*. Applying federal decisional law regarding CBAs, *Arbuckle* held that the intent of the parties and the specific

language of the CBA controlled whether a benefit vests and that when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life. The CBAs and letters of agreement at issue contained language providing that the agreements would remain in effect "until termination or earlier amendment" of the agreement. Thus, the right to uncoordinated benefits had not vested because it was subject to an express durational limit and it clearly informed persons covered by the agreement that the right was subject to modification. As a result, under the terms of the 1990 letter of agreement and the 1990 CBA, the right to uncoordinated benefits was subject to modification. Because the present case involved the same agreements as in *Arbuckle*, application of federal law dictated the same result: defendant's coordination of plaintiff's benefits was lawful. Therefore, the judgment was affirmed because it reached the correct result, albeit for the wrong reasons.

Affirmed.

LETICA, J., concurred in the result only.

LABOR RELATIONS — LABOR MANAGEMENT RELATIONS ACT — STATE-LAW CLAIMS — COLLECTIVE-BARGAINING AGREEMENTS — PREEMPTION.

A state-law claim that is based on a clause in a collective-bargaining agreement is preempted by § 301 of the Labor Management Relations Act, 29 USC 185, if proof of the claim requires interpretation of the agreement's terms or if the right being claimed arises from the agreement rather than from state law.

Paskel, Tashman, & Walker, PC (by *Michael J. Cantor*) for plaintiff.

Lacey & Jones, LLP (by *Gerald M. Marcinkoski*) for defendant.

Before: BOONSTRA, P.J., and TUKEL and LETICA, JJ.

TUKEL, J.

I. INTRODUCTION

Over time, public policy has evolved in Michigan regarding the "coordination" of some social welfare benefits. "Coordination" refers to the approach by which

"an employer paying workers' compensation obligations may set off a portion of certain other benefits, such as pensions and social security payments, also received by the employee and financed by the employer." *Reidenbach v Kalamazoo*, 327 Mich App 174, 183; 933 NW2d 335 (2019) (quotation marks and citation omitted). Our Supreme Court has noted the history and legal development of coordination:

> Because most social legislation in Michigan was implemented in unrelated fragments, failure to coordinate resulted in an accumulation of benefits. For example, before coordination, it was not unusual for an employee to collect both unemployment and worker's compensation benefits at the same time. However, if an employee undergoes a period of wage loss, it does not follow that he should receive multiple wage-loss benefits simultaneously. An employee can experience only one wage loss and, in any logical or coherent system, should receive only one wage-loss benefit at any one time. [*Drouillard v Stroh Brewery Co*, 449 Mich 293, 299; 536 NW2d 530 (1995) (citation omitted).]

Thus, "[a]fter discovering that many employers were paying more than once to compensate a disabled employee's lost earning potential when that employee was also receiving disability pension benefits, the Legislature, in 1981, enacted MCL 418.354." *Arbuckle v Gen Motors LLC*, 499 Mich 521, 526; 885 NW2d 232 (2016).

> The statute permits an employer to reduce its obligation to pay an employee's weekly workers' compensation benefits by coordinating those benefits with that employee's disability pension benefits. Although the statute makes coordination mandatory by default, MCL 418.354(14) permits an employer to elect *not* to coordinate disability pension benefits in certain circumstances, such as when it negotiates an employment agreement that provides otherwise. [*Id*.]

The statute has another twist, beyond the default and opt-out positions: the Legislature also provided that "[d]isability insurance benefit payments under the so-

cial security act," more commonly referred to as Social Security Disability Insurance or SSDI benefits, shall be coordinated, but only if the social security act were to someday be amended in a particular manner in which, to date, it has not been so amended. MCL 418.354(11); see note 4 of this opinion.

All of that is a long way of bringing us to the question presented in this case. The current disability pension plan between the United Auto Workers—which represents plaintiff, Ira O. Kelley—and defendant, General Motors LLC, includes SSDI payments as part of a formula for coordinating benefits. The formula, which has been incorporated in collective-bargaining agreements (CBAs) for a number of years, aggregates a disabled employee's various sources of disability income and then, if the total exceeds the employee's average weekly wage, coordinates the benefits to reduce them; the formula limits the amount by which a benefit can be coordinated by providing that the amount of the reduction shall not exceed the amount of the disability benefit. See notes 1 and 3 of this opinion. Plaintiff challenges the formula as unlawful under MCL 418.354(11); plaintiff argues that the formula improperly considers his SSDI benefits by combining them with other benefits to determine whether he has reached an average weekly wage cap. Essentially, plaintiff argues that the formula effectively uses his SSDI benefits to reduce his worker's compensation benefits in violation of MCL 418.354(11). It is plaintiff's position that if SSDI benefits were not included in the formula, as he asserts MCL 418.354(11) mandates, then his total income under the formula would be less than his average weekly wage and not subject to any coordination.[1]

[1] In other words, it is plaintiff's position that the statute protects his right to receive more than "one wage-loss benefit at any one time."

Although this case presents an interesting question of Michigan law regarding employee benefits, plaintiff's claim is preempted by § 301 of the Labor Management Relations Act (LMRA), codified at 29 USC 185, which requires that "the relationships created by [a collective-bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy," *Bowen v US Postal Serv*, 459 US 212, 224-225; 103 S Ct 588; 74 L Ed 2d 402 (1983). Thus, we need not consider whether MCL 418.354(11), in the abstract, operates in the manner in which plaintiff asserts because it simply is not available to him in this context involving a collective-bargaining agreement. Therefore, applying federal law, we affirm the judgment of the Michigan Compensation Appellate Commission (the Commission), which upheld defendant's coordination of plaintiff's benefits.

II. PROCEDURAL HISTORY

Plaintiff appeals by leave granted the decision of the Commission.[2] Plaintiff's claim for unemployment benefits proceeded under a stipulated record. The magistrate agreed with plaintiff that MCL 418.354(11) prohibited consideration of SSDI benefits as part of the

Drouillard, 449 Mich at 299. Defendant argues that the formula actually protects plaintiff, because absent the formula all of his benefits would be subject to coordination, but the formula prohibits the amount of the reduction from exceeding the amount of the disability benefit. As *Arbuckle* noted, the formula "did not completely coordinate future retirees' benefits." *Arbuckle*, 499 Mich at 235 n 9. "In short, a retiree who was subject to coordination under the new formula would, at least, still receive payments from defendant equal to his earnings before the injury that resulted in the disability benefits." *Id*. Because plaintiff's claim is preempted by federal law, we have no occasion to determine which position regarding MCL 418.354(11) is correct.

[2] *Kelley v Gen Motors LLC*, unpublished order of the Court of Appeals, entered December 10, 2018 (Docket No. 344005).

formula for coordinating plaintiff's benefits, ordering defendant to reimburse plaintiff for benefits wrongfully withheld. On appeal, the Commission concluded that defendant had not violated the statute and reversed the magistrate's order to reimburse plaintiff. Plaintiff now appeals the Commission's decision, which we affirm, albeit for reasons that differ from those provided by the Commission.

III. UNDERLYING FACTUAL HISTORY

Plaintiff was awarded workers' compensation benefits in 1990 and retired due to disability in 1992. At the time of his retirement, a 1990 letter of agreement, which was incorporated into a CBA involving plaintiff and defendant General Motors, barred coordination of benefits. In 2007, a letter of agreement was incorporated into the 2007 CBA, which for the first time resulted in some coordination of benefits, but only for "employees who are injured and retire on or after October 1, 2007," a class of employees that did not include plaintiff. In 2009, a new letter of agreement for the first time subjected plaintiff to coordination, because it applied to "all retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury." As noted, the 2009 agreement contained a formula for computing the amount of benefit reduction, but it also placed a cap on the amount by which benefits could be reduced. The formula included "consideration" of an employee's SSDI benefits.[3] It is plain-

[3] Under the formula, plaintiff's weekly workers' compensation benefit, pension benefit, and SSDI benefit were added together and compared to plaintiff's average weekly wage and a "yielded coordination rate" was produced, which could reduce an employee's workers' compensation benefits by a certain amount, but the amount of the reduction could not be "greater than the disability retirement benefit payable."

tiff's contention that the consideration of those benefits runs afoul of MCL 418.354(11).[4]

On January 1, 2010, defendant began coordinating benefits pursuant to the 2009 letter of agreement. On January 21, 2014, plaintiff began receiving Social Security retirement benefits, and consequently his eligibility for workers' compensation benefits ended. We need not detail the amounts involved in the application of the coordination formula in this particular case, but under it, plaintiff's workers' compensation benefits were reduced by $118.70 per week for just over four years, from January 1, 2010 until January 21, 2014, a period of approximately 211 weeks, for a total difference of approximately $25,000.[5] As noted, plaintiff argued below and maintains on appeal that the reduction of his benefits by that amount was in violation of MCL 418.354(11). In April 2010, he filed an application with the Michigan Administrative Hearings System Workers' Compensation Board of Magistrates, making

[4] That provision states:

> Disability insurance benefit payments under the social security act shall be considered to be payments from funds provided by the employer and to be primary payments on the employer's obligation under section 301(7) or (8), 351, or 835 as old-age benefit payments under the social security act are considered pursuant to this section. The coordination of social security disability benefits shall commence on the date of the award certificate of the social security disability benefits. Any accrued social security disability benefits shall not be coordinated. However, social security disability insurance benefits shall only be so considered if section 224 of the social security act, 42 USC 424a, is revised so that a reduction of social security disability insurance benefits is not made because of the receipt of worker's compensation benefits by the employee.

[5] According to counsel, there are other retirees whose benefits were coordinated using the same formula and who have filed claims, which are at various stages of proceedings, asserting that MCL 418.354(11) prohibits such coordination.

those allegations. After a hearing on the stipulated facts, the magistrate agreed, ordering reimbursement to plaintiff of the reduced payments. Defendant appealed the magistrate's decision to the Commission, which ruled that defendant's coordination formula did not violate MCL 418.354(11). This appeal followed.

IV. STANDARD OF REVIEW

We review questions of law in a workers' compensation case, including the proper interpretation of a statute, de novo. *Arbuckle*, 499 Mich at 531. "Interpretation of a collective-bargaining agreement, like interpretation of any other contract, is also a question of law" subject to de novo review. *Id*. (citation omitted). "A reviewing court interprets a collective-bargaining agreement according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." *Id*. at 531-532 (quotation marks and citation omitted).

V. ANALYSIS

MCL 418.354(11), the statute on which plaintiff relies, provides that SSDI benefits shall be coordinated, but it further provides that it shall become operative only "if section 224 of the social security act, 42 USC 424a, is revised so that a reduction of social security disability insurance benefits is not made because of the receipt of worker's compensation benefits by the employee." See note 4 of this opinion. Thus, at present, MCL 418.354(11) is without operative effect and therefore does not mandate coordination of SSDI benefits because it is undisputed that Congress has never amended § 224 of the Social Security Act in the manner that would trigger the contingency in the statute. See *Arbuckle*, 499 Mich at 530 n 15. In *Arbuckle*, the plain-

tiff made precisely the same argument made here, in addition to a contractual claim. *Id*. The parties agree that, in *Arbuckle*, our Supreme Court did not address the question at issue in this case and they further agree generally that Michigan courts have never construed MCL 418.354(11). In fact, the entire premise of plaintiff's claim is that because *Arbuckle* did not decide the question, MCL 418.354(11) at least arguably affords him a remedy under Michigan law. However, plaintiff's position fails to consider the threshold issue of whether Michigan law applies to this case, and proper resolution of that threshold question is fatal to his claim.[6]

A. *ARBUCKLE* AND THE "THRESHOLD QUESTION"

In many respects, this case is simply a relitigation of *Arbuckle* by a different party, making it in material part factually and legally indistinguishable. The 2007 letter

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[6] In *Arbuckle*, our Supreme Court ordered supplemental briefing to address the question of " 'whether the plaintiff's action is governed by state law or federal law.' " *Arbuckle*, 499 Mich at 531, quoting *Arbuckle v Gen Motors LLC*, 498 Mich 956, 956 (2015). We did not order such supplemental briefing in this case. The question of preemption was answered unanimously by our Supreme Court in *Arbuckle*, so it should have been apparent to the parties that it was an issue that merited their consideration in this case. Nevertheless, in his principal brief on appeal, plaintiff did not address the question of whether state or federal law applied. Defendant, in its brief, did raise the argument that "federal law might be considered controlling," and it made the argument that federal law requires the labor contract to be respected. While defendant might not have briefed the question as fully as warranted, it did nonetheless acknowledge the issue. Even though he filed a reply brief, however, plaintiff again failed to address the issue of whether state or federal law controlled, or to even acknowledge defendant's argument in that regard.

Nonetheless, the parties' positions in this regard do not control; even if they had argued that state law alone governed, we would not be bound by that approach if it was incorrect. In a similar case involving federal preemption of state law, in which the respondent "argue[d] that petitioner waived her right to the application of anything other than a uniform federal rule of demand because she failed to advert to state law until her

of agreement is the same letter of agreement that was at issue in *Arbuckle*; that letter of agreement for the first time permitted the coordination of benefits "for employees who are injured and retire on or after October 1, 2007," a category that included neither plaintiff Kelley nor the plaintiff in *Arbuckle*.[7] The 2009 collective-bargaining agreement at issue here is the same collective-bargaining agreement involved in *Arbuckle*;[8] the 2009 letter of agreement, which modified the 2007 letter of agreement, making the coordination of benefits applicable "to all retirees who retired prior to January 1, 2010," is the identical letter that modified the same agreement in *Arbuckle* and that, by its terms, applies to plaintiff Kelley and to the plaintiff in *Arbuckle*;[9] and plaintiff's argument, relying on MCL 418.354(11), is one of the arguments that was ad-

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reply brief in the proceedings below," the United States Supreme Court expressly disagreed, holding that "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v Kemper Fin Servs, Inc*, 500 US 90, 99; 111 S Ct 1711; 114 L Ed 2d 152 (1991). The Supreme Court cited *Arcadia v Ohio Power Co*, 498 US 73; 111 S Ct 415; 112 L Ed 2d 374 (1990), in support of that point. In *Arcadia*, Justice Stevens, in a concurrence, noted, "While I join the Court's opinion because I am persuaded that its interpretation of the statute is correct, I add this additional explanation of my vote because neither the parties, the interested agencies, nor the Court of Appeals considered the construction of § 318 that the Court adopts today." *Id*. at 86 (Stevens, J., joined by Marshall, J., concurring). Thus, it is clear that we have the independent power to apply federal law if it controls, regardless of whether or not the parties advanced that position. As we read *Arbuckle*, it mandates the application of federal law in this circumstance.

[7] Compare Appellant's Index, pp 21-22, with *Arbuckle*, 499 Mich at 527-528 and 528 n 9.

[8] Compare Appellant's Index, pp 21-22, with *Arbuckle*, 499 Mich at 527-528 and 528 n 10.

[9] Compare Appellant's Index, pp 21-22, with *Arbuckle*, 499 Mich at 527-528 and 528 n 10.

vanced in *Arbuckle*. *Arbuckle* ultimately held that the claim that was ruled upon was governed by federal law. The obvious implication of the applicability of the same CBAs and letters of agreement is that *Arbuckle*'s holding that federal law controlled also prevails here. Plaintiff tries to sidestep that implication by noting that the Supreme Court did not reach the merits of the MCL 418.354(11) argument in *Arbuckle*. It is true that the Supreme Court did not decide that question:

> Plaintiff also claimed that defendant's coordination-of-benefits formula illegally "considered" plaintiff's SSDI benefits to reduce his workers' compensation benefits in violation of MCL 418.354(11), which, as previously indicated, requires employers to "consider[]" a retiree's SSDI benefits as "payments from funds provided by the employer and to be primary payments on the employer's obligation as old-age benefit payments under the social security act are considered" in MCL 418.354(1)(a), but only if the Social Security Act has been amended in a particular way. [*Arbuckle*, 499 Mich at 530 n 15 (ellipsis omitted).]

Our Supreme Court then stated, "We decline to consider this question because plaintiff failed to adequately brief and argue the issue in this Court, thereby abandoning it." *Id*.

Plaintiff treats that discussion as conclusive with respect to the argument that MCL 418.354(11) is available as a potential remedy in this case, and therefore, as noted, does not even address whether state or federal law applies. By doing so, plaintiff ignores the Supreme Court's disposition of the "threshold inquiry" in *Arbuckle*, *id*. at 534:

> A threshold question is whether plaintiff's claim of entitlement to uncoordinated workers' compensation benefits is actually a claim under § 301 of the federal Labor Management Relations Act (LMRA) and is, therefore,

> preempted by federal law. As part of this inquiry, we must determine whether we, as a state court, have jurisdiction to decide the merits of this case and, if so, whether state or federal law controls. [*Id*. at 532 (citation omitted).]

Arbuckle noted that " 'state courts have concurrent jurisdiction over controversies involving collective-bargaining agreements' " and that "state courts must apply federal law in deciding those claims . . . .' " *Id*. at 533, quoting *United Steelworkers of America v Rawson*, 495 US 362, 368; 110 S Ct 1904; 109 L Ed 2d 362 (1990). Thus, our Supreme Court held that "[a]lthough state courts have concurrent jurisdiction over controversies involving collective-bargaining agreements, § 301 preempts state substantive law. '[S]tate courts must apply federal law in deciding those claims' because 'only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements.' " *Arbuckle*, 499 Mich at 533, quoting *United Steelworkers*, 495 US at 368.[10]

B. PREEMPTION UNDER § 301 OF THE LABOR MANAGEMENT RELATIONS ACT

Preemption under § 301 "occurs when a decision on the state claim is inextricably intertwined with consid-

[10] It is perhaps a bit confusing that our Supreme Court stated that the plaintiff in *Arbuckle* abandoned the argument that the defendant's "coordination-of-benefits formula illegally 'considered' plaintiff's SSDI benefits to reduce his workers' compensation benefits in violation of MCL 418.354(11)," *Arbuckle*, 499 Mich at 530 n 15, in light of the fact that federal law applied, and thus the Michigan statute could have played no role whatsoever in any analysis. The Court's statement that the argument was abandoned due to inadequate briefing appears at the beginning of its opinion where it sets out the arguments of the parties, prior to its discussion of any legal issue. It is therefore understandable that the Court dismissed the argument as being inadequately briefed without proceeding to the threshold legal issue because the plaintiff's

eration of the terms of the labor contract and when application of state law to a dispute requires the interpretation of a collective bargaining agreement." *Arbuckle*, 499 Mich at 534 (quotation marks and citation omitted). Although " 'a suit in state court alleging a violation of a provision of a labor contract must be brought under § 301 and be resolved by reference to federal law,' other state-law claims could still involve 'the meaning or scope of a term in a contract suit[.]' " *Id*. (citation omitted). Those claims "are likewise preempted by federal labor law." *Id*.

Arbuckle adopted a two-part test "for determining whether § 301 preemption occurs." *Id*. at 535. Under that test, "[t]he court first 'examine[s] whether proof of the state law claim requires interpretation of collective bargaining agreement terms' and second, 'ascertain[s] whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law.' " *Id*. (citation omitted). "If application of this test reveals a right that both arises from state law and does not require contract interpretation, then there is no preemption. However, 'if a state-law claim fails *either* of these two requirements, it is preempted by § 301.' " *Id*. (citations omitted).

Here, the claimed right arises from the collective-bargaining agreement and MCL 418.354(11), a provision of state law. Thus, the operative question is whether resolution of this claim "does not require contract interpretation," because if it does not, "then there is no preemption." The question, then, boils down to the meaning of the term "contract interpretation" in this context.

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position was not sufficiently developed for the Court to even consider it. We understand the Court to have been saying that plaintiff's briefing of the issue was inadequate for submission regardless of whether state or federal law controlled.

C. "INTERPRETATION" OF COLLECTIVE-BARGAINING AGREEMENTS UNDER § 301

As noted, the United States Supreme Court has interpreted § 301 of the LMRA as requiring that "the relationships created by [a collective-bargaining] agreement" be defined by application of "an evolving federal common law grounded in national labor policy." *Bowen*, 459 US at 224-225. Indeed, as an initial matter, the mere fact that CBAs are to be governed by an evolving federal common law strongly suggests that statutory state-law exceptions, such as plaintiff maintains that MCL 418.354(11) creates, must be preempted, as they would obviously be in derogation of a uniform, federal common law.

The Supreme Court has noted that the need for such a uniform federal common law arises because

> the subject matter of § 301(a) "is peculiarly one that calls for uniform law." The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. [*Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v Lucas Flour Co*, 369 US 95, 103; 82 S Ct 571; 7 L Ed 2d 593 (1962) (citation omitted).][11]

The Court in *Lucas Flour* further noted that "[i]ndeed, the existence of possibly conflicting legal concepts might

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[11] *Arbuckle* quoted a passage from *United Steelworkers* that expressly relied on *Lucas Flour*. See *Arbuckle*, 499 Mich at 533.

substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes." *Id*. at 104. If the position that plaintiff advocates here were the law, the possibilities referred to in *Lucas Flour* would become certainties; the CBA between the UAW and General Motors, which is a national contractual agreement, would have a different meaning in Michigan than it would elsewhere, based on MCL 418.354(11), and presumably would be subject to similar state-law exceptions throughout the United States. In order to preclude such a possibility, "[a] state rule that purports to define the meaning or scope of a term in a contract suit therefore is pre-empted by federal labor law." *Allis-Chalmers Corp v Lueck*, 471 US 202, 210; 105 S Ct 1904; 85 L Ed 2d 206 (1985).

The Supreme Court has read § 301 as preempting state-law claims if " '[t]he heart of the [state-law] complaint [is] a . . . clause in the collective bargaining agreement . . . .' " *Caterpillar Inc v Williams*, 482 US 386, 394; 107 S Ct 2425; 96 L Ed 2d 318 (1987) (citation omitted; alterations in original). "Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims 'substantially dependent on analysis of a collective-bargaining agreement.' " *Id*., quoting *Int'l Brotherhood of Electrical Workers, AFL-CIO v Hechler*, 481 US 851, 859 n 3; 107 S Ct 2161; 95 L Ed 2d 791 (1987). Thus,

> "the pre-emptive force of § 301 is so powerful as to displace entirely any state cause of action 'for violation of contracts between an employer and a labor organization.' Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301." [*Caterpillar Inc*, 482 US at 394 (citations omitted).]

Thus, although plaintiff claims a state cause of action under MCL 418.354(11) for breach of contract on the

part of defendant, § 301 preempts that claim, rendering it "a creature of federal law," even though such a cause of action would exist under Michigan law in the absence of § 301.

Moreover, in holding that the claims at issue in *Arbuckle* involved the interpretation of the terms of the collective-bargaining agreement, our Supreme Court noted that "[i]n order to determine whether defendant was authorized to coordinate plaintiff's workers' compensation benefits with his disability pension benefits, then, we must *necessarily interpret* the 1990 Letter of Agreement and the 1990 CBA as well as the parties' subsequent agreements permitting benefit coordination, which were incorporated into the then-existing CBAs." *Arbuckle*, 499 Mich at 536 (emphasis added). This was so even though such "interpretation" simply involved a plain-meaning application of the language "all retirees who retired prior to January 1, 2010, regardless of their date of retirement or injury," against the backdrop of federal rules of construction of collective-bargaining agreements.

In *Arbuckle*, the crux of the Court's reasoning was:

> Plaintiff cannot avoid the preemptive force of § 301 by arguing that only defendant's *defense* of coordination depended on interpretation of the CBA, whereas proof of plaintiff's claims does not. Resolution of plaintiff's state-law workers' compensation claim " 'is inextricably intertwined with consideration of the terms of the labor contract' " because application of MCL 418.354(14) to the instant dispute " 'requires the interpretation of [the relevant] collective-bargaining agreement.' " [*Id*. at 536-538 (citation omitted; alteration in original).]

Thus, our Supreme Court concluded, "Because resolution of the underlying coordination claim requires the interpretation of the terms of a collective-bargaining agreement, plaintiff's claim fails the first prong of the

Sixth Circuit's preemption test. Plaintiff's claim, therefore, is preempted by § 301." *Id*. at 536.[12]

As plaintiff Kelley's claim relies on precisely the same agreements that were at issue in *Arbuckle*, necessitating precisely the same interpretation and construction of them, his claim too is preempted by § 301 and thus is controlled by federal law. Plaintiff argues that one component of the benefit formula in the collective-bargaining agreement is made unlawful and thus unenforceable by virtue of a Michigan statute. That claim cannot be evaluated without considering the terms of the labor contract, and our resolution of the claim is therefore "inextricably intertwined with consideration of the terms of the labor contract" and preempted by federal law. Any contrary interpretation would undermine the rule under § 301 that CBAs be construed uniformly. Consequently, we must find that MCL 418.354(11) constitutes "[a] state rule that purports to define the meaning or scope of a term in a contract suit" and that it "therefore is pre-empted by federal labor law," *Allis-Chalmers*, 471 US at 210, because "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules," *Lucas Flour*, 369 US at 104.

[12] As noted, the Court in *Arbuckle* was considering an argument under MCL 418.354(14), and it did not also specifically address preemption in the context of MCL 418.354(11) because, as noted, it had already concluded that the plaintiff had abandoned that argument. However, the preemption analysis is the same with respect to the two statutory provisions. In other words, regardless of whether the claimed violation of state law relates to MCL 418.354(11) or MCL 418.354(14), resolution of that claim "is inextricably intertwined with consideration of the terms of the labor contract" where the application of the statute to the dispute "requires the interpretation of [the relevant] collective-bargaining agreement." *Arbuckle*, 499 Mich at 538 (quotations and citations omitted; alteration in original).

MCL 418.354(11) is just such an "inconsistent local rule." Accordingly, we hold that plaintiff's claim is governed by federal law.

D. THE MERITS OF THE CLAIM UNDER FEDERAL LAW

Plaintiff Kelley retired in 1992, during a time when the 1990 letter of agreement was in effect, prohibiting coordination of benefits. See *Arbuckle*, 499 Mich at 527-529. That placed Kelley on precisely the same legal footing as the plaintiff in *Arbuckle*, who also retired while the 1990 letter of agreement was in force. *Id*. at 526-527. Applying federal decisional law regarding CBAs, *Arbuckle* held that "the intent of the parties and the specific language of the CBA at issue control whether a benefit vests . . . ." *Id*. at 539. " '[W]hen a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.' " *Id*. at 540 (citation omitted). *Arbuckle* particularly relied on the Sixth Circuit's opinion in *Garbinski v Gen Motors LLC*, 521 F Appx 549 (CA 6, 2013), which itself was based on the same CBAs and letters of agreement that were at issue in *Arbuckle* and, as noted, were thus the same provisions involved in this case. *Arbuckle* quoted *Garbinski*'s reference to language contained in each of the agreements providing that the agreements would remain in effect "until termination or earlier amendment of the" agreement. Thus, "the right to uncoordinated benefits had not vested because it was subject to an express durational limit." *Arbuckle*, 499 Mich at 539, citing *Garbinski*, 521 F Appx at 556-557. "Indeed, as in the agreement before us, 'the clause placing limits on the right was in the *very same sentence* as the right it created[.]' It, thus, clearly informed persons covered by the agreement that 'the right was

subject to modification.' " *Arbuckle*, 499 Mich at 539, quoting *Garbinski*, 521 F Appx at 557.

> By confining plaintiff's right to uncoordinated benefits to a specific period of time, the parties plainly intended to reserve the power to modify the policy regarding coordination at some point in the future. As a result, under the terms of the 1990 Letter of Agreement and the 1990 CBA, plaintiff's right to uncoordinated benefits was subject to modification and was thus a nonvested right. [*Arbuckle*, 499 Mich at 541.]

"Because nothing in the 1990 CBA itself, or the subsequent modifications thereto, demonstrates a commitment by defendant to provide plaintiff an unalterable right to uncoordinated benefits that would survive termination of the agreement," *id*. at 542-543, "[t]he agreement . . . did not create vested rights," *id*. at 539-540. General Motors thus had "the authority to coordinate plaintiff's benefits . . . ." *Id*. at 543. "Under a proper reading of the relevant agreements and the application of federal substantive law, defendant's subsequent coordination of plaintiff's workers' compensation benefits with his disability pension benefits did not violate the terms of plaintiff's disability pension plan, nor did it violate MCL 418.354."[13] *Id*.

As the present case involves the same agreements as in *Arbuckle*, application of federal law dictates the same result. Defendant's coordination of plaintiff's benefits was entirely lawful. Thus, the Commission was correct that defendant acted lawfully, but it reached that conclusion for the wrong reasons, by applying Michigan law. Nevertheless, we affirm the judgment, because "[a]lthough the lower court's decision was based on a

[13] The Court's conclusion that General Motors' actions did not violate MCL 418.354 necessarily flowed from its determination that Michigan law was preempted and therefore played no role in the case.

different rationale, we will not reverse when the lower court reaches the correct result albeit for the wrong reason." *Norris v State Farm Fire & Cas Co*, 229 Mich App 231, 240; 581 NW2d 746 (1998).

VI. CONCLUSION

Proper resolution of this case requires the application of federal law, specifically the federal common law applicable to collective-bargaining agreements under § 301 of the LMRA. Under the applicable federal law, as found by our Supreme Court in *Arbuckle*, the intent of the parties to a CBA controls, and the parties to the various agreements at issue here did not intend to forever preclude defendant from coordinating benefits. Consequently, defendant's actions were entirely lawful, and defendant did not violate the law or a CBA by coordinating plaintiff's benefits. Therefore, we affirm the decision of the Commission. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

BOONSTRA, P.J., concurred with TUKEL, J.

LETICA, J. (*concurring in the result*). I concur in the result only.

FARMLAND CAPITAL SOLUTIONS, LLC v MICHIGAN VALLEY IRRIGATION COMPANY

Docket No. 352689. Submitted January 8, 2021, at Grand Rapids. Decided January 14, 2021, at 9:05 a.m.

Farmland Capital Solutions, LLC, filed an action against Michigan Valley Irrigation Company in the Van Buren Circuit Court, asserting claims of common-law and statutory conversion, claim and delivery, and disgorgement. In 2014, plaintiff's predecessor in interest, First Farmers Bank and Trust, recorded a Uniform Commercial Code (UCC) financing statement as a secured creditor of Boersen Farms, Inc., claiming as secured collateral personal property owned or later acquired by Boersen. In 2016, Boersen ordered irrigation pivots (agricultural equipment) from defendant, which were shipped, unassembled, to Boersen in April 2016. Boersen did not pay for the pivots after defendant initially invoiced Boersen for them. On June 2, 2016, Boersen entered into an equipment lease agreement for the pivots with Bank of the West, which purported to lease the pivots to Boersen and provided that Boersen would pay the bank an annual rental payment of $89,125.76. On June 8, 2016, Bank of the West filed a UCC financing statement identifying Boersen as a secured debtor and listing as collateral all equipment covered by the equipment lease agreement. The following day, Bank of the West paid defendant the entire purchase price of the pivots. Boersen later defaulted on its payments to the bank under the equipment lease agreement, and the bank foreclosed on the pivots and other property. The bank held a foreclosure sale, where defendant purchased the pivots. In February 2019, plaintiff was the holder of First Farmer's secured interest in Boersen's personal property. Plaintiff filed suit against defendant, and both parties later moved for summary disposition. Defendant asserted that Bank of the West had properly recorded a purchase-money security interest (PMSI) in the pivots, which took priority over plaintiff's general interest in Boersen's personal property. Plaintiff argued that Bank of the West had failed to perfect its PMSI within 20 days of Boersen taking possession of the pivots, and therefore Bank of the West's interest in the pivots was second in priority to

plaintiff's earlier-recorded interest. The trial court, David J. DiStefano, J., granted defendant's motion and denied plaintiff's motion. Plaintiff appealed.

The Court of Appeals *held*:

Although the agreement between Boersen and Bank of the West was termed an "equipment lease agreement" and purported to rent or lease the pivots to Boersen with the bank retaining ownership, the parties and trial court seemed to acknowledge that the agreement was actually a security agreement rather than a true lease. The equipment lease agreement appeared to bind Boersen to become the owner of the pivots and was not terminable by Boersen; under MCL 440.1203(2)(b) of the UCC, MCL 440.1101 *et seq*., a security interest is created by such transactions. Generally, the first secured creditor to perfect a security interest in the collateral of a debtor has priority over other secured creditors who later file a financing statement or otherwise perfect a security interest. However, a perfected PMSI in goods has priority over a conflicting security interest in the same goods. Purchase-money collateral is comprised of goods that secure a purchase-money obligation (an obligation incurred by a debtor that is used to pay for all or part of the collateral). Under MCL 440.9324(1), a PMSI is perfected when a debtor receives possession of the collateral or within 20 days thereafter. In this case, if Bank of the West perfected its PMSI by filing its UCC financing statement covering the pivots within 20 days after Boersen received possession of them, then it had priority over plaintiff's earlier-recorded security interest. Whether the bank had priority depended on what it meant for Boersen to have received possession of the collateral. Defendant argued that the 20-day perfection period under the statute does not begin to run until the goods in question become collateral, i.e., subject to a security interest. This view is supported by the official comments for UCC § 9-324, which is codified in Michigan law at MCL 440.9324. Official Comment 3 for UCC § 9-324 notes that when a debtor acquires possession of goods under a transaction that is not governed by Article 9 and later agrees to buy the goods on secured credit, the 20-day period to perfect the creditor's interest by filing a financing statement does not begin to run until the goods become collateral by being subject to a security interest; this is known as the "obligation" standard. Although some jurisdictions follow the view urged by plaintiff, i.e., that a debtor has possession of goods for purposes of the statute upon delivery, the obligation standard is more faithful to the language of MCL 440.9324 and Comment 3. In this case, until Boersen entered into

the equipment lease agreement with Bank of the West, the pivots were not collateral. Consequently, the 20-day perfection period did not begin to run for Bank of the West until the bank and Boersen entered into the equipment lease agreement on June 2, 2016. Therefore, the bank's June 8, 2016 filing of its UCC financing statement served to timely perfect its PMSI in the pivots.

Affirmed.

UNIFORM COMMERCIAL CODE — PRIORITY — PURCHASE-MONEY SECURITY INTEREST — POSSESSION OF COLLATERAL.

Under MCL 440.9324(1) of the Uniform Commercial Code, MCL 440.1101 *et seq*., a perfected purchase-money security interest (PMSI) has priority over a conflicting security interest in the same goods, subject to certain exceptions; the PMSI is perfected when the debtor receives possession of the collateral or within 20 days thereafter; goods do not become "collateral" until they are subject to a security interest; accordingly, the 20-day perfection period under MCL 440.9324(1) does not begin to run until the goods at issue become collateral subject to a security interest.

Wardrop & Wardrop, PC (by *Thomas M. Wardrop*) for Farmland Capital Solutions, LLC.

Smith Haughey Rice & Roegge (by *Katherine E. Wendt* and *Krista A. Jackson*) for Michigan Valley Irrigation Company.

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

BOONSTRA, J. Plaintiff appeals by right the trial court's order denying its motion for summary disposition and granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The largely undisputed facts of this case concern the priority of two creditors with regard to their respective security interests in specific farm equipment purchased in 2016 by Boersen Farms, Inc. (Boersen). Plaintiff's

predecessor in interest, First Farmers Bank and Trust (First Farmers), recorded a Uniform Commercial Code (UCC) financing statement in 2014 as a secured creditor of Boersen, claiming as secured collateral the following:

> All present and future right, title and interest in and to any and all personal property of the Debtor, whether such property is now existing or hereafter created, acquired or arising and wherever located from time to time, including without limitation, the following categories of property as defined in the Revised Article 9 of the Uniform Commercial Code (the "UCC"): goods (including inventory, equipment, fixtures, farm products and any accessions thereto), instruments (including promissory notes), documents, accounts (including health-care-insurance receivables), chattel paper (whether tangible or electronic), deposit accounts, letter-of-credit rights (whether or not the letter-of-credit is evidenced by a writing), commercial tort claims, securities and all other investment property, general intangibles (including payment intangibles and software), all supporting obligations and all proceeds, products, additions, accessions, substitutions and replacements of the foregoing property.
>
> Any term used herein which is defined in the UCC shall have the meaning set forth in the UCC, and if the meaning is modified by an amendment, modification or revision to the UCC, such modified definition will apply automatically as of the date of such amendment, modification or revision to the UCC.
>
> This financing statement covers, and is intended to cover, all personal property of the Debtor.[1]

In 2016, Boersen ordered seven irrigation "pivots" from defendant. Pivots are large pieces of agricultural farm equipment. According to bills of lading provided to the trial court, the pivots were shipped, unassembled, to Boersen during the month of April 2016.

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[1] First Farmers subsequently released certain specific property from its security interest through additional UCC filings.

John McGee (McGee), who was the president of defendant in 2016, stated in an affidavit that it was defendant's goal to construct and install pivots within two to four weeks of delivery. McGee's affidavit further stated that defendant "originally invoiced Boerson [sic] for the pivots on April 22, 2016." Defendant attached invoices to its motion for summary disposition that bore an "invoice date" of April 22, 2016.[2]

The parties agree that Boersen did not pay for the pivots after receiving the initial invoices. On June 2, 2016, defendant issued Boersen another set of invoices for the pivots in the total amount of $465,599.00. That same day, Boersen entered into an "equipment lease agreement" for the pivots with a lender, Bank of the West. The equipment lease agreement provided that Boersen would make annual rental payments of $89,125.76 to Bank of the West. It also contained a provision stating, in part:

> 18. OWNERSHIP, PERSONAL PROPERTY. This is a lease, and Lessee's rights to the Equipment are those solely of a lessee notwithstanding any trade-in or down-payment Lessee may make. Lessee will move the Equipment or Equipment Location [at] Lessor's request to [illegible][3] Lessor's ownership of the Equipment.

Attached to the equipment lease agreement was Schedule A, which described the pivots and provided the amount and due dates of the payments and also provided that the "Effective date for option to pur-

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[2] The invoices also reflected a date of "5/22/16." Because of the poor quality of the invoices, it is unclear what this date refers to, but on the basis of other, better-quality invoices in the record, we infer that the "5/22/16" date refers to the invoices' "Due Date."

[3] All of the copies of the equipment lease agreement found in the lower-court record and provided by the parties on appeal are of extremely poor quality.

chase" was "6/21." Additionally, Boersen executed several addendums to the equipment lease agreement, including a document entitled "Certificate of Acceptance," which noted that the leased equipment was described in the attached Schedule A and also stated, in relevant part:

> LESSEE ACKNOWLEDGES RECEIPT OF ALL OF THE EQUIPMENT AND ITS ACCEPTANCE FOR PURPOSES OF THE LEASE.
>
> LESSEE ACKNOWLEDGES THAT THE RENT FOR THE EQUIPMENT WILL BE BASED ON THE EQUIPMENT'S ACTUAL COST, EXCEPT AS MAY BE PROVIDED IN AN ADDENDUM TO THE LEASE.
>
> LESSEE UNDERSTANDS THAT (i) BASED HEREON LESSOR WILL PAY FOR THE EQUIPMENT NOT PREVIOUSLY FUNDED . . . .

Another addendum was entitled "Lease Expiration Purchase Agreement" and stated, in relevant part, that "Lessor and Lessee agree that at the expiration of the Lease, Lessee will purchase, AS-IS-WHERE-IS, Lessor's interest in all, but not less than all, of the Equipment then leased or otherwise included under the Lease for the Residual Value of the cost to Lessor of such Equipment."

On June 8, 2016, Bank of the West filed a UCC financing statement identifying Boersen as a secured debtor and listing as collateral all equipment covered by the equipment lease agreement. On June 9, 2016, Bank of the West paid defendant the entire purchase price for the pivots.

The parties agree that at some point Boersen defaulted on its payments under the equipment lease agreement and that in January 2019, Bank of the West foreclosed on property in which it claimed a security

interest, including the pivots. Bank of the West held a private foreclosure sale at which defendant purchased the pivots.

Plaintiff, which had become the holder of First Farmer's security interest in Boersen's personal property, filed suit in February 2019, arguing that it possessed a superior interest in the pivots by virtue of various UCC financing statements and asserting claims of common-law and statutory conversion, claim and delivery, and disgorgement. After discovery, both parties moved for summary disposition, each arguing that a different security interest had priority. Defendant argued that Bank of the West had properly recorded a purchase-money security interest (PMSI) in the pivots that took priority over plaintiff's interest in Boersen's personal property generally. Plaintiff argued that Bank of the West had failed to perfect its PMSI within 20 days of when Boersen took "possession" of the pivots, which it alleged was when the pivots were delivered or when the invoices were issued, and that Bank of the West's interest was therefore second in priority to plaintiff's earlier-recorded interest. After holding a hearing on the competing motions, the trial court granted defendant's motion and denied plaintiff's motion, concluding that Bank of the West had timely recorded its PMSI. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the

record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010).

We review de novo as questions of law the interpretation and application of the UCC, MCL 440.1101 *et seq*. See *Heritage Resources, Inc v Caterpillar Fin Servs Corp*, 284 Mich App 617, 632; 774 NW2d 332 (2009).

III. ANALYSIS

Plaintiff argues that the trial court erred by concluding that Bank of the West had timely perfected its PMSI in the pivots (and that the repossession and sale to defendant was therefore valid). We disagree.

As a threshold matter, although the agreement between Boersen and Bank of the West was termed an "equipment lease agreement" and purported to rent the pivots to Boersen with the bank retaining ownership, the parties seem to agree that the agreement was a security agreement, not a true lease. That is also how the trial court analyzed the issue. An agreement entitled an "equipment lease" may, by its terms, in fact constitute a security agreement. See MCL 440.1203; see also *John Deere Co v Wonderland Realty Corp*, 38 Mich App 88, 91; 195 NW2d 871 (1972). Although the copies of the equipment lease agreement available to this Court are of extremely poor quality and are largely illegible, the equipment lease agreement does appear to

bind Boersen to become the owner of the pivots and is not terminable by Boersen; such transactions generally create a security interest. MCL 440.1203(2)(b). In any event, because the trial court and the parties proceeded as though Bank of the West had financed Boersen's purchase of the pivots, we will analyze the issue in that manner as well.

As a further preliminary matter, we note that plaintiff only refers to its 2014 UCC financing statement in a single footnote of its brief on appeal, and it does so there in conjunction with a reference to a 2014 Security Agreement. Yet plaintiff does not explain the linkage, if any, between the two documents, and we note that the debtor named in the 2014 Security Agreement appears to be a different entity (i.e., Boersen Farms Properties, LLC) than that named in the UCC financing statement (i.e., Boersen Farms, Inc.). Still further, plaintiff premises its entire argument on appeal not upon the security interest as identified in the UCC financing statement, but instead on that identified in the Security Agreement. According to plaintiff, the Security Agreement contains a "standard 'after-acquired' clause," which plaintiff contends gives it a security interest in the pivots that are at issue in this case. Yet plaintiff's quotation from that clause fails to reflect that the clause on its face appears to apply only to "Fixtures" (which pivots appear not to be) and "Specific Property" (i.e., other pivots) that are not at issue in this case. Despite all of this, we conclude that we need not navigate these issues because, even construing plaintiff's argument as relating to its 2014 UCC financing statement (which we quote above), and even assuming that the 2014 UCC financing statement gives plaintiff a security interest in the pivots at issue in this case, plaintiff's claim still fails for the reasons that we will explain in this opinion.

Generally, the first secured creditor to file a financing statement or otherwise perfect a security interest in the collateral of a debtor has priority over other secured creditors who later file or perfect a security interest. MCL 440.9322(1)(a). However, an exception exists with regard to "purchase-money collateral," which is comprised of "goods or software that secures a purchase-money obligation incurred with respect to [the] collateral." MCL 440.9103(1)(a). A "purchase-money obligation" is an obligation incurred by a debtor, the value of which is used to pay for all or part of the collateral. See MCL 440.9103(1)(b). In other words, it is what we commonly refer to as the "financing" for a purchase. "[A] perfected purchase-money security interest in goods . . . has priority over a conflicting security interest in the same goods . . . if the purchase-money security interest is perfected when the debtor receives possession of the collateral or within 20 days thereafter." MCL 440.9324(1). As applied to this case, this means that if Bank of the West perfected its PMSI by filing its UCC financing statement covering the pivots no later than 20 days after Boersen "receive[d] possession of the collateral," then its PMSI had priority over plaintiff's earlier-recorded security interest. The parties' dispute centers on what it means in this instance for the debtor (Boersen) to have received possession of the collateral (the pivots).

Plaintiff argues that Boersen took possession of the pivots no later than May 13, 2016.[4] It is not entirely clear how plaintiff arrived at the May 13 date, which plaintiff identifies definitively as the date by which the

[4] If the 20-day perfection period began to run on May 13, 2016, it would have expired on June 2, 2016, before Bank of the West filed its June 8, 2016 UCC financing statement.

pivots were installed.[5] Plaintiff cites the deposition testimony of two persons who presumably were involved in the delivery of the pivots, but the cited testimony does not actually support such a conclusion; at best, the testimony merely shows that, generally, pivots are typically installed on a customer's property within a few weeks of delivery. Plaintiff also provides no legal support for its interpretation of the "possession" requirement in MCL 440.9324(1) as meaning that Boersen had possession on the date that installation of the pivots was complete;[6] similarly, plaintiff does not support its contention that the date of the first set of invoices, i.e., April 22, 2016, is a relevant date for purposes of determining when the 20-day clock began to run.

On the other hand, defendant argues, and the trial court found, that the 20-day perfection period does not begin to run until the goods in question actually become "collateral" subject to a security interest. This comports with language found in the official comments to MCL 440.9324, which, although they do not have the force of law, "are useful aids to interpretation and construction of the UCC" and "were intended to promote uniformity in the interpretation of the UCC." *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 260 n 6; 761 NW2d 694 (2008). Comment 3 to MCL 440.9324 discusses an example in which a debtor "acquires possession of goods under a transaction that is not governed by this Article[7] and then later agrees

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[5] In fact, plaintiff elsewhere asserts that "[t]he goods (i.e., pivots) were delivered to [Boersen] and installed by April 22, 2016."

[6] We note that plaintiff did not make this argument in the trial court, and instead asserted that "possession" related to delivery of the pivots.

[7] MCL 440.9324 is part of Article 9 of Michigan's codification of the UCC; therefore, the reference to "this Article" in Comment 3 refers to Article 9 of the Michigan UCC, which governs "secured transactions."

to buy the goods on secured credit." See MCL 440.9324; UCC § 9-324, official comment 3 (2021). Comment 3 makes clear that in such a case there is no need to file a financing statement to protect a secured creditor's interest until the creditor's secured interest comes into being. According to Comment 3, "the 20-day period in subsection (a) does not commence until the goods become 'collateral' . . . , i.e., until they are subject to a security interest." *Id*. A number of jurisdictions have followed this rationale, which has been called the "obligation" standard. See, e.g., *Citizens Bank of Americus v Fed Fin Servs, Inc*, 235 Ga App 482; 509 SE2d 339 (1998); *Brodie Hotel Supply, Inc v United States*, 431 F2d 1316 (CA 9, 1970); *In re Prior Bros, Inc*, 29 Wash App 905; 632 P2d 522(1981).[8]

Plaintiff urges this Court to instead view the transaction between Boersen and defendant as a sale of goods in which title passed upon delivery. Plaintiff does not provide any citation of authority in support of its position other than a bare citation of UCC provisions. But this view of the transaction would arguably be consistent with the approach taken in *North Platte State Bank v Production Credit Ass'n of North Platte*, 189 Neb 44; 200 NW2d 1 (1972), in which the court held that the plaintiff bank had not even acquired a PMSI in the goods at issue (in that case, 79 head of cattle) because the purchaser had obtained title and possession of them under an oral sales agreement and was already indebted to the seller;

[8] Decisions of other state courts and lower federal courts are not binding on this Court but may be persuasive; further, it may be especially appropriate to review the law of other jurisdictions when interpreting the UCC "[i]n light of the UCC's admonition that courts promote uniformity among the jurisdictions that have adopted" it. *Higgins v Lauritzen*, 209 Mich App 266, 271; 530 NW2d 171 (1995).

the bank's funds therefore did not enable the purchaser to "acquire rights in or the use of" the cattle. *Id*. at 51.[9]

However, we believe the "obligation" standard is more faithful to the language of MCL 440.9324 and Comment 3. See *Heritage Resources, Inc*, 284 Mich App at 632; *Prime Fin Servs LLC*, 279 Mich App at 260 n 6. MCL 440.9324(1) conditions the commencement of the 20-day perfection period on when the "debtor" receives possession of the "collateral." Article 9 defines a "debtor" as "[a] person having an interest, other than a security interest or other lien, *in the collateral*, whether or not the person is an obligor." See MCL 440.9102(bb)(*i*) (emphasis added). Until Boersen entered into the equipment lease with Bank of the West, the pivots were not "collateral." See MCL 440.9103(1)(a). We therefore interpret MCL 440.9324(1) as requiring the existence of "collateral" before there can be a "debtor" for purposes of that statutory section. Consequently, the 20-day period for the perfection of Bank of the West's PMSI did not begin to run until Boersen entered into the equipment lease agreement on June 2, 2016; therefore, Bank of the West's June 8, 2016 filing of its UCC financing statement served to timely perfect its PMSI in the pivots.

Moreover, to the extent that the initial transaction between Boersen and defendant was a sale of goods, sales of goods are governed by Article 2 of the UCC, MCL 440.2101 *et seq*., not by Article 9. Therefore, even if Boersen did acquire possession of the pivots on

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[9] Some jurisdictions, in contrast to those applying the "obligation" standard, have followed a "physical possession" standard. See *North Platte*, 189 Neb 44; see also *In re Automated Bookbinding Servs, Inc*, 471 F2d 546 (CA 4, 1972). But even that standard "requires more than bare possession on the part of the debtor; it requires possession plus title or a sales contract or a security agreement, depending on the specific facts of a given case." *Color Leasing 3, LP v FDIC*, 975 F Supp 177, 186 (D RI, 1997), citing *Equip Fin Group, Inc v Traverse Computer Brokers*, 973 F2d 345, 349 n 5 (CA 4, 1992).

or before May 13, 2016,[10] as plaintiff contends, it would have done so "under a transaction that is not governed by" Article 9, and according to Comment 3, the 20-day perfection period still would not have commenced until the goods became collateral. MCL 440.9324; UCC § 9-324, official comment 3. Since the goods did not become collateral until the signing of the equipment lease agreement on June 2, 2016, Bank of the West's June 8, 2016 perfection of its PMSI was effective.

For all of these reasons, we conclude that the trial court did not err by granting summary disposition in favor of defendant.

Affirmed.

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

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[10] We note that there was evidence in the record, in the form of testimony from defendant's employees, that defendant still considered itself to be the owner of the pivots until they were paid for and that defendant would have retrieved the equipment if financing had not been obtained.

COMMITTEE TO BAN FRACKING IN MICHIGAN v BOARD OF STATE CANVASSERS

Docket No. 354270. Submitted December 8, 2020, at Detroit. Decided January 21, 2021, at 9:00 a.m.

Plaintiff, the Committee to Ban Fracking in Michigan, filed an action in the Court of Claims against the Board of State Canvassers, seeking a declaration that MCL 168.472a—which provides that a signature on a petition that proposes an amendment to the state Constitution or is to initiate legislation shall not be counted if the signature was made more than 180 days before the petition is filed with the Secretary of State—was unconstitutional as applied to statutory-initiative petitions. Plaintiff argued that the 180-day rule in MCL 168.472a unconstitutionally infringed Const 1963, art 2, § 9, in which the people of Michigan reserved their right to propose laws through statutory-initiative petitions. Plaintiff requested a preliminary injunction to require defendant to canvass plaintiff's petition without excluding signatures that violated the 180-day rule. Defendant argued that plaintiff had not shown that it was entitled to injunctive relief because plaintiff's action was untimely and filed in the wrong court. Defendant maintained that MCL 168.479 granted exclusive jurisdiction to the Michigan Supreme Court and that the Supreme Court had already denied plaintiff's complaint for a writ of mandamus earlier in 2020. 505 Mich 1137 (2020). The Court of Claims, CHRISTOPHER M. MURRAY, J., granted summary disposition in favor of defendant under MCR 2.116(I)(1), holding that the Court of Claims lacked subject-matter jurisdiction over plaintiff's claims. The Court of Claims dismissed plaintiff's complaint. Plaintiff appealed.

The Court of Appeals *held*:

1. If there is conflict or tension between statutes, the court must engage in judicial interpretation to harmonize the conflicting provisions and carry out the intent of the Legislature. Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. If there is a conflict between statutes that are *in pari materia*, the more recent and specific statute controls.

MCL 600.6419(1) provides, in pertinent part, that except as provided in MCL 600.6421 and MCL 600.6440, the jurisdiction of the Court of Claims is exclusive. MCL 600.6419(1)(a) provides, in pertinent part, that the Court of Claims has jurisdiction to hear and determine any claim or demand, statutory or constitutional, or any demand for monetary, equitable, or declaratory relief, or any demand for an extraordinary writ against the state or any of its departments or officers. Comparatively, MCL 168.479 concerns the Michigan Supreme Court's jurisdiction to hear legal challenges to any determination made by the Board of State Canvassers. MCL 168.479(1) provides that notwithstanding any other law to the contrary and subject to MCL 168.479(2), any person who feels aggrieved by any determination made by the Board of State Canvassers may have the determination reviewed by mandamus or other appropriate remedy in the Supreme Court. MCL 168.479(2) provides that if a person feels aggrieved by any determination made by the Board of State Canvassers regarding the sufficiency or insufficiency of an initiative petition, the person must file a legal challenge to the Board of State Canvassers' determination in the Supreme Court within seven business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. MCL 168.479(2) further states that any legal challenge to the official declaration of the sufficiency or insufficiency of an initiative petition has the highest priority and shall be advanced on the Supreme Court docket so as to provide for the earliest possible disposition. In this case, MCL 168.479 and MCL 600.6419 are *in pari materia* because each statute relates to subject-matter jurisdiction. Of these two statutes, MCL 168.479 controls because it is more recent and specific: MCL 168.479 was amended by the Legislature in 2018 by 2018 PA 608; MCL 600.6419 was amended in 2013 by 2013 PA 164. MCL 168.479 also specifically applies to requests for relief from determinations made by defendant, as in this case. Comparatively, MCL 600.6419 is broader and applies to all claims against the state, its departments, or its officers. Therefore, because MCL 168.479 is more recent and specific, it creates an exception to the exclusive jurisdiction of the Court of Claims and controlled in this case.

2. Plaintiff's argument that the inclusion of the permissive term "may" in MCL 168.479(1) meant that plaintiff was entitled to file a later action in the Court of Claims after the Supreme Court denied its mandamus action was rejected. If MCL 168.479(1) did set forth a permissive invitation—as opposed to a

mandatory directive—to file complaints concerning decisions by defendant in the Supreme Court, then that interpretation of MCL 168.479(1) would frustrate the legislative intent of the statute when read together with MCL 168.479(2). MCL 168.479(2) is clear that any person challenging the determination made by defendant regarding sufficiency or insufficiency of an initiative petition is required to file a timely legal challenge in the Supreme Court. Reading MCL 168.479(1) and (2) together, the most logical interpretation of the statute is that the permissive word "may" in Subsection (1) provides that the Supreme Court may review the issue, and Subsection (2) establishes the procedure to have a decision made by defendant reviewed. The permissive language in MCL 168.479(1) does not create a choice of forum for potential litigants; it merely serves as an invitation of judicial review to an aggrieved party. Accordingly, the Court of Claims did not err by granting summary disposition in favor of defendant because the Court of Claims lacked subject-matter jurisdiction over plaintiff's claims. Plaintiff's sole legal remedy in this case was to file a legal action in the Supreme Court, which it did. Plaintiff was entitled to file any legal challenge in the Supreme Court, including a request for declaratory and injunctive relief; it was not limited to its mandamus action. However, because plaintiff filed an action in the Supreme Court, and because the Supreme Court denied plaintiff's mandamus complaint, plaintiff exhausted its legal remedies with respect to judicial review of defendant's insufficiency determination of its initiative petition.

Affirmed.

SHAPIRO, J., dissenting, would have held that plaintiff's request for a declaratory judgment was proper and that the Supreme Court's 2020 order denying mandamus did not have preclusive effect because it did not state the basis for the denial or provide other guidance regarding the constitutional question whether MCL 168.472a burdens the right of citizen initiative established in Const 1963, art 2, § 9. Although access to the 2020 ballot ended with the Supreme Court's denial of mandamus, the underlying legal issue was not resolved, and plaintiff is now in the position of a proposal committee that seeks a determination of its responsibilities to obtain ballot access in the future. The time limit for signature gathering remains a justiciable issue, and declaratory-judgment actions against the state begin in the Court of Claims. Accordingly, plaintiff—like any other litigant—could bring an action for declaratory relief because there is an actual controversy: plaintiff collected the required number of signatures, submitted its petition to defendant, and defendant rejected the petition because

many of the signatures were collected more than 180 days before the petition was filed. Consequently, plaintiff had standing to seek a declaratory judgment in the Court of Claims that the 180-day rule was unconstitutional. Alternatively, to the extent that an actual controversy no longer existed, the court may address a moot issue that is of public significance and is likely to recur yet evade judicial review; this issue fell within that scope. Finally, the 180-day rule violated the right of statutory initiative established by Const 1963, art 2, § 9. The language of Const 1963, art 2, § 9 places no limit on the time to gather signatures, and the 180-day limit in MCL 168.472a constitutes a legislative attempt to interfere with the people's self-retained right to initiate legislation. Therefore, Judge Shapiro would have addressed the constitutional question, concluded that MCL 168.472a violates Const 1963, art 2, § 9, and directed the Court of Claims to issue an appropriate declaratory judgment.

1. Statutes — Subject-Matter Jurisdiction — Court of Claims — Michigan Supreme Court — Legal Challenges to Determinations Made by the Board of State Canvassers.

MCL 600.6419, a broad statute providing exclusive jurisdiction to the Court of Claims to hear and determine all claims against the state, its departments, and its officers, and MCL 168.479, which concerns the Michigan Supreme Court's jurisdiction to hear legal challenges to any determination made by the Board of State Canvassers, are *in pari materia* because each statute relates to subject-matter jurisdiction; of these two statutes, MCL 168.479 controls because it is more recent and specific.

2. Statutes — Jurisdiction — Michigan Supreme Court — Legal Challenges to Determinations Made by the Board of State Canvassers.

MCL 168.479(1) provides that notwithstanding any other law to the contrary and subject to MCL 168.479(2), any person who feels aggrieved by any determination made by the Board of State Canvassers may have the determination reviewed by mandamus or other appropriate remedy in the Supreme Court; the permissive word "may" in MCL 168.479(1) provides that the Supreme Court may review the issue, and MCL 168.479(2) establishes the procedure to have a decision made by the Board of State Canvassers reviewed; the permissive language in MCL 168.479(1) does not create a choice of forum for potential litigants but merely serves as an invitation of judicial review to an aggrieved party.

Law Office of Matthew S. Erard, PLLC (by *Matthew Erard*) and *Ellis Boal* for the Committee to Ban Fracking in Michigan.

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

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

JANSEN, J. In this constitutional challenge to MCL 168.472a, plaintiff, the Committee to Ban Fracking in Michigan (CBFM), appeals as of right the order of the Court of Claims granting summary disposition in favor of defendant, the Board of State Canvassers, under MCR 2.116(I)(1) on the basis of a lack of subject-matter jurisdiction. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This is the third appeal before this Court in this matter. In 2017, this Court summarized the facts of this case as follows:

> [CBFM] is engaged in a statutory initiative campaign that seeks to include a ballot option to ban horizontal hydraulic fracturing, which is commonly known as "fracking." . . . [CBFM] sought to have the issue on the 2016 ballot and, on April 14, 2015, the Board of State Canvassers approved the form of CBFM's initiative petition. On May 22, 2015, [CBFM] began circulating [its] petitions and collecting signatures. By November 18, 2015, the 180th day, [CBFM] had collected over 150,000 signatures—but that was less than the required number of 252,523. By June 1, 2016, the deadline for filing initiative petitions for the November 2016 ballot, [CBFM] had over 207,000 signatures—but, again, that was less than the required number. [CBFM] is apparently continuing to

> collect signatures with the same petition sheets in an effort to have the fracking issue on the November 2018 ballot. Accordingly, on June 1, 2016, [CBFM] filed this action [in the Court of Claims] challenging the 180-day rule set forth in MCL 168.472a . . . . [*Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), pp 1-2 (*Comm to Ban Fracking I*).]

The Court of Claims granted summary disposition of CBFM's claims in favor of the Director of Elections under MCR 2.116(C)(8) on the basis that CBFM failed to establish the existence of an actual controversy because CBFM had failed to collect the required number of signatures or submit its initiative petition to the Secretary of State. *Id*. at 2. This Court affirmed, concluding that "because no actual controversy ripe for declaratory relief exists, the Court of Claims lacked jurisdiction to issue a declaratory judgment and properly dismissed [CBFM's] complaint." *Id*. at 5.

CBFM again appealed in this Court in 2019. This Court summarized CBFM's activities following its first appeal as follows:

> [CBFM] continued to collect signatures and on November 5, 2018—the day before the 2018 election—[CBFM] sought to file the initiative petition with the Secretary [of State] for a vote, if necessary, in the 2020 election. According to [CBFM], [it] had collected about 270,962 signatures. However, the Director of Elections refused to accept the petition because the front-page summary stated that it was to be voted on at the November 8, 2016 general election and that election had already passed. [CBFM] filed a complaint in this Court seeking a writ of mandamus requiring the Director to accept their legislative initiative petition. We denied the complaint. *Comm to Ban Fracking in Mich v Secretary of State*, unpublished order of the Court of Appeals, entered November 15, 2018 (Docket No. 346280).

> In December 2018, [CBFM and its director] filed the instant complaint [against the Secretary of State, the Director of Elections, and the Board of State Canvassers], challenging the Secretary's action in several respects including a claim that the Secretary had usurped the power of the Board [of Canvassers], which is the only entity charged by statute with determining the sufficiency and adequacy of an initiative petition. [CBFM] also alleged that the petition did not violate MCL 168.471, which provides that petitions must be filed at least 160 days before the election at which the proposal would be voted on. [*Comm to Ban Fracking in Mich v Secretary of State*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 350161), p 2 (*Comm to Ban Fracking II*).]

The Court of Claims ultimately granted summary disposition of CBFM's claims in favor of the defendants, determining that the erroneous date listed on the initiative petition violated the statutory requirements of MCL 168.471. *Id*. at 2-3. CBFM appealed, and this Court reversed, concluding that because initiative petitions are not required to state the election at which the proposed law will be voted on, the petition's reference to a previous election did not preclude the question from appearing on the 2020 ballot. *Id*. at 3-4. Further, this Court ordered the Secretary of State to accept the initiative petition as of November 5, 2018, and forward it to defendant for canvassing. *Id*. at 4.

On June 8, 2020, defendant certified that CBFM's petition was insufficient because approximately 89% of the signatures had been collected more than 180 days before the petition had been filed. Therefore, MCL 168.472a barred defendant from counting those signatures. Following defendant's determination that the petition was insufficient, CBFM filed a complaint for a writ of mandamus in the Michigan Supreme Court, asserting that our Supreme Court had original jurisdiction over the action under MCL 168.479. CBFM claimed

that it was entitled to mandamus or any other appropriate remedy and asked our Supreme Court to declare the 180-day rule in MCL 168.472a unconstitutional. On July 2, 2020, the Michigan Supreme Court denied the relief requested in CBFM's complaint. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 505 Mich 1137 (2020).

On July 6, 2020, CBFM filed the instant action in the Court of Claims, seeking a declaration that MCL 168.472a was unconstitutional as applied to statutory-initiative petitions. CBFM argued that the 180-day rule in MCL 168.472a unconstitutionally infringed Const 1963, art 2, § 9, in which the people of Michigan reserved their right to propose laws through statutory-initiative petitions. CBFM argued that unlike Const 1963, art 12, § 2, which concerns constitutional-amendment petitions, Const 1963, art 2, § 9 did not include a call for legislative regulation. Thus, according to CBFM, this omission meant that Const 1963, art 2, § 9 expressly limited the Legislature's authority regarding statutory-initiative petitions. CBFM argued in the alternative that even if Const 1963, art 2, § 9 permitted the Legislature to regulate statutory-initiative petitions, the 180-day rule was "a direct curtailment of the right and invocation-standard set forth by the Constitution." CBFM requested a preliminary injunction to require defendant to canvass the petition without excluding signatures that violated the 180-day rule.

Defendant responded, arguing, *inter alia*, that CBFM had not shown that it was entitled to injunctive relief because CBFM's action was "untimely and filed in the wrong court." Defendant argued that MCL 168.479 granted exclusive jurisdiction to the Michigan Supreme Court and that the Supreme Court had already denied CBFM's complaint.

Ultimately, the Court of Claims granted summary disposition in favor of defendant under MCR 2.116(I)(1), opining that it lacked subject-matter jurisdiction over CBFM's claims. The Court of Claims stated:

> [T]his Court lacks jurisdiction to grant the relief requested. . . . The plain language of [MCL 168.479(2)] is clear—any challenge to [defendant's] decision on an initiative petition must be filed in the Supreme Court. This language is mandatory . . . .
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> * * *
>
> [CBFM] properly pursued its challenge to [defendant's] decision in the Supreme Court, the Court [CBFM] admitted had original jurisdiction over such a challenge. Because the Supreme Court has jurisdiction over these challenges, this Court has none and can proceed no further.

The Court of Claims dismissed CBFM's complaint. This appeal followed.

II. STANDARD OF REVIEW

CBFM first argues that the Court of Claims erroneously determined that it lacked subject-matter jurisdiction over CBFM's claims on the basis of its erroneous interpretation that the Michigan Supreme Court had exclusive jurisdiction over the claims under MCL 168.479. More specifically, CBFM argues that our Supreme Court's jurisdiction under MCL 168.479 is actually nonexclusive because MCL 600.6419 vests the Court of Claims with exclusive jurisdiction to hear claims for declaratory relief against the state and CBFM is seeking declaratory relief. We disagree and conclude that MCL 168.479 controls in this case because it is the more recent and specific statute.

The Court of Claims granted summary disposition in favor of defendant under MCR 2.116(I)(1) on the basis that it lacked subject-matter jurisdiction to consider CBFM's claims. MCR 2.116(I)(1) provides: "If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." This Court reviews de novo whether a trial court has subject-matter jurisdiction. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013). This Court also reviews de novo issues of statutory interpretation. *Id*.

III. ANALYSIS

Whether a statute applies in a certain case is an issue of statutory interpretation. *In re Forfeiture of $176,598*, 465 Mich 382, 385; 633 NW2d 367 (2001). When interpreting a statute, this Court's goal is to give effect to the intent of the Legislature. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009). The language of the statute itself is the primary indication of the Legislature's intent. *Id*. This Court interprets statutes by considering "[t]he fair and natural import of the terms employed, in view of the subject matter of the law . . . ." *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 274; 744 NW2d 10 (2007) (quotation marks and citation omitted). This Court must read the statute as a whole and may not read provisions in isolation. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010).

MCL 600.6419(1) provides, in pertinent part, that, "[e]xcept as provided in [MCL 600.6421] and [MCL 600.6440], the jurisdiction of the court of claims, as

conferred upon it by this chapter, is exclusive."[1] MCL 600.6419(1)(a) provides, in pertinent part, that the Court of Claims has jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, . . . or any demand for monetary, equitable, or declaratory relief or any demand for an extraordinary writ against the state or any of its departments or officers . . . ."

Comparatively, MCL 168.479 concerns the Michigan Supreme Court's jurisdiction to hear legal challenges to any determination made by defendant and provides as follows:

> (1) Notwithstanding any other law to the contrary and subject to [MCL 168.479(2)], any person who feels aggrieved by any determination made by the board of state canvassers may have the determination reviewed by mandamus or other appropriate remedy in the supreme court.
>
> (2) If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person must file a legal challenge to the board's determination in the supreme court within 7 business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. Any legal challenge to the official declaration of the sufficiency or insufficiency of an initiative petition has the highest priority and shall be advanced on the supreme court docket so as to provide for the earliest possible disposition.

Mandamus is a discretionary writ and an extraordinary remedy. *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016).

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[1] MCL 600.6421 creates exceptions for trials by jury, and MCL 600.6440 precludes claims for which there is an adequate remedy in federal court.

At first glance, MCL 600.6419 and MCL 168.479 appear to be in conflict. MCL 600.6419(1) provides that the Court of Claims has exclusive jurisdiction to hear extraordinary writs against the state or any of its departments or officers, but MCL 168.479(1) grants the Michigan Supreme Court exclusive jurisdiction over determinations made by defendant.

If there is conflict or tension between statutes, this Court must engage in judicial interpretation to harmonize the conflicting provisions and carry out the intent of the Legislature. *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002). "Statutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *O'Connell v Dir of Elections*, 316 Mich App 91, 99; 891 NW2d 240 (2016) (quotation marks and citation omitted). If there is a conflict between statutes that are *in pari materia*, the more recent and specific statute controls. *Id*.

MCL 168.479 and MCL 600.6419 are *in pari materia* because each statute relates to subject-matter jurisdiction. Of these two statutes, MCL 168.479 controls because it is more recent and specific. MCL 168.479 was amended by our Legislature in 2018, see 2018 PA 608; by contrast, MCL 600.6419 was amended in 2013 by 2013 PA 164. MCL 168.479 also specifically applies to requests for relief from determinations made by defendant, as in this case. Comparatively, MCL 600.6419 is broader and applies to all claims against the state, its departments, or its officers. Therefore, because MCL 168.479 is more recent and specific, we conclude that it creates an exception to the exclusive jurisdiction of the Court of Claims and controls in this case.

MCL 168.479(1) provides, in pertinent part, that "any person who feels aggrieved by any determination made by the board of state canvassers *may* have the determination reviewed by mandamus or other appropriate remedy in the supreme court." (Emphasis added.) Courts should generally give the word "shall" a mandatory meaning and the word "may" a permissive meaning, "unless to do so would clearly frustrate legislative intent as evidenced by other statutory language or by reading the statute as a whole." *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982).

CBFM argues that the permissive language in MCL 168.479(1) supports its position that it was entitled to file a later action in the Court of Claims after the Michigan Supreme Court denied its mandamus action. However, if MCL 168.479(1) did set forth a permissive invitation—as opposed to a mandatory directive—to file complaints concerning decisions by defendant in the Michigan Supreme Court, then that interpretation of MCL 168.479(1) would frustrate the legislative intent of the statute when read together with MCL 168.479(2). Specifically, MCL 168.479(1) provides that a person "may" have a determination made by defendant reviewed in the Michigan Supreme Court. However, CBFM fails to consider MCL 168.479 as a whole. MCL 168.479(2) is clear that any person challenging the determination made by defendant regarding sufficiency or insufficiency of an initiative petition is required to file a timely legal challenge in the Michigan Supreme Court. See MCL 168.479(2), which unambiguously provides:

> If a person feels aggrieved by any determination made by the board of state canvassers regarding the sufficiency or insufficiency of an initiative petition, the person must file a legal challenge to the board's determination in the supreme

> court within 7 business days after the date of the official declaration of the sufficiency or insufficiency of the initiative petition or not later than 60 days before the election at which the proposal is to be submitted, whichever occurs first. Any legal challenge to the official declaration of the sufficiency or insufficiency of an initiative petition has the highest priority and shall be advanced on the supreme court docket so as to provide for the earliest possible disposition.

The stated purpose of MCL 168.479 is to have our Supreme Court decide any legal challenge to the sufficiency or insufficiency of an initiative petition as promptly as possible. Reading MCL 168.479(1) and (2) together, we conclude that the most logical interpretation of the statute is that the permissive word "may" in Subsection (1) provides that the Michigan Supreme Court may review the issue, and Subsection (2) establishes the procedure to have a decision made by defendant reviewed. To be clear, the permissive language in MCL 168.479(1) does not create a choice of forum for potential litigants; it merely serves as an invitation of judicial review to an aggrieved party.

In sum, we conclude that the Court of Claims did not err by granting summary disposition in favor of defendant because the Court of Claims lacked subject-matter jurisdiction over CBFM's claims. CBFM's sole legal remedy in this case was to file a legal action in the Michigan Supreme Court, which it did. CBFM was entitled to file any legal challenge in our Supreme Court, including a request for declaratory and injunctive relief; it was not limited to its mandamus action. However, having filed an action in the Michigan Supreme Court, and the Michigan Supreme Court having denied CBFM's mandamus complaint, CBFM has exhausted its legal remedies with respect to judicial re-

view of defendant's insufficiency determination of its initiative petition.

On appeal, CBFM also challenges the constitutionality of MCL 168.472a, known as the 180-day rule, and requests relief in time for the 2020 election. However, given our conclusion that the Court of Claims did not have subject-matter jurisdiction of CBFM's claims, we need not address these issues.

Affirmed. Defendant, as the prevailing party, is entitled to tax costs. See MCR 7.219(A).

CAVANAGH, P.J., concurred with JANSEN, J.

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

The question raised in this case is of significant public importance: whether MCL 168.472a, which limits petition signature gathering to a period of 180 days, unconstitutionally burdens the right of citizen initiative established in Article 2, § 9 of Michigan's 1963 Constitution. Despite the fact that this question has been before the judiciary since plaintiff first raised it in 2016, we have yet to provide an answer.[1] The majority's

[1] Plaintiff sought a declaratory judgment on this issue in 2016, and we affirmed the dismissal of that action because plaintiff had not established an "actual controversy." On November 5, 2018, plaintiff submitted its petition with the required number of signatures to the Secretary of State for a vote, if necessary, in the 2020 election. The Director of Elections refused to accept the petition for filing. Plaintiff filed suit in the Court of Claims, seeking to have the petition accepted and challenging the constitutionality of the 180-day limit. On April 2, 2020, we held that the Secretary acted improperly by refusing to accept the petition for canvassing, but we did not address the constitutional question because the Board of State Canvassers had not decided whether the signatures were adequate. *Comm to Ban Fracking in Mich v Secretary of State*, unpublished per curiam opinion of the Court of Appeals, issued April 2, 2020 (Docket No. 350161). Although it did not seek leave to appeal in the Supreme Court, the Board of State Canvassers still refused to accept the

approach would again put the question off to some other day. However, no further delay is jurisdictionally required; plaintiff's request for a declaratory judgment is proper, and the Supreme Court's 2020 order denying mandamus does not have preclusive effect because it does not state the basis for the denial or provide other guidance regarding this constitutional question. See *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012) ("An order of this Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision."). See also *Hoffman v Silverthorn*, 137 Mich 60, 64-65; 100 NW 183 (1904) (holding that when the Supreme Court denies mandamus the Court does not decide the merits of the application for purposes of res judicata).

I would therefore address the constitutional question, conclude that MCL 168.472a violates Article 2, § 9 of the 1963 Constitution, and direct the Court of Claims to issue an appropriate declaratory judgment.

I. MANDAMUS DENIAL AND JURISDICTION

The majority concludes that the Supreme Court's denial of mandamus regarding plaintiff's 2020 petition deprives the Court of Claims of its normal jurisdiction to grant declaratory judgments. However, the majority

signatures for nearly one month and then took another month to complete the canvass, finally issuing its rejection on June 8, 2020. Having been denied ballot access, plaintiff sought a writ of mandamus in the Supreme Court per MCL 168.479. The Supreme Court denied relief without comment. *Comm to Ban Fracking in Mich v Bd of State Canvassers*, 505 Mich 1137 (2020). Plaintiff then returned to the Court of Claims, which ruled against it on July 20, 2020, on the ground that the Supreme Court had exclusive jurisdiction to hear the constitutional challenge. Plaintiff now appeals that decision.

offers very little explanation for this extraordinary holding. The majority seems to conclude that because plaintiff has exhausted its claim for 2020 ballot access, it is therefore precluded from ever bringing a declaratory-judgment action on the basis of the claim that the 180-day limit is unconstitutional. However, with access to the 2020 ballot a moot question, plaintiff is no longer acting as a "person who feels aggrieved by any determination made by the board of state canvassers" as to "the sufficiency or insufficiency of an initiative petition . . . ." MCL 168.479(1) and (2). While access to the 2020 ballot ended with the Supreme Court's denial of mandamus, the underlying legal issue has not been resolved.

Plaintiff is now in the position of a proposal committee that seeks a determination of its responsibilities to obtain ballot access in the future. The time limit for signature gathering remains a justiciable issue, and declaratory-judgment actions against the state begin in the Court of Claims. MCL 600.6419(1)(a). The majority fails to appreciate that even though plaintiff "has exhausted its legal remedies with respect to judicial review of defendant's insufficiency determination of its initiative petition," plaintiff—like any other litigant—may nonetheless bring an action for declaratory relief if there is an "actual controversy." MCR 2.605(A)(1). In 2017, we concluded that plaintiff had not established an actual controversy when it had not yet had its petition rejected by the Board of State Canvassers (the Board) on the basis of the 180-day rule:

> This is not a case in which plaintiffs have collected the number of required petition signatures, albeit during a time-frame outside the 180-day rule, filed those petitions at least 160 days before the election, had those petitions rejected by defendants as insufficient, and then had their ballot proposal denied. In fact, defendants had made no

> adverse claim and had taken no adverse action that impacted plaintiffs' legal rights in any way before plaintiffs filed this action. That is, no controversy between the parties existed. Rather, plaintiffs are projecting that, in the future, if they ever collect the precise number of petition signatures required for their ballot initiative, they will be rejected by defendants because they do not meet the requirements of the 180-day rule. Thus, plaintiffs' claim sets forth a possible—not actual—controversy that may arise in the future which rests upon contingent, uncertain events that may not occur at all and the injury plaintiffs seek to prevent is merely conjectural or hypothetical. [*Comm to Ban Fracking in Mich v Dir of Elections*, unpublished per curiam opinion of the Court of Appeals, issued March 14, 2017 (Docket No. 334480), p 4.]

When plaintiff sought a declaratory judgment from the Court of Claims in 2020, however, its claim was no longer hypothetical. Plaintiff had collected the required number of signatures and submitted its petition to the Board, and the Board rejected the petition because many of the signatures were collected more than 180 days before the petition was filed. Thus, plaintiff clearly had standing to seek a declaratory judgment in the Court of Claims that the 180-day rule was unconstitutional.

I would conclude that plaintiff continues to have standing to seek a declaratory judgment even though the 2020 election has passed. This is not a case in which plaintiff "only ask[s] for a declaratory judgment because it perhaps may be needed in the future . . . ." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 586; 957 NW2d 731 (2020). Rather, plaintiff obtained the requisite number of petition signatures once, and it intends to file again. Seeking clarification of the statute prior to another round of signature gathering is wholly consistent with the purpose of allowing a party to seek declaratory relief. Declaratory-judgment actions

are of particular significance when a constitutional question is at issue. In *Int'l Union, United Auto, Aerospace, & Agricultural Implement Workers of America v Central Mich Univ Trustees*, 295 Mich App 486, 493-497; 815 NW2d 132 (2012), the plaintiffs sought a declaratory judgment that a policy barring Central Michigan University (CMU) employees from running for office was unconstitutional even though no CMU employee had attempted to become a candidate. We held that the plaintiffs had standing, noting that the purpose of a declaratory judgment is "to enable the parties to obtain adjudication of rights before an actual injury occurs, to settle a matter before it ripens into a violation of the law . . . , or to avoid multiplicity of actions by affording a remedy for declaring in expedient action the rights and obligations of all litigants." *Id*. at 496, quoting *Rose v State Farm Mut Auto Ins Co*, 274 Mich App 291, 294; 732 NW2d 160 (2006) (emphasis omitted). Considering "that the bar for standing is lower when a case concerns election law," *League of Women Voters*, 506 Mich at 587, plaintiff has shown a continuing actual controversy.

Alternatively, to the extent that an actual controversy no longer exists, a court may address a moot issue that "is one of public significance that is likely to recur, yet evade judicial review . . . ." *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 127; 715 NW2d 398 (2006) (quotation marks and citation omitted). It seems absurd to suggest that this issue of public importance may not be heard until plaintiff (or some other petitioner) (a) again goes to the enormous effort of signature gathering, (b) is denied ballot access on the basis of MCL 168.472a by the Board, and (c) seeks mandamus from the Supreme Court with the ballot deadline breathing down that Court's neck. Indeed, it would be hard to define a less efficient way for the courts to address this important

question. And, of course, the Supreme Court could again deny mandamus without addressing the substantive issue, which—under the majority's approach—would bring us back to square one and further delay judicial review of MCL 168.472a. I cannot conclude that in amending MCL 168.479 the Legislature intended to forever bar a declaratory-judgment action as to the constitutionality of MCL 168.472a, and I cannot approve of the Catch-22 defined by the majority effectively precluding judicial review.

Even though plaintiff's access to the 2020 ballot is foreclosed, the constitutional question remains an issue for which a declaratory judgment is proper. Initiative petitions will almost certainly be filed for the 2022 and 2024 elections, and according to plaintiff, it will be among the groups seeking ballot access. Either an actual controversy exists or the substantive issue should nonetheless be reviewed because it is publicly significant and likely to evade judicial review. Accordingly, I would hold that the Court of Claims has jurisdiction to hear plaintiff's request for declaratory relief on the merits.

II. DOES MCL 168.472a VIOLATE THE RIGHT OF STATUTORY INITIATIVE ESTABLISHED BY ARTICLE 2, § 9 OF THE 1963 CONSTITUTION?

Article 2, § 9 of the 1963 Constitution established the right to initiative reserved by the people:

> The people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative . . . . To invoke the initiative . . . , petitions signed by a number of registered electors, not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required.

The language of the provision places *no* limit on the time to gather signatures. On the face of the provision, therefore, it is difficult to see the basis for the Legislature to place a 180-day limit on the time to gather signatures. Article 2, § 9 establishes rights in the people alone, without any language suggesting that the Legislature may limit those rights. There is an overriding rule of constitutional construction that requires that "specific power[s] the people themselves have expressly reserved . . . be saved if possible as against conceivable if not likely evasion or parry by the legislature." *Mich Farm Bureau v Hare*, 379 Mich 387, 393; 151 NW2d 797 (1967). "[C]onstitutional provisions by which the people reserve to themselves a direct legislative voice ought to be liberally construed." *Kuhn v Dep't of Treasury*, 384 Mich 378, 385; 183 NW2d 796 (1971). See also *Farm Bureau Mut Ins Co of Mich v Comm'r of Ins*, 204 Mich App 361, 367; 514 NW2d 547 (1994).

The Board relies on *Consumers Power Co v Attorney General*, 426 Mich 1; 392 NW2d 513 (1986), as its primary authority for the constitutionality of the 180-day limit. However, *Consumers Power* did not address the people's right to initiative or the text of Article 2, § 9. That case held that, *as to a petition to amend the Constitution*, the Legislature may impose a *presumption* of staleness to signatures gathered outside a 180-day period. *Id*. at 8. *Consumers Power* held that MCL 168.472a was constitutional as to a petition to amend the Constitution, which is governed by Article 12, § 2 of the Constitution, not Article 2, § 9, the provision at issue here. And unlike Article 2, § 9, Article 12, § 2 provides that "[a]ny such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law," a grant of authority to the Legislature *not* present in Article 2, § 9. Thus,

Consumers Power actually undermines the Board's position because in Article 12, § 2, the drafters of the Constitution demonstrated that they understood what language would provide the Legislature with broad power over the petition process and they chose not to include that language in Article 2, § 9.

Even if one were to view *Consumers Power* as relevant, the nature of the Legislature's actions at issue in that case were far less burdensome on the right to petition than is the statute we consider in this case. The "presumption of staleness" limitation approved in *Consumers Power* did not place any legal limit on the time allowed for circulation. That presumption is rebuttable and allows the petitioner an opportunity to demonstrate that individuals who signed the petition outside the 180 days were still registered to vote in Michigan and so were entitled to have their signatures counted. *Consumers Power* explicitly relied on the distinction between an unrebuttable and rebuttable presumption and did not approve a hard-and-fast time limit: "The statute does not set a 180-day time limit for obtaining signatures. *The statute itself establishes no such time limit*. It states rather that if a signature is affixed to a petition more than 180 days before the petition is filed it is presumed to be stale and void. But that presumption can be rebutted." *Consumers Power*, 426 Mich at 8 (emphasis added).

The presumption of staleness provides increased security in the petitioning process to ensure signature validity but does not require the Board to disqualify all signatures outside the 180 days. Thus, even if one were to somehow incorporate the text from Article 12, § 2 into Article 2, § 9, MCL 168.472a would remain infirm. Even when an amendment is at issue, the Legislature and the courts may not impose "undue burdens" on the people's right to amend. See *Wolverine Golf Club v*

Secretary of State, 384 Mich 461, 466; 185 NW2d 392 (1971) (quotation marks and citation omitted).

Moreover, it is well settled that Article 2, § 9 is self-executing and does not require any legislation for it to be applied. This was discussed at length in *Wolverine Golf Club v Secretary of State*, 24 Mich App 711, 725; 180 NW2d 820 (1970): "Our only inquiry must be whether the statute is repugnant to the Constitution. It is settled law that the legislature may not act to impose additional obligations on a self-executing constitutional provision."[2]

Some administrative requirements may be imposed to ensure that the petitions follow a certain form and that the Board has the time to canvass them prior to preparation of the ballot. However, "[t]here is . . . an important distinction between statutes which protect

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[2] The Court further explained:

> To hold that the right of initiative reserved to the people of the State of Michigan is not self-executing is to ignore the expressed intent of the framers. This conclusion is more compelling in light of the perceptive opinion of Justice BIRD in *Hamilton* v. *Secretary of State* (1924), 227 Mich 111, 130:
>
> > The initiative found its birth in the fact that political parties repeatedly made promises to the electorate both in and out of their platforms to favor and pass certain legislation for which there was a popular demand. As soon as election was over their promises were forgotten, and no effort was made to redeem them. These promises were made so often and then forgotten that the electorate at last through sheer desperation took matters into its own hands and constructed a constitutional procedure by which it could effect changes in the Constitution and bring about desired legislation without the aid of the legislature. It was in this mood that the electorate gave birth to the constitutional provision under consideration. In view of this I am persuaded that it was not the intention of the electorate that the legislature should meddle in any way with the constitutional procedure to amend the State Constitution. It was fittingly said in the following cases that:

the people from fraudulent attempts to bypass the legislature through initiative and those which create unnecessary obstacles to restrict the lawful use of initiative." *Wolverine Golf Club*, 24 Mich App at 733. To the degree that "legislation supplementary to self-executing constitutional provisions" may be effective, "such laws must not curtail the rights reserved, or exceed the limitations specified" in the Constitution. *League of Women Voters of Mich v Secretary of State*, 331 Mich App 156, 179; 952 NW2d 491 (2020) (quotation marks and citation omitted), rev'd in part on other grounds 506 Mich 561 (2020). But that is exactly what MCL 168.472a does.

> [W]hile the Constitution places the duty of implementation of initiative and referendum provisions on the Legislature, it does so as an incident to the granting of a right to the people. Although administrative implementation is needed if the initiative process is to function smoothly, the administrative statutes *may not create unnecessary burdens which tend to restrict the constitutional right*. The spirit of the Constitution is not met if the rights it grants are unnecessarily impaired under the

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> "A constitutional provision designed to remove an existing mischief should never be construed as dependent for its efficacy and operation on legislative will."
>
> * * *
>
> In cases where a provision is self-executing, legislation may still be desirable, by way of providing a more specific and convenient remedy and facilitating the carrying into effect or executing of the rights secured, making every step definite, and safeguarding the same so as to prevent abuses. Such legislation, however, must be in harmony with the spirit of the Constitution and its object to further the exercise of constitutional right and make it more available, and such laws must not curtail the rights reserved, or exceed the limitations specified. *State, ex rel. Caldwell, v Hooker* (1908), 22 Okla 712, 718 (98 p 964).

[*Wolverine Golf Club*, 24 Mich App at 728, 730.]

> guise of implementation. [*League of Women Voters*, 331 Mich App at 179-180 (quotation marks and citation omitted; emphasis added).][3]

The burden created by the 180-day circulation limit is unquestionably an "undue burden." It provides no more protection from the counting of invalid signatures than did the "presumption of staleness" that placed the burden on the circulators to show that signatures more than 180 days old are valid. Yet despite adding no additional election security, the absolute limit requires that valid signatures of registered voters be discarded. It is difficult to articulate any basis for the absolute limit other than a legislative desire to constrain the self-retained right of the people to initiate legislation. Indeed, the Board does not even attempt to argue that the 180-day requirement is necessary to ensure the security of the process or its administrative responsibility. And, as noted, *Consumers Power* specifically relied on the fact that the "presumption of staleness" was a rebuttable rather than an unrebuttable presumption.

The 180-day absolute limit for circulation of initiative petitions is violative of the state Constitution. It is a blatant attempt by the Legislature to interfere with the people's self-retained right to initiate legislation.

For these reasons, I respectfully dissent.

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[3] The Supreme Court recently held that the League of Women Voters' challenge to newly adopted petition requirements was moot because the plaintiff had voluntarily abandoned its petition drive. *League of Women Voters*, 506 Mich at 579-584. That is not the case here given the completed petition drive, the ensuing litigation, and plaintiff's declared intent to proceed in 2022.

PEOPLE v BENNETT

Docket No. 350649. Submitted December 8, 2020, at Detroit. Decided January 21, 2021, at 9:05 a.m.

In 1972, David L. Bennett was convicted following a jury trial in the Wayne Circuit Court of first-degree murder, MCL 750.316. The court, George E. Bowles, J., sentenced defendant, who was 17 years old at the time of the offense, to mandatory life imprisonment without the possibility of parole. In *Miller v Alabama*, 567 US 460 (2012), the United States Supreme Court held that mandatory life-without-parole sentences for offenders under 18 years old constituted cruel and unusual punishment under the Eighth Amendment of the United States Constitution. In *Montgomery v Louisiana*, 577 US 190 (2016), the Supreme Court held that *Miller* applied retroactively to juvenile offenders whose convictions and sentences were final when *Miller* was decided, entitling those affected to be resentenced. At the resentencing hearing for defendant, the court, Dalton A. Roberson, J., sentenced defendant to life imprisonment without the possibility of parole, reasoning that although defendant had been an exemplary prisoner, because he was mentally ill, he might be unable to care for himself if released. Defendant appealed.

The Court of Appeals *held*:

1. MCL 769.25(6) requires that when a juvenile offender is being resentenced under *Miller* and *Montgomery*, the trial court must conduct a hearing to consider the juvenile sentencing factors set forth in *Miller*, as well as other relevant information, including the defendant's record while incarcerated. Under MCL 769.25(7), the court must specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed. The *Miller* factors developed from the Eighth Amendment's proportionality principle as related to juvenile sentencing; the proportionality principle gives meaning to society's evolving standards of decency. The *Miller* factors recognize that children are constitutionally different from adults for purposes of sentencing, that children have diminished culpability and greater prospects for reform, and that children are less deserving of the most severe

punishments. The traditional trio of justifications for harsh sentencing—retribution, deterrence, and incapacitation—are thus not as relevant in the context of minors because youth is a time of immaturity, irresponsibility, impetuousness, and recklessness, all of which qualities are generally transient. When sentencing a juvenile, a trial court must begin with the understanding that life-without-parole sentences are, unequivocally, appropriate only in rare cases. Thus, before resentencing a defendant to life without parole, a court must consider (1) the juvenile's age and immaturity, (2) the family and home environment that surround the defendant—and from which they cannot usually extricate themselves—no matter how brutal or dysfunctional, (3) the circumstances of the homicide offense, including the extent of the defendant's participation in the conduct and the effect of familial and peer pressures, (4) that a youthful offender might have been charged and convicted of a lesser offense if not for incompetencies associated with youth, and (5) the possibility of rehabilitation. Although mental illness is not a specific *Miller* factor, it is embedded within the first two factors: immaturity, impetuosity, and failure to appreciate risks and consequences; and the family and home environment. Therefore, the factors include the consideration of mental illness resulting from an abusive childhood or exacerbated by living in an abusive home. When applied to a juvenile being sentenced for the first time, consideration of those factors allows a court to distinguish between the juvenile offender whose crime reflects unfortunate yet transient immaturity and the rare juvenile offender whose crime reflects irreparable corruption. In contrast, when a court considers an appropriate sentence for an adult who was sentenced to life imprisonment for a crime committed as a juvenile, the *Miller* factors remain highly relevant, but a judge resentencing an offender who has served many years in prison has the benefit of actual data regarding whether the offender's life in prison is truly consistent with the "irreparable corruption" factor the *Miller* Court specifically identified for imposing a life-without-parole sentence. In fashioning a proportionate sentence, the resentencing judge may also consider the traditional objectives of sentencing or other factors, including reformation of the offender, protection of society, the disciplining of the offender, and the deterrence of others from committing like offenses.

2. Applying the *Miller* factors, it was clear that defendant was severely abused—physically and emotionally—by his parents, deeply scarring his psyche. While the circumstances of the crime were horrific, defendant's rage and violence were shaped by his untreated mental illness. Despite the child abuse and mental

illness, defendant's prison record demonstrated that he had a profound capacity for change. Evidence of defendant's life in prison—including the diagnosis of and treatment for his mental illness (schizoaffective disorder and major depression) and strong work and educational histories—indicated that he had been successfully rehabilitated and reformed. The resentencing court's recognition that defendant had been an excellent prisoner also strongly favored defendant's release. Under those facts, evidence supported a conclusion that a life-without-parole sentence was not proportionate. The resentencing court's conclusion that defendant's well-treated mental illness trumped his rehabilitation and that defendant might find it challenging to live outside of the prison structure was speculative and constituted clear error. Accordingly, the trial court abused its discretion by imposing that life-without-parole sentence, and the case was remanded for resentencing to a term-of-years sentence.

Sentence vacated and case remanded for resentencing to a term of years.

GLEICHER, J., concurring, fully agreed with the majority but wrote separately to express that because of his mental illness, the Eighth Amendment of the United States Constitution also prohibited defendant from being resentenced to life imprisonment without the possibility of parole. Given the evolving standards of decency underlying the proportionality requirement of the Eighth Amendment, successfully treated mental illness cannot be the sole basis for imposing a life-without-parole sentence following a *Miller* hearing. Instead, mental illness is a mitigating factor under the Eighth Amendment because it lessens an offender's moral culpability. The evolving standards of decency reflected in MCL 768.36 (the guilty-but-mentally-ill statute) and Michigan's Mental Health Code, MCL 330.1001 *et seq*., supported the proposition that imposing additional punishment on a defendant whose mental illness was successfully treated violates the Eighth Amendment. Judge GLEICHER would have included this additional analysis as a ground for concluding that it was constitutionally imperative that defendant be resentenced to a term of years.

CONSTITUTIONAL LAW — JUVENILES — HOMICIDE — SENTENCES — LIFE WITHOUT PAROLE — RESENTENCING — CONSIDERATION OF MITIGATING FACTORS — MENTAL ILLNESS.

Juvenile offenders sentenced to mandatory life-without-parole sentences before the United States Supreme Court declared those sentences unconstitutional in *Miller v Alabama*, 567 US 460 (2012), are entitled to be resentenced; a resentencing court must consider the five *Miller* factors when deciding whether to impose a

term-of-years or life-without-parole sentence; the *Miller* factors include the consideration of untreated mental illness resulting from an abusive childhood or exacerbated by living in an abusive home.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

Bush Seyferth PLLC (by *Susan M. McKeever*, *Derek J. Linkous*, *Andrea S. Carone*, and *Grant A. Newman*) for defendant.

Amicus Curiae:

John Schwend for Michigan Protection and Advocacy Service, Inc.

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

GLEICHER, J. David Bennett was 17 years old when he stabbed Vivian Berry to death. The jury rejected his insanity defense and convicted him of first-degree murder, MCL 750.316. The trial judge sentenced Bennett to life imprisonment without parole, as required under Michigan law.

Forty years later, the United States Supreme Court held that when imposed on a juvenile, a mandatory sentence of life without parole constitutes cruel and unusual punishment under the Eighth Amendment of the United States Constitution. *Miller v Alabama*, 567 US 460, 465; 132 S Ct 2455; 183 L Ed 2d 407 (2012). The Supreme Court later imbued *Miller* with retroactive effect, entitling Bennett to a resentencing hearing. *Montgomery v Louisiana*, 577 US 190, 208-209; 136 S Ct

718; 193 L Ed 2d 599 (2016). On resentencing, the judge determined that because Bennett is mentally ill—a condition that remained undiagnosed and untreated until Bennett's incarceration—he "might" be unable to care for himself if released. For that reason, the judge opted to reimpose a life-without-parole sentence.

The resentencing court improperly employed Bennett's mental illness as a factor weighing against his release and compounded that error by relying on speculation, not evidence. We vacate Bennett's sentence and remand for resentencing to a term of years.

I. LEGAL CONTEXT

Anticipating that the United States Supreme Court would give *Miller* retroactive effect, Michigan's Legislature designed a system for resentencing all prisoners serving life without parole who were under the age of 18 when they committed the offense. MCL 769.25a. In those cases, the resentencing court must select either life without parole or a term-of-years sentence. MCL 769.25a(2). Prosecutors seeking imposition of a life-without-parole sentence are obligated to file a motion specifying the grounds for imposing that punishment. MCL 769.25a(4)(b). The resentencing court then must hold a hearing to consider the juvenile sentencing factors set forth in *Miller* and other relevant information, including the defendant's "record while incarcerated." MCL 769.25(6). The court is additionally obligated to "specify on the record the aggravating and mitigating circumstances considered by the court and the court's reasons supporting the sentence imposed." MCL 769.25(7). If the court elects a term-of-years sentence rather than life without parole, "the court shall sentence the individual to a term of imprisonment for which the maximum term shall be not less

than 60 years and the minimum term shall be not less than 25 years or more than 40 years." MCL 769.25(9). Bennett has served seven years more than the longest minimum term allowable under the statute.

At a resentencing hearing, MCL 769.25 requires that the judge take into account the "hallmark features" of youth, known as the *Miller* factors. The *Miller* factors developed from the Eighth Amendment proportionality principles described by the United States Supreme Court in other decisions involving juvenile sentencing: *Roper v Simmons*, 543 US 551; 125 S Ct 1183; 161 L Ed 2d 1 (2005), and *Graham v Florida*, 560 US 48, 68; 130 S Ct 2011; 176 L Ed 2d 825 (2010). The Court observed in *Graham* and repeated in *Miller* that "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*, 560 US at 59; *Miller*, 567 US at 469. That concept, the Court emphasized in *Miller*, must be viewed in a manner that gives meaning to "the evolving standards of decency that mark the progress of a maturing society." *Miller*, 567 US at 469 (quotation marks and citations omitted).

Those evolving standards have led to a recognition that "imposing the death penalty for nonhomicide crimes against individuals, or imposing it on [intellectually disabled] defendants, violates the Eighth Amendment."[1] *Id*. at 470. In line with these precepts, *Roper* held that the Eighth Amendment categorically prohibits imposing the death penalty on defendants who were under 18 years old when the crime was

[1] This passage in *Miller* uses the phrase "mentally retarded defendants." *Id*. at 470. Since *Miller* was decided, the federal government has generally replaced the term "mental retardation" with "intellectual disability." See, e.g., Social Security Administration, *Change in Terminology: "Mental Retardation" to "Intellectual Disability"*, 78 Fed Reg 46499 (August 1, 2013).

committed, and *Graham* barred life-without-parole sentences for juvenile nonhomicide offenders. *Miller*, 567 US at 470. "[T]he confluence of these two lines of precedent" led the Supreme Court to conclude in *Miller* "that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Id*.

Miller's holding is grounded in the propositions that "children are constitutionally different from adults for purposes of sentencing," "have diminished culpability and greater prospects for reform," and "are less deserving of the most severe punishments." *Id*. at 471 (quotation marks and citation omitted). The "distinctive attributes of youth" render the customary penological justifications for harsh sentencing—retribution, deterrence, and incapacitation—far less relevant in the context of minors. *Id*. at 472-473. Rather than focusing on that traditional trio of sentencing factors, *Miller* requires judges to bear in mind that youth "is a time of immaturity, irresponsibility, impetuousness[,] and recklessness." *Id*. at 476 (quotation marks and citation omitted; alteration in original). These qualities, the Court stressed, are almost always "transient." *Id*. (quotation marks and citation omitted).

The Court additionally noted that childhood is a time when we are " 'most susceptible to influence and to psychological damage.' " *Id*., quoting *Eddings v Oklahoma*, 455 US 104, 115; 102 S Ct 869; 71 L Ed 2d 1 (1982). *Eddings* was "especially on point," in the Court's view, *Miller*, 567 US at 476, and it is particularly pertinent here, too. The 16-year-old defendant in *Eddings* entered a *nolo contendere* plea to the charge of first-degree murder of a police officer, putting him at risk of the death penalty. *Eddings*, 455 US at 106. At the sentencing hearing, he presented evidence that he had been severely abused by his parents and was

mentally and emotionally "disturbed." *Id*. at 107. Although the Supreme Court did not use the term "mental illness," the description of the defendant's condition is consistent with that phrase.[2]

The sentencing judge weighed Eddings's youth as a strong mitigating factor but refused to consider the "fact" of Eddings's "violent background" or his psychological or emotional disorders. *Id*. at 109 (quotation marks omitted). The Oklahoma appellate court "conceded that Eddings had a 'personality disorder,' but cast this evidence aside on the basis that 'he knew the difference between right and wrong . . . and that is the test of criminal responsibility.' " *Id*. at 113.

The Supreme Court reversed, vacating Eddings's death sentence and ordering that on remand "all relevant mitigating evidence" be considered. *Id*. at 117. The Court had "no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant," *id*. at 115, reasoning:

> Eddings was not a normal 16-year-old; he had been deprived of the care, concern, and paternal attention that children deserve. On the contrary, it is not disputed that he was a juvenile with serious emotional problems, and had been raised in a neglectful, sometimes even violent, family background. In addition, there was testimony that Eddings'[s] mental and emotional development were at a

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[2] Testimony at the sentencing hearing revealed "that Eddings was emotionally disturbed in general and at the time of the crime, and that his mental and emotional development were at a level several years below his age. A state psychologist stated that Eddings had a sociopathic or antisocial personality and that approximately 30% of youths suffering from such a disorder grew out of it as they aged." *Eddings*, 455 US at 107 (citation omitted). According to a psychiatrist, "Eddings could be rehabilitated by intensive therapy over a 15- to 20-year period." *Id*. The psychiatrist suggested that, if treated, Eddings "would no longer pose a serious threat to society." *Id*.

> level several years below his chronological age. All of this does not suggest an absence of responsibility for the crime of murder, deliberately committed in this case. Rather, it is to say that just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing. [*Id*. at 116.][3]

Miller's citation of and specific reliance on *Eddings* informs our approach to this case. It is beyond dispute that the "qualities of youth" encapsulated in the *Miller* factors include untreated mental illness born of an abusive childhood or exacerbated by living in an abusive home.

Miller details the many reasons that precedent, science, and common sense mandate that juvenile homicide offenders be approached differently than adults for sentencing purposes. The Court adopted several guideposts that must inform a judge's sentencing evaluation. These factors apply in both initial sentencings and in resentencing hearings necessitated by *Montgomery*. Specifically, before resentencing an adult to life without parole for a homicide committed while a juvenile, a court must still consider "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional"; "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him"; that a youthful offender "might have

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[3] Today, "[a]ll death penalty states allow a defendant to present mitigating evidence of mental illness to the jury as a reason not to impose a sentence of death." Entzeroth, *The Challenge and Dilemma of Charting a Course to Constitutionally Protect the Severely Mentally Ill Capital Defendant From the Death Penalty*, 44 Akron L Rev 529, 566 (2011).

been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys"; and "the possibility of rehabilitation . . . ." *Miller*, 567 US at 477-478.

In addition to these factors, the judge may consider "the traditional objectives of sentencing or other factors . . . ." *People v Garay*, 506 Mich 936, 937 (2020). The principles that guide proportional sentencing in our state are: "(a) the reformation of the offender, (b) protection of society, (c) the disciplining of the wrongdoer, and (d) the deterrence of others from committing like offenses." *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).

This Court's holding in *People v Garay*, 320 Mich App 29; 903 NW2d 883 (2017), and its modification by our Supreme Court, also have special relevance here. Not long after *Miller* was decided, the defendant in *Garay* was convicted of first-degree murder and sentenced to life without parole. *Garay*, 320 Mich App at 43. Although the trial judge expressed awareness of *Miller* and acknowledged that he was bound to consider the *Miller* factors, the judge "also stated that [he] had to consider the goals of sentencing: rehabilitation, punishment, deterrence, protection, and retribution." *Id*. at 47. This Court held that the judge had improperly applied *Miller* by finding that none of the *Miller* factors applied and relying instead on the *Snow* factors. We explained that the trial court "implie[d] a belief that a life-without-parole sentence can or should be imposed unless there is a mitigating factor not to impose the sentence." *Id*. at 49. By failing to consider whether the defendant "was and would remain wholly incapable of rehabilitation for the remainder of his life," the trial judge had abused his

discretion, we held. *Id*. On remand, we instructed that "*Miller* and *Montgomer*y caution against the imposition of a life-without-parole sentence except in the rarest of cases and operate with the understanding that, more likely than not, a life-without-parole sentence is a disproportionate sentence for defendant." *Id*. at 50.

The Supreme Court reversed, but only to the extent that this Court's opinion "would broadly preclude sentencing courts from considering, at all, the traditional objectives of sentencing—punishment, deterrence, protection, retribution, and rehabilitation—when considering whether to sentence persons who were under the age of 18 when they committed their offenses to a term of life without parole." *Garay*, 506 Mich at 936. The Court's brief order added, "Although reliance on other criteria to the exclusion of, or without proper consideration of, *Miller v Alabama* . . . would be an abuse of discretion, mere consideration of the traditional objectives of sentencing or other factors is not, per se, an error of law." *Id*. at 936-937.

When applied to a juvenile offender being sentenced for the first time, the *Miller* factors require a court to examine an offender's childhood and to use information gathered about the child's past to make an informed prediction about whether the child can be rehabilitated. Thoughtful application of the concepts described in *Miller* permits a court to distinguish between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Miller*, 567 US at 479-480 (quotation marks and citation omitted). The Court reiterated in *Montgomery*, 577 US at 209, that although life without parole might qualify as a "proportionate sentence for the latter kind of juvenile offender," that "does not mean that all other children

imprisoned under a disproportionate sentence have not suffered the deprivation of a substantive right."

The focus of the analysis necessarily shifts when a court considers an appropriate sentence for an adult who was sentenced to a lifetime of imprisonment for a crime committed as a juvenile. While sentencing a young person, a judge looks forward and endeavors to predict the future. *Miller* counsels that a careful examination of the offender's developmental characteristics, his or her family environment, and the circumstances surrounding the crime help guide a determination of whether that child will ever be capable of change. Resentencing an adult requires restructuring the evidentiary review; the older the adult, the larger the predictive canvas becomes. While the *Miller* factors remain highly relevant, a judge resentencing an offender who has served many years in prison has the benefit of actual data regarding whether the offender's life in prison is truly consistent with "irreparable corruption," the only ground *Miller* specifically identified for imposing a life-without-parole sentence. See *Miller*, 567 US at 479-480.

Here, the trial court mentioned the *Snow* and *Miller* factors. But instead of crafting a decision drawing on them, the court concentrated its attention on Bennett's mental illness. In so doing, the court abused its discretion and violated Bennett's constitutional rights.

II. THE *MILLER* HEARING EVIDENCE

The Wayne County prosecutor requested that on resentencing, Bennett receive another life-without-parole sentence. The prosecutor supported the motion as follows: "Defendant's crime in the current case was not the result of unfortunate yet transient immaturity, but, rather, evinced irreparable corruption that requires

a [l]ife without parole sentence." The prosecution called as witnesses during the *Miller* hearing the victim's two daughters. They testified movingly about the devastating impact their mother's murder had on their lives and the lives of their family members. Both were asked whether there was "anything you would like to tell the Court about this sentencing," and neither advocated that Bennett receive another life-without-parole sentence.

The remaining two witnesses, a psychologist and a corrections expert, were called by the defense. The defense also introduced extensive documentary evidence including two psychological evaluations; COMPAS and TAP Risk assessments performed by the Michigan Department of Corrections;[4] Bennett's voluminous prison records (including misconduct reports, work evaluations, accomplishments, and security classification screens); and a comprehensive reentry plan created by the State Appellate Defender Office.

The evidence established that Bennett had been severely abused—physically and emotionally—by his parents. The experts explained that this abuse deeply scarred the young man's already fragile psyche. Although the details of the crime are horrific, they reflected a "rage state of frenetic violence," one of the

[4] COMPAS "stands for the 'correctional offender management profiling for alternative sanctions' program. COMPAS is a comprehensive risk and needs assessment system, which takes into account both static information (such as the prisoner's past criminal offenses) and dynamic data (such as the prisoner's evolving attitudes and mental condition)." *In re Elias*, 294 Mich App 507, 520; 811 NW2d 541 (2011). TAP is the Transition Accountability Plan, considered "the lynchpin" of the Department of Corrections' reentry programming. *Id*. at 519 (quotation marks and citation omitted). These 2013 instruments indicated that Bennett's risks of recidivism and violence were "low."

psychologists expressed, shaped by serious and untreated mental illness rather than sadistic depravity. Despite the childhood abuse and his underlying mental illness, Bennett's prison record demonstrates that he had a profound capacity for change. As we detail later, the experts described a man who has been successfully rehabilitated and reformed. Overwhelmingly, the evidence supported that life without parole is not a proportional sentence.

A. THE FIRST TWO *MILLER* FACTORS

The evidence regarding the first two *Miller* factors (immaturity, impetuosity, and failure to appreciate risks and consequences, and the family and home environment) is interwoven in Bennett's case; accordingly, we consider the two factors together.

Abundant evidence substantiated that Bennett suffered profound physical and emotional abuse during his childhood. In a letter written to the court, Bennett's sister described that Bennett's father had unpredictable rages during which he struck and beat Bennett with whatever was available, including a hammer and a shovel. She described her father as "horrifically violent" toward Bennett, and acknowledged that their mother did nothing to contain the abuse. A neighbor recounted that she heard or witnessed episodes of physical abuse perpetrated on Bennett by his father. She characterized Bennett's home environment as "frightening and sometimes brutal." The neighbor expressed deep regret that she had not contacted Child Protective Services.

Dr. Michael Caldwell, a psychologist who specializes in adolescent brain development, performed a comprehensive evaluation focused on Bennett's current and past mental conditions. Bennett reported to Dr.

Caldwell that in the months leading up to the offense he "felt increasingly angry and depressed" and was "confused and having difficulty concentrating in school." His father's violence escalated during this time, and Bennett recalled being the target of "humiliating abuse" and bullying by his peers, including physical assaults, sabotage of his school projects, and theft of his property.

Dr. Caldwell determined that Bennett suffered from severe underlying mental illness at the time of the crime, as well as post-traumatic stress disorder (PTSD) produced by his abusive home environment. The PTSD symptoms impaired the development of areas of Bennett's brain controlling emotional impulses and moderating agitation, Dr. Caldwell explained, and stress hormones generated by his childhood experiences further exacerbated the delay in brain maturity. "These traumatic experiences would have impaired his ability to anticipate negative outcomes, generate rational plans for dealing with his emotional problems, modulate his emotions and agitation, and to avoid impetuous or irrational actions," Dr. Caldwell opined, adding that "[h]is impairment in these areas would have been significantly greater than what would be the case with adolescents in general."

At his criminal trial, Bennett's attorneys recognized the young man's mental illness and advanced an insanity defense. Daniel Burress, who represented Bennett, recalled that a psychiatrist and a psychologist examined Bennett and determined that he was "schizophrenic." Judge Burress[5] related that Bennett "did not receive the mental health treatment he needed" until he was imprisoned and diagnosed by prison professionals as

[5] Daniel Burress subsequently served for many years as a judge on the Livingston Circuit Court.

suffering from a schizoaffective disorder and major depression. His letter to the resentencing court continued:

> I was and remain convinced that Mr. Bennett suffered from an untreated mental illness at the time of the offense. Prison records confirm that he continued untreated in the prison system for some time. Once he was properly diagnosed and treated within the prison system he has proven himself, and is a model of what the prison system wishes it could accomplish with every inmate.
>
> Each and every one of the 350 or more Michigan cases affected by *Miller* involve tragic circumstances. But I am certain very few if any of these cases involve previously undiagnosed mental illness and the long-term rehabilitation documented by Mr. Bennett.

The presentence investigation report (PSIR) prepared after Bennett's conviction reported that Bennett's family "realized" that he "had mental problems," but "never had him examined by a psychiatrist and agreed to let him go his own way." Bennett's mother reflected that after hearing the trial testimony regarding her son's "schizophrenic, paranoid, homicidal" behavior "and his intense hatred for women," she "realized for the first time how seriously mentally ill he is." She expressed no remorse for Bennett's mistreatment, only fear that he would "either kill himself or someone else" if released.

Bennett finally received a mental health diagnosis and treatment in prison. Initially he adjusted poorly to incarceration, and within a short time he was referred for psychiatric evaluation. In 1973, Bennett was formally diagnosed with "Schizoaffective Disorder, Major Depression with psychosis, Depressive Disorder . . . with psychotic features" and began to participate in a treatment program offering medication, individual and group psychotherapy, and vocational and

academic training. Bennett made excellent progress. At age 21, he returned to the general prison population. According to both psychologists who evaluated Bennett for *Miller* purposes, the records from that time demonstrate that Bennett had matured considerably. In other words, Bennett grew up—and his brain developed into that of an adult—in prison.

The first two *Miller* factors are rooted in "hallmark features" of youth. *Miller*, 567 US at 477. Bennett's immaturity and his inability to control his anger—indeed, his "seeth[ing] . . . rage," as Dr. Caldwell put it—permeated his childhood. So too did the brutality of Bennett's home environment. These factors mitigated strongly in favor of a term-of-years sentence.[6]

B. THE THIRD *MILLER* FACTOR

The third *Miller* factor addresses the "circumstances of the homicide offense," including the extent of the offender's participation and "the way familial and peer pressures may have affected him." *Id*. Indisputably, Bennett committed a horrific crime. He was the sole participant, and no evidence suggests that peer or family pressures influenced him. Bennett personally acknowledged his role in Berry's murder, expressed remorse, and apologized to the victim's family at the *Miller* hearing.

In *People v Hyatt*, 316 Mich App 368, 420-421; 891 NW2d 549 (2016), rev'd in part on other grounds by

[6] The resentencing judge commented that he had "taken into consideration" Bennett's home environment and specifically that Bennett's father's "disciplinary acts were kind of violent, in terms of dealing with Mr. Bennett, causing him to suffer depression and other mental health issues." The court apparently did not fully appreciate the severity of the abuse that Bennett suffered and that Bennett's mother's refusal to intervene was, in itself, another facet of the abuse.

People v Skinner, 502 Mich 89 (2018), a conflict panel of this Court placed the ghastly and vicious nature of the defendant's homicide offense in proper perspective, and we adopt that panel's reasoning:

> [N]early every situation in which a sentencing court is asked to weigh in on the appropriateness of a life-without-parole sentence will involve heinous and oftentimes abhorrent details. After all, the sentence can only be imposed for the worst homicide offenses. However, the fact that a vile offense occurred is not enough, by itself, to warrant imposition of a life-without-parole sentence. The court must undertake a searching inquiry into the particular juvenile, as well as the particular offense, and make the admittedly difficult decision of determining whether this is the truly rare juvenile for whom life without parole is constitutionally proportionate as compared to the more common and constitutionally protected juvenile whose conduct was due to transient immaturity for the reasons addressed by our United States Supreme Court.

The resentencing court in this case indicated that it had considered the nature of the underlying offense, but did not rely on it in any way in formulating its decision. The resentencing court did not abuse its discretion by implicitly determining that the circumstances surrounding the offense did not merit a life-without-parole sentence.

C. THE FINAL *MILLER* FACTOR: REHABILITATION

The remaining *Miller* factor of relevance concerns "the possibility of rehabilitation." *Miller*, 567 US at 478. In the usual sense, "rehabilitation" involves the successful completion of vocational, educational, or counseling programs designed to enable a prisoner to lead a useful life, free from crime, when released. The evidence supported that Bennett had achieved reha-

bilitation. The prosecution presented no evidence whatsoever to the contrary.

Since his transfer to the general population in 1976, Bennett has incurred no serious misconducts, has completed a college education, and has participated in a number of programming opportunities. According to Richard Stapleton, an expert on the Michigan Department of Corrections (MDOC) and its records and policies,[7] Bennett "has demonstrated that he is a responsible, worthwhile individual." Bennett successfully completed programs in substance abuse, assault reduction, and anger management; benefited from vocational training in a cornucopia of fields, including horticulture, food service and hospitality management, and custodial maintenance; and served an apprenticeship in tool and die making. He obtained his associate's degree in general studies from Jackson Community College.

Bennett has held a variety of prison jobs, including as a food service worker, a greenhouse and garden worker, a janitor, a payroll clerk, and a factory worker. He experienced no difficulties at work, earned "excellent" or "very favorable" work performance reviews, enjoyed a "consistently positive work history," and developed good working skills.[8] Bennett made a point of saving money and has accumulated over $40,000. Dr. Bernard Gaulier, a second examining psychologist, opined that

[7] Stapleton was employed by the MDOC in various capacities for more than 30 years. He began working for the MDOC as a corrections officer and earned a law degree in 1986. During his career he assumed responsibility for managing the prisoner disciplinary process and supervised the administrative law judges who conducted formal disciplinary hearings. From 1999 until his retirement in 2011, Stapleton served as the administrator of the MDOC's Office of Legal Affairs.

[8] Stapleton commented that prison staff is not "routinely generous with praise in their evaluations."

Bennett's accomplishments reflect "amenability to treatment" and a desire for self-improvement.

During the last 40 years, Bennett has not had any infractions or tickets related to violent or aggressive behavior or serious misconduct; his last aggressive incident occurred in 1975. Stapleton described Bennett's misconduct history while serving in the prison's general population as "remarkable" and "commendable," especially considering "the circumstances under which prisoners are required to survive and the fact that they must engage 24 hours a day with other prisoners, many of whom are violent and predatory." Stapleton related that he has "known very few cases" like Bennett's, characterized Bennett's overall behavior while incarcerated as "exceptionally positive," and expressed that "such a positive disciplinary record reflects self-control and an ability to get along with others . . . ."

Bennett's rehabilitation is a strong mitigating factor. The resentencing court addressed it as follows: "It's my feeling that Mr. Bennett has done everything that he possibly could do, in terms of trying to rehabilitate himself in prison. He has been an excellent prisoner." This finding is well supported in the record. Bennett's remarkable rehabilitation "demonstrate[s] the truth of *Miller*'s central intuition—that children who commit even heinous crimes are capable of change." *Montgomery*, 577 US at 212. The resentencing court's recognition that Bennett "has been an excellent prisoner" strongly favored Bennett's release.

The resentencing court nevertheless elected a sentence of life without parole, stating:

> And . . . I cannot get out of my mind the fact that Mr. Bennett suffers from schizophrenia. And I'm deeply con-

> cerned about how he will operate back in society after having been gone for forty-seven years.
>
> I think that he's done well with his mental health issues because he's been in a very structured situation, and therefore he was able to survive. But if he's released into the community, whereby he has to go back to caring for himself, it might cause a problem.
>
> And, for that reason, I'm going to sentence him under [MCL 750.316], and not to a term of years.
>
> That's my decision[.]

We next consider the factual and legal support for that ruling.

III. MENTAL ILLNESS

Mental illness is not a specific *Miller* factor. But it is imbedded within the first two factors: immaturity, impetuosity, and failure to appreciate risks and consequences; and the family and home environment. Untreated mental illness can lead to criminal behavior and violence. The evidence in this case supports that severe abuse and emotional neglect exacerbated Bennett's undiagnosed and untreated mental illness.

Our justice system generally regards an offender who commits a crime while suffering from undiagnosed or untreated mental illness as *less* deserving of the harshest punishments; that is the central lesson of *Eddings*. See also *Zant v Stephens*, 462 US 862, 885; 103 S Ct 2733; 77 L Ed 2d 235 (1983) (stating that in a death penalty case the decision-maker must consider "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness"); *United States v Doering*, 909 F2d 392, 395 (CA 9, 1990) (holding that the federal sentencing guidelines "make[] abundantly clear that the need for psychiatric treatment is not a circumstance which justifies departure").

Furthermore, although untreated mental illness may predispose a person to violent behavior, successfully treated mental illness does not. The evidence in this case demonstrates that Bennett's illness was successfully treated and that he had been stable from a mental health standpoint for many years. Next, we review that evidence.

Over his four decades in prison, Bennett suffered only a few psychiatric episodes. In March 1981, his mental condition "deteriorated significantly" and he experienced "paranoid delusions" and "persecutory hallucinations." He was treated with antipsychotic medications and improved. In October 1981, Bennett was rehospitalized after responding to auditory hallucinations and making suicidal gestures. Again, he improved after a medication adjustment. Two months later, his antipsychotic medications were discontinued and he became withdrawn, depressed, and paranoid. The medications were restarted, and he returned to his baseline. Bennett relapsed on two later occasions, the last in 1996, but both episodes "cleared rapidly" with medication adjustments.

Bennett has received psychiatric services on a voluntary basis for the last three decades, including psychotropic medications, individual and group therapy, and case management. He has a long record of mental stability with medication.

In October 2016, Dr. Gaulier evaluated Bennett to address the *Miller* factors and to assess his future risk for reoffending. Dr. Gaulier noted "no indication of delusions, or of paranoid thoughts, or other indicators of psychosis," and that Bennett "did not endorse symptoms that would indicate the presence of significant mood difficulties such as excessive depression or anxiety." Dr. Gaulier's testing assessed Bennett at a "low

risk level for antisocial personality and psychopathic behaviors." He opined that Bennett "is no longer a young and immature adolescent. He is able to think before he acts and weigh the potential consequences of his actions," is at "low risk for future criminal behavior," and "understands the need to continue mental health treatment if he were released from prison." Dr. Gaulier recommended that, on release, Bennett engage in community reentry services to address his housing, financial, employment, and mental health needs. He predicted that the "skills and attitudes" Bennett "developed through his education and his work are likely to be helpful upon reintegration into the community."

Dr. Caldwell's report and testimony also addressed Bennett's risk of reoffending. Bennett suffered from several mental disorders at the time of the murder, Dr. Caldwell explained, and continues to suffer from "Schizoaffective Disorder, Depressive type," characterized by major depression with episodes of psychotic illness. Bennett has not experienced a psychotic episode or instability for over 20 years; since the mid-1990s he "has been stabilized with antidepressant medications . . . and is currently in partial remission, with only mild to moderate symptoms of depression that he is able to cope with without difficulty." According to Dr. Caldwell, Bennett was doing "very well" with his current medication:

> Over the past several decades his mental disorder has been well managed with medications. He has been highly motivated to continue the medications and was able to alert prison staff and ask for more medicine when he began to decline in 1996. Although he continues to experience some symptoms of depression and anxiety, he has not shown the hostility, paranoid suspiciousness or rage that were central to his previous violent behavior for over 20 years.

Dr. Caldwell assessed Bennett's "potential for future violence and persistent criminality" and found "no significant characteristics of psychopathic personality." His risk assessment placed Bennett "in the lowest risk category for general recidivism" and the lower one percent of prison inmates for aggressive behavior. Bennett's risk for antisocial behavior was primarily related to his mental disorder, which Dr. Caldwell noted has been "well managed" for several decades. Bennett "poses a very low risk of any kind of future either violence or just criminal behavior in general," Dr. Caldwell concluded.

In Dr. Caldwell's opinion, Bennett "has demonstrated remarkably positive rehabilitation over his time in the prison system" and was "rehabilitated." He explained that Bennett had matured and had a "much better understanding" of his emotions, "does not harbor the sense that the world is malicious and that he has to be on guard, constantly, ready to fight back and protect himself," and "is able to just manage his stress more effectively, and, in particular, to reach out to sources of support . . . to effectively deal with it when he starts to have more symptoms." Bennett no longer has the "hair-trigger sort of anger" he experienced at the time of the offense, and has not had any aggressive incidents for over 40 years. Dr. Caldwell also noted Bennett's "remarkable degree of recognition that he needs the medication" and treatment, and that he had "developed an understanding of . . . when he's starting to deteriorate, when the medication isn't working as well." His prison records confirmed that Bennett had asked for an increase in medications at times when he has felt that his symptoms were worsening and had not refused treatment.

Stapleton, too, described Bennett as rehabilitated, remarking that he "is not a violent person, nor is he a danger to others. He is clearly not the same person that came to prison as a terrified and withdrawn 18-year-old offender." Stapleton summarized:

> [Bennett] successfully matured through those early years and has been an essentially problem-free prisoner over the last 40 years of his incarceration. He is now a 64-year[-]old man who has been incarcerated for 46 years. He has taken advantage of the limited opportunities he has had to better himself and clearly gets along well with other prisoners and staff. These are the indicators of a person who would readily become a productive member of our community if given the opportunity.
>
> As an MDOC employee for over 33 years, including a Parole Officer for 10 years, I have personally witnessed and supervised the reentry of many offenders who were convicted of homicide offenses. As a group, they are recognized as having a very low rate of parole violation or return to new crime. Indeed, the MDOC's own risk assessment tools and internal guidelines agree that Mr. Bennett poses little risk of recidivism or violent behavior.

The comprehensive reentry plan developed by the State Appellate Defender Office, Stapleton observed, reflects "that [Bennett] has community support and services ready to facilitate his return to community in the event he is released." The plan incorporates community programs addressing Bennett's mental health. Dr. Gaulier noted that, at present, Bennett experiences only mild to moderate symptoms of depression and anxiety and is treated with a "very widely prescribed" antidepressant that does not take a great deal of specialization to monitor. Dr. Caldwell, too, expressed that Bennett's medication and supervision needs could be managed in the community by a family physician or a social worker.

IV. THE EVIDENCE DOES NOT SUPPORT A LIFE-WITHOUT-PAROLE SENTENCE

The resentencing court found that Bennett's well-treated mental illness trumped his rehabilitation and that Bennett might find it challenging to live in a less structured environment. The court's unfounded speculation finds no record support.

The *Miller* and *Snow* factors weighed strongly in favor of Bennett's release. Indeed, the prosecutor introduced *no* evidence supporting that Bennett is "irreparably corrupt." "Just as courts are not allowed to impose disproportionate sentences, courts are not allowed to sentence juveniles who are not irreparably corrupt to life without parole." *Skinner*, 502 Mich at 125. The resentencing court clearly erred by ignoring this constitutional mandate. Treated mental illness is not a signal of irreparable corruption, and no evidence even hinted that Bennett's mental illness created a realistic danger that he would reoffend.

Instead of fashioning a sentence grounded in the abundant evidence that Bennett has become a productive, stable, and peaceful adult, the court resorted to a purely theoretical and uncertain prediction that because Bennett is mentally ill, he "might" "cause a problem." "The sentencing judge's exercise of discretion must be based upon accurate information." *People v Smith*, 423 Mich 427, 448; 378 NW2d 384 (1985). This is a due-process requirement. *People v Miles*, 454 Mich 90, 100; 559 NW2d 299 (1997). To the extent that the resentencing court made a factual finding regarding Bennett's risk of reoffending, it was clearly erroneous because no evidence supported it. Nor did any evidence support any other ground for Bennett's continued incarceration. Accordingly, we reverse and remand for resentencing to a term of years based on the

present record and consistent with MCL 769.25(9). We further instruct that the resentencing be conducted with all deliberate speed.[9]

We vacate Bennett's sentence of life without parole and remand for resentencing to a term of years based on the same record and with all deliberate speed. We retain jurisdiction.

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

GLEICHER, J. (*concurring*). I fully concur with the majority opinion. Unconstrained by majority authorship, I write separately to express my view that the Eighth Amendment of the United States Constitution also prohibits resentencing defendant, David Bennett, to life without parole because of his mental illness diagnosis.

"Protection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence." *Montgomery v Louisiana*, 577 US 190, 206; 136 S Ct 718; 193 L Ed 2d 599 (2016). The evolving standards of decency underlying the Eighth Amendment's proportionality requirement compel me to conclude that successfully treated mental illness cannot serve as the sole basis for imposing a life-without-parole sentence following a *Miller* hearing. The Eighth Amendment requires judges to view mental illness as a fact that mitigates an offender's culpability

[9] We are aware that the resentencing judge has died and that a new judge must be assigned the task of resentencing Bennett. Given the resentencing parameters set by the Legislature, we anticipate that the sentence imposed will result in Bennett's immediate eligibility for consideration by the Parole Board. We have retained jurisdiction to facilitate further appellate review, should it be necessary.

for committing a crime. It logically follows that a juvenile offender's successfully treated mental illness must be regarded as a mitigating factor under the Eighth Amendment.

The United States Supreme Court has tethered the "evolving standards of decency" paradigm to "objective indicia of society's standards, as expressed in legislative enactments and state practice . . . ." *Roper v Simmons*, 543 US 551, 563; 125 S Ct 1183; 161 L Ed 2d 1 (2005). Mental illness is universally recognized by courts and legislatures as a mitigating factor in sentencing considerations. Judicial recognition that mental illness is mitigating rather than aggravating is abundant. In *Rompilla v Beard*, 545 US 374, 393; 125 S Ct 2456; 162 L Ed 2d 360 (2005), the Supreme Court described that evidence of the defendant's mental illness that had been undiscovered by counsel "adds up to a mitigation case" that bore no relationship to the arguments otherwise presented. Similarly, in *Porter v McCollum*, 558 US 30, 40; 130 S Ct 447; 175 L Ed 2d 398 (2009), the Supreme Court unanimously held that counsel's failure "to uncover and present any evidence of [the defendant's] mental health or mental impairment" during the penalty phase of his trial amounted to the ineffective assistance of counsel.

These cases represent but a handful of expressions of our society's understanding that mental illness is a circumstance that *lessens* an offender's moral culpability. "Numerous state legislatures and courts have concluded that certain mental and emotional states may constitute mitigating factors. Nearly two dozen jurisdictions list as a statutory mitigating circumstance the fact that the defendant's capacity to appreciate the criminality of her conduct was substantially impaired, often as a result of mental defect or disease." Note,

Mental Illness as an Aggravating Circumstance in Capital Sentencing, 89 Colum L Rev 291, 296-297 (1989). Michigan's "guilty but mentally ill" statute, MCL 768.36, was intended by the Legislature to serve beneficent purposes:

> (1) to ensure that criminally responsible but mentally ill defendants obtain professional treatment in "the humane hope of restoring their mental health" while incarcerated or on probation, and, correlatively, (2) to assure the public that a criminally responsible and mentally ill defendant will not be returned to the streets to unleash further violence without having received necessary psychiatric care after sentencing. [*People v Booth*, 414 Mich 343, 353-354; 324 NW2d 741 (1982).]

And Michigan's Mental Health Code, MCL 330.1001 *et seq*., prohibits a court from ordering a person involuntarily committed for mental health treatment absent clear and convincing evidence of the following:

> (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. [MCL 330.1401(1).][1]

See also *Foucha v Louisiana*, 504 US 71, 77; 112 S Ct 1780; 118 L Ed 2d 437 (1992) ("[A]s a matter of due process[,] . . . it was unconstitutional for a State to continue to confine a harmless, mentally ill person. Even if the initial commitment was permissible, 'it could not constitutionally continue after that basis no longer existed.' ") (citation omitted).

The evolving standards of decency reflected in these statutes support that inflicting additional punishment on people with successfully treated mental illness violates the Eighth Amendment. Allowing treated mental illness to aggravate Bennett's punishment is inconsistent with *Miller*'s proportionality principles and the traditional justifications for punishment. On this ground as well as those detailed in the majority opinion, resentencing to a term of years is a constitutional imperative.

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[1] "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.

ELIA COMPANIES, LLC v UNIVERSITY OF MICHIGAN REGENTS

Docket No. 351064. Submitted January 8, 2021, at Lansing. Decided January 21, 2021, at 9:10 a.m.

Elia Companies, LLC, filed an action in the Washtenaw Circuit Court against the University of Michigan Regents after defendant terminated the parties' lease agreement. In 2013, the parties had entered into a lease agreement under which plaintiff rented space in the Michigan Union (the Union), a building owned by defendant that served as a gathering place for university students and that included some commercial restaurant space. Pursuant to the lease agreement, plaintiff constructed and operated a coffee shop franchise. In 2017, defendant announced its plans to renovate the building, and in April 2018, defendant sent plaintiff a letter terminating the lease agreement. Plaintiff filed its action in August 2018 in the circuit court, and defendant promptly filed a notice of transfer removing the case to the Court of Claims pursuant to MCL 600.6404(3) and MCL 600.6419(1) of the Court of Claims Act (the COCA), MCL 600.6401 *et seq*. Defendant asserted before the Court of Claims that plaintiff's complaint was not proper as to form because it was not verified as required by MCL 600.6434(2). Defendant later moved for summary disposition, arguing in part that plaintiff's claims should be dismissed for failing to comply with the COCA's verification requirements and that plaintiff's tort claims were barred by governmental immunity. The Court of Claims, CHRISTOPHER M. MURRAY, J., dismissed plaintiff's action for failure to comply with the notice requirements in MCL 600.6431. The court further observed that, alternatively, many of plaintiff's claims would have been independently subject to dismissal as a matter of law because they were torts barred by governmental immunity, duplicative, or controlled by the lease agreement. Plaintiff appealed.

The Court of Appeals *held*:

1. The University of Michigan (and defendant, its governing board) is a governmental unit that is protected from tort liability by the government tort liability act (GTLA), MCL 691.1401 *et seq*. Plaintiff argued that governmental immunity did not apply in this case because defendant was engaged in a proprietary func-

tion in operating the Union. The proprietary-function exception to governmental immunity permits tort liability arising out of any activity that is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding any activity normally supported by taxes or fees. Whether the activity generates a profit or loss is relevant but not conclusive evidence. The unrefuted evidence in this case showed that defendant operated the Union at a consistent loss and that the purpose of the Union was to enrich student life by providing a social gathering place. The provision of commercial food establishments was part of that purpose. The evidence further showed that revenue from commercial operations at the Union were placed into a fund for the Union, rather than a general fund, and that defendant provided financial support to the Union. According to the evidence, profit-generation was not defendant's primary purpose for renting commercial space in the Union but was a way to provide services to students with as little loss as possible. The proprietary-function exception does not penalize a governmental agency's desire to conduct an activity on a self-sustaining basis. The Court of Claims correctly determined that the proprietary-function exception did not apply, so defendant had immunity from any claims sounding in tort. Common-law and statutory conversion both sound in tort; accordingly, plaintiff's common-law and statutory conversion claims had to be dismissed irrespective of plaintiff's compliance or noncompliance with the COCA's notice provisions.

2. Plaintiff claimed in its complaint that defendant had violated the anti-lockout statute, MCL 600.2918. Although no caselaw addressed the nature of claims arising under the statute, the Court of Claims properly concluded that such claims sound in tort. MCL 600.2918(1) allows for recovery of treble, i.e., noncontractual, damages, and the statute does not limit its application to contractual disputes. Plaintiff sought to impose liability for a noncontractual civil wrong, i.e., allegedly being forced out of the premises in violation of MCL 600.2918, for which a remedy may be obtained in the form of compensatory damages. Although plaintiff separately alleged a claim of breach of contract, plaintiff's claim under MCL 600.2918 did not seek to impose liability for the mere breach of the lease agreement. Rather, plaintiff sought treble damages for injury caused by the noncontractual civil wrong of being put out of land in violation of MCL 600.2918(1). This was an attempt to impose liability for far more than the breach of the agreement and was instead an attempt to impose tort liability on defendant. Therefore, plaintiff alleged a tort to which the GTLA is applicable. Because plaintiff's anti-

lockout claim sounded in tort, it was barred by governmental immunity and was subject to dismissal regardless of whether plaintiff complied with the COCA's notice provisions.

3. The Court of Claims properly dismissed plaintiff's claims of unjust enrichment; breach of covenant for quiet possession, use, and enjoyment; constructive eviction; and inverse condemnation. Unjust enrichment is a viable claim only if there is no express contract covering the same subject matter. There was no dispute here as to the existence or terms of the lease, and plaintiff's unjust-enrichment claim was premised on defendant's alleged violation of the lease agreement. Therefore, this claim was properly dismissed regardless of plaintiff's compliance or lack thereof with the COCA's notice provisions. Similarly, plaintiff's claim of breach of covenant for quiet possession, use, and enjoyment was derived from the lease agreement, and plaintiff's claim of constructive eviction also expressly asserted that the rights that were allegedly invaded were conferred by the lease. Further, a plain reading of the complaint showed that these claims were functionally identical. The Court of Claims did not err by dismissing these claims, as they merely restated plaintiff's breach-of-contract claim. Inverse condemnation is a constitutional claim that does not truly sound in tort, but in support of this claim, plaintiff relied on the same alleged facts that supported its claim of breach of the lease agreement. A lessee can maintain an inverse-condemnation claim when a government entity takes property from the lessor, thereby causing a termination of the lease. However, a governmental taking is generally understood to totally sever title, while leaving any leases or contracts intact. In this case, defendant owned the property and terminated only plaintiff's leasehold interest. Therefore, defendant's alleged misconduct amounted to a breach of a lease agreement, not an exercise of eminent-domain powers. A breach-of-contract claim does not sound in tort, and plaintiff's breach-of-contract claim did not appear to be so facially unmaintainable that it clearly should have been dismissed as a matter of law. Therefore, whether this claim should have been dismissed depended on other considerations.

4. Under MCL 600.6431, in order to maintain a claim against the state, a claimant must file a written claim or written notice of intention to file a claim against the state in the office of the clerk of the Court of Claims. The claim or notice must contain, among other things, a signature and verification by the claimant. Failure to comply with the notice-verification requirements is a complete defense in an action against the state, and it may be raised at any

time during the proceedings, regardless of whether the defendant has suffered actual prejudice. Although MCL 600.6431 does not apply to claims properly filed in circuit court, a plaintiff is obligated to comply with the statute when a claim is not properly before the circuit court and the action is proceeding in the Court of Claims. Plaintiff asserts that under MCL 600.6421(1), parties are entitled to proceed in circuit court as to claims for which there is a right to a trial by jury as otherwise provided by law. However, the question is not whether there would ordinarily be a right to a jury trial as between private parties, but whether there is a specific right to a jury trial against the state. Although a right to a jury trial against the state exists under certain statutes, unless the Legislature clearly intended to submit claims to the circuit court's jurisdiction, the Court of Claims has exclusive jurisdiction over claims against the state for money damages. There was no real dispute that neither of plaintiff's claims were verified within the meaning of MCL 600.6431 or MCL 600.6434. However, after the Court of Claims dismissed plaintiff's action, the Supreme Court clarified in *Progress Mich v Attorney General*, 506 Mich 74 (2020), that a complaint that has not been verified pursuant to MCL 600.6431 or MCL 600.6434 is not a nullity and is not ineffective to commence an action. While plaintiffs are not excused from compliance with the COCA's verification requirement, they may simply amend an unverified complaint. Therefore, plaintiff was required to comply with the requirements of MCL 600.6431 and MCL 600.6434, and it was permitted to correct any defect in its complaint in order to comply with the statute during the pendency of the proceedings and in accordance with the court rules. Therefore, to the extent that the Court of Claims dismissed plaintiff's breach-of-contract claim on the grounds that it was too late for plaintiff to provide proper verification, its dismissal was no longer based on good law.

Affirmed in part; reversed and remanded in part.

1. CIVIL ACTIONS — STATE DEFENDANTS — CLAIMS ARISING UNDER MCL 600.2918 — APPLICATION OF THE GOVERNMENT TORT LIABILITY ACT.

Under the government tort liability act (the GTLA), MCL 691.1401 *et seq*., a tort is a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages; a plaintiff who files a claim under MCL 600.2918 seeks to impose liability on a state defendant for a noncontractual civil wrong, i.e., being forced out of the premises, for which a remedy may be obtained in the form of compensatory damages; therefore, a claim against a state defendant under MCL 600.2918 sounds in tort and is barred by the GTLA.

2. CIVIL ACTIONS — STATE DEFENDANTS — COURT OF CLAIMS ACT — NOTICE AND VERIFICATION REQUIREMENTS — CORRECTING DEFECTS.

A claimant who files an action in the Court of Claims against a state defendant must comply with the notice and verification requirements under MCL 600.6431 and MCL 600.6434 of the Court of Claims Act (the COCA), MCL 600.6401 *et seq*.; however, a complaint that has not been verified pursuant to these provisions is not a nullity and is not ineffective to commence an action; a plaintiff may amend an unverified complaint to correct any defect in its compliance with the COCA during the pendency of the proceedings and in accordance with the court rules.

Foley & Lardner LLP (by *Jason Conti*) for Elia Companies, LLC.

Brooks Wilkins Sharkey & Turco PLLC (by *Keefe A. Brooks*) for the University of Michigan Regents.

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

RONAYNE KRAUSE, J. Plaintiff, Elia Companies, LLC, filed a lawsuit in the Washtenaw Circuit Court against defendant, the University of Michigan Regents, after defendant terminated an agreement in April 2018 that had allowed plaintiff to operate a coffee shop in one of defendant's student unions. Shortly after plaintiff filed its lawsuit, defendant filed a notice of transfer, moving the case to the Court of Claims. Ultimately, the Court of Claims granted summary disposition in favor of defendant under MCR 2.116(C)(7). It concluded that defendant was entitled to dismissal because plaintiff had not filed a written claim or a written notice of intention to file a claim in the Court of Claims, let alone a signed and verified notice or claim, by April 2019. Plaintiff appeals as of right. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

According to the complaint, plaintiff is the owner and operator of various restaurants and coffee shops through its entities Think Fresh Restaurant Holdings, LLC, and Perfect Cup-Ann Arbor, LLC, both of which plaintiff seems to treat interchangeably with itself. Defendant owns and operates a building or facility called the Michigan Union (the Union), which serves as a gathering place for University of Michigan students and features some commercial restaurant space. In 2013, the parties entered into a lease agreement; pursuant to that lease, plaintiff, apparently through Perfect Cup, constructed and operated a Starbucks coffee shop franchise in the Union. Plaintiff found its coffee shop operation profitable. Meanwhile, defendant operated the Union at a consistent loss. In March 2017, defendant announced that it would be renovating the Union. On April 17, 2018, defendant sent plaintiff a letter terminating the lease, effective April 20, 2018, on the basis of a several-page-long enumerated list of alleged violations by plaintiff, including details and dates of the alleged violations, that occurred between April 2014 and December 2017. Defendant required plaintiff to vacate the premises. In the same year, defendant closed the Union for renovations.

In August 2018, plaintiff commenced the instant action in the Washtenaw Circuit Court. Defendant promptly filed a notice of transfer removing the case to the Court of Claims, pursuant to MCL 600.6404(3) and MCL 600.6419(1) of the Court of Claims Act (the COCA), MCL 600.6401 *et seq*. Plaintiff objected, contending that it had a right to a jury trial, but the Court of Claims rejected plaintiff's objection. Late in August 2018, defendant filed an answer and affirmative defenses asserting that "[m]any of the claims asserted

in the Complaint are barred by governmental immunity" and that "[p]laintiff's Complaint is not verified as required by law." Defendant noted in a footnote on the first page of its answer that plaintiff's complaint was "not proper as to form as it is not verified as required by MCL 600.6434(2)."

The Court of Claims permitted plaintiff to file an amended complaint to plead in avoidance of governmental immunity. Plaintiff's amended complaint alleged breach of contract (Count I); violation of the anti-lockout statute, MCL 600.2918 (Count II); breach of covenant for quiet possession, use, and enjoyment (Count III); constructive eviction (Count IV); common-law and statutory conversion (Count V); unjust enrichment (Count VI); and inverse condemnation (Count VII). Defendant again filed an answer citing MCL 600.6434(2) in a footnote and asserting affirmative defenses including governmental immunity and a lack of verification "as required by law." Defendant eventually moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), arguing that plaintiff's entire action should be dismissed because plaintiff had failed to comply with the COCA's verification requirements, plaintiff lacked standing because Perfect Cup had actually operated the coffee shop even though only plaintiff was a party to the lease, several of plaintiff's claims were duplicative of or precluded by plaintiff's breach-of-contract claim, defendant never exercised any eminent-domain powers, and plaintiff's tort claims were barred by governmental immunity.

The Court of Claims ultimately dismissed plaintiff's case pursuant to MCR 2.116(C)(7) for failure to comply with the notice requirements of MCL 600.6431(1).[1] The

[1] MCL 600.6431 was amended in 2020—that is, after the complaint in this case was filed. See 2020 PA 42. The amendment reorganized the

Court of Claims also observed that most of plaintiff's claims would have been independently subject to dismissal as a matter of law in any event because they were torts barred by governmental immunity, duplicative, or controlled by the lease contract. 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). Under MCR 2.116(C)(7), when the claim is allegedly barred, the trial court must accept as true the contents of the complaint unless they are contradicted by documentary evidence submitted by the moving party. *Id*. at 119. A motion brought under MCR 2.116(C)(8) should be granted only where 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*. Only the pleadings may be considered when deciding a motion under MCR 2.116(C)(8). *Id*. at 119-120. Appellate courts will affirm a right result arrived at on the basis of wrong reasoning. *Kirl v Zinner*, 274

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requirements in former MCL 600.6431(1) and (2), but the substantive portions of those provisions that are relevant here are unchanged. See 1961 PA 236, § 6431. Accordingly, this opinion quotes and cites the current version of the statute. MCL 600.6431(1) requires claimants to file "either a written claim or a written notice of intention to file a claim" within a year of the claim's accrual. It appears that the Court of Claims particularly analyzed whether plaintiff had complied with the "signature and verification" requirement in MCL 600.6431(2)(d). The Court of Claims explicitly declined to address MCL 600.6434(2), which defendant had cited in its answers to plaintiff's complaints, because the verification requirement in that statute contains no language imposing dismissal for noncompliance.

Mich 331, 336; 264 NW 391 (1936). This is especially the case when review is de novo. See *Mich Gas & Electric Co v Dowagiac*, 278 Mich 522, 526; 270 NW 772 (1936).

III. GOVERNMENTAL IMMUNITY

As an initial matter, we agree with the alternative basis for dismissal cited by the Court of Claims for most of plaintiff's claims: they are barred by governmental immunity or because they are controlled by plaintiff's breach-of-contract claims. As to those claims, we need not consider whether plaintiff complied with the notice or verification requirements in the COCA.

"The University of Michigan (and its governing board, the Board of Regents) is one of the governmental units to which Michigan's governmental immunity statute applies." *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 683; 558 NW2d 225 (1996). "Under the government tort liability act (GTLA), MCL 691.1401 *et seq*., governmental agencies are broadly shielded from tort liability." *Fairley v Dep't of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015). The state or its subdivisions cannot be sued without legislative consent, and the Legislature "may . . . place conditions or limitations on the liability imposed." *ADR Consultants, LLC v Mich Land Bank Fast Track Auth*, 327 Mich App 66, 74; 932 NW2d 226 (2019) (quotation marks and citation omitted).

A. PROPRIETARY-FUNCTION EXCEPTION

Plaintiff tacitly does not dispute that defendant would in general be immune to tort liability, but plaintiff argues that governmental immunity does not apply in this matter because defendant was engaging

in a "proprietary function." The proprietary-function exception to governmental immunity permits tort liability arising out of "any activity which is conducted primarily for the purpose of producing a pecuniary profit for the governmental agency, excluding, however, any activity normally supported by taxes or fees." MCL 691.1413. To establish a proprietary function, "[t]wo tests must be satisfied: The activity (1) must be conducted primarily for the purpose of producing a pecuniary profit, and (2) it cannot be normally supported by taxes and fees."[2] *Coleman v Kootsillas*, 456 Mich 615, 621; 575 NW2d 527 (1998). Whether the activity generates a profit or a loss is relevant, but not conclusive, evidence. *Id*. Similarly, it is probative but not dispositive whether revenues are placed into a general fund or used to pay for the activity itself. *Id*. at 621-622. Ultimately, liability is permitted "only where the *primary* purpose is to produce a pecuniary profit." *Hyde v Univ of Mich Bd of Regents*, 426 Mich 223, 258-259; 393 NW2d 847 (1986).

Plaintiff states, without citing any evidence, that defendant leased commercial space in the Union "for a profit." In fact, the unrefuted evidence established that defendant operated the Union at a *consistent loss*. However, plaintiff also accurately observes that, as noted, operating at a loss is not dispositive. *Coleman*, 456 Mich at 621. Plaintiff argues that the Union effectively competed with other restaurants in the vicinity, that defendant required plaintiff to pay defendant a percentage of its gross sales, and that defendant considered maximal revenue as a factor in leasing

[2] Because both of these tests must be satisfied, and, as we will discuss, the activity at issue here was clearly not conducted primarily for the purpose of producing a pecuniary profit, we decline to consider whether it would be "normally supported by taxes and fees."

space to tenants. Nevertheless, plaintiff's focus is too narrow: courts "look to the general activity involved rather than the specific conduct engaged in" when considering the applicability of the proprietary-function exception to governmental immunity. *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 84; 782 NW2d 514 (2010). The general activity at issue is the operation of the Union.

The evidence established that the Union was founded more than a century ago as "a center of campus life" for students at the University of Michigan, and it continues to be operated for the purpose of enriching student life by providing a social gathering place. The provision of commercial food establishments is part of that function. Plaintiff correctly notes that defendant's "Agreement of University Financial Support for University Unions" document states, in part, that the Union's management "will strive to achieve the greatest possible revenue stream from activities and operations . . . ." However, that statement goes on to specify that those activities and operations must be "consonant with the mission and philosophy that underlies the Unions' operations" and that "net profits from these enterprises will offset the required funding from University sources." In general, the evidence shows that revenues from the commercial operations at the Union were not placed into a general fund for defendant, but rather were placed into the Union's own fund, and defendant, as a matter of policy, actually supported the Union. Far from showing profit-generation to be the *primary* purpose of renting out commercial space in the Union, the evidence showed that defendant sought primarily to provide services for students but wished to do so with as little loss as feasible. The proprietary-function exception "does not penalize a governmental agency's legitimate desire to

conduct an activity on a self-sustaining basis." *Hyde*, 426 Mich at 259. Here, defendant did not even try to make the Union self-sustaining.[3]

The Court of Claims correctly determined that the proprietary-function exception did not apply, so defendant is immune to any claims sounding in tort. Common-law and statutory conversion both sound in tort. See *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 348-362; 871 NW2d 136 (2015). Therefore, plaintiff's Count V must be dismissed irrespective of plaintiff's compliance or noncompliance with the COCA's notice provisions.

B. ANTI-LOCKOUT STATUTE

One of plaintiff's claims is for violation of Michigan's anti-lockout statute, MCL 600.2918. We have found no published authority specifically and clearly addressing whether such a claim sounds in tort, in contract, or possibly in the nature of something else. We adopt the Court of Claims' thoughtful and well-reasoned analysis holding that such a claim sounds in tort, and we reproduce that analysis below.

> Plaintiff is seeking recovery under MCL 600.2918(1), which allows recovery of treble, i.e., non-contractual damages. This subsection applies to "[a]ny person who is ejected or put out of any lands or tenements in a forcible and unlawful manner, or being out is afterwards held and kept out[.]" The plain language of this section does not

[3] We further note that college athletics programs are considered governmental, rather than proprietary, even if the college generates revenue from ticket sales and even though at least some sports are quite profitable and involve extensive facilities and support operations. See *Harris*, 219 Mich App at 690-693; *Ward*, 287 Mich App at 85-86. The fact that the University's provision of what amounts to a student-enrichment facility, includes some support operations that generate revenue similarly lacks dispositive force here.

limit its application to contractual disputes, nor does the statute impose liability for the mere breach of a promise. Instead, liability is predicated on "forcible and unlawful" conduct.

In *In re Bradley Estate*, 494 Mich 367, 384; 835 NW2d 545 (2013), the Supreme Court explained that the word "tort" as used in the GTLA refers to "a civil wrong, other than a breach of contract, for which the court will provide a remedy in the form of compensatory damages." And as noted by the *In re Bradley Estate* Court, the GTLA refers not just to "torts," but to "tort *liability*." *Id*. at 385, citing MCL 691.1407(1). Accordingly, when:

> [c]onstruing the term 'liability' along with the term 'tort,' it becomes apparent that the Legislature intended "tort liability" to encompass legal responsibility arising from a tort. We therefore hold that "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*. [*Id*. (emphasis added).]

Returning to the instant case, plaintiff is seeking to impose liability for a noncontractual civil wrong, i.e., being forced out of the premises purportedly in violation of MCL 600.2918, for which a remedy may be obtained in the form of compensatory damages. Although plaintiff has separately alleged a breach of contract action, plaintiff's claim under MCL 600.2918 in Count II does not seek to impose liability for the mere breach of the lease agreement. Rather, Count II seeks treble damages "for an injury caused by the noncontractual civil wrong," i.e., being put out or kept out of land in a "forcible and unlawful manner" in violation of MCL 600.2918(1). This is an attempt to impose liability for far more than the breach of a promise and is instead an attempt to impose tort liability on defendant. See *In re Bradley Estate*, 494 Mich at 389, 391-392. Cf. *Genesee Co Drain Comm'r v Genesee Co*, 321 Mich App 74, 78; 908 NW2d 313 (2017) (holding that an action for unjust enrichment, which implied a contract to

> prevent unjust enrichment, "ultimately involves contract liability, not tort liability" and such claim is not barred by the GTLA). As a result, plaintiff has, in Count II, alleged a "tort" to which the GTLA is, in theory, applicable. See *id*. [Alterations in original.]

We agree, and therefore plaintiff's claim under the anti-lockout statute, MCL 600.2918, is among those claims that sound in tort and are barred by governmental immunity. Count II of the complaint must also be dismissed irrespective of plaintiff's compliance or noncompliance with the COCA's notice provisions.

IV. OTHER BARRED CLAIMS

The courts are not bound by the labels given by parties to their claims; rather, the courts are obligated to scrutinize the substance of the parties' pleadings. *Hurtford v Holmes*, 3 Mich 460, 463 (1855); *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). On that basis, the Court of Claims also properly dismissed plaintiff's claims of unjust enrichment; breach of covenant for quiet possession, use, and enjoyment; constructive eviction; and inverse condemnation.

Unjust enrichment is only a viable claim "if there is no express contract covering the same subject matter." *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Plaintiff correctly notes that "[i]n general, parties are permitted to plead inconsistent claims and facts in the alternative." *AFSCME Council 25 v Faust Pub Library*, 311 Mich App 449, 459; 875 NW2d 254 (2015), citing MCR 2.111(A)(2). Therefore, a breach-of-contract claim and an unjust-enrichment claim may be brought in the alternative when there is some question of whether an express contract actually existed. See *Keywell & Rosenfeld v*

Bithell, 254 Mich App 300, 327-328; 657 NW2d 759 (2002). However, there is no dispute as to the existence or terms of the lease here. Indeed, plaintiff's claim of unjust enrichment is explicitly premised on defendant's alleged violation of the lease agreement. A plain reading of the amended complaint is that without the lease agreement, no basis for unjust enrichment would exist, and because the unjust-enrichment claim is based on an express contract, it cannot be maintained. Therefore, Count VI of the complaint must be dismissed irrespective of plaintiff's compliance or noncompliance with the COCA's notice provisions.

Similarly, plaintiff's claim of breach of covenant for quiet possession, use, and enjoyment expressly asserts that it is derived from rights conferred by the lease agreement. Plaintiff's constructive-eviction claim is almost literally duplicative of its claim for breach of covenant for quiet possession, use, and enjoyment. The constructive-eviction claim also expressly asserts that plaintiff's allegedly invaded rights were conferred by the lease. The lease expressly provides in paragraph 42, "[s]o long as the TENANT is not in default under this Lease, it shall be entitled to and have quiet enjoyment of the PREMISES."

We note that these two claims are, in effect, legally indistinguishable: the covenant for quiet enjoyment protects lessees from dispossession by lessors, and any such dispossession amounts to an eviction. *Stewart v Lawson*, 199 Mich 497, 498-500; 165 NW 716 (1917). Furthermore, pursuant to a plain reading of the complaint, plaintiff is not truly pleading alternative claims, but rather pleading two functionally identical claims for breach of one narrow provision of the lease agreement. The Court of Claims correctly construed these two claims in plaintiff's complaint as merely, and

redundantly, setting forth a slight redressing of its breach-of-contract claim. Therefore, the Court of Claims did not err by dismissing Counts III and IV of plaintiff's complaint irrespective of plaintiff's compliance or noncompliance with the COCA's notice provisions.

Finally, plaintiff does not present any argument that the Court of Claims erred by dismissing its inverse-condemnation claim and, in fact, plaintiff barely mentions that claim. Therefore, it is unclear whether plaintiff regards that dismissal as having been erroneous; to the extent it does, this claim may be considered abandoned. See *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Nonetheless, in the interest of completeness, we may address this claim, at least to the extent of any controlling legal issues. See *Paschke v Retool Indus (On Rehearing)*, 198 Mich App 702, 705-706; 499 NW2d 453 (1993), rev'd on other grounds 445 Mich 502 (1994). Inverse condemnation is a constitutional claim that does not truly sound in tort. See *Tamulion v State Waterways Comm*, 50 Mich App 60, 66-67; 212 NW2d 828 (1973). Furthermore, plaintiff pleaded inverse condemnation "in the alternative," which, as discussed, is certainly permissible. Nevertheless, plaintiff relied on the same alleged facts, which clearly set forth a claim that defendant breached the lease agreement by improperly terminating the lease.

Lessees can maintain inverse-condemnation claims when a government entity takes property from the lessor and thereby causes a termination of the lease. See *Lookholder v State Hwy Comm'r*, 354 Mich 28, 35-36; 91 NW2d 834 (1958); *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 134; 680 NW2d 485 (2004). However, a governmental taking is generally under-

stood to be a total severance of title, leaving intact any leases or contracts. See *AW Duckett & Co, Inc v United States*, 266 US 149, 149-152; 45 S Ct 38; 69 L Ed 216 (1924). Here, if defendant "took" any property, it was property that defendant itself owned, and it terminated plaintiff's leasehold interest only. Defendant's letter of termination clearly provides that plaintiff was to remove its merchandise, displays, and non-built-in fixtures. In short, defendant's alleged misconduct simply does not amount to an exercise of eminent-domain powers; it amounts to a breach of a contract for the lease of premises. Therefore, had plaintiff argued that dismissal of its Count VII was erroneous, we would disagree.

Conversely, it is axiomatic that a claim for breach of contract does not sound in tort, and plaintiff's breach-of-contract claim does not appear to be so facially unmaintainable that it should clearly have been dismissed as a matter of law. Therefore, whether Count I of the complaint should be dismissed depends on other considerations.

V. THE COCA'S NOTICE PROVISIONS

"In MCL 600.6431(1) [and (2)], the Legislature has qualified a claimant's ability to bring a claim against the state by requiring that 'the claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.' " *Fairley*, 497 Mich at 298. In relevant part, the statute provides as follows:

> (1) Except as otherwise provided in this section, a claim may not be maintained against this state unless the claimant, within 1 year after the claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim

> against this state or any of its departments, commissions, boards, institutions, arms, or agencies.
>
> (2) A claim or notice under subsection (1) must contain all of the following:
>
> (a) A statement of the time when and the place where the claim arose.
>
> (b) A detailed statement of the nature of the claim and of the items of damage alleged or claimed to have been sustained.
>
> (c) A designation of any department, commission, board, institution, arm, or agency of the state involved in connection with the claim.
>
> (d) A signature and verification by the claimant before an officer authorized to administer oaths. [MCL 600.6431.]

Furthermore, MCL 600.6434(2) states that "[t]he complaint shall be verified." Failure to comply with the notice-verification requirements is "a complete defense in an action against the state or one of its departments." *Fairley*, 497 Mich at 292. Moreover, it is a defense that may be raised at any time, irrespective of whether the defendant has suffered actual prejudice.[4] *Id*. at 292, 298; *ADR Consultants*, 327 Mich App at 75. Thus, the Court of Claims correctly recognized that failure to provide a verified claim or notice serves as a bar to pursuing a claim in the Court of Claims, even if

[4] We note that although defendant did not specifically cite MCL 600.6431 in its answers, which might have been more helpful, it did at least provide plaintiff with a reference to MCL 600.6434(2) and with prompt notice that verification of its complaints was an issue. Therefore, whether or not the procedural hurdles in the COCA serve any practical purpose, if actual prejudice is irrelevant, it is difficult to accuse defendant of engaging in gamesmanship. We further note that there is no question that plaintiff filed its original complaint within one year of when its claims accrued, and therefore this is not a case involving the *timeliness* of notice, but rather the *adequacy* of notice, i.e., whether the verification requirement was met.

defendant was in fact on notice. See *McCahan v Brennan*, 492 Mich 730, 743; 822 NW2d 747 (2012).

Plaintiff argues that the verification requirement in MCL 600.6431 does not apply because it filed its complaint in circuit court. This argument is slightly off base. This Court has recently held that "the requirements in MCL 600.6431 do not apply to claims properly filed in circuit court." *Tyrrell v Univ of Mich*, 335 Mich App 254, 265; 966 NW2d 219 (2020). However, this Court reaffirmed that plaintiffs remain obligated to comply with MCL 600.6431 when proceeding in the Court of Claims. *Id*. at 269-271. Therefore, the bare fact that plaintiff filed its complaint in circuit court is irrelevant to the instant matter. Rather, the dispositive factor is whether plaintiff's remaining claim may actually be maintained in circuit court.

Plaintiff argues that parties remain entitled to proceed in the circuit court as to claims "for which there is a right to a trial by jury as otherwise provided by law . . . ." MCL 600.6421(1). However, the question is not whether there would ordinarily be a right to a jury trial as between private parties but whether there is a specific right to a jury trial *against the state*. No right to any suit against the state, even for breaches of contract, existed at common law; and to the extent any such claims were permitted by grace of the Legislature, they took place in courts of chancery. See *Mich State Bank v Hastings*, 1 Doug 225, 235-237 (1844). A right to a jury trial against the state exists under certain statutes, such as the Whistleblowers' Protection Act, MCL 15.361 *et seq*., and the Civil Rights Act, MCL 37.2101 *et seq*. But those statutes make clear that the Legislature intended for the circuit court to have jurisdiction over those claims. See *Anzaldua v Band*,

457 Mich 530, 548; 578 NW2d 306 (1998). Otherwise, the Court of Claims has exclusive jurisdiction over claims against the state for money damages. See *Lumley v Bd of Regents for Univ of Mich*, 215 Mich App 125, 133; 544 NW2d 692 (1996). If litigants against the state could avail themselves of jury trials merely because they have a right to a jury trial against any other kind of party, the exception would swallow the rule. See *Barbour v Dep't of Social Servs*, 172 Mich App 275, 279-280; 431 NW2d 482 (1988). Therefore, the Court of Claims has exclusive jurisdiction over plaintiff's breach-of-contract claim seeking money damages. See *Chen v Wayne State Univ*, 284 Mich App 172, 197-198; 771 NW2d 820 (2009).

There appears to be no real dispute that neither of plaintiff's complaints were verified within the meaning of MCL 600.6431 or MCL 600.6434. Plaintiff argues that it satisfied the verification requirement with an affidavit from Zaid Elia, plaintiff's managing member, which was filed with plaintiff's November 2018 response to defendant's first motion for summary disposition. The Court of Claims acknowledged that the affidavit was signed and verified before an officer authorized to administer oaths. It did not otherwise substantively analyze whether it satisfied the requirements of MCL 600.6431(2) because it found that the affidavit was untimely, that it was neither a "written notice of intention to file a claim" nor a "written claim," and that it was not filed in the Court of Claims; therefore, it concluded that the affidavit could not save plaintiff's action from dismissal.

After the Court of Claims entered its dismissal of this matter, our Supreme Court clarified that a complaint that has not been verified pursuant to MCL 600.6431 or MCL 600.6434 is not a nullity and is not

ineffective to commence an action. *Progress Mich v Attorney General*, 506 Mich 74, 97-98; 954 NW2d 475 (2020). Plaintiffs are not excused from complying with the verification requirement. *Id*. at 89, 98. However, plaintiffs may simply amend an unverified complaint. *Id*. at 95, 97-99. Doing so may be considered a mere correction of a technical defect. See *id*. at 99 n 18. Therefore, to the extent the Court of Claims concluded that plaintiff was precluded from achieving compliance with MCL 600.6431 at any later time in the proceedings, that conclusion is no longer "good law."

We conclude that plaintiff must comply with the verification requirements of MCL 600.6431 and MCL 600.6434. However, plaintiff may correct any defect in its complaint in order to comply with those requirements during the pendency of the proceedings and in accordance with the court rules. Clearly, if plaintiff cannot provide proper verification, plaintiff's claim must be dismissed. However, plaintiff may cure a defect in that verification during the proceedings. Therefore, to the extent the Court of Claims dismissed plaintiff's breach-of-contract claim on the grounds that it was too late for plaintiff to provide proper verification, that dismissal must be reversed. We decline to consider whether the affidavit would be sufficient to bring plaintiff into compliance. We also decline to consider any of the substantive merits of plaintiff's remaining breach-of-contract claim. Such issues are better addressed by the Court of Claims in the first instance.

VI. CONCLUSION

The Court of Claims' dismissal of plaintiff's claim for breach of contract is reversed and the case is remanded for further proceedings. Those proceedings shall include

providing plaintiff with an opportunity to correct any defects in its compliance with the verification requirements in MCL 600.6431 and MCL 600.6434 if the Court of Claims determines that the affidavit is insufficient to bring plaintiff into compliance. In all other respects, dismissal of the remainder of plaintiff's claims is affirmed. We do not retain jurisdiction. The parties shall bear their own costs, neither party having prevailed in full. MCR 7.219(A).

SWARTZLE, P.J., and RICK, J., concurred with RONAYNE KRAUSE, J.

FEDERAL HOME LOAN MORTGAGE CORPORATION v WERME

Docket No. 350981. Submitted January 8, 2021, at Grand Rapids. Decided January 21, 2021, at 9:15 a.m. Leave to appeal denied 508 Mich 925 (2021).

Federal Home Loan Mortgage Corporation (Freddie Mac) filed a summary-proceeding-for-possession action in the 57th District Court against Lesa Werme, seeking to obtain possession of property in which Werme asserted an interest. In 2004, Werme obtained a loan on the property from NovaStar Home Mortgage, Inc., and secured the loan with a first-in-priority mortgage granted to NovaStar's nominee, Mortgage Electronic Registration Systems, Inc. (MERS); Freddie Mac subsequently acquired the promissory note secured by the first mortgage, and Mortgage Center, LLC, serviced that loan for Freddie Mac. In 2004, Werme also obtained a personal line of credit from Huntington National Bank (HNB), which was secured by granting HNB a second mortgage on the property. In 2014, Werme defaulted on both loans. In January 2015, MERS assigned the first mortgage to Mortgage Center, which, in turn, began foreclosure proceedings. Werme then filed an action in the United States District Court for the Western District of Michigan against Mortgage Center, seeking to prevent, in part, the foreclosure. While that federal case was pending, HNB foreclosed the second mortgage by advertisement; in November 2015, HNB purchased the property at the sheriff's sale for the amount owed under the second mortgage and HNB recorded the deed. Rather than redeeming the property by May 6, 2016—the day the statutory redemption period provided for in MCL 600.3236 expired—Werme filed an action against HNB in the federal district court, challenging the validity of the foreclosure. In September 2016, the federal court dismissed the HNB action, with prejudice, for failure to state a claim, reasoning that Werme had failed to establish fraud, irregularity, or prejudice in the foreclosure proceedings. In July 2017, HNB conveyed by quitclaim deed all of its rights, title, and interest in the property to Freddie Mac; the property was subject to the first mortgage held by Mortgage Center. In August 2017, Mortgage Center discharged the first mortgage and registered the discharge with the Allegan County Register of Deeds; thereafter, the

federal district court dismissed Werme's action against Mortgage Center and Freddie Mac because her claim for declaratory judgment was moot given that Mortgage Center had discharged its mortgage. In April 2018, Freddie Mac commenced summary proceedings for possession of the property in the state district court. Werme removed the action to federal district court and filed a counterclaim; the federal district court granted Freddie Mac's motion to remand the case to the state district court. On remand, Werme moved to transfer the case to the Allegan Circuit Court, arguing that the transfer was appropriate because in her counterclaim she sought declaratory and injunctive relief and a determination of rights to the property; according to Werme, she held fee-simple title to the property because Freddie Mac never foreclosed the discharged first mortgage, resulting in Freddie Mac not owning the property or having the right to possess it. The state district court removed Werme's counterclaim to the circuit court but retained the summary proceedings for possession. During the summary proceedings, the district court granted Freddie Mac's motion for possession and ordered Werme to vacate the premises. Freddie Mac then moved in the circuit court for summary disposition of Werme's counterclaims. The circuit court, Margaret Zuzich Bakker, J., granted Freddie Mac summary disposition and dismissed Werme's counterclaims. Werme appealed.

The Court of Appeals *held*:

1. Under MCL 600.2932, a person may bring an action in circuit court to quiet title to real property. A mortgage is a lien on real property intended to secure performance or payment of an obligation. A mortgage is a security interest incident to an underlying obligation, and the transfer of the note necessarily includes a transfer of the mortgage with it. If the underlying indebtedness evidenced by a promissory note is paid, the debt is extinguished and the mortgage is discharged because the mortgage follows the note. Mortgagees of record, parties who own the indebtedness, and parties who act as the servicing agent of the mortgage have the power to foreclose under the foreclosure-by-advertisement statute. After foreclosure, the rights and obligations of the parties are fixed by statute because the foreclosure extinguishes the mortgage itself. At that time, the purchaser becomes the owner of an equitable interest in the mortgaged premises; that interest ripens into a legal title if the mortgagor does not redeem the property by paying the requisite amount within the prescribed time as provided for in MCL 600.3240. If the mortgagor does not redeem the property within the redemp-

tion period, all rights, title, and interest in the property, including the right to possess it, vest in the holder of the sheriff's deed. To set aside a statutory foreclosure sale, the mortgagor must establish clear proof of fraud or irregularity in the foreclosure itself. To obtain possession of foreclosed property, MCL 600.5714(1)(g) requires the new deed holder to file an action for summary proceedings. In this case, Freddie Mac purchased the property from HNB after HNB foreclosed on the second mortgage and Werme did not redeem the property within the statutory redemption period. Werme's rights in and to the property were therefore extinguished by the foreclosure sale, and because Werme failed to provide clear proof of fraud or irregularity in the foreclosure proceedings, the extinguishment could not be set aside. Accordingly, Freddie Mac was entitled to possession of the property under MCL 600.5714(1)(g), and the circuit court did not err by affirming the district court's grant of judgment of possession to Freddie Mac. Werme conceded that HNB properly foreclosed the second mortgage, that HNB obtained title when she failed to redeem, and that HNB conveyed its title to Freddie Mac by quitclaim deed. Given those facts, Werme could not establish a prima facie case of title to the property, and the circuit court correctly granted Freddie Mac summary disposition of her claims that she owned and had the right to possess the property.

2. Under MCL 600.3236, a purchaser of a second mortgage at a foreclosure sale takes the property subject to the first mortgage, but the contrary is not true. Under the merger doctrine set forth in *Bd of Trustees of the Gen Retirement Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318 (1985), a single entity, which holds both a first and second mortgage on a property, forecloses by advertisement on the second mortgage, and purchases the property at the foreclosure sale may not recover the amount owed on the note secured by the first mortgage when it is undisputed that the fair market value of the property exceeds the amount secured by both the first and second mortgages; that is, the mortgages merge as a matter of law, and the debt owed on the first mortgage is extinguished. Equity, however, will generally prevent a merger if the parties did not intend a merger, and an intent to avoid a merger will ordinarily be inferred when it is in the interest of the person holding the various estates to keep them separate; the equitable principle underlying the merger doctrine can be applied to avoid an owner obtaining double recovery after the owner forecloses on a property. Thus, while the title holder of a sheriff's deed after foreclosure maintains the right to possession of the property after the statutory redemption period passes, equity will not permit a double recovery that would constitute a windfall;

in other words, the former mortgagor and debtor is protected against claims that would permit the new owner from double recovery. In this case, HNB purchased the property subject to the senior mortgage held by Mortgage Center. Freddie Mac purchased the property from HNB and held the property subject to Mortgage Center's mortgage. However, Freddie Mac owned the debt secured by Mortgage Center's mortgage, so the promissory note and the mortgage were held by separate entities. Mortgage Center, with Freddie Mac's approval, discharged the first mortgage on the property, resulting in Freddie Mac's having an unsecured debt given that the collateral (i.e., the property) had been given up. Although a creditor in that situation could ordinarily hold the debtor personally liable, equity would not allow that result in this case because the value of the property purchased by Freddie Mac after the second mortgage was foreclosed exceeded the combined amount of both the debt underlying the second mortgage and the outstanding debt underlying the first mortgage. Because equity would not allow Freddie Mac a double recovery, the trial court should have declared that Freddie Mac's ownership and possession of the property satisfied the unsecured debt under the promissory note formerly secured by Mortgage Center's first mortgage.

Judgment affirmed but case remanded for amendment of the order.

Orlans PC (by *Melissa Z. Prantzalos* and *Regina M. Slowey*) for plaintiff.

Steven A. Finegood for defendant.

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

REDFORD, P.J. Defendant/counterplaintiff-appellant, Lesa Werme, appeals the circuit court's grant of summary disposition and dismissal of her counterclaims against plaintiff/counterdefendant-appellee, Federal Home Loan Mortgage Corporation (Freddie Mac). For the reasons set forth in this opinion, we affirm the circuit court's grant of summary disposition in favor of Freddie Mac, but remand for entry of an order declaring that Freddie Mac's ownership and possession of the real property resulted in the extinguishment of the

mortgage-loan debt under the promissory note that it holds associated with the discharged senior mortgage because equity will not permit Freddie Mac a double recovery.

I. FACTUAL AND PROCEDURAL BACKGROUND

Werme owned property in Saugatuck, Michigan, and during 2004, she granted two mortgages on the property to secure two loans. First, she obtained a $330,400 mortgage loan from NovaStar Home Mortgage, Inc., and granted its nominee, Mortgage Electronic Registration Systems, Inc. (MERS), a mortgage on the property to secure the loan. A little over one month later, Werme obtained a $46,000 personal line of credit secured by a second mortgage on the property that she granted to Huntington National Bank (HNB). Werme later obtained an increase in the HNB loan and agreed to a modification of the HNB mortgage. During 2008, Freddie Mac acquired ownership of the promissory note secured by the senior mortgage on the property. Mortgage Center, LLC, serviced that loan for Freddie Mac. Werme defaulted during 2014 on both loans.

In January 2015, MERS assigned the senior mortgage to Mortgage Center, which initiated foreclosure proceedings. Werme sued Mortgage Center and Freddie Mac in the United States District Court for the Western District of Michigan for declaratory and injunctive relief to prevent the foreclosure and for an accounting and damages for alleged unjust enrichment. HNB later foreclosed its mortgage by advertisement, and on November 5, 2015, HNB purchased the property at the sheriff's sale for a full-credit bid of $96,000. HNB recorded its Sheriff's Deed on Mortgage Sale on November 12, 2015, in the Allegan County Register of Deeds. The sheriff's deed specified May 6, 2016, as the

last day to redeem the subject property. Werme failed to redeem the property. Instead, on May 6, 2016, she sued HNB in the same federal court in which she sued Mortgage Center and Freddie Mac to challenge the validity of the foreclosure sale. The federal court dismissed Werme's lawsuit against HNB on September 2, 2016, with prejudice, for failure to state a claim because she could not establish fraud, irregularity, or prejudice related to HNB's foreclosure.

On July 6, 2017, Freddie Mac purchased the sheriff's deed from HNB, and HNB conveyed the property to Freddie Mac by quitclaim deed. On April 5, 2018, Freddie Mac filed in the 57th District Court a summary proceeding for possession of the property. Werme removed the action to federal court and filed a counterclaim. Freddie Mac moved to remand the case to state court; the federal court granted the motion, remanded to the state district court, and closed the case. On remand from the federal court, Werme moved to transfer the case to Allegan Circuit Court on ground that she had filed a counterclaim for declaratory and injunctive relief because Freddie Mac had no right to possess the property or evict her from the premises. The district court ordered the removal of Werme's counterclaim to the circuit court on December 20, 2018, but retained the summary proceeding. Werme filed an amended counterclaim in the circuit court in which she admitted facts related to HNB's foreclosure and that Freddie Mac purchased the property from HNB. She alleged two counts, one for declaratory and injunctive relief and the other for determination of the rights to the property. Werme claimed that she held fee-simple title to the property and that Freddie Mac neither owned nor had a right to possess it.

Meanwhile, Freddie Mac moved for judgment of possession in the district court; the court granted the motion, entered a judgment of possession, and ordered Werme to vacate the premises. Freddie Mac next moved for summary disposition in the circuit court, and that court granted the motion. Werme now appeals.

II. STANDARDS OF REVIEW

We review de novo questions of law, actions to quiet title in equity, as well as decisions to grant or deny summary disposition. *Trademark Props of Mich, LLC v Fed Nat'l Mtg Ass'n*, 308 Mich App 132, 138; 863 NW2d 344 (2014). This Court reviews de novo the grant or denial of summary disposition to determine if the moving party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). In *Maiden*, our Supreme Court explained:

> A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence. If such material is submitted, it must be considered. MCR 2.116(G)(5). Moreover, the substance or content of the supporting proofs must be admissible in evidence. . . . Unlike a motion under subsection (C)(10), a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant.
>
> * * *
>
> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged

> are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings.
>
> 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 . . . 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 119-120 (quotation marks and some citations omitted).]

Summary disposition is appropriate under MCR 2.116(C)(10) if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

This Court also reviews de novo a decision to grant or deny a declaratory judgment, and it reviews for clear error the trial court's factual findings regarding that decision. *Ter Beek v City of Wyoming*, 297 Mich App 446, 452; 823 NW2d 864 (2012), aff'd 495 Mich 1 (2014). Clear error occurs "when this Court is left with a definite and firm conviction that a mistake has been made." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 660; 819 NW2d 28 (2011) (quotation marks and citation omitted).

III. ANALYSIS

Werme argues that the circuit court erred by granting Freddie Mac summary disposition of her claims for

declaratory judgment and for a determination of rights in the property because, she asserts, Freddie Mac must foreclose the discharged first mortgage and until it does, she continues to hold fee-simple title to the property and has the right to possess it. We disagree.

Under MCR 2.605(A)(1), a court "may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." In a declaratory action, the plaintiff generally has the burden to prove each fact alleged. *Shavers v Attorney General*, 402 Mich 554, 589; 267 NW2d 72 (1978). Under MCL 600.2932, a person may seek to quiet title to real property by bringing an action in circuit court. MCL 600.2932 provides, in relevant part:

> (1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not.
>
> (2) No action may be maintained under subsection (1) by a mortgagee, his assigns, or representatives for recovery of the mortgaged premises, until the title to the mortgaged premises has become absolute, or by a person for the recovery of possession of premises, which were sold on land contracted, to whom relief is available under subdivision (1) of section 5634.
>
> (3) If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated.
>
> * * *

(5) Actions under this section are equitable in nature.

"[T]he plaintiff in a quiet-title action has the initial burden of establishing a prima facie case of title and that 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 plaintiff makes out a prima facie case, the defendant then has the burden of proving superior right or title in itself. *Beulah Hoagland Appleton Qualified Personal Residence Trust v Emmet Co Rd Comm*, 236 Mich App 546, 550; 600 NW2d 698 (1999); see also *Boekeloo v Kuschinski*, 117 Mich App 619, 629; 324 NW2d 104 (1982). Actions to quiet title are equitable in nature. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998); see also MCL 600.2932(5).

Resolution of the issues presented necessarily requires consideration of the legal principles governing promissory notes secured by mortgages on real property and the equities as between the parties. In *Babcock v Young*, 117 Mich 155, 160; 75 NW 302 (1898), our Supreme Court explained:

> It has been held many times in this State that where a negotiable note is given, and a mortgage taken as security therefor, the note is the evidence of the debt, and the mortgage only an incident of the debt ; that the mortgage follows the note into the hands of the lawful owner of the note ; and that, without any written assignment of the mortgage, the owner of the note is the owner of the mortgage.

This Court has similarly expressed that a mortgage "is a lien on real property intended to secure performance or payment of an obligation." *Prime Fin Servs LLC v Vinton*, 279 Mich App 245, 256; 761 NW2d 694 (2008). A promissory note secured by a mortgage is personal

property that may be transferred by the owner to third parties. *Id*. "A mortgage is a mere security interest incident to an underlying obligation, and the transfer of the note necessarily includes a transfer of the mortgage with it." *Id*. at 257, citing *Ginsberg v Capitol City Wrecking Co*, 300 Mich 712, 717; 2 NW2d 892 (1942). "[A] mortgage without an underlying obligation is a nullity." *Prime Fin Servs LLC*, 279 Mich App at 269, citing *Ginsburg*, 300 Mich at 717. If the underlying indebtedness evidenced by a promissory note is paid, the debt is extinguished and the mortgage is discharged because the mortgage follows the note. *Fox v Mitchell*, 302 Mich 201, 212; 4 NW2d 518 (1942).

"Under general contract law, rights can be assigned unless the assignment is clearly restricted." *Burkhardt v Bailey*, 260 Mich App 632, 653; 680 NW2d 453 (2004), citing Calamari & Perillo, Contracts (3d ed), § 18-10, p 735. "An assignee stands in the position of the assignor, possessing the same rights and being subject to the same defenses." *Burkhardt*, 260 Mich App at 652-653. "[A] mortgage is merely a 'chose in action'—a secondary incident to the debt to secure its payment through a lien on specific property." *Id*. at 653-654. "A mortgagee may foreclose on a mortgage without producing the note secured by the mortgage." *Sallie v Fifth Third Bank*, 297 Mich App 115, 118; 824 NW2d 238 (2012).

In *Residential Funding Co, LLC v Saurman*, 490 Mich 909, 909-910 (2011), our Supreme Court clarified that a record holder of a mortgage claiming

> status as an "owner of an interest in the indebtedness" does not equate to an ownership interest in the note. Rather, [the] record-holder of the mortgage . . . owned a security lien on the properties, the continued existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness—i.e., the ownership of legal

> title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness—authorized [the record holder of the mortgage] to foreclose by advertisement under MCL 600.3204(1)(d).
>
> . . . Under the settled law of this State, the mortgage and the note are to be construed together. The rule is well-settled that the mortgagee has a lien on the land to secure the debt. It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. The choice of a mortgagee is a matter of convenience. Indeed, in interpreting predecessor foreclosure-by-advertisement statutes, in cases in which the mortgagee had transferred a beneficial interest, but retained record title, this Court has unanimously held that only the record holder of the mortgage has the power to foreclose; the validity of the foreclosure is not affected by any unrecorded assignment of interest held for security.
>
> . . . Rather, as explained above, the Legislature's use of the phrase "interest in the indebtedness" to denote a category of parties entitled to foreclose by advertisement indicates the intent to include mortgagees of record among the parties entitled to foreclose by advertisement, along with parties who "own the indebtedness" and parties who act as "the servicing agent of the mortgage." [Quotation marks, citations, ellipsis, and brackets omitted.]

After foreclosure, the rights and obligations of the parties are fixed by statute rather than controlled by the mortgage. *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 52; 503 NW2d 639 (1993). That is because upon foreclosure, the mortgage itself becomes extinguished. *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551, 555; 444 NW2d 217 (1989). In *Trademark Props*, 308 Mich App at 138-139, this Court explained the consequence of foreclosure of a mortgage as follows:

> Foreclosure of a mortgage containing a power of sale is permissible by advertisement, provided the proceedings

> are instituted in accordance with the foreclosure statutes. A foreclosure of a mortgage extinguishes it. And the purchaser becomes the owner of an equitable interest in the mortgaged premises which ripens into a legal title if not defeated by redemption as provided by law. Statutory foreclosures should not be set aside without some very good reasons therefor. A strong case of fraud, irregularity, or some peculiar exigency is required to set aside a statutory foreclosure sale. [Quotation marks, citations, ellipsis, and brackets omitted.]

Thus, if a holder of a mortgage on real property forecloses, the foreclosure extinguishes the mortgage. *Id*. at 139. "Pursuant to MCL 600.3240, after a sheriff's sale is completed, a mortgagor may redeem the property by paying the requisite amount within the prescribed time limit[.]" *Bryan v JPMorgan Chase Bank*, 304 Mich App 708, 713; 848 NW2d 482 (2014). MCL 600.3236 provides:

> Unless the premises described in [the sheriff's] deed shall be redeemed within the time limited for such redemption as hereinafter provided, such deed shall thereupon become operative, and shall vest in the grantee therein named, his heirs or assigns, all the right, title, and interest which the mortgagor had at the time of the execution of the mortgage, or at any time thereafter, except as to any parcel or parcels which may have been redeemed and canceled, as hereinafter provided; and the record thereof shall thereafter, for all purposes be deemed a valid record of said deed without being re-recorded, but no person having any valid subsisting lien upon the mortgaged premises, or any part thereof, created before the lien of such mortgage took effect, shall be prejudiced by any such sale, nor shall his rights or interests be in any way affected thereby.

The mortgagee who purchases the property at the sheriff's sale and holds a sheriff's deed must wait the statutory redemption period, but if the mortgagor fails

to redeem the property within the statutory redemption period, all right, title, and interest in the property vest in the holder of the sheriff's deed. *Trademark Props*, 308 Mich App at 139. Accordingly, "[i]f a mortgagor fails to avail him or herself of the right of redemption, all the mortgagor's rights in and to the property are extinguished," *Bryan*, 304 Mich App at 713, and the mortgagor does not have standing to bring any claim related to the property absent clear proof of fraud or irregularity, *id*. at 713-715.

Upon the expiration of the redemption period, the sheriff's deed becomes operative and vests in the purchaser at the sheriff's sale "all the right, title, and interest" in the property, including the right to possess the property. MCL 600.3236. To effectuate possession, however, the deed holder must seek possession of the premises through summary proceedings under MCL 600.5714, which provides, in relevant part, as follows:

> (1) A person entitled to possession of premises may recover possession by summary proceedings in the following circumstances:
>
> * * *
>
> (g) When a person continues in possession of premises sold by virtue of a mortgage or execution, after the time limited by law for redemption of the premises.

In this case, the following facts are supported by record evidence, and the legal consequences that follow cannot be evaded:

(1) During 2014, Werme defaulted under the terms of promissory notes secured by mortgages on the subject real property.

(2) HNB foreclosed by advertisement its second mortgage on the property that secured Werme's $96,000 unpaid HNB loan debt.

(3) HNB purchased the property at the sheriff's sale for the full amount of its credit bid of $96,000.[1]

(4) Werme failed to redeem the property during the statutory redemption period, which expired on May 6, 2016.

(5) Instead of redeeming the property, Werme challenged HNB's foreclosure in a lawsuit filed in federal court; the federal court dismissed the complaint with prejudice for failure to state a claim because she could not establish fraud, irregularity, or prejudice related to HNB's foreclosure.[2]

(6) All right, title, and interest in the property vested in HNB as a matter of law because Werme failed to timely redeem.[3]

(7) HNB conveyed by quitclaim deed all of its right, title, and interest in the property to Freddie Mac on July 6, 2017.

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[1] "It is well established that a purchaser at a foreclosure sale of a second mortgage takes the property subject to the first mortgage . . . ." *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 124; 667 NW2d 880 (2003), citing *Bd of Trustees of the Gen Ret Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318, 322; 377 NW2d 432 (1985).

[2] "The principle of judicial comity generally states that foreign courts can afford each other's judgments mutual respect and recognition." *MLive Media Group v Grand Rapids*, 321 Mich App 263, 273; 909 NW2d 282 (2017). Therefore, the principles of comity require a state court "to defer to a federal court ruling when a federal district court is the equivalent of a state circuit court." *Id*. (quotation marks, citation, and brackets omitted).

[3] MCL 600.3236.

(8) As of July 6, 2017, Freddie Mac held all right, title and interest in the property subject to the senior mortgage held by Mortgage Center.[4]

(9) Mortgage Center held by an assignment dated January 13, 2015, the senior mortgage granted by Werme on the property to secure her 2004 mortgage loan in the amount of $330,400, which Mortgage Center had serviced for Freddie Mac since 2008.

(10) Mortgage Center initiated the foreclosure of its mortgage in 2015, and Werme filed suit in federal court against Mortgage Center and Freddie Mac to prevent the foreclosure, seeking declaratory relief, an accounting, and damages for alleged unjust enrichment.

(11) Mortgage Center discharged its mortgage on August 22, 2017, and recorded its discharge with the Allegan County Register of Deeds on September 15, 2017.[5]

(12) After three years of litigating in federal court, Mortgage Center and Freddie Mac moved for summary judgment of Werme's claims and the federal court granted the motion because her claim for declaratory relief had been rendered moot by Mortgage Center's discharge of its mortgage. The federal court also ruled that Werme had failed to establish a basis for an accounting and that she had failed to factually and legally support her claim of unjust enrichment.

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[4] *Advanta Nat'l Bank*, 257 Mich App at 124.

[5] "When a document stating that a mortgage is discharged is filed with the register of deeds, the mortgage is discharged." *Burkhardt*, 260 Mich App at 657.

(13) Freddie Mac commenced summary proceedings in state district court under MCL 600.5714 for possession of the property. Werme removed the action to the federal court, but the federal court remanded the case to the state district court. The district court transferred Werme's counterclaim against Freddie Mac to the circuit court but not the summary proceedings for possession.

(14) Freddie Mac moved in the district court for possession of the property, and the district court granted Freddie Mac judgment of possession and ordered Werme to vacate the premises.

(15) Werme appealed the district court's judgment and order, and the circuit court affirmed because Werme could not establish her right to possession having failed to redeem the property.

In this appeal, Werme essentially collaterally attacks the circuit court's affirmance of the district court's judgment by asserting that Freddie Mac does not own and cannot retain possession of the property. In an effort to support her position, Werme argues that Freddie Mac must foreclose the senior mortgage, despite its having been discharged, before it can assert that it holds title to the property. Michigan law does not support her position.

De novo review of the record establishes that Freddie Mac proved its superior right to ownership and possession of the property under the title it holds by virtue of its purchase of the property from HNB following its foreclosure of the junior mortgage and Werme's admitted failure to timely redeem the property. Accordingly, all of Werme's rights "in and to the property" were extinguished absent clear proof of fraud

or irregularity in HNB's foreclosure proceeding itself. *Bryan*, 304 Mich App at 713-714. Werme challenged HNB's foreclosure of the second mortgage, and the federal district court dismissed her claims with prejudice because she could not establish fraud, irregularity, or prejudice related to HNB's foreclosure.[6] Therefore, as a matter of law, Freddie Mac was entitled to entry of judgment of possession under MCL 600.5714(1)(g). The district court did not err by granting Freddie Mac judgment, and the circuit court did not err by affirming that ruling.

The record also reflects that, in this action, Werme did not challenge HNB's foreclosure but conceded that HNB properly foreclosed its mortgage, that HNB obtained title when she failed to redeem, and that HNB conveyed its interest in the property to Freddie Mac by quitclaim deed. These unavoidable concessions completely undermined her claim for a declaration that she owned and had the right to possess the property. Further, the evidence established that she could make no legitimate claim to quiet title to the property in herself. In an action to quiet title, a plaintiff bears the burden of proof to establish a prima facie case of title. *Boekeloo*, 117 Mich App at 628. If the plaintiff fails to meet this burden, summary disposition is appropriate. *Special Prop VI*, 273 Mich App at 590. As a matter of law, Werme could not establish her prima facie case of title to the property having lost it by her failure to redeem. Accordingly, the circuit court did not err by granting Freddie Mac summary disposition of her claims. *Id*.

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[6] *Werme v Huntington Nat'l Bank*, unpublished opinion of the United States District Court for the Western District of Michigan, issued September 2, 2016 (Case No. 1:16-CV-479).

Werme argued in the circuit court that the court should reinstitute the senior mortgage that, before it was discharged by Mortgage Center, secured the promissory note owned and held by Freddie Mac. Distilled to its essence, Werme's appeal challenges whether Freddie Mac owns and can possess the property while holding the unsatisfied and unsecured debt obligation, which it could potentially attempt to collect from her sometime in the future. Werme asserts that, despite her loss of title to the property because of her failure to redeem, she nevertheless owns the property and has the right to possess it. Werme's argument is factually and legally unsupported.

Werme relies on *Bd of Trustees of the Gen Retirement Sys of Detroit v Ren-Cen Indoor Tennis & Racquet Club*, 145 Mich App 318; 377 NW2d 432 (1985), to advance her contentions that Freddie Mac has no right to possess the property and evict her from the premises, that Mortgage Center's discharge of its mortgage is void, and that she, not Freddie Mac, holds fee-simple title to the property. *Bd of Trustees*, however, does not support Werme's contentions. Nevertheless, the equity principle articulated in *Bd of Trustees* guides our decision.

In *Bd of Trustees*, 145 Mich App at 319-320, the plaintiff held two mortgages on a property, the first securing a $1.1 million loan and the second securing a $500,000 loan. The property had a fair market value of more than $3 million. The defendant defaulted on both mortgage loans. The plaintiff foreclosed by advertisement on the junior mortgage, purchased the sheriff's deed at the sheriff's sale for the amount owed on the second note, and took possession of the property after the redemption period expired without the defendant redeeming the property. *Id*. at 320. The plaintiff then

commenced an action to recover the amount owed on the first note despite its ownership and possession of the property that secured that debt. *Id*.

The defendant could not avail itself of the defense against a party seeking a deficiency judgment as provided in MCL 600.3280, because the statute only applied in those situations where a foreclosure sale involved one note and one mortgage. The defendant argued that foreclosure of the second mortgage discharged the promissory note secured by the first mortgage because the property held value exceeding the junior loan debt and possession of the property required deeming the senior debt satisfied. *Id*. at 320-321. A panel of this Court considered caselaw and treatises addressing the consequence of a holder of two mortgages foreclosing on either the first mortgage or the second mortgage. The panel observed that under MCL 600.3236, a purchaser at a foreclosure sale of a second mortgage takes the property subject to the first mortgage, but the contrary is not true. *Id*. at 322. The panel explained:

> At law, whenever a greater and lesser estate or a legal and equitable estate coincide in the same person, the lesser or equitable estate is destroyed by merger. Equity, however, will generally prevent a merger if the parties did not intend a merger, and an intent to avoid a merger will ordinarily be inferred where it is in the interest of the person holding the various estates to keep them separate. Plaintiff must look to equity here to prevent the merger which would be automatic at law. As . . . cases show, equity is of no assistance to plaintiff under the circumstances presented here, because plaintiff seeks to avoid a merger to enable it to obtain, in effect, a double recovery.
>
> The price at a foreclosure sale on a second mortgage is depressed to reflect the outstanding first mortgage. A third party who purchases the property at the foreclosure sale on the second mortgage would have to satisfy the debt

> secured by the first mortgage in order to prevent the mortgagee of the first mortgage from asserting a superior claim to the property. Because plaintiff itself is the mortgagee of the first mortgage, plaintiff need not concern itself with the possibility that the mortgagee of the first mortgage would assert a superior claim. Plaintiff wants to obtain the price advantage of purchasing at a second mortgage sale without the disadvantage of having to satisfy the debt secured by the first mortgage in order to obtain uninterrupted enjoyment of the property. Equity will not assist plaintiff to achieve such a result. Instead, the debt secured by the first mortgage was discharged when plaintiff acquired the mortgaged property at the foreclosure sale on the second mortgage. [*Id*. at 325-326 (citation omitted).]

Close analysis of *Bd of Trustees* discloses that the panel's decision rested on its determination of the equities as between the parties. The panel discerned that, under the circumstances, equity could not permit the plaintiff to enjoy both title to the property and maintain a deficiency action to collect the debt because the value of its property sufficed to satisfy both loan debts. The panel recognized that equity would not permit the plaintiff a double recovery that would constitute a windfall. Although *Bd of Trustees* involved a single party holding both the senior and junior mortgages, we hold that the general equitable principle against double recovery applies under the particular facts of this case.

Contrary to Werme's argument, however, *Bd of Trustees* does not stand for the proposition that, once having lost all right, title, and interest in the property because of failure to redeem, one may still claim title to the property and a right to possess it. *Bd of Trustees* instead upholds the vesting of title in the holder of the sheriff's deed after the mortgagor has failed to redeem.

Bd of Trustees also supports the title holder's right of possession of the property while protecting the former mortgagor and debtor against claims that would permit double recovery, an inequitable and unjust outcome.

The equitable principle set forth in *Bd of Trustees* applies in this case, and when applied, it clarifies the rights of the parties, resulting in an equitable and just outcome. Ordinarily, the foreclosure of a junior mortgage does not impact the senior mortgagee's rights because the senior mortgage rides through the foreclosure and the junior mortgagee takes the property subject to the senior mortgage. *Advanta Nat'l Bank*, 257 Mich App at 124. The underlying debt would have to be satisfied by the new title holder to obtain the discharge of the senior mortgage and release of the encumbrance upon the property. In this case, however, HNB purchased the property and took it subject to the senior mortgage held by Mortgage Center. Freddie Mac then purchased the property from HNB, which conveyed all of its right, title, and interest to Freddie Mac. Accordingly, Freddie Mac held the property subject to Mortgage Center's mortgage. Freddie Mac, however, owned the debt secured by Mortgage Center's mortgage. The promissory note and the mortgage were held by separate entities. Mortgage Center initiated foreclosure of its mortgage, and Werme responded by filing suit in federal court to challenge the foreclosure. After protracted litigation and after Freddie Mac obtained title to the property from HNB, Mortgage Center, with Freddie Mac's approval, discharged its mortgage and the federal court dismissed Werme's lawsuit. The discharge of the senior mortgage resulted in Freddie Mac's holding an unsecured debt, the collateral and security for the debt's repayment having been given

up. Ordinarily in this situation, a creditor may seek to hold the debtor personally liable.

The problem in this case, however, is that it would not be equitable for Freddie Mac to hold Werme personally liable for the outstanding debt underlying the first mortgage because Freddie Mac holds title to and possesses the property, the value of which the parties do not dispute suffices to satisfy not only the debt underlying the second mortgage (on which HNB foreclosed) but additionally to satisfy the outstanding debt underlying the first mortgage. Although the equitable-merger doctrine articulated in *Bd of Trustees* does not technically apply in this case because two separate entities each held a mortgage, the underlying equitable principle against double recovery must apply.[7] We conclude that under the particular facts of this case, Werme is entitled to a declaration that Freddie Mac's ownership and possession of the property satisfied the unsecured debt under the promissory note formerly secured by Mortgage Center's senior mortgage. Freddie Mac cannot enforce the note and hold Werme personally liable for that debt because equity will not permit Freddie Mac a double recovery.

The circuit court properly ascertained that Werme had neither a legal nor an equitable right to own and possess the property, the relief that she sought in this case. The record reflects that the circuit court understood the equitable problem and realized that Werme appeared to be vulnerable to personal liability on the outstanding unsecured debt. The circuit court inquired whether she desired to be released from the debt, but Werme declined and argued against declaring the debt

[7] We note that in the matter at bar, Freddie Mac filed an affidavit of its representative in the trial court that stated it would *not* pursue any action for deficiency against Werme.

satisfied because she wanted ownership and possession of the property. Rather than declaring the debt extinguished, the circuit court granted Freddie Mac summary disposition because, as a matter of law, Werme failed and could not establish her claims for the relief she sought. The circuit court did not err in this regard.

Nevertheless, the circuit court should have declared the rights of the parties more clearly, particularly respecting Werme's personal liability for the debt under the promissory note formerly secured by the discharged senior mortgage. Freddie Mac's having obtained fee title to the property and its judgment of possession, as a matter of equity, extinguished Freddie Mac's right to ever hold Werme personally liable and collect the unsecured debt. The circuit court reached the right result respecting Werme's claims and her lack of entitlement to the relief she sought, but it failed to definitively clarify the parties' rights by setting forth on the record that equity would not permit Freddie Mac a double recovery.

The record reflects that the circuit court accepted the sworn statement of Freddie Mac's representative that Freddie Mac had no intention of collecting on the outstanding debt and agreed that Freddie Mac likely would be collaterally estopped from collecting the debt. While Werme may be able to assert a defense to a collection action given Freddie Mac's stated intention, Werme still faces the potential that Freddie Mac could change that intention, take action to collect the outstanding debt, and force her to have to defend. Accordingly, the circuit court should have exercised its equitable powers and clarified the parties' respective rights by declaring that Freddie Mac could not seek to hold Werme personally liable on the remaining debt, the property having satisfied it.

Therefore, we affirm the circuit court's summary disposition ruling because it correctly concluded that Freddie Mac held absolute title to the property and had the right to possess it; nevertheless, the circuit court erred by not declaring that Freddie Mac's ownership and possession of the property resulted in the extinguishment of the debt associated with the discharged senior mortgage because equity will not permit Freddie Mac a double recovery.

Affirmed but remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

MARKEY and BOONSTRA, JJ., concurred with REDFORD, P.J.

PEOPLE v LYDIC

Docket No. 349216. Submitted November 10, 2020, at Lansing. Decided January 28, 2021, at 9:00 a.m.

Shaun P. Lydic was convicted by a jury in the Bay Circuit Court of assault by strangulation, MCL 750.84(1)(b), and domestic violence, MCL 750.81(2). The court, Harry P. Gill, J., sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve 17 months to 10 years in prison for the assault-by-strangulation conviction and 93 days in jail for the domestic-violence conviction. Defendant was in a romantic relationship with TK. On the day of the altercation at issue, they got into an argument, and TK spat on defendant. Defendant then pushed TK to the ground, put a belt around her neck, choked her with it, and made threatening statements. Defendant was convicted, and the prosecution appealed, challenging defendant's assault-by-strangulation sentence on the basis that the trial court abused its discretion by imposing an out-of-guidelines sentence below that recommended by the advisory sentencing guidelines. Defendant disagreed and argued that the trial court erred by assessing 50 points for Offense Variable (OV) 7.

The Court of Appeals *held*:

1. MCL 777.37(1)(a) provides that 50 points are to be assessed for OV 7 when a victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. The phrase "designed to substantially increase the fear and anxiety a victim suffered during the offense" modifies only the fourth category, i.e., conduct that is "similarly egregious" to sadism, torture, and excessive brutality. Each of the three categories of "sadism," "torture," and "excessive brutality" is independent of the others and also independent of the requirement of substantially increasing a victim's fear and anxiety. Accordingly, a sentencing court must first determine if the case involves one or more of the categories of sadism, torture, or excessive brutality; if so, OV 7 applies and the defendant is to be assessed 50 points. If the case does not involve one or more of those three categories, then the sentencing court must determine whether the case involves con-

duct that is similarly egregious to at least one of those three categories. If so, then the court also must determine whether the conduct substantially increased a victim's fear and anxiety during the offense. If the court determines that the case involves conduct that is similarly egregious to one of those three categories and the conduct substantially increased a victim's fear and anxiety during the offense, then OV 7 applies and 50 points are assessed for purposes of the fourth category of conduct. In this case, defendant choked the victim with a belt, which involved excessive brutality. However, the case also involved allegations of death threats and taunting during the assault, which was akin to sadism because the conduct humiliated the victim and prolonged her mental suffering. Defendant's overall conduct involved various categories under OV 7, some of which required and some of which did not require the criminal conduct to have substantially increased the victim's fear and anxiety. On the night of the incident itself, TK stated that defendant choked her with a belt and told her that when her young son returned home, her son would find TK dead. At trial, there was conflicting evidence regarding the altercation; TK testified at trial that defendant did not choke her. The court resolved the conflict by stating that it believed the statements TK made on the night of the altercation were accurate. The trial court did not clearly err by making that factual determination. With regard to the application of OV 7, defendant's use of a belt satisfied the requirement of excessive brutality; therefore, OV 7 applied. Defendant's death threats and taunting of TK during the assault were severe enough to be treated as "similarly egregious" to sadism based on their infliction of humiliation and other emotional suffering; furthermore, this conduct substantially increased TK's fear and anxiety by increasing not only TK's fear for her own welfare but also her fear for the well-being of her young child. Accordingly, the enhancement of OV 7 was applicable both as excessive brutality, on its own, and as similarly egregious conduct to sadism that substantially increased TK's fear and anxiety. The trial court did not err by finding that OV 7 applied.

2. Trial courts must consult the sentencing guidelines when imposing a sentence, but the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range. The principle of proportionality simply requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. In imposing an out-of-guidelines sentence, a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more

proportionate to the offense and the offender than a different sentence, i.e., one within the guidelines, would have been. Other factors include the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation. In this case, the trial court carefully explained its findings and reasons for imposing an out-of-guidelines sentence. The court stated that assessing 50 points was too harsh given the circumstances of this case, stating that TK "did her best" to provoke defendant and that, although TK's provocation did not justify defendant's conduct, TK's behavior during the assault nevertheless did play a part in the trial court's sentencing decision. The trial court contrasted these two factors with defendant's conduct in this case, including defendant's act of strangling TK and threatening to kill her. After carefully weighing these competing factors, the trial court stated that it had discretion to sentence outside the sentencing guidelines range when doing so is appropriate and that it chose to exercise that discretion in this case. Thus, the trial court expressed that while it was aware that it was imposing an out-of-guidelines sentence, it was of the view that the sentencing guidelines inaccurately reflected the seriousness of the crime and that the guidelines also failed to properly account for TK's conduct. Because the trial court's sentencing decision was supported by the record, the trial court did not abuse its discretion.

Affirmed.

SENTENCING — OFFENSE VARIABLES — OFFENSE VARIABLE 7 — SADISM, TORTURE, EXCESSIVE BRUTALITY, OR SIMILARLY EGREGIOUS CONDUCT DESIGNED TO SUBSTANTIALLY INCREASE A VICTIM'S FEAR AND ANXIETY.

MCL 777.37(1)(a) provides that 50 points are to be assessed for Offense Variable 7 when a victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense; each of the three categories of "sadism," "torture," and "excessive brutality" is independent of the others and also independent of the requirement of substantially increasing a victim's fear and anxiety; the phrase "designed to substantially increase the fear and anxiety a victim suffered during the offense" modifies only the fourth category, i.e., conduct that is "similarly egregious" to sadism, torture, and excessive brutality.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Nancy E. Borushko*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for defendant.

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

TUKEL, J. The prosecution appeals as of right defendant's sentence following his jury-trial conviction of assault by strangulation, MCL 750.84(1)(b), and domestic violence, MCL 750.81(2). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve 17 months to 10 years in prison for the assault-by-strangulation conviction and 93 days in jail for the domestic-violence conviction. The prosecution appeals by right, challenging defendant's assault-by-strangulation sentence on the basis that the trial court abused its discretion by imposing an out-of-guidelines sentence below that recommended by the advisory guidelines.[1] Defendant disagrees and argues that the trial court erred by assessing 50 points for Offense Variable (OV) 7. We affirm defendant's sentence.

I. UNDERLYING FACTS

This appeal arises from a physical altercation that took place between defendant and TK on October 14, 2018. TK and defendant were involved in a romantic relationship, and they resided together in an apartment in Bay City, where the events took place. On the day of the altercation, defendant had been to the hospital and was taking antibiotics to treat a serious injury to his arm. After leaving the hospital, defendant began drinking beer at home. TK told defendant to stop

[1] For a discussion of the greater precision of the term "out-of-guidelines" sentence as compared to the term "departure" under the now-advisory sentencing guidelines regime, see *People v Lampe*, 327 Mich App 104, 133; 933 NW2d 314 (2019) (BOONSTRA, J., concurring).

drinking because she believed the beer would make the antibiotics defendant was taking less effective. An argument ensued, and TK spat on defendant. Defendant then pushed TK to the ground, put a belt around her neck, choked her with it, and made threatening statements, which we detail below. Following a jury trial, defendant was convicted of assault by strangulation and domestic violence. This appeal followed.

II. OV 7

Defendant argues that the trial court erred by assessing 50 points for OV 7.[2] We disagree.

A. STANDARD OF REVIEW

When reviewing a trial court's guidelines scoring decisions, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011) (quotation marks and citation omitted). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Hardy*, 494 Mich at 438. "The sentencing court may consider facts not admitted by the

[2] The issue of whether OV 7 was properly scored was raised by defendant in his response brief on appeal. Because we view this issue as potentially dispositive, however, we choose to address it before the prosecution's argument that defendant's sentence was disproportionately low based on the circumstances of this case.

defendant or found beyond a reasonable doubt by the jury. Offense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *People v Roberts (On Remand)*, 331 Mich App 680, 687-688; 954 NW2d 221 (2020) (quotation marks and citations omitted), rev'd in part on other grounds 506 Mich 938 (2020).

B. OV 7 IN GENERAL

OV 7 provides that 50 points are to be assessed when

> [a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense. [MCL 777.37(1)(a).]

The threshold legal question in this case is whether the phrase "designed to substantially increase the fear and anxiety a victim suffered during the offense" modifies only the fourth category, i.e., conduct that is "similarly egregious" to sadism, torture, and excessive brutality, or whether even in a case involving sadism, torture, or excessive brutality, the 50-point enhancement applies only if the conduct also was "designed to substantially increase the fear and anxiety a victim suffered during the offense." This issue has evolved over the last several years, as we explain.

C. *PEOPLE v HARDY*: "SUBSTANTIALLY INCREASE THE FEAR AND ANXIETY" AND THE LEGISLATIVE RESPONSE

In *Hardy*, our Supreme Court considered the predecessor to the current OV 7. At that time,[3] OV 7 provided that 50 points were to be applied if "[a] victim

[3] For ease of reading, here are the two provisions at issue, in which only three words differ:

was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a), as amended by 2002 PA 137. Our Supreme Court held that

> "[o]r" is a word "used to indicate a disunion, a separation, an alternative." While the first "or" may be interpreted as linking the first three categories in a common series, the second "or" separates the last OV 7 category from the series that precedes it. Thus, the use of "or" before the phrase "conduct designed" shows that this phrase is an independent clause that has an independent meaning. [*Hardy*, 494 Mich at 441 (citation omitted).]

Thus, following *Hardy*, a trial court would "properly assess 50 points under OV 7 if it finds that a defendant's conduct falls under one of the four categories of conduct listed in subsection (1)(a)." *Id*. at 439-440. As noted, the four categories of conduct listed in Subsection (1)(a) were sadism, torture, excessive brutality, or "conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." *Id*. at

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The current version of OV 7, MCL 777.37(1)(a), as amended by 2015 PA 137, provides that 50 points should be assigned when

> [a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.

The pre-2015 version of OV 7, MCL 777.37(1)(a), as amended by 2002 PA 137, provides that 50 points should be assigned when

> [a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.

In other words, the amendment, 2015 PA 137, changed the guideline as follows:

> A victim was treated with sadism, torture, ~~or~~ excessive brutality or *similarly egregious* conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.

440. In other words, if a defendant's conduct constituted at least one of the first three categories of sadism, torture, or excessive brutality, then the 50-point enhancement would apply *simpliciter*; the fourth category was "conduct designed to substantially increase the fear and anxiety a victim suffered." *Id*. at 441.

Justice MCCORMACK concurred in *Hardy*. While joining the majority opinion in full, Justice MCCORMACK wrote "separately to encourage the Legislature to amend MCL 777.37, offense variable (OV) 7, to define, or more clearly articulate its intent in including, the language 'conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.' " *Id*. at 448 (MCCORMACK, J., concurring). Justice MCCORMACK expressed concern that "the potential for subjectivity inherent in the 'conduct designed' language is likely to cause disparate outcomes for criminal defendants in this state even with the guiding principles today's decision provides." *Id*.

The Legislature did, in fact, amend OV 7 following *Hardy*. See 2015 PA 137. The amended version of OV 7, still in force today, now provides for a 50-point enhancement when "[a] victim was treated with sadism, torture, excessive brutality, or similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a).[4]

D. COURT OF APPEALS DECISIONS FOLLOWING THE AMENDMENT OF OV 7

Following the amendment of OV 7, courts have addressed the question of whether the slightly amended phrase "similarly egregious conduct designed

[4] See note 3 of this opinion.

to substantially increase the fear and anxiety a victim suffered during the offense" is a separate, fourth category and thus whether "sadism," "torture," and "excessive brutality" also retain their preamendment statuses as separate and independent categories. As with the original enactment that was at issue in *Hardy*, this inquiry boils down to whether the unamended phrase "designed to substantially increase the fear and anxiety a victim suffered during the offense" modifies only the newly added "similarly egregious" conduct or whether it also applies to each of the categories of sadism, torture, and excessive brutality to which fourth-category conduct must be similarly egregious. This Court has twice addressed the question in published cases following *Hardy* and the amendment of the guideline language.[5] See *People v Walker*, 330 Mich

[5] We respectfully suggest that the Legislature could assist courts and perhaps head off many such disputes in the first instance through more extensive use of punctuation in drafting legislation, because "the meaning of a statute will typically heed the commands of its punctuation." *US Nat'l Bank of Oregon v Indep Ins Agents of America, Inc*, 508 US 439, 454; 113 S Ct 2173; 124 L Ed 2d 402 (1993). Indeed, "[n]o intelligent construction of a text can ignore its punctuation." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 161.

Michigan courts have observed:

> Punctuation is an important factor in determining legislative intent, and the Legislature is presumed to know the rules of grammar. "Semicolon" is defined as "the punctuation mark (;) used to indicate a major division in a sentence where a more distinct separation is felt between clauses or items on a list than is indicated by a comma, as between the two clauses of a compound sentence." [*People v Beardsley*, 263 Mich App 408, 412-413; 688 NW2d 304 (2004) (citations omitted).]

Thus, "[w]hen elements in a series are particularly complex or when one or more of the elements contains an internal comma, the sentence may be clearer with semicolons instead of commas separating the elements." *Id*. at 413 (citation omitted); see also *Park Bldg Co v George P Yost Fur Co*, 208 Mich 349, 359; 175 NW 431 (1919) (noting that the semicolon "is

App 378; 948 NW2d 122 (2019); *People v Rodriguez*, 327 Mich App 573; 935 NW2d 51 (2019).

Rodriguez, decided first, involved only the fourth category of conduct and held that this fourth category requires conduct that substantially increased a victim's fear in a manner "similarly egregious" to sadism, torture, or excessive brutality. *Rodriguez*, 327 Mich App at 578-581. *Rodriguez* did not reach the issue of whether any one of the categories of sadism, torture, or excessive brutality, standing on its own, required a substantial increase in the victim's level of fear because, as noted, only the fourth category was at issue. *Id*.

Walker analyzed the legislative amendment of OV 7 and, by essentially following the analysis in *Hardy*, held that the fourth category remained independent of the others. *Walker*, 330 Mich App at 389-390. Although the *Walker* Court recognized that legislative amend-

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a punctuation point 'used to mark the division of a sentence somewhat more independent than that marked by a comma' ") (citation omitted).

For example, and using a semicolon to show categorical demarcations, *Hardy* read the guideline to mean that a court should assign 50 points when "[a] victim was treated with sadism; torture; or excessive brutality; or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." Had the guideline been so punctuated, there could have been no argument that the "substantially increase the fear and anxiety" language applied to anything other than the final category. Similarly, if the Legislature had intended for that language to apply to each of the categories, punctuating the provision as follows would have achieved that end without possible ambiguity: the court should assign 50 points when "the conduct was designed to substantially increase the fear and anxiety a victim suffered during the offense, and the conduct consisted of sadism; torture; or excessive brutality."

Our only mandate is to faithfully adhere to the Legislature's intent; we do not make the policy choices that the guidelines, and all legislation, embody. Greater clarity through punctuation would help courts fulfill our duty of faithfully applying legislative intent.

ments of language generally are presumed to change statutory meaning, it dismissed the post-*Hardy* amendment of the guideline on the basis that "here it is clear that the Legislature only intended a stylistic change to improve clarity." *Id*. at 390. The Court reached that conclusion by noting that the word "or" used before the last item in the list made the entire list disjunctive; thus, it held that "similarly egregious conduct" constitutes its own category, and the "substantially increase the fear and anxiety" language is part of that category only. *Id*. The *Walker* Court thus read the phrase "similarly egregious conduct designed to substantially increase the fear and anxiety a victim suffered during the offense" as an independent category, thereby necessarily interpreting "sadism," "torture," and "excessive brutality" as independent categories themselves. *Id*. at 390-391.

Walker thus is entirely consistent with *Rodriguez*. *Rodriguez* involved only the fourth category, "similarly egregious conduct." *Walker* involved excessive brutality, one of the first three categories, and noted that each of those three categories is independent of the others and thus also independent of the requirement of substantially increasing a victim's fear and anxiety, which is a part of the fourth category only.

Accordingly, a sentencing court faced with applying the current version of OV 7 must conduct the following analysis: If the case involves conduct consisting of one or more of the categories of sadism, torture, or excessive brutality, then OV 7 applies.[6] If the case does not

[6] OV 7 defines "sadism" in MCL 777.37(3) as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." The words "torture" and "excessive brutality" are undefined and thus have their ordinary meaning. See *Hardy*, 494 Mich at 440 (opinion of the Court).

involve one or more of the categories of sadism, torture, or excessive brutality, then the sentencing court must determine whether the case involves "similarly egregious conduct" to at least one of those categories. If it does, the court also must determine whether the conduct substantially increased a victim's fear and anxiety.[7] If all those factors are met, then OV 7 applies for purposes of the fourth category of conduct.

E. ANALYSIS AS APPLIED TO THIS CASE

This case involves claims of excessive brutality based on defendant's choking the victim with a belt; however, it also involves allegations of death threats and taunting during those violent assaults, and as we discuss in greater detail, those additional factors are, at a minimum, akin to sadism because this conduct humiliated the victim and prolonged her mental suffering. Defendant's overall conduct thus involves various factors under OV 7, some of which require and some of which do not require the criminal conduct to have substantially increased the victim's fear and anxiety. However, that distinction ultimately is not significant here, because the additional element of substantially increasing a victim's fear and anxiety, if applicable to a particular act on the part of defendant, was easily satisfied, as discussed below.

The prosecution presented evidence that on the night of the incident itself, TK stated that defendant threw her to the ground, dragged her a few feet on the floor, choked her with a belt, and told TK that when her

[7] That analysis requires the sentencing court to determine " 'whether the defendant engaged in conduct beyond the minimum required to commit the offense' and, if so, 'whether the conduct was intended to make a victim's fear or anxiety greater by a considerable amount.' " *Rodriguez*, 327 Mich App at 579, quoting *Hardy*, 494 Mich at 443-444.

young son returned home, her son would find TK dead. At trial, however, there was conflicting evidence regarding the altercation that occurred between defendant and TK on the night of the assault. TK testified at trial that defendant did not choke her and that their altercation only lasted a few seconds.[8] At sentencing, the trial judge resolved that conflict by stating that he believed that defendant choked TK with a belt and told her that her son would find her dead when he returned home. In making that factual determination, the trial court did not clearly err, so we must treat that factual finding as conclusive. See *Antwine*, 293 Mich App at 194; MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.").

Defendant's actions, as found by the trial court, certainly involved excessive violence beyond the minimum required to commit the offense of assault by strangulation. See *Hardy*, 494 Mich at 442-443 & 443 n 37 (opinion of the Court).[9] Assault by strangulation does not require the use of a weapon, and by using a belt, defendant increased the physical severity of the

[8] Thus, although not material for sentencing purposes, it appears that in convicting defendant of assault by strangulation, the jury credited the version of events TK reported the night of the incident rather than her testimony at trial.

[9] MCL 750.84(1)(b) criminalizes "[a]ssault[ing] another person by strangulation or suffocation." An "assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). And a "battery is the consummation of an assault." *Id*. Additionally, MCL 750.84(2) defines "strangulation or suffocation" as "intentionally impeding normal breathing or circulation of the blood by applying pressure on the throat or neck or by blocking the nose or mouth of another person."

offense. The use of the belt thus satisfies the requirement of excessive brutality, and OV 7 applies. Additionally, death threats are not encompassed by the offense of assault by strangulation. Whether a death threat can itself be sadistic—a question we need not decide—the particular threats at issue here were, at a minimum, akin to sadism; the same is true of defendant's taunting of TK during the assault because defendant told TK that not only was TK about to die, but TK's body would be found by her minor son. Such threats were severe enough to be treated as "similarly egregious" to sadism based on their infliction of humiliation and other emotional suffering; accordingly, the threats require the additional element of substantially increasing the victim's fear and anxiety.

We find that by gratuitously and repeatedly telling TK during the brutal assault that she was about to die and that her young son would be the one to find her dead body, defendant substantially increased TK's fear and anxiety, which included not only fear for her own welfare, as would always be the case during a violent assault, but also fear for the well-being of her young child. This conduct certainly increased TK's fear beyond the level that the physical assault alone would have caused. Thus, we find that the enhancement of OV 7 is applicable both as excessive brutality, on its own, and as similarly egregious conduct to sadism that substantially increased TK's fear and anxiety. See *Rodriguez*, 327 Mich App at 578-759. The trial court committed no error by finding that the enhancement applied.

III. PROPORTIONALITY OF SENTENCE

The finding that OV 7 applies does not end our inquiry, however, because the prosecution argues that by imposing an out-of-guidelines sentence below the

advisory sentencing range, the trial court violated the principle of proportionality. We disagree.

A. STANDARD OF REVIEW

"This Court reviews the proportionality of a trial court's sentence for an abuse of discretion." *People v Foster*, 319 Mich App 365, 375; 901 NW2d 127 (2017). "A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality . . . ." *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003).

B. ANALYSIS

"[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), [abrogation recognized by *People v Steanhouse*, 500 Mich 453 (2017)]." *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017) (*Steanhouse II*). "[T]he nature of the offense and the background of the offender" must be taken into account when making this assessment. *Id*. at 472, quoting *Milbourn*, 435 Mich at 651.

Trial courts must consult the sentencing guidelines when imposing a sentence, but " 'the key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.' " *Steanhouse II*, 500 Mich at 474-475, quoting *Milbourn*, 435 Mich at 661. In imposing an out-of-guidelines sentence, "a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence [i.e.,

one within the guidelines] would have been." *People v Dixon-Bey*, 321 Mich App 490, 525; 909 NW2d 458 (2017) (quotation marks and citations omitted). Nevertheless, our Supreme Court has expressly rejected dicta suggesting a "presumptions of unreasonableness for out-of-guidelines sentences." *Steanhouse II*, 500 Mich at 474. Rather, the principle of proportionality simply "requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, 435 Mich at 636; see also *Steanhouse II*, 500 Mich at 474.

> [R]elevant factors for determining whether a departure sentence is more proportionate than a sentence within the guidelines range continue to include (1) whether the guidelines accurately reflect the seriousness of the crime; (2) factors not considered by the guidelines; and (3) factors considered by the guidelines but given inadequate weight. When making this determination and sentencing a defendant, a trial court must justify the sentence imposed in order to facilitate appellate review, which includes an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been. [*Dixon-Bey*, 321 Mich App at 525 (quotation marks and citations omitted).]

"Other factors listed by this Court in *People v Steanhouse*, 313 Mich App 1, 46; 880 NW2d 297 (2015) [(*Steanhouse I*)], rev'd in part on other grounds 500 Mich 453 (2017), include 'the defendant's misconduct while in custody, the defendant's expressions of remorse, and the defendant's potential for rehabilitation.' " *Dixon-Bey*, 321 Mich App at 525 n 9 (citations omitted).

At sentencing, the trial judge carefully explained his findings and reasons for imposing an out-of-guidelines sentence. Specifically, the trial judge explained that he

viewed assessing 50 points under OV 7 as too harsh given the circumstances of this case. The trial judge expressed his disagreement with the scoring scheme in place for OV 7, which he viewed as an "all or nothing" guideline because, when properly scored at 50 points, it placed defendant's guidelines range "in a whole new ballpark." The trial judge additionally stated that TK "did her best to provoke" defendant and that, although TK's provocation did not justify defendant's conduct, TK's behavior during the assault nevertheless did play a part in the trial judge's sentencing decision. The trial judge contrasted these two factors with defendant's conduct in this case, including defendant's act of strangling TK and threatening to kill her. After carefully weighing these competing factors, the trial judge stated that he had discretion to sentence outside the sentencing guidelines range when doing so is appropriate and that he chose to exercise that discretion in this case. Thus, the trial judge expressed that while he was aware that he was imposing an out-of-guidelines sentence, he was of the view that the sentencing guidelines inaccurately reflected the seriousness of the crime and that the guidelines also failed to properly account for TK's conduct. Because the trial judge's sentencing decision was supported by the record, we do not find that the trial judge abused his discretion.

IV. CONCLUSION

The trial court properly scored OV 7. Furthermore, the trial court adhered to the principle of proportionality; its sentencing decision, which balanced competing considerations, was within the trial court's discretion.

Affirmed.

REDFORD, P.J., and RIORDAN, J., concurred with TUKEL, J.

WEBB v PROGRESSIVE MARATHON INSURANCE COMPANY

Docket No. 351048. Submitted January 13, 2021, at Lansing. Decided January 28, 2021, at 9:05 a.m. Leave to appeal denied 508 Mich 993 (2021).

Brian Webb brought an action in the Wayne Circuit Court seeking personal protection insurance (PIP) benefits from Progressive Marathon Insurance Company, which insured the vehicle in which Webb was injured as the result of a car crash. The vehicle was registered to and insured by Webb's mother, Chirece Clark. Progressive sought to deny coverage because Clark did not disclose on her application for insurance that Webb lived with her. According to Progressive, Clark's premiums would have been 32% higher had Webb's identity been disclosed. Webb also sued the Michigan Automobile Insurance Placement Facility (MAIPF) as an alternative source of PIP benefits, and VHS of Michigan, doing business as Detroit Medical Center—which treated Webb for his injuries—intervened as a plaintiff. Both defendants moved for summary disposition. The trial court, Patricia P. Fresard, J., granted summary disposition to the MAIPF but denied Progressive's motion, concluding that there were genuine issues of material fact regarding whether Clark had committed fraud when submitting the application for insurance. The trial court also concluded that Webb was innocent to Clark's fraud and, when balancing the equities between Webb's need for coverage and Progressive's desire to avoid liability, those equities favored Webb. Progressive appealed.

The Court of Appeals *held*:

1. The trial court erred by concluding that factual issues precluded summary disposition on the issue of whether Clark committed fraud when submitting her application for insurance. To establish actionable fraud, Progressive bore the burden of proving that (1) Clark made a material misrepresentation; (2) it was false; (3) when Clark made it, she knew it was false, or else made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) she made it with the intention that it should be acted on by Progressive; (5) Progressive acted in reliance on it; and (6) Progressive thereby suffered injury. When there is a question of fact on at least one of the elements, and the

insured is not otherwise entitled to summary disposition, the matter is one for the jury. Rescission is justified in cases of innocent misrepresentation if a party relies on the misstatement, because otherwise the party responsible for the misstatement would be unjustly enriched. Thus, even if Progressive completed the application and Clark did not read it, Progressive was still entitled to an order that Clark committed fraud in connection with the application for insurance. The evidence indicated that (1) the policy was procured through Clark's misrepresentation that no one else lived in her household, and this misrepresentation was material; (2) the representation was false, as Clark was not the sole member of her household, nor would she be the primary driver of the vehicle; (3) Clark knew that she was not the sole member of her household and that she was not the sole driver of the vehicle; (4) Clark made the misrepresentation with the intent that she would obtain insurance, as evidenced by Clark's signature on the insurance application that contained the misrepresentation; (5) Progressive relied on the misrepresentation in issuing the insurance policy; and (6) Progressive was injured because it would not have ordinarily issued the policy according to its underwriting guidelines and for a decreased premium given that the actual risk of providing the insurance was not fully contemplated. Accordingly, Progressive was entitled to summary disposition in its favor on this issue, and the portion of the trial court order denying its motion as to Clark was vacated.

2. The trial court erred by finding that Webb was an innocent party with respect to Clark's fraud because a question of fact remained regarding whether Webb participated in the fraudulent procurement of the insurance policy at issue. Under prior caselaw, the "innocent third party" rule prohibited an insurer from rescinding an insurance policy because of a material misrepresentation made in an application for no-fault insurance where there is a claim involving an innocent third party. However, in *Bazzi v Sentinel Ins Co*, 502 Mich 390 (2018), the Michigan Supreme Court held that in the context of the no-fault act, the innocent-third-party rule had been abrogated by *Titan Ins Co v Hyten*, 491 Mich 547 (2012). Further, in this case, Webb had spoken directly to a Progressive agent regarding coverage and the cost of the policy without indicating that he would be the primary driver of the vehicle or that he was a member of Clark's household, instead identifying himself as Clark's friend and using his debit card to purchase the policy. On remand, if a trier of fact determines that Webb participated in the fraudulent procurement of the Progressive policy, then the trial court need not

engage in a balancing of the equities because Progressive would be entitled to rescind coverage to Webb on that basis.

Reversed, vacated in part, and remanded for further proceedings.

Law Offices of Robert June, PC (by *Robert B. June*) for Brian Webb.

Miller & Tischler, PC (by *Milea M. Vislosky*) for VHS of Michigan, Inc.

Magdich Law (by *Neil E. Hansen*) for Progressive Marathon Insurance Company.

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

Before: JANSEN, P.J., and SERVITTO and RIORDAN, JJ.

JANSEN, P.J. In this no-fault action, defendant, Progressive Marathon Insurance Company (Progressive), appeals by leave granted[1] the trial court's order denying Progressive's motion for summary disposition under MCR 2.116(C)(10), which sought to rescind personal protection insurance (PIP) coverage on the basis that the insurance policy at issue was procured by fraud. We reverse, vacate the portion of the trial court's order denying Progressive's motion for summary disposition as to Clark, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

This case arises out of a motor vehicle accident that occurred on March 24, 2018, in Detroit, Michigan. At

[1] *Webb v Progressive Marathon Ins Co*, unpublished order of the Court of Appeals, entered January 10, 2020 (Docket No. 351048).

the time of the accident, plaintiff, Brian Webb, was driving a 2013 Dodge Challenger registered to his mother, Chirece Clark, and insured in her name. Webb was not listed as a driver or member of Clark's household on the policy. Webb spent approximately two weeks in the hospital after the accident.

Progressive sought to deny coverage because Clark did not disclose on her application for insurance that Webb lived with Clark. According to Progressive, Clark's premiums would have been 32% higher had Webb's identity been disclosed. Two telephone call recordings between Clark and Progressive agents were disclosed during the course of discovery. During the first call, which occurred on November 23, 2016, Clark did, in fact, disclose Webb's identity and residence in her home. She also disclosed that Webb would be the primary driver of the vehicle. Clark was soliciting quotes from the agent, but she did not purchase a policy at that time. Instead, Progressive e-mailed Clark a quote at the e-mail address she provided. During the second call, which occurred on November 30, 2016, the topic of who was in Clark's household did not come up. However, when Webb spoke with the insurance agent to make payment for the policy, he told the agent he was Clark's "friend." When Clark eventually submitted the application for insurance, Webb was not listed as a resident relative in Clark's home. Clark did not attempt to add Webb as a resident of her home after receiving the completed application for insurance from Progressive, which she signed and returned.

The trial court denied Progressive's motion for summary disposition, concluding that there were genuine issues of material fact regarding whether Clark committed fraud when submitting the application for insurance. The trial court also concluded that Webb was

innocent to Clark's fraud and, when balancing the equities between Webb's need for coverage and Progressive's desire to avoid liability, those equities favored Webb.[2] This appeal followed.

II. STANDARD OF REVIEW

"Appellate review of the grant or denial of a summary-disposition motion is de novo . . . ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate . . . if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West*, 469 Mich at 183. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

The interpretation of a contract, such as an insurance policy, is also reviewed de novo. *Reed v Reed*, 265 Mich App 131, 141; 693 NW2d 825 (2005); see also *Meemic Ins Co v Fortson*, 324 Mich App 467, 481; 922 NW2d 154 (2018) (construing an insurance policy using standard principles of contractual interpretation), aff'd on other grounds 506 Mich 287 (2020). "When interpreting a contract, such as an insurance policy, the primary goal is to honor the intent of the parties."

[2] In a separate order, the Michigan Automobile Insurance Placement Facility was dismissed from the case when the trial court granted its motion for summary disposition. That order has not been appealed.

Fortson, 324 Mich App at 481 (quotation marks and citation omitted).

Rescission is "granted only in the sound discretion of the court." *Lenawee Co Bd of Health v Messerly*, 417 Mich 17, 26; 331 NW2d 203 (1982). "The trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Berryman v Mackey*, 327 Mich App 711, 717; 935 NW2d 94 (2019).

III. ANALYSIS

A. FRAUDULENT MISREPRESENTATION IN THE PROCUREMENT OF THE POLICY

Progressive first argues that the trial court erred when it concluded that factual issues precluded summary disposition on the issue of whether Clark committed fraud when submitting her application for insurance. We agree.

The elements of fraud in connection with an insurance policy as applied to this case are as follows:

> To establish actionable fraud, [Progressive] bears the burden of proving that (1) [Clark] made a material misrepresentation; (2) it was false; (3) when [Clark] made it, [she] knew it was false, or else made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) [she] made it with the intention that it should be acted on by [Progressive]; (5) [Progressive] acted in reliance on it; and (6) [Progressive] thereby suffered injury. [*Titan Ins Co v Hyten*, 491 Mich 547, 571-572; 817 NW2d 562 (2012).]

"When there is a question of fact on at least one of the elements, and the insured is not otherwise entitled to summary disposition, the matter is one for the jury." *Nahshal v Fremont Ins Co*, 324 Mich App 696, 719; 922 NW2d 662 (2018).

"Rescission is justified in cases of innocent misrepresentation if a party relies upon the misstatement, because otherwise the party responsible for the misstatement would be unjustly enriched if he were not held accountable for his misrepresentation." *Lash v Allstate Ins Co*, 210 Mich App 98, 103; 532 NW2d 869 (1995). Thus, even if it is true that Progressive completed the application and Clark did not read it, Progressive was still entitled to an order that Clark committed fraud in connection with the application for insurance. See *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 129-130; 713 NW2d 801 (2005) ("Whether it was plaintiff, the decedent, or the agent who misrepresented the decedent's tobacco use on the application is not material because plaintiff and the decedent signed the authorization, stating that they had read the questions and answers in the application and that the information provided was complete, true, and correctly recorded.").

The evidence of record in this case is clear that Clark committed fraud in the procurement of the insurance policy at issue. During the first phone call with Progressive's agent, Clark initially disclosed that Webb was not only a member of her household, but that Webb would be the primary driver of the vehicle. Clark asked the agent to run various coverage scenarios in order to find a better price to insure the Challenger, and even inquired whether transferring the title of the vehicle to Webb's name only would provide a better insurance rate. Progressive's agent indicated that the insurance rate would only drop minimally, because Webb and Clark were members of the same household. After the call ended, the agent forwarded an insurance quote to the e-mail address Clark provided. One week later, Clark again called Progressive and spoke to a second agent, explaining that the quote sent to her via

e-mail by the first agent was "way higher" than discussed. At no point during the second phone call did Clark mention anything about Webb living in her household or driving the vehicle, and when Webb spoke to the agent to pay the premium, he identified himself as a friend.

To be clear, we conclude that Progressive is entitled to rescind its policy as it pertained to Clark in its entirety: (1) the policy was procured through Clark's misrepresentation that no one else lived in her household, and this misrepresentation was material; (2) the representation was false, as Clark was not the sole member of her household, nor would she be the primary driver of the vehicle; (3) Clark knew that she was not the sole member of her household and that she was not the sole driver of the vehicle; (4) Clark made the misrepresentation with the intent that she would obtain insurance, as evidenced by Clark's signature on the insurance application that contained the misrepresentation; (5) Progressive relied on the misrepresentation in issuing the insurance policy; and (6) Progressive was injured because it would not have ordinarily issued the policy according to its underwriting guidelines and for a decreased premium given that the actual risk of providing the insurance was not fully contemplated. *Titan Ins Co*, 491 Mich at 555, 571-572. Thus, we conclude that Progressive was entitled to summary disposition in its favor on the issue of whether Clark committed fraud when procuring the policy at issue.

B. WEBB AS AN INNOCENT PARTY AND THE BALANCING OF THE EQUITIES

Next, Progressive argues that the trial court erred when it concluded that Webb was an innocent party

with respect to Clark's fraud. Progressive asserts that Webb conspired with Clark to defraud Progressive, as evidenced by Webb's statement to the insurance agent that he was Clark's "friend." We conclude that a question of fact remains regarding whether Webb participated in the fraudulent procurement of the insurance policy at issue. Accordingly, the trial court erred by finding Webb was an innocent party and then proceeding to engage in a balancing-of-the-equities analysis.

Under prior caselaw, "[t]he 'innocent third party' rule prohibit[ed] an insurer from rescinding an insurance policy because of a material misrepresentation made in an application for no-fault insurance where there is a claim involving an innocent third party." *Sisk-Rathburn v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 425, 430; 760 NW2d 878 (2008). Recently, in *Bazzi v Sentinel Ins Co*, 502 Mich 390; 919 NW2d 20 (2018), our Supreme Court addressed the viability of the innocent-third-party rule in the context of no-fault law. In *Bazzi*, the plaintiff, the son of the insured, brought suit against the defendant insurer for PIP benefits. *Id*. at 396. The defendant obtained a default judgment against the insured that rescinded the policy on the basis of fraud. *Id*. The defendant then moved for summary disposition in the trial court with respect to the plaintiff's claims, which the trial court denied on the basis of the innocent-third-party rule. *Id*. at 397. This Court reversed, concluding that "the innocent-third-party rule did not survive this Court's decision in *Titan* because there was no meaningful distinction between the easily-ascertainable-fraud rule and the innocent-third-party rule and because no statute prohibits an insurer from raising a fraud defense with respect to PIP benefits." *Id*. at 397-398.

Our Supreme Court agreed with this Court that the innocent-third-party rule was not applicable. The Supreme Court first noted that "[i]n the absence of any applicable statute, . . . the rights and limitations of the coverage are entirely contractual and construed without reference to the statute." *Bazzi*, 502 Mich at 399-400 (quotation marks, citations, and emphasis omitted). Our Supreme Court also reiterated that, in *Titan*, it had held that " 'an insurer is not precluded from availing itself of traditional legal and equitable remedies to avoid liability under an insurance policy on the ground of fraud in the application for insurance, even when the fraud was easily ascertainable and the claimant is a third party.' " *Id*. at 403, quoting *Titan*, 491 Mich at 571. Thus, our Supreme Court conclusively held that *Titan* abrogated the innocent-third-party rule in the context of the no-fault act. *Bazzi*, 502 Mich at 407.

After reviewing the record evidence in this case, we conclude that a question of fact remains regarding whether Webb participated in the fraudulent procurement of the insurance policy at issue. The evidence is clear that during the first phone call between Clark and Progressive's agent, Webb spoke directly to Progressive's agent regarding coverage and the cost of the policy. Webb also spoke to Progressive's agent during the second phone call. However, that time, Webb did not indicate that he would be the primary driver of the vehicle or that he was a member of Clark's household. Rather, Webb provided authorization to use his debit card to purchase the policy. Webb provided Progressive's agent with his address and phone number, and he identified himself as Clark's "friend." Thus, a material question of fact remains regarding whether Webb participated in the fraudulent procurement of the insurance policy. If a trier of fact answers that question in the affirmative, then Webb cannot be considered an inno-

cent party, and the trial court need not engage in any balancing of the equities where Progressive would be entitled to rescind coverage to Webb. Indeed, our Supreme Court recently explained that "[a]t common law, the defrauded party could only seek rescission, or avoidance of the transaction, if the fraud related to the inducement to or inception of the contract." *Meemic Ins Co v Fortson*, 506 Mich 287, 305; 954 NW2d 115 (2020). Thus, under the no-fault act, an insurer may only deny all coverage under a policy on the basis of fraud if the policy itself was procured by fraud. *Id*. at 309-310.

IV. CONCLUSION

We reverse, vacate the portion of the trial court's order denying Progressive's motion for summary disposition as to Clark, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

SERVITTO and RIORDAN, JJ., concurred with JANSEN, P.J.

In re EJ SMITH, MINOR

Docket No. 353861. Submitted January 7, 2021, at Lansing. Decided January 28, 2021, at 9:10 a.m.

Petitioner, the Michigan Department of Health and Human Services, petitioned the Grand Traverse Circuit Court, Family Division, seeking the termination of respondent-mother's parental rights to her child and seeking removal of the child from both respondent-mother and the child's father, SMS. An amended petition was filed that no longer named SMS as a respondent. The trial court authorized the petition, adjudicated respondent-mother as unfit, took jurisdiction over the child, released the child to SMS's care, and ordered supervised parenting time for respondent-mother. The trial court ordered that reunification efforts be made. A dispute arose between the parents about vaccinating the child, and respondent-mother sought an order to have the child vaccinated. Both petitioner and the child's lawyer-guardian ad litem (the LGAL) voiced their agreement, although neither filed a written response. SMS stated that he had religious objections to vaccinating the child. The trial court, Melanie D. Stanton, J., concluded that the court could not order vaccination over the express objection of SMS, given that he was presumed to be a fit parent and the trial court did not have jurisdiction over him. Respondent-mother sought leave to appeal, which the Court of Appeals granted on an expedited basis. However, in the interim, the trial court terminated its jurisdiction over respondent-mother and the child, and the parents—now both presumptively fit—began working to resolve the dispute in a separate custody proceeding.

The Court of Appeals *held*:

An issue is moot when there is not a real controversy but merely a hypothetical one. However, when a case presents an issue of public significance and disputes involving the issue are likely to recur yet evade judicial review, courts have held that it is appropriate to reach the merits of the issue even when the case is otherwise moot. In this case, the claim on appeal was predicated on respondent-mother being adjudicated as unfit and SMS being unadjudicated and therefore presumptively fit; however,

both parents became presumptively fit parents during the pendency of the appeal, and therefore there was no claim left to address on appeal. Accordingly, the appeal was moot. The case presented an issue of public significance regarding childhood vaccines and religious objections to them, and this issue was likely to recur, albeit with different parties. However, this case did not present a legal question that is likely to evade judicial review. The dispute in this appeal evaded appellate review because respondent-mother made sufficient progress in a relatively short period of time, and the trial court released her and her child from its jurisdiction. But it is not uncommon for an adjudicated parent to spend considerably longer time under the trial court's jurisdiction, and therefore a future dispute will likely not be moot by the time it reaches appellate review. Furthermore, this appeal would be a particularly poor vehicle for giving guidance to future litigants because this appeal was not an adversarial contest among competing interests given that neither SMS nor petitioner nor the LGAL filed an appearance, submitted an appellate brief, or participated in oral argument. The judicial system is grounded on competing factual and legal arguments presented by adverse parties, and this case merely presented respondent-mother's side of the story. Accordingly, the appeal was dismissed as moot.

Case dismissed as moot.

RONAYNE KRAUSE, J., dissenting, agreed that the appeal was moot as to these particular parties at this time and that the nature of the issue in this appeal was of great importance and likely to recur, albeit involving different parties; however, she did not share the majority's confidence that future disputes of this nature will not evade judicial review. She therefore would have addressed the substantive issues in this case and would have concluded that rather than simply deferring to the unadjudicated parent, the trial court should have resolved the vaccination dispute under the Child Custody Act, MCL 722.21 *et seq*. Importantly, adjudication is not termination. Until the adjudicated parent's parental rights are actually terminated, an adjudicated parent retains at least some due-process rights; while an adjudicated parent loses the right to make decisions for his or her child, that does not mean that the trial court is absolutely forbidden to permit an adjudicated parent—as a matter of discretion and grace—to continue having some say in the child's life. Accordingly, Judge RONAYNE KRAUSE would have concluded that after a trial court takes jurisdiction over a child, the trial court may either (1) exercise its discretion to permit the adjudicated parent

> to continue making some or all medical decisions for the child, including whether to vaccinate the child, or (2) act as a person *in loco parentis* of the child in the stead of the adjudicated parent for purposes of vaccinations under the Public Health Code, MCL 333.1101 *et seq*. To hold otherwise would, in effect, mean that an adjudicated parent's rights have been abolished rather than merely suspended, that the trial court could be unilaterally deprived of its discretion and obligation to enter orders in the best interests of the child, and that the unadjudicated parent could unilaterally undermine an adjudicated parent's ability to comply with a safety or treatment plan. The trial court erred by determining that it was completely powerless to act. Furthermore, a dispute between two parents as to vaccination of a child necessarily implicates the Child Custody Act. Vaccinations are of a class of decisions—specifically, significant medical decisions—that clearly fall under the category of "custodial disputes." And although the trial court may not subject an unadjudicated parent to its dispositional authority under the juvenile code, the trial court is obligated to resolve a dispute between an adjudicated parent and an unadjudicated parent under the Child Custody Act. In resolving this dispute, the trial court must hold a hearing and determine the best interests of the child by expressly considering the statutory best-interest factors under MCL 722.23. The trial court in this case erred by failing to recognize that it was obligated to make a determination under the Child Custody Act of whether vaccination was in the best interests of the child and then order that the child be vaccinated or not vaccinated accordingly. The trial court therefore abused its discretion by operating under the wrong legal framework and by failing to exercise discretion when called on to do so.

Marie Walker, PLLC (by *M. Marie Walker*) for respondent-mother.

Before: SWARTZLE, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

SWARTZLE, P.J. Everyone agrees that this appeal is moot. The trial court had earlier adjudicated respondent-mother as unfit (with the goal of reunification), although it did not adjudicate the infant child's father, SMS. A dispute arose between the parents about

vaccinating the child, and the trial court concluded that it could not order vaccination over the express objections of SMS, given that he was presumed to be a fit parent and the trial court did not have jurisdiction over him under *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014). Respondent-mother sought leave to appeal, and this Court granted leave on an expedited basis. But in the interim, the trial court terminated its jurisdiction over respondent-mother and the child, and now the parents—both presumptively fit—are working to resolve the dispute in a separate custody proceeding.

Accordingly, this appeal presents the Court with merely hypothetical questions, rather than an actual, justiciable controversy. Concluding that the "capable-of-repetition-but-evading-review" exception should not be invoked on this record, we dismiss the appeal as moot without reaching the merits.

I. BACKGROUND

The facts known to this Court are brief and appear to be undisputed, though the record on appeal has gaps. Petitioner, the Michigan Department of Health and Human Services, filed the initial petition on October 7, 2019, three days after the child was born. The initial petition named SMS and respondent-mother as respondents and sought both removal of the child and termination of respondent-mother's parental rights.

For reasons not entirely clear on this record, an amended petition was eventually filed that no longer named SMS as a respondent. The trial court authorized the amended petition, took jurisdiction over the child, released the child to SMS's care, and ordered supervised parenting time for respondent-mother. The trial court ordered that efforts should be made toward reunification.

SMS's refusal to vaccinate the child was first noted, as far as we can discern, in a December 12, 2019 report from the lawyer-guardian ad litem (the LGAL). The trial court held a hearing following that report, though the transcript of that hearing is not in the appellate record. The trial court ordered petitioner to work with SMS to ensure that respondent-mother was kept informed of the child's medical appointments so that she could participate. The order also stated that "if needed, a motion may be filed regarding immunizations for the minor child."

In March 2020, respondent-mother sought an order to have the child vaccinated. During the subsequent hearing in May, respondent-mother asked that the vaccinations be administered under a doctor's orders in light of the COVID-19 pandemic, rather than strictly following the state's vaccination schedule. Both petitioner and the LGAL voiced their agreement, although neither filed a written response. When asked by the trial court, SMS voiced the following objection: "I have religion and disbelief of the vaccinations." (This appears to be the sum and substance of SMS's position on the matter.) The trial court denied the motion, stating that while it did "not disagree with the majority of people that I think vaccines are in the best interests of this child," it did not believe that it had the authority to order vaccination over the objections of an unadjudicated parent.

In June, respondent-mother sought leave to appeal, and this Court granted leave on an expedited basis. *In re Smith*, unpublished order of the Court of Appeals, entered August 20, 2020 (Docket No. 353861). Respondent-mother subsequently moved this Court for an extension of time (which was granted). While the appeal advanced, the trial court concluded that

respondent-mother had progressed to the point where there was "not an identified risk of harm to the minor child in her care." The trial court terminated its jurisdiction over the child in October and encouraged the parents to pursue a custody agreement or order. The parents are now parties to a separate custody proceeding involving the child.

II. ANALYSIS

Given that the dispute over whether the child should be vaccinated has moved to a separate proceeding, this Court must determine what to do with the current appeal. "The courts of this state may only exercise the authority granted to them by Article VI of the 1963 Constitution. An essential element of that authority is that courts will not reach moot issues." *In re Smith*, 324 Mich App 28, 41; 919 NW2d 427 (2018). An issue is moot when there is not a real controversy, but merely a hypothetical one. *Id*. As our Supreme Court recently elaborated, a case becomes moot when there is either a "pretended controversy," a potential controversy sometime in the future, or a judgment sought "which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580; 957 NW2d 731 (2020) (cleaned up).

During oral argument, counsel for respondent-mother conceded that this appeal is moot, and we agree. The claim on appeal was predicated on respondent-mother being adjudicated as unfit and SMS being unadjudicated and therefore presumptively fit. When both parents are adjudicated as unfit, then the question of who has authority to make vaccination decisions involving the child has already been answered by this Court in

In re Deng, 314 Mich App 615; 887 NW2d 445 (2016). Alternatively, when neither parent is adjudicated and the parents share legal custody, the trial court can resolve a dispute between the parents involving vaccination using the best-interest factors in MCL 722.23. *Pierron v Pierron*, 486 Mich 81, 91; 782 NW2d 480 (2010); *Lombardo v Lombardo*, 202 Mich App 151, 160; 507 NW2d 788 (1993). In fact, as now-presumptively fit parents, respondent-mother and SMS have chosen this latter route, as explained earlier. Accordingly, there is no claim left for this Court to address in this appeal, and any decision on the now-hypothetical questions posed by this Court in the August 20, 2020 order "would only serve to instruct" future litigants "as to the law in this area . . . ." *League of Women Voters of Mich*, 506 Mich at 582.

"There is, however, a well-recognized exception to the dismissal of a moot case." *In re Detmer*, 321 Mich App 49, 56; 910 NW2d 318 (2017). "When a case presents an issue of public significance, and disputes involving the issue are likely to recur, yet evade judicial review, courts have held that it is appropriate to reach the merits of the issue even when the case is otherwise moot." *Id*. We do not doubt the public significance of childhood vaccines or religious objections to them, nor do we doubt the legal import of answering the questions listed in this Court's August 20, 2020 order. Although there is nothing in this record to suggest that the precise dispute is likely to recur *in this case*—and, in addressing the "likely to recur" condition in *League of Women Voters of Mich*, our Supreme Court focused solely on whether the issue was likely to recur in the context of that case and with that initiative proponent, see *League of Women Voters of Mich*, 506 Mich at 583 n 26—it seems reasonable to assume that the issue will recur in future cases with

different parties.[1] These are important questions that are likely to recur, albeit with different parties.

But as to the third condition, this case does not present a legal question that is likely to evade judicial review. The dispute in this appeal has evaded our review because respondent-mother made sufficient progress in a relatively short period of time, and the trial court released her and her child from its jurisdiction. Unfortunately, it is not uncommon for an adjudicated parent to spend considerably longer time under the trial court's jurisdiction. In those unfortunate cases, the dispute will not be moot by the time this Court is able to resolve it on an expedited basis.

And even assuming for the sake of argument that the third condition was satisfied, this appeal is a particularly poor vehicle for giving guidance to future litigants. Simply put, this appeal has not been an adversarial contest among competing interests. Neither SMS, petitioner, nor the LGAL has filed an appearance, let alone submitted a brief or participated in oral argument. What we have before us is respondent-mother's side of the story, as well as whatever this Court has been able to glean from the partial record before us and our own legal research. Our judicial system is grounded on competing factual and legal arguments presented by adverse parties. As our Supreme Court recently emphasized:

> We agree that, when it is appropriate, this Court has an obligation to say what the law is. But we cannot let this desire for stability overcome the limits of our role. The

[1] We agree with our dissenting colleague that there is no clear pronouncement by the majority in *League of Women Voters of Mich* to craft a new, drastically narrower exception to the traditional mootness doctrine, and no such new rule has been applied here. We simply point out what our Supreme Court did in that case.

> judiciary cannot simply scan the horizon for important legal issues to opine on—we address such issues only as they arise in the genuine controversies between adverse parties that come before us. Because such a case is not before us, we are constrained from reaching the underlying merits. [*Id*. at 599 n 60 (cleaned up).]

We are similarly constrained from reaching the underlying merits in the present appeal. Accordingly, we dismiss the appeal as moot.

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

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent. I agree with the majority's recitation of the underlying facts. As the majority observes, this appeal appears to be moot as to these particular parties at this time. As the majority also observes, the nature of the issue in this appeal is of great importance and likely to recur, albeit involving different parties. I respectfully do not share the majority's confidence that future disputes of this nature will not evade judicial review. I would therefore address the substantive issues in this matter and conclude that, rather than simply deferring to the unadjudicated parent, the trial court should have resolved the vaccination dispute under the Child Custody Act, MCL 722.21 *et seq*.

I. MOOTNESS

This Court reviews mootness de novo, and "mootness is a threshold issue that a court must address before it reaches the substantive issues of a case." *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 661; 939 NW2d 454 (2019) (quotation marks and citation omitted). Mootness may, and in some instances should, be raised sua sponte by an appellate court. *People v Richmond*, 486 Mich 29, 35;

782 NW2d 187 (2010). As the majority observes, courts generally may not address issues that are merely hypothetical. *In re Smith*, 324 Mich App 28, 41; 919 NW2d 427 (2018). An issue is moot if a court cannot craft an order having "any practical legal effect upon a then existing controversy." *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580; 957 NW2d 731 (2020) (quotation marks and citation omitted).

However, there is an exception to mootness: "even though an issue is moot, it is nevertheless justiciable if the issue is one of public significance that is likely to recur, yet may evade judicial review." *Richmond*, 486 Mich at 37. This is a two-prong test. *League of Women Voters*, 506 Mich at 583 n 26. The Court in *League of Women Voters* focused on whether there would be a future controversy involving the specific parties to that case. However, the exception has historically been employed when a matter carries significance to persons other than the specific parties to the case but may evade judicial attention in the future. *Milford v People's Community Hosp Auth*, 380 Mich 49, 55-56; 155 NW2d 835 (1968); *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001). In the absence of a clear pronouncement, I would not infer from our Supreme Court's opinion in *League of Women Voters* that the Court intended to craft a new rule drastically narrowing the scope of the "capable of repetition yet evading judicial review" exception to mootness. Rather, the Court appears simply to have been addressing the particulars of the case before it.

This panel unanimously agrees that the first half of the test is satisfied: the issue in this matter is likely to recur. As to the second half of the test, the majority concludes that this kind of issue is not likely to evade

judicial review because it is only by happenstance that the issue has become moot in this case. I respectfully disagree. Michigan courts have tended to apply or refuse to apply the exception to mootness depending on whether the party seeking appeal or the party opposing appeal has done something affirmative (or has the ability to do so) to render the appeal moot for the purpose of precluding further review. See *Richmond*, 486 Mich at 37-41.[1] The fact that this issue became moot by happenstance simply precludes that line of reasoning. Indeed, in the situation of a parole hearing, our Supreme Court expressly applied the exception to mootness precisely *because* the underlying proceedings might come to an end before the matter could be judicially reviewed. *Kaczmarek*, 464 Mich at 481. The majority aptly observes that it is not uncommon for child protective proceedings to be protracted. Nevertheless, the goal is to achieve stability and safety for the child within a reasonable time, and a parent motivated to seek vaccination for a child would likely also be motivated to undertake whatever must be done to achieve reunification. It may well be that a similar dispute will *eventually* drag on long enough. However, I find that line of reasoning unpersuasive.

"[W]hen our courts are entrusted with safeguarding the interests of minor children," it is especially important to take care not to apply preclusion doctrines in the interest of "lighten[ing] the loads" of the courts.[2] *In re Bibi Guardianship*, 315 Mich App 323, 335-336; 890

[1] The United States Supreme Court recognizes a similar rule but regards it as equitable. See *Azar v Garza*, 584 US ___, ___; 138 S Ct 1790, 1792-1793; 201 L Ed 2d 118 (2018).

[2] I do not mean to suggest that the majority is intentionally seeking to shirk its duties but only that its analysis is inappropriately narrow for the circumstances.

NW2d 387 (2016). Whether the issue is custody, termination, or adoption, "unquestionably, the focus of Michigan law is to advance the best interests of children . . . ." *In re MJG*, 320 Mich App 310, 316; 906 NW2d 815 (2017). Vaccination can have both immediate and lifelong consequences. A child cannot be "unvaccinated" if they receive a vaccination contrary to a parent's objection; also, a child cannot be "unkilled" if they die as a result of an infection that a timely vaccination could have prevented.[3] The old saying that "justice delayed is justice denied" has medical reality here: children might suffer permanent health consequences that could render an appeal moot for entirely different—and far more tragic—reasons. Our Supreme Court indicated that a need for "dispatch" does not inherently require invocation of the exception to mootness. *League of Women Voters*, 506 Mich at 583 n 26. However, our Supreme Court seemingly trusted that the class of cases before it would actually receive that dispatch—yet, here we are, more than a year after a dispute as to vaccination was first raised as an issue, and almost half a year after we granted leave in this matter. This does not inspire the same degree of faith that future disputes of this nature will, in fact, "receive a timely decision on the merits." *Id*.

Put most simply, the exception to mootness for issues of public importance that are capable of repetition yet are likely to evade review does not have as high of a threshold as the majority appears to believe,

[3] It is, after all, possible for the situation in the instant matter to be inverted: an adjudicated parent might object to vaccination while the unadjudicated parent does not. Because, by default, vaccination is mandatory, MCL 333.9205, the majority's holding essentially guarantees that such an inverted situation will *never* receive appellate review until it is "too late" if, as occurred here, the trial court simply defers to the unadjudicated parent per se.

and nothing in *League of Women Voters* has altered the law on point. The possibility that an inevitable similar issue might someday manage to survive long enough to be judicially reviewed is not the dispositive analysis. Rather, the dispositive analysis is whether it is likely that a future vaccination dispute between an adjudicated and an unadjudicated parent involving a child under the jurisdiction of a court will *not* reach judicial review. The pendency of the instant matter, the need for vaccinations or decisions regarding vaccinations to be made timely, and the potential dire or irreversible consequences of failing to make such a decision strongly suggest a likely repeat performance of the instant situation. I believe that the majority reads more into *League of Women Voters* than our Supreme Court intended, and I would apply the exception to mootness here.[4]

Therefore, I find it necessary to substantively address the issues presented.

II. VACCINATIONS AND EXEMPTIONS

By default, children are required to receive vaccinations in this state under the Public Health Code, MCL 333.1101 *et seq*.:

> A parent, guardian, or person in loco parentis of a child shall provide for the child's immunization by an authorized health professional, physician, local health department, clinic, or other agency offering immunizations for diseases and within an age period prescribed by the department. [MCL 333.9205.]

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[4] I share the majority's concern over the failure of petitioner, the LGAL, and SMS to participate in this appeal. However, I am not persuaded that their failure to participate is an adequate reason under the circumstances to refrain from addressing the issues, which are, at this point, mostly legal.

However, there are two exceptions, only one of which is relevant in this matter:

> A child is exempt from this part if a parent, guardian, or person in loco parentis of the child presents a written statement to the administrator of the child's school or operator of the group program to the effect that the requirements of this part cannot be met because of religious convictions or other objection to immunization. [MCL 333.9215(2).]

As noted by the majority, SMS invoked the exception in MCL 333.9215(2), stating, "I have religion and disbelief of the vaccinations." SMS has not been adjudicated as an unfit parent, so the trial court believed that it was unable to order that the child be vaccinated, despite agreement by respondent-mother, the LGAL, petitioner, and even the trial court that doing so would be in the child's best interests.

III. PARENTAL RIGHTS AFTER BEING ADJUDICATED

"Child protective proceedings are governed by the juvenile code, MCL 712A.1 *et seq*., and Subchapter 3.900 of the Michigan Court Rules." *In re Ferranti*, 504 Mich 1, 14; 934 NW2d 610 (2019). Child protective proceedings occur in two phases: an adjudicative phase and a dispositional phase. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). An unadjudicated parent enjoys extensive constitutional rights to direct the care, control, and custody of the parent's children. *Id*. at 409-410. An adjudication permits the state to overrule a parent's directives on the basis of the state's own determination of the child's needs. *Id*. at 405-406; *In re Deng*, 314 Mich App 615, 626-627; 887 NW2d 445 (2016). However, an adjudication as to one parent does not empower the trial court to interfere with the rights of an unadjudicated parent. *Sanders*, 495 Mich at 421-422.

This Court summarized the consequences of adjudication as follows: "the [adjudicated] parent will be unable to control the care and custody of his or her child . . . ." *In re Pederson*, 331 Mich App 445, 467; 951 NW2d 704 (2020). More fully,

> the court gains broad powers to enter orders for the welfare of the child and the interests of society and make decisions regarding a host of issues that would normally fall to the parent to decide, including the ability to decide the child's placement, order medical care or other healthcare for the child, provide clothing and other incidental items as necessary, order compliance with case service plans, allow parental visitation with the child, enter orders affecting adults, and, more generally, enter orders that the court considers necessary for the interests of the child. [*Deng*, 314 Mich App at 626-627.]

Thus, after an adjudication, the trial court then "can exercise its *parens patriae* authority" over the child. *Sanders*, 495 Mich at 404. Put another way, "[t]he adjudication divests the [adjudicated] parent of her constitutional right to parent her child and gives the state that authority instead." *Ferranti*, 504 Mich at 16.

However, none of the above cases compels the conclusion that an adjudicated parent's rights just disappear. "The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). An adjudicated parent retains at least some due-process rights. See *In re Rood*, 483 Mich 73, 109-111; 763 NW2d 587 (2009) (opinion by CORRIGAN, J.); *id*. at 125 (opinion by CAVANAGH, J.). "There is no reason to conclude that a parent has a diminished constitutional right to his child merely because he does not have physical custody of that child."

Id. at 121 (opinion by CORRIGAN, J.), citing *Santosky*, 455 US at 753. Rather, the adjudicated parent is simply no longer presumed to be acting in the child's best interests. *Sanders*, 495 Mich at 416-418. Thus, the adjudicated parent may not dictate to the trial court whether to have the child vaccinated. Nevertheless, it does not follow that the adjudicated parent's wishes become irrelevant. Put another way, an adjudicated parent loses the *right* to make decisions for his or her child, but that does not mean that the trial court is absolutely forbidden to *permit* an adjudicated parent—as a matter of discretion and grace—to continue having some say in the child's life.[5]

"If the court acquires jurisdiction, the dispositional phase determines what action, if any, will be taken on behalf of the child. Substantial effort is expended to improve the home situation in order to return children to the custody of their parents if at all possible." *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993). "[T]he interest of the state as *parens patriae* is for the welfare of the child." *Id*. at 112-113. To that end, the juvenile code should

> be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents. [MCL 712A.1(3).]

The trial court has discretion to remove the child from the home or leave the child in the home. MCR 3.965(B)(12) and (13)(a); *Sanders*, 495 Mich at 405. It

[5] Indeed, the trial court in this matter ordered that respondent-mother should be able to participate in the child's medical appointments.

appears implicit that the trial court has discretion to decide *how much* interference is appropriate under the circumstances, and MCL 712A.1(3) strongly suggests a public policy of exercising as little interference as feasible.

Additionally, the Latin term *parens patriae* was derived from its use in chancery proceedings "to describe the power of the state to act *in loco parentis* for the purpose of protecting the property interests and the person of the child." *In re Gault*, 387 US 1, 16; 87 S Ct 1428; 18 L Ed 2d 527 (1967), abrogated in part on other grounds as recognized by *Allen v Illinois*, 478 US 364 (1986). By statute, a "person in loco parentis of" a child is both obligated to vaccinate the child and empowered to object to vaccinations for religious reasons. MCL 333.9205; MCL 333.9215(2). The term *in loco parentis* is not defined in the Public Health Code.[6] The term *in loco parentis* generally has been understood as referring to a temporary assumption of the duties, character, or function of a lawful parent. See *Mayberry v Pryor*, 422 Mich 579, 584; 374 NW2d 683 (1985); *Hush v Devilbiss Co*, 77 Mich App 639, 649 n 1; 259 NW2d 170 (1977).[7]

[6] The term is defined in the Mental Health Code, MCL 330.1001 *et seq*., as "an individual who is not the parent or guardian of a child or minor but who has legal custody of the child or minor and is providing support and care for the child or minor," MCL 330.1260(1)(f), or "a person who is not the parent or guardian of a minor, but who has either legal custody of a minor or physical custody of a minor and is providing support and care for the minor," MCL 330.1498c(a). However, in general, terms defined in one statutory scheme should not be blindly applied to a different statutory scheme. See *Grimes v Dep't of Transp*, 475 Mich 72, 85; 715 NW2d 275 (2006).

[7] In addition, our Supreme Court has described the probate court as standing *in loco parentis* as to persons under a guardianship, reasoning that such persons were actually wards of the court, the "guardian was the medium through whom the court acted," and the guardian was required to "invoke the aid or consent of the court" to undertake some actions.

Assumption of parental functions has been held to constitute assumption of parental duties. See *People v Thomas*, 85 Mich App 618, 624; 272 NW2d 157 (1978).

The trial court does not micromanage every detail of the child's care, nor could it. However, the court clearly assumes many parental functions, and thus many parental responsibilities, even if it does so partly by delegation. Indeed, "the court may enter orders that govern all matters of care for the child," including medical decisions and essentially any other matter the court deems necessary. *Deng*, 314 Mich App at 624-627 (quotation marks and citation omitted). Thus, it appears that when a trial court takes jurisdiction over a child, the trial court de facto becomes a "person in loco parentis of the child" within the meaning of the Public Health Code. The trial court is therefore *obligated* under MCL 333.9205 to ensure that the child receives the vaccinations required by law and, strictly speaking, is also empowered under MCL 333.9215(2) to object to vaccination on religious or other grounds.[8]

This Court reached a parallel conclusion in *Deng* that the trial court's broad authority to enter disposi-

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Andrews v Bassett, 92 Mich 449, 451-453; 52 NW 743 (1892). Although *Andrews* did not involve a child, I believe that the same general principle should apply in child protective proceedings by analogy.

[8] As noted earlier, the situation in the case at bar could easily be inverted: an adjudicated parent might object to vaccination on religious grounds, while the unadjudicated parent does not. Nothing in this opinion should be construed as holding that it is impossible for a trial court to conclude that it would be in the child's best interests to uphold that religious objection. Alternatively, the trial court might conclude that the other exemption, under which a physician certifies that a particular immunization would be inappropriate or unhealthy for the child, should apply. See MCL 333.9215(1). Nevertheless, by default, vaccination is mandatory, MCL 333.9205, and therefore presumptively appropriate unless the trial court affirmatively concludes that an exemption should apply.

tional orders in the best interests of a child within its jurisdiction included the authority to order that a child be vaccinated contrary to the religious objection of a parent. *Deng*, 314 Mich App at 625-629. However, *Deng* is not controlling as to the issue at bar, because in *Deng*, both parents had been adjudicated. *Id*. at 618. Thus, both parents were subject to the trial court's dispositional power under the juvenile code. Consequently, the trial court's authority in *Deng* to order that the child be vaccinated was premised on a straightforward application of MCL 712A.18(1)(f), which plainly confers on the court power to enter orders providing medical care for a child within its jurisdiction. This Court in *Deng* had no reason to consider the extent of a trial court's power to make medical decisions for a child when only one parent is subject to its dispositional power and the other parent is not.

I conclude that after taking jurisdiction over a child, the trial court may either (1) exercise its discretion to permit the adjudicated parent to continue making some or all medical decisions for the child, including whether to vaccinate the child, or (2) act as a person *in loco parentis* of the child in the stead of the adjudicated parent for purposes of vaccinations under the Public Health Code. To hold otherwise would, in effect, mean that an adjudicated parent's rights have been abolished rather than merely suspended, that the trial court could be unilaterally deprived of its discretion and obligation to enter orders in the best interests of the child, and that the unadjudicated parent could unilaterally undermine an adjudicated parent's ability to comply with a safety or treatment plan. Clearly, the fact that an unadjudicated parent is not subject to the trial court's dispositional power under the juvenile code necessarily means that the trial court's power to

enter orders is curbed if the unadjudicated parent disagrees with a dispositional order. However, the trial court erred by determining that it was completely powerless to act.

IV. TRIAL COURT'S POWERS *IN LOCO PARENTIS*

To partially summarize the preceding discussion, adjudication is not termination. Until the adjudicated parent's parental rights are actually terminated, those rights still exist, and in the trial court's discretionary assessment of the child's best interests, some of those rights may continue to be exercised by the parent; if not, the trial court becomes obligated to exercise those rights in the adjudicated parent's stead. Indeed, our Supreme Court has indicated that when a child is made a ward of the court, the court becomes obligated to safeguard the child's interests, even if doing so contravenes an agreement by the parents. *West v West*, 241 Mich 679, 683-684, 685-686; 217 NW 924 (1928).

Nevertheless, the trial court's assumption of jurisdiction over a child does not subject an unadjudicated parent to the court's dispositional authority under the juvenile code. *Sanders*, 495 Mich at 421-422; *In re Kanjia*, 308 Mich App 660, 666-667; 866 NW2d 862 (2014). Thus, the trial court is not empowered to unilaterally order that a child be immunized, whether at the adjudicated parent's request or on its own initiative. Rather, the unadjudicated parent clearly also has a right to object to immunization under MCL 333.9215(2). I conclude that although the trial court may not subject an unadjudicated parent to its dispositional authority under the juvenile code, the trial court is obligated to resolve that dispute under the Child Custody Act.

When both parents are adjudicated, the trial court simply has the power to enter orders in the best interests of the child. See *Deng*, 314 Mich App at 628-629. When neither parent is adjudicated and the parents share legal custody, the trial court becomes obligated to step in and resolve a dispute between those two parents as to important decisions affecting the child's welfare. See *Pierron v Pierron*, 486 Mich 81, 85-86; 782 NW2d 480 (2010); *Lombardo v Lombardo*, 202 Mich App 151, 159; 507 NW2d 788 (1993). In resolving such a dispute, the trial court must determine the best interests of the children by expressly considering the statutory best-interest factors in MCL 722.23. *Pierron*, 486 Mich at 91;[9] *Lombardo*, 202 Mich App at 160.

Our Supreme Court has held that "[t]he Child Custody Act 'applies to all circuit court child custody disputes and actions, whether original or incidental to other actions.' " *Pierron*, 486 Mich at 85, quoting MCL 722.26(1). A child custody dispute does not require the parties to seek judicial intervention. See *Phillips v Jordan*, 241 Mich App 17, 23 n 1; 614 NW2d 183 (2000). Rather, a child custody dispute can arise within the context of some other proceeding.[10] See MCL 722.27. Although the term "child custody dispute" is not defined by statute, this Court has defined it as

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[9] The *Pierron* Court emphasized that although the trial court must consider and make specific findings as to all the statutory best-interest factors, such a finding could be simply that any particular factor was irrelevant under the circumstances. *Pierron*, 486 Mich at 91.

[10] I do not think that the Child Custody Act was intended to permit state intervention into every disagreement between parents over any aspect of child-rearing, and certainly not an unbidden intervention; but I think it important that the trial court was expressly asked to resolve the instant vaccination dispute.

"any matter that relates to the custody of a child from the time the issue of custody arises until the child reaches the age of majority," *Phillips*, 241 Mich App at 23 n 1, or "any number of situations or actions wherein the placement of a child must be determined," *Nelson v Kendrick*, 187 Mich App 367, 370; 466 NW2d 402 (1991).[11]

Notably, however, such a dispute may include educational decisions that do not necessarily affect a child's physical placement or established custodial environment. See *Pierron*, 486 Mich at 93; *Lombardo*, 202 Mich App at 159-160. The dispute may potentially entail "all matters relating to the child's welfare and upbringing . . . ." *Phillips*, 241 Mich App at 23 n 1. Although vaccination might not seem to directly affect a child's placement, medical decisions in general certainly could. A choice of a particular doctor, therapist, or other medical professional might likewise involve a child's placement. As noted earlier, vaccinations can have both immediate and lifelong health consequences—and a child's death should not be a traditional way of affecting "placement" but effectively does so nonetheless. Thus, vaccinations are of a *class of* decisions—specifically, significant medical decisions—that clearly fall under the category of "custodial disputes."

The consequence is that a dispute between two parents as to vaccination of a child necessarily implicates the Child Custody Act. Such a conclusion does not implicate attempting to impermissibly subject an unadjudicated parent to a court's dispositional authority

[11] At the time *Nelson* was decided, the Child Custody Act did contain a partial definition of "child custody dispute," but that definition was only applicable to grandparent-visitation issues. *Nelson*, 187 Mich App at 370-371. The quotation from *Nelson* addressed the term "child custody dispute" as used in the remainder of the Child Custody Act.

under the juvenile code.[12] Rather, adjudication of one parent obligates the trial court to step into that parent's shoes as a person *in loco parentis* of the child or to grant that parent some ability to continue making decisions for the child. The trial court may not unilaterally enter dispositional orders affecting the unadjudicated parent, but the trial court has both the power and the obligation to act as if it were a parent within the meaning of the Child Custody Act. In other words: when the trial court (or the adjudicated parent exercising a parental right with the trial court's permission) disagrees with an unadjudicated parent as to a medical decision, the trial court must therefore resolve that disagreement pursuant to the Child Custody Act. Notably, everyone involved in the child's life in this case other than the father agreed that the child should be vaccinated.

Therefore, the trial court must hold a hearing and make findings as to the best-interest factors under MCL 722.23. In addition, MCL 712A.18(4) would also seem to provide that parents are entitled to proper notice and an opportunity to be heard. Importantly, the trial court's assessment of the child's best interests under the juvenile code is significantly distinguishable from the trial court's assessment of the child's best interests under the Child Custody Act, because the latter specifically mandates a comparative analysis and requires numerous express factual findings. See *In re COH*, 495 Mich 184, 205; 848 NW2d 107 (2014).

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[12] I note as an aside that even if unadjudicated parents are not subject to *dispositional* authority under the juvenile code, they are not necessarily "untouchable." In particular, the juvenile code appears to give trial courts some power over "any other person" pursuant to MCL 712A.18(1)(g). See *In re Macomber*, 436 Mich 386, 390-400; 461 NW2d 671 (1990). However, I also note that MCL 712A.18(1)(g) has a limited scope, which I think renders it inapplicable to this matter.

To be clear, the trial court cannot unilaterally order that a child under its jurisdiction be vaccinated pursuant to its powers under the juvenile code if an unadjudicated parent objects to vaccination. However, unless the trial court affirmatively concludes that one of the vaccination exemptions found in MCL 333.9215 should apply, either pursuant to its role as a person *in loco parentis* of the child or at the request of either parent, the trial court must resolve whether to order that the child be vaccinated under the Child Custody Act. The trial court is obligated to make a determination of the best interests of the child after explicitly considering all the statutory best-interest factors. Doing so does not impermissibly subject the unadjudicated parent to the dispositional authority of the trial court under the juvenile code; rather, the unadjudicated parent is entitled to the same rights he or she would have in the event of a dispute between two unadjudicated parents. I believe that our Supreme Court's rejection of the one-parent doctrine in *Sanders* was intended to be used as a shield, not, as SMS is attempting to do here, as a sword.

V. CONCLUSION

The trial court correctly recognized that it lacked the power under the juvenile code to order that the child be vaccinated contrary to the religious objection made by an unadjudicated parent. However, the trial court erred by failing to recognize that it was obligated to make a determination under the Child Custody Act of whether vaccination is in the best interests of the child and then order that the child be vaccinated or not vaccinated accordingly. The trial court therefore abused its discretion by operating under the wrong legal framework and by failing to exercise

discretion when called on to do so. However, because this matter is moot as to this child and as between these parties, we must leave the trial court's order undisturbed.

CHARTER TOWNSHIP OF YORK v MILLER (ON REMAND)

Docket No. 335344. Submitted October 20, 2020, at Lansing. Decided January 28, 2021, at 9:15 a.m.

The Charter Township of York sought a declaratory judgment in the Washtenaw Circuit Court regarding the validity of its zoning and construction regulations and its right to enforce them as they apply to the cultivation of medical marijuana in areas zoned residential. Defendants, Donald Miller, Katherine Null, and David Miller, were qualified medical marijuana patients, and Null, who was David Miller's registered caregiver, rented a space in Donald Miller's backyard on which she cultivated marijuana. Plaintiff argued that the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., authorized it to limit the places where medical marijuana could be grown. Defendants argued that plaintiff's prohibition against growing marijuana outdoors conflicted with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and that the MMMA preempted plaintiff's zoning ordinance. The court, Carol A. Kuhnke, J., ruled that the MMMA preempted plaintiff's prohibition against growing medical marijuana outdoors but that defendants were required to comply with construction regulations and to seek the necessary permits to build an enclosed, locked facility for growing marijuana outdoors. The court denied plaintiff's motion for reconsideration, and plaintiff appealed. The Court of Appeals, MURPHY, P.J., and SAWYER and BECKERING, JJ., affirmed in a published per curiam opinion. 322 Mich App 648 (2018). The Supreme Court, after initially holding plaintiff's application for leave to appeal in abeyance for *DeRuiter v Byron Twp*, 505 Mich 130 (2020), vacated the Court of Appeals judgment and remanded the case to the Court of Appeals for reconsideration in light of *DeRuiter*. 506 Mich 916 (2020).

On remand, the Court of Appeals *held*:

Under the Supreme Court's decision in *DeRuiter*, the zoning ordinance at issue did not directly conflict with the MMMA by prohibiting the outdoor cultivation of medical marijuana. In *DeRuiter*, the Supreme Court held that the MMMA does not nullify or preempt a local unit of government's authority to regulate land use under the MZEA as long as the unit of government does not

prohibit or penalize all medical marijuana cultivation and does not impose regulations that are unreasonable and inconsistent with regulations established by state law. Although local ordinances are preempted when they ban an activity that is authorized and regulated by state law, a local unit of government may add to the conditions in the MMMA if the additional requirements do not contradict the requirements set forth in the statute. Because the zoning ordinance at issue in this case did not prohibit or penalize all cultivation of medical marijuana, nor did it impose regulations that were unreasonable and inconsistent with the regulations established by the MMMA, the circuit court judgment was reversed.

Reversed and remanded for further proceedings.

ZONING — ORDINANCES REGULATING MARIJUANA CULTIVATION — MICHIGAN MEDICAL MARIHUANA ACT — PREEMPTION.

The Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., does not preempt a local zoning ordinance that prohibits the outdoor cultivation of medical marijuana if the ordinance does not prohibit or penalize all cultivation of medical marijuana or impose regulations that are unreasonable and inconsistent with the regulations established by the MMMA.

Victor L. Lillich for plaintiff.

Dennis M. Hayes for defendants.

ON REMAND

Before: SAWYER, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM. In a published opinion, this Court affirmed a May 16, 2016 judgment in which the circuit court declared that plaintiff's zoning ordinance, to the extent that it prohibited the outdoor growth of medical marijuana in all zoning districts, conflicted with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., and was unenforceable. *York Charter Twp v Miller*, 322 Mich App 648; 915 NW2d 373 (2018). The Supreme Court has vacated this Court's judgment

and remanded for reconsideration in light of *DeRuiter v Byron Twp*, 505 Mich 130; 949 NW2d 91 (2020). *York Charter Twp v Miller*, 506 Mich 916 (2020). After reconsideration, we conclude that, under the Supreme Court's decision in *DeRuiter*, the zoning ordinance at issue[1] did not directly conflict with the MMMA.

In *DeRuiter*, 505 Mich at 134-136, 136 n 5, the Supreme Court addressed whether a "locational restriction," a phrase it used "to denote a zoning restriction that regulates where an activity may occur within a municipality," directly conflicted with the MMMA. The defendant township's zoning ordinance allowed for the cultivation of medical marijuana by primary caregivers, but only as "a home occupation." *Id*. at 135-136. Under the home-occupation requirement, the ordinance mandated that "the 'medical use' of marijuana by a primary caregiver be 'conducted entirely within a dwelling or attached garage . . . .' " *Id*. at 136 (citation omitted). The plaintiff, a licensed qualifying patient and a registered primary caregiver, began growing marijuana on rented commercially zoned property because she did not want to grow marijuana at her residence. *Id*. at 135. At the rented commercially zoned property, she grew the marijuana in "an 'enclosed, locked facility.' " *Id*., quoting MCL 333.26423. After learning about the plaintiff's operation, the defendant township's supervisor determined that the operation violated the defendant township's zoning ordinance. *Id*. The defendant township sent the plaintiff's landlord a letter, directing the landlord to cease and desist the plaintiff's cultivation of marijuana and to remove

[1] Plaintiff has since amended its zoning ordinance to allow the cultivation of medical marijuana outdoors in some areas under certain circumstances. See Charter Township of York Zoning Ordinance § 7.204(A)(13)(e), as amended January 29, 2018.

all marijuana and related equipment or be subject to enforcement action. *Id*. at 137. The plaintiff filed a complaint and sought a declaratory judgment that the zoning ordinance was preempted by the MMMA and, therefore, unenforceable. *Id*. The defendant township filed a counterclaim, requesting a declaratory judgment and abatement of the alleged nuisance. *Id*.

The Supreme Court held that the MMMA does not nullify a local unit of government's authority to regulate land use under the Michigan Zoning Enabling Act, MCL 125.3101 *et seq*., so long as the unit of government "does not prohibit or penalize all medical marijuana cultivation" and so long as the unit of government "does not impose regulations that are 'unreasonable and inconsistent with regulations established by state law.' " *Id*. at 147-148 (citation omitted).

The plaintiff in *DeRuiter* argued that the defendant township's ordinance directly conflicted with the MMMA because the MMMA "protects a registered caregiver from 'penalty in any manner' for 'assisting a qualifying patient . . . with the medical use of marihuana' so long as the caregiver abides by the MMMA's volume limitations and restricts the cultivation to an 'enclosed, locked facility.' " *Id*. at 143. The Supreme Court disagreed with the argument:

> Were we to accept [the plaintiff's] argument, the only allowable restriction on where medical marijuana could be cultivated would be an "enclosed, locked facility" as that term is defined by the MMMA. MCL 333.26423(d). Because the MMMA does not otherwise limit cultivation, the argument goes, any other limitation or restriction on cultivation imposed by a local unit of government would be in conflict with the state law. We disagree. The "enclosed, locked facility" requirement in the MMMA concerns what type of structure marijuana plants must be kept and grown in for a patient or caregiver to be entitled to the

> protections offered by MCL 333.26424(a) and (b); the requirement does not speak to *where* marijuana may be grown. In other words, because an enclosed, locked facility could be found in various locations on various types of property, regardless of zoning, this requirement is not in conflict with a local regulation that limits *where* medical marijuana must be cultivated. [*Id*. at 143-144.]

According to the Supreme Court, "[a] local ordinance is preempted when it bans an activity that is authorized and regulated by state law." *Id*. at 144. But this does not mean that a local unit of government "cannot 'add to the conditions' in the MMMA." *Id*. at 145 (citation omitted). Rather, the Court said that "an ordinance is not conflict preempted as long as its additional requirements do not contradict the requirements set forth in the statute." *Id*. at 147.

In *DeRuiter*, the Supreme Court indicated that a zoning ordinance can directly conflict with the MMMA in two ways. An ordinance directly conflicts with the MMMA if it prohibits or penalizes all medical marijuana cultivation. *Id*. at 147-148. The zoning ordinance in this case did not prohibit or penalize all medical marijuana cultivation. It allowed primary caregivers to cultivate medical marijuana but placed limitations on where a caregiver may cultivate the marijuana (i.e., in "the main building" of "a single-family detached dwelling"). Former Charter Township of York Zoning Ordinance § 40.204(A). Because the zoning ordinance did not prohibit or penalize all medical marijuana cultivation, the "immunity language" in the MMMA, MCL 333.26424(a) and (b), could not have served as the source of any conflict. See *DeRuiter*, 505 Mich at 145.

The second manner in which an ordinance can directly conflict with the MMMA is when it "impose[s] regulations that are 'unreasonable and inconsistent with regulations established by state law.' " *Id*. at 148

(citation omitted). The zoning ordinance here was very similar to the defendant township's ordinance in *DeRuiter*. Both ordinances allowed for the cultivation of medical marijuana by primary caregivers as a "home occupation" and required that the caregiver cultivate the marijuana inside a residence.[2] Given the similarity of the two ordinances, because the Supreme Court concluded in *DeRuiter* that the defendant township's ordinance did not directly conflict with the MMMA, we conclude that there was no direct conflict between plaintiff's zoning ordinance and the MMMA.

For these reasons, we conclude that the zoning ordinance at issue here did not directly conflict with the MMMA. The ordinance did not prohibit or penalize all cultivation of medical marijuana, and it did not impose regulations that were unreasonable and inconsistent with the regulations established by the MMMA. *DeRuiter*, 505 Mich at 147-148. Accordingly, we reverse the declaration in the May 16, 2016 judgment that the zoning ordinance, to the extent that it prohibited the outdoor cultivation of medical marijuana, was unenforceable because it conflicted with the MMMA.

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

SAWYER, P.J., and BECKERING and M. J. KELLY, JJ., concurred.

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[2] The zoning ordinance required that the cultivation occur in "the main building" of "a single-family detached dwelling," former Charter Township of York Zoning Ordinance § 40.204(A), while the ordinance in *DeRuiter* required that the cultivation occur in "a dwelling or attached garage," *DeRuiter*, 505 Mich at 136.

HOUSTON v MINT GROUP, LLC

Docket No. 353082. Submitted January 7, 2021, at Grand Rapids. Decided January 28, 2021, at 9:20 a.m.

Denise Houston filed a quiet-title action in the Kent Circuit Court against Mint Group, LLC (MGL) and its resident agent, Jacob Wielhouwer, claiming that through the doctrines of adverse possession and acquiescence she was the owner of land located along one side of her property (Lot 4) that abutted property owned by MGL (Lot 1). Houston asserted that a stretch of land containing a retaining wall and a garden that faced her property marked the boundary of the two adjoining properties regardless of the fact that the disputed land was contained in the legal description of MGL's property. Lot 4 had been owned by Houston's family since 1952—first by her parents, George and Mable Houston, by land contract, then by deed in 1960, then by Houston and her mother after her father died, and then solely by Houston from 1996 forward under quitclaim deed. Eugene and Virginia Proctor held legal title to Lot 1 from 1968 through 2001: (1) the Proctors purchased Lot 1 in 1968 by warranty deed, (2) they conveyed the property to Vernon Proctor in 1977 by land contract, but he transferred his interest back to the Proctors in 1981 by quitclaim deed, (3) in 1990, the Proctors sold the property to Vincent Ingerson by land contract, but he transferred the property back to them by quitclaim deed in 1996, (4) in 2001, the Proctors sold the property to Kenneth Schaafsma by warranty deed, divesting the Proctors of any fee interest in the land. After additional changes in ownership, MGL purchased Lot 1 by warranty deed in 2016. Houston asserted that she and her parents had maintained the disputed land since 1952, that Houston's parents and the Proctors had always treated the retaining wall as the boundary line between the properties, and that because of this, ownership of the disputed property had been obtained by adverse possession and acquiescence by 1983, 15 years after the Proctors purchased Lot 1. Defendants moved for summary disposition of Houston's claims, arguing that (1) Houston could not establish acquiescence because she could not prove that all owners of both parcels had treated the retaining wall as the true boundary line given that the Proctors' ownership included land contracts held by vendees who never indicated acceptance of the

retaining wall as the boundary line and because she could not establish what her parents believed regarding the boundary line and (2) Houston could not establish adverse possession given that she asserted her family's use of the disputed land was done with the permission of Lot 1's owner and could therefore not establish the required element of hostility. Houston also moved for summary disposition, relying on Virginia Proctor's affidavit in which Virginia stated that she treated the retaining wall as the property boundary for her 33 years of ownership and that she never objected to the Houston family possessing and maintaining a garden on the other side of the retaining wall. The court, Mark A. Trusock, J., denied defendants' motion for summary disposition, granted Houston's motion for summary disposition, and granted title in the disputed land to Houston, reasoning that Houston's parents had adversely possessed the land for more than 15 years. Given that conclusion, the court declined to address Houston's acquiescence claim. Defendants appealed.

The Court of Appeals *held*:

1. In Michigan, parties may acquiesce to a new property line. Acquiescence is established when a preponderance of the evidence establishes that the parties treated a particular boundary line as the property line. Acquiescence may be established in three ways: (1) acquiescence for the statutory period, (2) acquiescence following a dispute and agreement, and (3) acquiescence arising from intention to deed to a marked boundary. With regard to acquiescence for the statutory period, MCL 600.5801(4) provides that the statutory period for acquiring property under that theory is 15 years. Under the doctrine of acquiescence, when adjoining property owners acquiesce to a boundary line for at least 15 years, that line becomes the actual boundary line. Proof of privity is not necessary to tack holdings to obtain the 15-year minimum under the doctrine; therefore, when successive neighboring landowners use the property as marked by monuments as if the monuments were accurate for a period of 15 years, they have fixed the property line by acquiescence. Further, a legal title holder who has acquiesced in a boundary line or has not taken legal action to eject an adverse possessor can continue to acquiesce or sit on ejectment rights even after a land-contract vendee, who only has equitable title until the land contract is fulfilled, takes possession of the property. Unlike adverse possession, under the doctrine of acquiescence, it is not necessary to establish that possession of the land was hostile or without permission. In this case, Virginia Proctor's affidavit conveyed that by maintaining the garden on their side of the wall, George and Mable Houston treated the retaining wall as the

boundary, thereby tacitly agreeing and acquiescing to treating the wall as the boundary line. The affidavit also established that the Proctors tacitly agreed and acquiesced to treating the wall as the boundary line throughout the 33-year period, even when other parties occupied the property under a land contract and the Proctors only possessed legal title. The period of acquiescence, as well as the period of adverse possession, were therefore continuous from 1968 to 1983. Even though Vernon Proctor possessed Lot 1 from 1977 to 1981 under a land contract, that period of possession did not interrupt the 15-year period because defendants failed to present any evidence that Vernon Proctor did not acquiesce in treating the retaining wall as the boundary line or that he engaged in acts negating the elements of adverse possession. Therefore, the period of acquiescence was continuous from 1968 to 1983. Accordingly, although not addressed by the trial court, Houston established her claim of acquiescence.

2. MCL 600.5801 provides that no person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to the person or to someone through whom they claim, the person commences the action or makes the entry within the periods of time prescribed by MCL 600.5801. In general, an action for the recovery or possession of land must be brought within 15 years after it accrues. A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of 15 years. A cause of action does not accrue until the property owner of record has been disseised of the land; that is, when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. Possession of the land must be hostile and under cover of a claim of right. Hostile use is that which is inconsistent with the right of the owner, without permission asked or given, and which would entitle the owner to a cause of action against the intruder. The possession is not hostile and cannot establish adverse possession when a landowner possesses the land of an adjacent owner with the intent to hold to the true line. However, simply being mistaken with regard to the true boundary line does not defeat a claim of adverse possession. Adverse possession does not develop when a person *places* a monument to mark a boundary line that turns out to be inaccurate despite the intent to place it on the true line because the hostility element would be absent. However, believing that an artificial or natural *preexisting* monument represents the boundary line and holding to that monument can satisfy the hostility element. A person's "intent" and "belief" are not the same when analyzing the element of hostility for purposes of

an adverse-possession claim. That is, to prove hostility, a party need only demonstrate an intent to hold to a visible, preexisting, and recognizable boundary, and if there is evidence that the party did not believe that the boundary was the true line, it would make his or her case stronger in that it would reflect true hostility. For that reason, failure to show "belief" one way or the other does not doom a claim of adverse possession so long as there existed an "intent" to hold to a visible, recognizable boundary, which can be established by conduct and circumstantial evidence. Possession is also hostile when a person possesses the land of another intending to hold to a particular recognizable boundary regardless of the true boundary line; to hold otherwise would reward thieves while punishing persons who were merely mistaken. Successive periods of adverse possession by different parties can be joined or tacked to satisfy the 15-year statutory period, but only if there was privity of estate. In this case, the Houstons maintained the disputed strip of land for 33 years, evidencing their intent to hold to a visible, recognizable boundary, and defendants failed to submit any evidence to rebut Houston's showing of hostility. Virginia Proctor's affidavit also established that starting in 1968, the Proctors and the Houstons treated the existing retaining wall as the boundary and that the Houstons maintained the disputed land up to the retaining wall. There was no issue of material fact with regard to the element of hostility because defendants failed to rebut the evidence presented by Houston. In addition, Houston established that the adverse possession occurred continuously for a period of 15 years, regardless of Vernon Proctor's occupation of Lot 1 by land contract. Accordingly, the trial court did not err by granting summary disposition in favor of Houston on her claim of adverse possession.

Affirmed.

1. REAL PROPERTY — BOUNDARIES — ACQUIESCENCE IN BOUNDARIES — TACKING OF HOLDINGS — LAND-CONTRACT VENDORS.

Under MCL 600.5801(4), the statutory period for acquiring property under the doctrine of acquiescence is 15 years; when adjoining property owners acquiesce to a boundary line for at least 15 years, that line becomes the actual boundary line; proof of privity is not necessary to tack holdings to obtain the 15-year minimum; when successive neighboring landowners use the property as marked by monuments as if the monuments were accurate for a period of 15 years, they have fixed the property line by acquiescence; a legal title holder who has acquiesced in a boundary line or has not taken legal action to eject an adverse possessor can continue to acquiesce or sit on ejectment rights with regard to the property even after a

land-contract vendee, who only has equitable title until the land contract is fulfilled, takes possession of the property.

2. REAL PROPERTY — ADVERSE POSSESSION — ELEMENTS — HOSTILE POSSESSION — INTENT TO HOLD TO VISIBLE, RECOGNIZABLE BOUNDARY.

To establish a claim of adverse possession, the possession of the land must be hostile and under cover of a claim of right; a person's belief that an artificial or natural preexisting monument represents the boundary line and holding to that monument can satisfy the hostility element; a person's "intent" and "belief" are not the same when analyzing the element of hostility for purposes of an adverse-possession claim; to prove hostility, a party need only demonstrate an intent to hold to a visible, preexisting, and recognizable boundary; failure to show "belief" one way or the other does not doom a claim of adverse possession so long as there existed an "intent" to hold to a visible, recognizable boundary, which can be established by conduct and circumstantial evidence.

Legal Aid of Western Michigan (by *Karen Merrill Tjapkes* and *Mikhail Albuseiri*) for Denise Houston.

Rockford Law, PLLC (by *Jake Lombardo*) for Mint Group, LLC, and Jacob Wielhouwer.

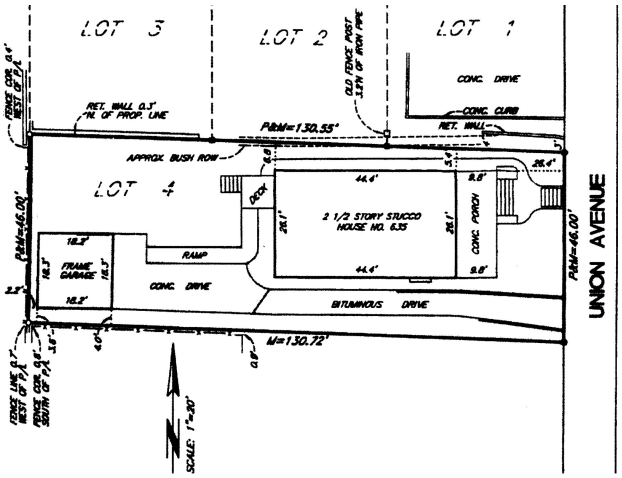
Before: REDFORD, P.J., and MARKEY and BOONSTRA, JJ.

MARKEY, J. Plaintiff, Denise Houston, and defendant Mint Group, LLC (MGL) own neighboring properties in a residential area of Grand Rapids. A retaining wall and a strip of land landscaped with a garden, trees, and shrubs located on Houston's side of the retaining wall are both situated on MGL's land according to legal descriptions and surveys. This boundary dispute concerns the ownership of the strip of land bordering the retaining wall. In a quiet-title action, Houston alleged claims of adverse possession and acquiescence, contending that her predecessor parents had cared for and tended the strip of land up to the retaining wall for more than 15 years and that she also had maintained the area. On cross-motions for summary disposition, the trial court determined as a matter of law that Houston

had obtained title to the disputed property by adverse possession. The trial court, therefore, declined to address the claim of acquiescence. On appeal, defendants argue that the element of "hostility" was not established, nor could it be, for purposes of adverse possession; consequently, the trial court erred by ruling in Houston's favor on the doctrine of adverse possession. Houston challenges defendants' position, but she also asserts that we can affirm on the alternate ground of acquiescence. We conclude that the trial court did not err by determining that Houston obtained title to the disputed strip of land under the doctrine of adverse possession; however, we also hold that Houston obtained title to the property by acquiescence. Accordingly, we affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The best way to quickly grasp the layout of the properties is by examination of the following survey from 2018:



Houston owns Lot 4, which is located on Union Avenue. To the north of and adjacent to Lot 4 is Lot 1,[1] which is owned by MGL and located on Pleasant Street (an east-west street to the north of Lot 1 and not shown in the survey). The two lots are improved properties with residential structures. The retaining wall is specifically identified in the survey, and plaintiff submitted a photograph of the retaining wall, looking at it from Union Avenue, which is attached as Appendix A to this opinion. At issue in this case is a strip of land of about 120 square feet located between the retaining wall and the legally described boundary line to the south of the wall that separates Lots 1 and 4.

Houston's property, Lot 4, has been owned by her family since 1952—at first by her parents George and Mable Houston under land contract (equitable title) and later by deed in 1960,[2] then by her mother Mable when her father George died in 1978, then by Mable and Houston jointly from 1990 to 1996, and then solely by Houston from 1996 forward under a quitclaim deed. MGL's property, Lot 1, was owned by Eugene and Virginia Proctor starting in 1968 when they purchased it by warranty deed. The Proctors conveyed the property to Vernon Proctor in 1977 by land contract, but Vernon transferred his interest back to Eugene and Virginia Proctor in 1981 by quitclaim deed. In 1990, the Proctors sold the property to Vincent Ingerson by land contract; however, he transferred his interest back to the Proctors by quitclaim deed in 1996. And in 2001, the Proctors conveyed Lot 1 by warranty deed to Kenneth Schaafsma, divesting the Proctors of their fee interest in the property. Schaafsma immediately trans-

[1] Lots 2 and 3, which are not at issue in this case, are also situated to the north of and abutting Lot 4.

[2] The deed was not recorded until 1964.

ferred the property by warranty deed to Michael Van Dyke. Subsequently, Van Dyke defaulted on a mortgage that was granted in 2003, and the property was foreclosed on in 2009. Lot 1 was acquired in a sheriff's sale in 2009 by Bank of New York Melon Trust Company, which then conveyed the property to JPMorgan Chase Bank by quitclaim deed. Still in 2009, JPMorgan deeded the property to defendant, Jacob Wielhouwer, who was a member of MGL and its resident agent. There were apparently some conveyances of Lot 1 between Wielhouwer and his wife, Tory Wielhouwer, and MGL after 2009. Then, in 2016, MGL acquired sole ownership of the property by warranty deed from Wielhouwer and his wife. MGL leases the house on the property to multiple tenants.

In April 2019, Houston filed a complaint to quiet title to the strip of land in dispute. She alleged that in 1952, her parents planted a garden, bushes, and trees on the disputed strip of land, and she attached a 1952 photograph of the area. Houston contended that her parents and then Houston herself maintained the strip of land continuously ever since 1952. She alleged that ownership was obtained by adverse possession and acquiescence around 1983, at the latest, which was 15 years after the Proctors had purchased Lot 1. Houston claimed that the Proctors and Houston's parents had always treated the retaining wall as the boundary line between the properties.

In January 2020, defendants moved for summary disposition under MCR 2.116(C)(10). With respect to the claim of acquiescence, defendants argued that the claim failed because Houston could not demonstrate that all owners of both parcels had treated the retaining wall as the true boundary line for any continuous period of 15 years given that the Proctors' ownership was inter-

rupted by land contracts held by vendees who never indicated acceptance of the retaining wall as the boundary line. Defendants further maintained that 15 continuous years of acquiescence could not be established in regard to the owners of Lot 4 itself, considering that Houston could not speak to what her deceased parents believed or did not believe with respect to the location of the boundary line and retaining wall. As to adverse possession, defendants contended that Houston could not establish the required element of "hostility" because Houston took the position that her family's use of the disputed strip of land was always with the permission of the owners of Lot 1.[3]

Houston moved for summary disposition under MCR 2.116(C)(10). She argued that her mother had obtained title by acquiescence based on her parents' use of the disputed strip of land and that Mable subsequently and necessarily transferred that title to Houston. Houston contended that her parents and Eugene and Virginia Proctor treated the retaining wall as the boundary line for more than 15 years. Houston relied on an affidavit by Virginia Proctor, who averred, in relevant part, as follows:

> 2. My husband, Eugene Proctor, and I purchased [Lot 1] . . . in January 1968 from Peter and Theresa Tiddens.
>
> 3. I believed at the time we purchased [Lot 1] that the boundary line between [Lots 1 and 4] . . . was marked by the retaining wall between the two properties.

[3] Defendant Wielhouwer averred in an affidavit that he purchased Lot 1 in 2009, that he later quitclaimed the property to MGL in 2016, that he never understood or believed that the retaining wall was the boundary line between the relevant properties, that he never treated the retaining wall as such, and that he obtained a survey showing that the true boundary line "runs approximately 3 feet to the south of the retaining wall."

> 4. I continued to treat the retaining wall as the property boundary line during my thirty-three (33) year period of ownership.
>
> 5. For the entire period of my ownership, I knew that George, Mable, and Denise Houston maintained a garden on the southern side of [the] retaining wall and I did not object to their possession and use of that strip of property.
>
> 6. Eugene Proctor and I did not take any legal action to claim title to the strip of property disputed in this case when we owned [Lot 1].
>
> 7. Eugene Proctor and I sold our interest in [Lot 1] in March 2001.

In conjunction with Virginia Proctor's affidavit, Houston relied on the 1952 photograph that ostensibly showed that her parents had maintained the disputed strip of land as a garden-type area. In the alternative, Houston argued that she obtained title based solely on her own period of ownership, absent consideration of her parents' ownership, because Houston had maintained the strip of land for the requisite 15-year period.

With respect to adverse possession, Houston argued that the evidence established all of the requisite elements as a matter of law, including hostility, on which issue Houston argued:

> . . . [T]he possession was hostile in that it was adverse to the title originally owned by the Proctors. The element of hostility does not require an attitude of ill will, but rather activity adverse, or hostile, to another's rights. When two parties are unaware of the true boundary line and instead rely on a recognizable boundary marker (often a wall or fence) that causes one party to possess the property of another, that possession is considered hostile.

The parties filed responses to the competing motions for summary disposition, and where relevant to our resolution of this appeal, they will be discussed later.

At the hearing on the motions for summary disposition, the trial court indicated that it had thoroughly reviewed and was familiar with the motions and documentary evidence and, after asking the parties if they had anything more to add, presented them with a written opinion and order denying defendants' motion for summary disposition and granting Houston's competing motion. The trial court focused on Houston's claim that title should be quieted in her favor on the basis of adverse possession. The court found that although it was unclear when the Houstons first began gardening the disputed area, the evidence showed that a garden was fully established on the strip of land in 1968, at which time the owners of Lot 1, the Proctors, "were disseised, accruing their cause of action." The trial court next addressed the issue whether the Proctors were effectively disseised of the strip of land for 15 *continuous* years in light of the periods during which Lot 1 was possessed by land-contract vendees. The trial court ruled that contrary to defendants' assertions, "a land contract does not immediately divest the vendor of ownership." Citing and quoting caselaw, the court observed that legal title remains in the vendor under a land contract during the life of the contract, with equitable title being obtained and held by the vendee. And under those circumstances, the vendor retains the right to maintain a cause of action related to his or her legal title throughout the duration of the land contract. Consequently, the trial court determined that more than 15 years of continuous use from 1968 to 2001 had been "established and unrefuted."

Next, the trial court addressed the issue whether the element of hostility had been established. Referring to and noting subtle distinctions in the caselaw, the trial court observed:

> [H]ostility cannot be established where an individual adheres to a boundary they attempted, but failed, to mark [as] a true boundary line. Hostility is established when an individual adheres to a boundary they believe to exist but are mistaken. To illustrate, hostility does not exist where an individual erroneously places a fence line believing that line to mark the true boundary. Hostility does exist where an individual believes a pre-existing fence line marks a boundary when, in fact, it does not. This case clearly falls into the latter category. Regardless of the Houstons' intentions—whether their use of Defendants' property was intentional or mistaken—their use was hostile. [Citations omitted.]

On the associated argument that "permission" allegedly negated the element of hostility, the trial court found that Virginia Proctor's affidavit could not reasonably be construed as indicating that the Houstons' use of the strip of land was by permission. Rather, according to the trial court, the affidavit merely stated that there was no objection to the Houston family's use of the disputed property. And when read in context, Virginia Proctor's affidavit simply reflected that the lack of an objection "was based on her lack of knowledge, not on her knowing consent." The court noted that "[i]t is not reasonable to impute an act of consent where none is expressed." The trial court next ruled:

> The remaining elements of adverse possession are satisfied by a common sense understanding of a residential garden as an improvement to land exclusively used by the homeowner. While there may be circumstances where a garden is shared by the community, there are no facts in this case which would suggest that this was that kind of garden. Every indication is that the land was used by the Houstons open and obviously, visible to the adjacent property, in full view of the community at large, and to the exclusion of all others. Defendant[s] raise[] no objections [n]or advance[] any argument contrary to this commonsense inference.

> Consequently, there is no genuine issue of material fact that [Houston's] predecessors in interest adversely possessed the land occupied by the Houstons' garden between the property line and retaining wall for more than 15 years. Accordingly, title to this property legally passes to [Houston].
>
> Because this matter is resolved under the doctrine of adverse possession, the Court does not address the parties' arguments relating to acquiescence.

Defendants MGL and Wielhouwer now appeal by right.

II. ANALYSIS

A. STANDARD OF REVIEW AND SUMMARY-DISPOSITION PRINCIPLES

We review de novo a trial court's ruling on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). Actions to quiet title are equitable in nature, and equitable rulings are reviewed de novo. *Gorte v Dep't of Transp*, 202 Mich App 161, 165; 507 NW2d 797 (1993). With respect to analyzing a motion brought pursuant to MCR 2.116(C)(10), this Court in *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013), observed:

> In general, MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ. The trial court is not permitted to assess

> credibility, weigh the evidence, or resolve factual disputes, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). [Citations and quotation marks omitted.]

"Like the trial court's inquiry, when an appellate court reviews a motion for summary disposition, it makes all legitimate inferences in favor of the nonmoving party." *Skinner v Square D Co*, 445 Mich 153, 162; 516 NW2d 475 (1994).

B. ADVERSE POSSESSION

1. GOVERNING PRINCIPLES

The underlying statutory basis that gives rise to the doctrine of adverse possession is found in MCL 600.5801, which provides, in pertinent part:

> No person may bring or maintain any action for the recovery or possession of any lands or make any entry upon any lands unless, after the claim or right to make the entry first accrued to himself or to someone through whom he claims, he commences the action or makes the entry within the periods of time prescribed by this section.

Ordinarily, an action for the recovery or possession of land must be brought within 15 years after it accrues. MCL 600.5801(4); *Kipka v Fountain*, 198 Mich App 435, 438; 499 NW2d 363 (1993). The *Kipka* panel, examining the principles of adverse possession, observed:

> A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone

> claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. [*Kipka*, 198 Mich App at 439 (citations omitted).]

In *Wengel v Wengel*, 270 Mich App 86, 92-93; 714 NW2d 371 (2006), this Court further explained the doctrine of adverse possession, touching on the requirement that the possession be hostile:

> Other cases additionally indicate that the possession must be hostile and under cover of a claim of right. *McQueen v Black*, 168 Mich App 641, 643; 425 NW2d 203 (1988), quoting *Connelly v Buckingham*, 136 Mich App 462, 467-468; 357 NW2d 70 (1984). "The term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will"; rather, hostile use is that which is "inconsistent with the right of the owner, without permission asked or given," and which "would entitle the owner to a cause of action against the intruder." *Mumrow v Riddle*, 67 Mich App 693, 698; 242 NW2d 489 (1976).

In *Gorte*, 202 Mich App at 170-171, this Court elaborated on some of the nuances with respect to the "hostility" element:

> Where a landowner possesses the land of an adjacent owner with the intent to hold to the true line, the possession is not hostile and cannot establish adverse possession. By contrast, where a person possesses the land of another intending to hold to a particular recognizable boundary regardless of the true boundary line, the possession is hostile and adverse possession may be established. Simply being mistaken with regard to the true boundary line, however, does

> not defeat a claim of adverse possession. As noted by this Court . . . , it would be unjust to limit the application of the doctrine of adverse possession to those adverse possessors who knew the possession was wrong, while excluding those whose possession was by mistake, thereby rewarding the thief while punishing the person who was merely mistaken. . . . [P]laintiffs in this case appear to have intended to hold to particular boundaries, but also believed that the boundary represented the true line. Plaintiffs therefore fall within the second group of adverse possessors in that they respected a line that they believed to be the true boundary, but which proved not to be the true boundary. [Citations omitted; see also *DeGroot v Barber*, 198 Mich App 48, 52-53; 497 NW2d 530 (1993).]

The *DeGroot* panel similarly explained that placing a monument to mark a boundary line that turns out to be inaccurate despite the intent to place it on the true line cannot develop into adverse possession because hostility would be absent, but erroneously believing that a preexisting monument—either artificial or natural—represents the boundary and holding to that monument can satisfy the hostility element. *DeGroot*, 198 Mich App at 52 n 1.

"In order to support a claim of title by adverse possession, acts of possession must be open and of a hostile character, but it is sufficient if the acts of ownership are of such character as to indicate openly and publicly an assumed control or use such as is *consistent with the character of the premises in question*." *Rose v Fuller*, 21 Mich App 172, 175; 175 NW2d 344 (1970) (emphasis added).

Finally, successive periods of adverse possession by different parties can be joined or "tacked" to satisfy the 15-year statutory period, but only if there was privity of estate. *Killips v Mannisto*, 244 Mich App 256, 259; 624 NW2d 224 (2001).

2. APPLICATION AND DISCUSSION

Defendants first argue that Houston "did not submit one shred of documentary evidence upon which the [trial] [c]ourt could possibly conclude that the hostility element of adverse possession had been met." Defendants maintain that with respect to "hostility" the trial court relied exclusively on Virginia Proctor's affidavit and the old black and white photograph that Houston claimed, without foundation, showed the garden area back in 1952. Defendants argue that this evidence demonstrated, at best, a mistaken belief by Mrs. Proctor about the boundary line, which was not relevant in determining the intentions of the *Houstons* relative to hostility. Defendants focus on the trial court's determination that this was a case involving a preexisting monument—the retaining wall—that the property owners mistakenly or erroneously believed was the true boundary line and held to it. Defendants contend that there was no evidence supporting this conclusion. Defendants argue that Houston "did not demonstrate when the retaining wall was created, why it was created, who created it or for what purpose." They assert that under all the surrounding circumstances, it is likely that the retaining wall was constructed with the intent that it mark the true boundary line. Defendants complain that Houston did not submit evidence upon which the court "could have concluded that [Houston's] predecessors adhered to an existing monument, rather than constructed the monument with intent to mark the true line." They claim that representations in Mrs. Proctor's affidavit cannot be imputed to Houston or her parents.

The trial court determined that the 15-year clock commenced ticking in 1968, which was the year that Eugene and Virginia Proctor purchased Lot 1. The court

plainly relied on Mrs. Proctor's affidavit while noting that it was unclear when George and Mable Houston first gardened the strip of land in dispute. Defendants are correct that there is no evidence regarding when the retaining wall was constructed and who built it. Assuming Houston's characterization of the photograph is accurate, the picture from 1952, which is the year that Houston's parents purchased Lot 4 by land contract, shows the retaining wall. In 1968, the retaining wall was in existence, and Virginia Proctor averred that she believed that the retaining wall marked the boundary between Lots 1 and 4, that she treated the wall as the boundary line for 33 years, that she knew that George, Mable, and Denise Houston maintained a garden on the south side of the retaining wall, and that she did not object to said possession and use. Under the circumstances presented in this case, for Houston to succeed on her adverse-possession theory based on an accrual date of 1968, she needed to provide evidence for purposes of proving hostility that her parents intended to hold to the visible, recognizable retaining wall. See *Gorte*, 202 Mich App at 170-171; *DeGroot*, 198 Mich App at 52-53, 52 n 1. This issue requires us to discuss *Gorte* and *DeGroot* in more detail.

In *DeGroot*, 198 Mich App at 53, this Court affirmed the trial court's decision that the plaintiffs had established the elements of adverse possession, and the panel stated as follows in regard to the element of hostility:

> We believe that this case falls within the . . . principle . . . where a landowner intends to claim title to a visible, recognizable boundary; that is, where a landowner respected the line believed to be the boundary but that proved not to be the true line. The evidence indicated that plaintiffs, apparently operating under the mistaken belief that Ashard Road represented the true boundary line,

> claimed possession and ownership to Ashard Road, including the disputed parcel. That intention was manifested by plaintiffs' exclusive use of the property, the posting of no trespassing signs, and their denial of permission to defendants' predecessors in title to use the disputed parcel.

The Court's discussion somewhat blended or intertwined the states of mind regarding "intent" and "belief," and we now make clear that they are not one and the same for purposes of analyzing a claim of adverse possession and the element of hostility. In *DeGroot*, the plaintiffs *intended* to claim title or hold to a visible, recognizable boundary *and believed* that the boundary was the true line. But this does not mean that such intent and belief must be established to show hostility—just the contrary. A party seeking to prove hostility need only demonstrate an intent to hold to a visible, preexisting, and recognizable boundary, and if there is evidence that the party did not believe that the boundary was the true line, it would make his or her case stronger because it would reflect true hostility. In that scenario, the party pursuing adverse possession would be indicating that he or she intended to hold to a visible, recognizable boundary regardless of or not caring whether it was the true line. Failure to show "belief" one way or the other does not doom a claim of adverse possession so long as there existed an intent to hold to a visible, recognizable boundary. *DeGroot* simply stands for the proposition that a party who does believe that the boundary is the true line is as entitled to claim adverse possession as the party who does not have that belief.

Gorte solidified the principles espoused in *DeGroot*. In *Gorte*, this Court ruled that the plaintiffs had established adverse possession where a predecessor in title testified that he specifically denied an encroachment accusation and expressed that he would stay put until

shown a survey undermining his stance and where yet another predecessor in title testified that he maintained the disputed land and "ejected trespassers." *Gorte*, 202 Mich App at 164. The *Gorte* panel stated:

> As in *DeGroot*, plaintiffs in this case appear to have intended to hold to particular boundaries, but also believed that the boundary represented the true line. Plaintiffs therefore fall within the second group of adverse possessors in that they respected a line that they believed to be the true boundary, but which proved not to be the true boundary. [*Id*. at 170-171.]

Thus, both *DeGroot* and *Gorte* involved parties who intended to hold to visible, recognizable boundaries and also believed that those boundaries represented the true lines. But again, this does not mean that the "belief" component is an evidentiary requirement to support a claim of adverse possession.[4] This was made abundantly clear when this Court in *Gorte* stated that "where a person possesses the land of another intending to hold to a particular recognizable boundary *regardless of the true boundary line*, the possession is hostile . . . ." *Gorte*, 202 Mich App at 170 (emphasis added). The *Gorte* panel noted that it did not wish to reward thieves while punishing persons who were merely mistaken. *Id*. Accordingly, the issue that we must confront is whether George and Mable Houston intended to hold to a visible, recognizable boundary, i.e., the retaining wall.

In *DeGroot*, there was evidence of exclusive use of the disputed land, the posting of no trespassing signs, and a denial of use of the property by others. *DeGroot*,

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[4] Stated otherwise, *Gorte* and *DeGroot* would have reached the same conclusion even had it been shown that the plaintiffs did not believe that the visible, recognized boundaries to which they intended to hold were the true lines or had there been no evidence regarding belief.

198 Mich App at 53. In *Gorte*, there was evidence of a denial of an encroachment accusation, a refusal to move, and the ejectment of trespassers. *Gorte*, 202 Mich App at 164. In this case, all we have is Mrs. Proctor's affidavit in which she averred that the Houstons "maintained a garden on the southern side of [the] retaining wall" and did so for 33 years. But intent can plainly be established by conduct and circumstantial evidence. See *Daley v Gruber*, 361 Mich 358, 362; 104 NW2d 807 (1960); *DeGroot*, 198 Mich App at 53. And the fact that the Houstons maintained the disputed strip of land for 33 years constituted evidence that they intended to hold to the visible, recognizable retaining wall as the boundary. In the context of the (C)(10) motions, Houston satisfied her obligation to submit documentary evidence to show hostility or, in this case, intent to hold to a visible, recognizable boundary, MCR 2.116(G)(3)(b), and defendants failed to counter that evidence with their own documentary evidence showing a lack of hostility or absence of such intent, which was necessary to create a genuine issue of material fact, MCR 2.116(G)(4).[5] Accordingly, Houston established as a matter of law that her parents had intended to hold to a visible, recognizable boundary, thereby proving hostility. We must, however, address defendants' argument concerning the unknowns about when

[5] MCR 2.116(G)(4) provides:

> A motion under subrule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under subrule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her.

the retaining wall was constructed and who constructed it, which is part of defendants' challenge on the hostility element.

In *DeGroot*, 198 Mich App at 52 n 1, this Court, in noting a subtle factual distinction in determining if hostility exists, stated that "the difference is between erroneously placing a monument, intending to place it on the true line, but failing to do so, and erroneously believing a preexisting monument (either artificial or natural) represents the boundary, and holding to that monument." There is no hostility as to the former situation, but hostility does exist under the latter circumstances. See *id*. at 52. Relying on this language, defendants argue that Houston was required to submit evidence that her parents did not construct the retaining wall intending it to mark the true line. We conclude that defendants improperly place the evidentiary burden on Houston. Assuming that the 1952 photograph is problematic because of foundational issues, we note that Houston submitted documentary evidence in the form of Virginia Proctor's affidavit that indicated that starting in 1968, the Proctors and the Houstons treated the *existing* retaining wall as the boundary and that the Houstons maintained the disputed land up to the retaining wall. This was documentary evidence on the "hostility" element and, as discussed earlier, the submission shifted the burden to defendants to present evidence to the contrary in order to create a genuine issue of material fact. Consequently, it was up to defendants to produce evidence, if it existed, showing that Mr. and Mrs. Houston erected the retaining wall and did so with the intent that it mark the true line. That evidence was not submitted. Accordingly, we reject defendants' argument.

Defendants also challenge the element of continuousness, but we shall address that issue in the context

of the acquiescence claim, which discussion has equal application to the claim of adverse possession. Given that we reject defendants' argument on that issue for the reasons stated below, we conclude that the trial court did not err by granting summary disposition in favor of Houston on her claim of adverse possession. Furthermore, even had Houston failed to prove entitlement to the property under the doctrine of adverse possession, the doctrine of acquiescence supported granting her title to the disputed strip of land.[6]

C. ACQUIESCENCE

1. GOVERNING PRINCIPLES

Under Michigan law, parties may acquiesce to a new property boundary line. *Walters v Snyder*, 239 Mich App 453, 456-457; 608 NW2d 97 (2000). "[A]cquiescence is established when a preponderance of the evidence establishes that the parties treated a particular boundary line as the property line." *Mason v Menominee*, 282 Mich App 525, 529-530; 766 NW2d 888 (2009) (citation, quotation marks, and emphasis omitted), superseded on other grounds by statutory amendment of MCL 600.5821 pursuant to 2016 PA 52. The three theories of acquiescence include: "(1) acquiescence for the statutory period; (2) acquiescence following a dispute and agreement; and (3) acquiescence arising from intention to deed to a marked boundary." *Sackett v Atyeo*, 217 Mich App 676, 681; 552 NW2d 536 (1996). At issue here is the first theory—acquiescence for the statutory period. The statutory period for ac-

[6] "[W]here the lower court record provides the necessary facts, appellate consideration of an issue raised before, but not decided by, the trial court is not precluded." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443-444; 695 NW2d 84 (2005). In this case, the necessary facts were provided below.

quiring property by acquiescence is 15 years. MCL 600.5801(4); *Mason*, 282 Mich App at 529. A claim of acquiescence for the statutory period requires a showing that the property owners treated a boundary line or marker as the property line for 15 years. *Walters*, 239 Mich App at 457-458; see also *Killips*, 244 Mich App at 260 ("The doctrine of acquiescence provides that where adjoining property owners acquiesce to a boundary line for at least fifteen years, that line becomes the actual boundary line."). Our Supreme Court has repeatedly held that a boundary line long acquiesced in and treated as the true line should not be disturbed on the basis of new surveys. *Johnson v Squires*, 344 Mich 687, 692; 75 NW2d 45 (1956).

"The acquiescence of predecessors in title can be tacked onto that of the parties in order to establish the mandated period of fifteen years." *Killips*, 244 Mich App at 260. "Proof of privity is not necessary, however, to employ tacking of holdings to obtain the 15-year minimum under the doctrine of acquiescence[;] [t]herefore, when successive neighboring landowners use the property as marked by monuments . . . as if the monuments were accurate, for a period of 15 years, they have fixed the property line by acquiescence." *Siegel v Renkiewicz Estate*, 373 Mich 421, 426; 129 NW2d 876 (1964). Unlike adverse possession, a claim of acquiescence does not require that possession of the land was hostile or without permission. *Walters*, 239 Mich App at 456. In *Wood v Denton*, 53 Mich App 435, 439-440; 219 NW2d 798 (1974), this Court explained that "[o]nly when there has been some agreement, whether tacit or overt, as to the location of the boundary does the question of acquiescence become important." "The underlying reason for the rule of acquiescence is the promotion of peaceful resolution of boundary disputes." *Killips*, 244 Mich App at 260.

2. APPLICATION AND DISCUSSION

Defendants argue that the trial court erred by ruling that Houston had established the element of continuousness for the requisite 15-year period.[7] Defendants contend that they have owned Lot 1 since 2009, that they have known the true boundary to be the surveyed line the entire time of ownership, and that any use of the disputed area by Houston during this period was with permission. Thus, the time frame from 2009 forward could not be part of any continuous 15-year period. Similarly, according to defendants, the period of 2001 to 2009 cannot be considered because there were no affidavits or testimony from the owners of Lot 1 during those years, i.e., Kenneth Schaafsma, Michael Van Dyke, and the banking institutions. Furthermore, as to the years when Lot 1 was owned by the Proctors, Houston did not present any evidence in the form of affidavits or otherwise in regard to the beliefs, intentions, and knowledge of Houston herself or her parents. Defendants assert that Virginia Proctor's affidavit could not supply the missing information. Moreover, defendants argue that the land-contract periods interrupted any continuous 15-year time frame considering that those periods could not be tacked on to the years that the Proctors owned and possessed Lot 1. Defendants maintain that the Proctors had no right to physical possession or occupancy when the land-contract vendees were living in the home on Lot 1. And there were no affidavits or testimony by the land-contract vendees. Defendants contend that the "equitable ownership conveyed by land contract begins a new 15-year statutory period."

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[7] Defendants make this argument with respect to Houston's claims of adverse possession and acquiescence.

We hold that Houston established as a matter of law acquiescence for the statutory period in light of the uncontroverted evidence that George and Mable Houston and Eugene and Virginia Proctor treated the retaining wall as the boundary line between Lots 1 and 4 for a continuous period of 15 years. In 1968, the Proctors purchased Lot 1, and for the next 15 years and far beyond, the Proctors continued to hold legal title to the property. During those first 15 years, Lot 4 was owned by George and Mable Houston jointly and then by Mable individually. As stated earlier, Virginia Proctor averred in her affidavit that she believed that the retaining wall marked the boundary between Lots 1 and 4, that she treated the wall as the boundary line for 33 years, that she knew that George, Mable, and Denise Houston maintained a garden on the south side of the retaining wall, and that she did not object to said possession and use. Even without an affidavit or testimony from any of the Houstons, Virginia Proctor's affidavit, which was uncontroverted, sufficiently conveyed that George and Mable Houston actually treated the retaining wall as the boundary line by maintaining the garden up to the south side of the wall. We conclude from the averments in the affidavit that the Houstons tacitly agreed and acquiesced to treating the wall as the boundary line. And there was tacit agreement and acquiescence by the Proctors that the retaining wall represented the boundary line. See *Daley*, 361 Mich at 362 ("[I]f the lack of an agreement threatens a settled boundary we do not hesitate to 'imply' agreement, sometimes from the conduct of the parties, or from surrounding circumstances, just as we do in other cases.") (citation omitted).

Contrary to defendants' argument, we conclude that the period of acquiescence, as well as the period of adverse possession, was continuous from 1968 to 1983

despite the fact that Vernon Proctor possessed Lot 1 from 1977 to 1981 under a land contract. As pointed out by defendants, Houston cannot rely on tacking because there is no evidence regarding Vernon Proctor's thoughts, actions, acquiescence, or lack thereof. But we agree with Houston that Vernon Proctor's period of possession did not interrupt the 15-year period because Mr. and Mrs. Proctor continued to hold legal title to Lot 1 from 1977 to 1981. A land contract is an executory contract in which legal title is retained by the vendor until the vendee performs all the obligations of the contract, even though equitable title does pass to the vendee upon proper execution of the land contract. *Zurcher v Herveat*, 238 Mich App 267, 291; 605 NW2d 329 (1999). Defendants' argument is built around assertions regarding the authority of and interest held by land-contract vendees and the ability of vendees to claim adverse possession and acquiescence. But none of defendants' contentions undermines the proposition that a legal title holder who has acquiesced in a boundary line or has not taken legal action to eject an adverse possessor can continue to acquiesce or sit on ejectment rights even after a land-contract vendee takes possession of the property. And Virginia Proctor's affidavit claimed acquiescence for the "thirty-three (33) year period of ownership," without any ejectment action. Therefore, for purposes of Houston's (C)(10) motion, the burden then fell on defendants to submit documentary evidence to counter the affidavit, i.e., evidence that Vernon Proctor did not acquiesce in treating the retaining wall as the boundary line or that he engaged in acts negating the elements of adverse possession. See MCR 2.116(G)(4). Defendants produced no such evidence. Accordingly, Houston established her claim of acquiescence.

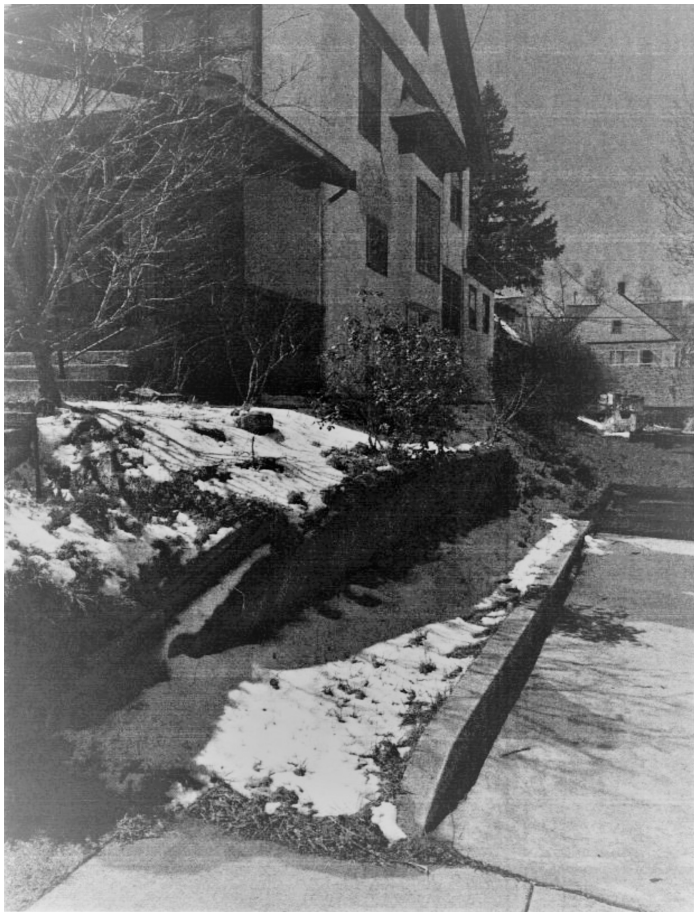
III. CONCLUSION

We hold as a matter of law that Houston obtained title to the disputed strip of land under the doctrines of both adverse possession and acquiescence.

We affirm. We decline to tax costs under MCR 7.219.

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

Appendix A



WILLIAMS v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN

Docket No. 349903. Submitted November 10, 2020, at Detroit. Decided January 28, 2021, at 9:25 a.m.

Marilyn Williams brought an action in the Wayne Circuit Court against her no-fault insurer, Farm Bureau Mutual Insurance Company of Michigan, after it denied her claim for personal protection insurance (PIP) benefits for injuries she had sustained in an automobile collision. Defendant moved for summary disposition on the ground that plaintiff's policy, including her PIP coverage, was void because she had violated an antifraud provision in the policy by making false statements to defendant after the collision regarding her employment, the extent of her injuries, and her need for assistance. The antifraud provision stated that the policy would be void if a claimant made a material misrepresentation either in procuring the policy or in the course of postprocurement claims. Defendant moved for summary disposition solely on the allegations of postprocurement fraud. The trial court, Annette J. Berry, J., granted the motion under MCR 2.116(C)(10). Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court erred by granting defendant summary disposition. In *Meemic Ins Co v Fortson*, 506 Mich 287 (2020), the Michigan Supreme Court held that as to benefits mandated by the no-fault act, MCL 500.3101 *et seq*., a no-fault policy may not provide for defenses to coverage other than those in the no-fault act or that existed in common law and were not abrogated by the act. Nothing in the no-fault act authorizes insurers to void or rescind a no-fault policy on the basis of fraud or misrepresentation, and at common law, the defrauded party could only seek rescission, or avoidance of the transaction, if the fraud related to the inducement to or inception of the contract. Therefore, the *Meemic* Court concluded that antifraud provisions are invalid to the degree they purport to apply to misrepresentations or fraud that occurs after the policy has been issued but upheld such provisions as long as they are limited to fraud in the inducement. In this case, plaintiff made the allegedly fraudulent statements

after the policy was procured, and they did not influence or induce the policy's procurement. Accordingly, the trial court's ruling required reversal.

2. *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420 (2014), which applied an antifraud provision to postprocurement fraud in a PIP case, relied exclusively on a fire insurance case governed by a wholly different statute to support its holding, and that statute, unlike the no-fault act, not only permits insurers to incorporate antifraud provisions in their policies, it requires fire insurance policies to provide that the policy may be void on the basis of misrepresentation, fraud, or concealment. *Bahri* remains good law only to the extent that it is consistent with the no-fault act and common law as explained in *Meemic*; in other words, it applies only in cases of fraud in the inducement. Limiting no-fault antifraud provisions to fraud in the inducement will not leave no-fault insurers without recourse in the event of a fraudulent claim because insurers maintain the power to deny claims or parts of claims they believe to be fraudulent, and MCL 500.3148(2) permits insurers to recoup attorney fees in defending against fraudulent claims. The fact that the no-fault act provides a specific mechanism for relief in the context of a fraudulent claim further supports that materially different remedies created by the insurance policy are not valid.

Reversed and remanded for further proceedings.

K. F. KELLY, J., dissenting, would have affirmed the trial court's grant of summary disposition to defendant because plaintiff's request for no-fault benefits did not fall within the parameters delineated in *Meemic*, which did not address situations in which the fraud was committed by the individual who was both the policyholder and the claimant and the fraud pertained to the claim for proof of loss. She also would have affirmed on the ground that plaintiff's claim for PIP benefits was precluded by the fraud-exclusion provision in her insurance policy because plaintiff gave conflicting sworn testimony directly related to her wages and abilities during the time she sought no-fault benefits for lost wages, transportation services, and replacement services from defendant.

INSURANCE — CONTRACTS — CONTRACTUAL DEFENSES — NO-FAULT ACT — DEFENSES — FRAUD.

A provision in a no-fault insurance policy that renders the policy void if a claimant makes material misrepresentations may apply to fraud in the inducement but is invalid to the degree that it applies to misrepresentations or fraud that occurs after the

policy has been issued; *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420 (2014), remains good law only to the extent that it applies to fraud in the inducement (MCL 500.3101 *et seq*.).

Perkins Law Group, PLLC (by *Stephen J. Chacko* and *Todd Russell Perkins*) for plaintiff.

Kopka Pinkus Dolin PC (by *Mark L. Dolin* and *Erin R. Katz*) for defendant.

Before: GLEICHER, P.J., and K. F. KELLY and SHAPIRO, JJ.

SHAPIRO, J. Plaintiff Marilyn Williams appeals the trial court's order granting summary disposition in favor of defendant Farm Bureau Mutual Insurance Company of Michigan under MCR 2.116(C)(10), on the basis that plaintiff made a false or fraudulent statement related to her claim for no-fault benefits in violation of an antifraud provision in its policy. In light of the Supreme Court's recent decision in *Meemic Ins Co v Fortson*, 506 Mich 287; 954 NW2d 115 (2020), we reverse.

I. BACKGROUND

Plaintiff was injured in an automobile collision on September 1, 2016. She filed a claim for personal protection insurance (PIP) benefits with defendant, her no-fault insurer. Defendant denied the claim, and plaintiff filed suit on October 20, 2017.

Defendant moved for summary disposition on the ground that plaintiff's policy, including her PIP coverage, was void because she had violated an antifraud provision in the policy by making false statements to defendant after the auto accident regarding her employment, the extent of her injuries, and her need for

assistance. Because the issue presented is purely legal, we need not recapitulate the details of the alleged fraud. The provision defendant relied on stated that the policy would be void if a claimant made a material misrepresentation either in procuring the policy or in the course of postprocurement claims. The relevant provision in the policy reads:

> The entire policy will be void if, whether before or after a loss, you, any family member, or any insured under this policy has:
>
> 1. Intentionally concealed or misrepresented any material fact or circumstance;
>
> 2. engaged in fraudulent conduct; or
>
> 3. made false statements;
>
> relating to this insurance or to a loss to which this insurance applies.

Significantly, defendant does not claim that plaintiff committed fraud in the inducement, i.e., that plaintiff made any material misrepresentations when applying for and purchasing defendant's no-fault policy. Nor does defendant claim in its motion that the evidence concerning the accident, injury, and treatment, seen in the light most favorable to plaintiff, would be insufficient to qualify for PIP benefits. Defendant sought dismissal solely on the allegations of postprocurement fraud. The trial court granted the motion, and this appeal followed.

II. ANALYSIS

A

In *Meemic*, 506 Mich 287, the Michigan Supreme Court considered whether a no-fault insurer may rely

on a contractual antifraud provision to deny a claim or void or rescind a policy when the benefits in question are those mandated by statute, such as PIP benefits, as opposed to optional coverages such as uninsured motorist coverage. The Court concluded that as to benefits mandated by the no-fault act, MCL 500.3101 *et seq*., a no-fault policy may not provide for defenses to coverage other than those in the no-fault act or that existed in common law and were not abrogated by the act. The Court unambiguously concluded that antifraud provisions are invalid to the degree they purport to apply to misrepresentations or fraud that occurs after the policy has been issued (postprocurement fraud) but upheld such provisions as long as they are limited to fraud in the inducement (preprocurement fraud). In the opinion's concise opening paragraph, the Court explained the legal problem and resolved it:

> Meemic Insurance Company seeks to void its policy with defendants Louise and Richard Fortson and stop paying no-fault benefits to their son. Although the benefits are mandated by statute, Meemic seeks to avoid its statutory obligations by enforcing the antifraud provision in the policy. The issue before the Court is the extent to which a contractual defense like the one here is valid and enforceable when applied to coverage mandated by the no-fault act, MCL 500.3101 *et seq*. We hold that such contractual provisions are valid when based on a defense to mandatory coverage provided in the no-fault act itself or on a common-law defense that has not been abrogated by the act. *Because Meemic's fraud defense is grounded on neither the no-fault act nor the common law, it is invalid and unenforceable*. [*Id*. at 293 (emphasis added).]

In determining that the antifraud provision did not have a basis in the common law, the Court distinguished postprocurement fraud from fraud in the inducement:

> [T]he fraudulent activity at issue here did not relate to the inception of the contract. The fraudulent attendant-care bills . . . neither induced Meemic to enter into the policy nor deceived Meemic as to the contents of the policy. Meemic could not possibly have relied on any fraudulent misrepresentations when it agreed to insure the Fortsons in 2009 because, at the time, they had not yet made any of the alleged misrepresentations. . . . *In short, Meemic's contract-based fraud defense fails because it is not the type of common-law fraud that would allow for rescission*. [*Id*. at 309-310 (emphasis added).]

The Court forcefully reiterated its view that a no-fault policy may provide for nonstatutory policy-based exclusions and defenses only as to optional coverages, not mandatory ones such as PIP benefits: "[O]ne thing that is not open to debate is that the [no-fault] act governs the coverages it mandates, and the insurance policy controls coverages that are optional (i.e., not required by the act)[.]" *Id*. at 297-298. The Legislature did not include postprocurement misrepresentations among the grounds in MCL 500.3113 on which a court may conclude that the claimant is not entitled to PIP benefits, though it could readily have been included.[1]

It is clear that the text of the no-fault act does not authorize insurers to void or rescind a no-fault policy on the basis of fraud or misrepresentation. Because

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[1] The grounds set forth in MCL 500.3113 are the knowing use of an unlawfully taken vehicle, MCL 500.3113(a); a failure to carry the security required by MCL 500.3101 or MCL 500.3103 on the vehicle involved in the accident, MCL 500.3113(b); and neither residing in Michigan nor owning a motor vehicle that is registered and insured in Michigan, see MCL 500.3113(c). And notably, in MCL 500.3173a(4) the Legislature has demonstrated that it knows how to adopt legislation making postprocurement fraud grounds for denial of a claim. That statute provides that, as to claims filed with the Michigan automobile insurance placement facility, provision of material false information renders the claimant ineligible for benefits and classifies such an act as a fraudulent insurance act under MCL 500.4503.

fraud is not a statutory defense, the sole remaining question is whether that defense existed at common law and survived the adoption of a no-fault system. *Meemic* concluded that under the common law, fraud constituted grounds to void a contract only as to preprocurement fraud:

> [W]e must consider whether Meemic's fraud defense is available at common law. As we explained in [*Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012)], "Michigan's contract law recognizes several interrelated but distinct common-law doctrines—loosely aggregated under the rubric of 'fraud'—that may entitle a party to a legal or equitable remedy if a contract is obtained as a result of fraud or misrepresentation." The key phrase is "if a contract *is obtained* as a result of fraud or misrepresentation." *Id*. [*Meemic*, 506 Mich at 304-305.]

The Court continued, "At common law, the defrauded party could only seek rescission, or avoidance of the transaction, if the fraud related to the inducement to or inception of the contract." *Id*. at 305. Thus, where the fraud alleged was not in "the inducement to or inception of the contract," there is no common-law basis to rescind or avoid performance.

Meemic also explained that applying such antifraud provisions to mandatory coverage undermines the entire no-fault system. It stated that "[t]o allow such provisions would reduce the scope of the mandatory coverage required by the no-fault act, as supplemented by the common law. *It would in short, vitiate the act*." *Id*. at 302 (emphasis added). And were there any doubt as to the import of its decision, the Court recapped its holding at the end of the opinion: "[W]e hold that [the] *contractual antifraud provision is invalid and unenforceable* because it is not based on a statutory or unabrogated common-law defense." *Id*. at 316 (emphasis added).

In the instant case, the allegedly fraudulent statements were made postprocurement and did not influence or induce the policy's procurement. The rule of law clearly set forth in *Meemic* requires that we reverse the trial court.

B

Whether postprocurement fraud could void a PIP policy has only became significant since this Court's decision in *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 424-425; 864 NW2d 609 (2014), which applied an antifraud provision to postprocurement fraud in a PIP case. Prior to *Bahri*, no case of record had ever held that false statements by a Michigan no-fault insured—other than those relevant to fraud in the inducement—were grounds to void or rescind a policy. Since *Bahri*, claims of fraud asserted by no-fault insurers against their insureds have become commonplace.

Bahri did not provide extensive analysis in support of its holding. Rather, it relied exclusively on *Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997), a fire insurance case governed by a wholly different statute, MCL 500.2833. That statute not only permits insurers to incorporate antifraud provisions in their policies, its plain text *requires* fire insurance policies to include a provision "[t]hat the policy may be void on the basis of misrepresentation, fraud, or concealment." MCL 500.2833(1)(c). Such a clause in a fire insurance policy is entirely consistent with the controlling statute. However, *Mina* provides no support for the notion that such a clause is consistent with the no-fault act, which does not contain such language. And *Bahri* neglected to examine or explain why no-fault insurance policies should be governed by a fire insurance statute

containing critical language missing from the no-fault act. Indeed, the inclusion of a fraud remedy in MCL 500.2833 reflects the Legislature's awareness that such provisions are warranted in certain circumstances, and strongly suggests that the Legislature deliberately adopted a different approach when it enacted the no-fault act.[2] In sum, by concluding that a single misrepresentation in the course of a PIP claim was ground to deny all benefits and void the contract on summary disposition, *Bahri* announced a rule of law unrooted in precedent or statutory authority.

Further, *Bahri* never considered whether the antifraud provision it upheld was consistent with the no-fault act insofar as it was applied to fraud other than fraud in the inducement—it merely assumed that to be the case despite the absence of supporting caselaw. And the no-fault act does provide other grounds for denial of benefits. For example, *Meemic* points out that "MCL 500.3113 lists several of these circumstances, including, for example, when a person willingly operates an unlawfully taken vehicle and when a person was operating a vehicle as to which he or she was an excluded operator. *The no-fault act, however, does not provide a fraud defense to PIP coverage . . . .*"[3] *Id*. at 303-304 (emphasis added).

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[2] The only other case cited in *Bahri* was *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39; 795 NW2d 229 (2010). But that case did not address whether or not antifraud provisions were permissible in no-fault policies. The question in *TBCI* was whether a prior jury's finding of fraud by the claimant constituted res judicata as to the claimant's medical provider when it filed its own suit for reimbursement. *Id*. at 40-44. The jury's finding in the prior case that the claimant was not entitled to coverage because he had committed fraud was not appealed, and so the validity of the antifraud provision was never considered by this Court.

[3] As noted earlier, this does not apply if the claim is made to the Michigan automobile insurance placement facility. MCL 500.3173a(2).

Contrary to defendant's suggestion, limiting no-fault antifraud provisions to fraud in the inducement—as required by *Meemic*—will not leave no-fault insurers without recourse in the event of a fraudulent claim. An insurer maintains the power to deny claims or parts of claims it believes fraudulent. The plaintiff then bears the burden of filing suit and ultimately proving that they were injured in an auto accident and that the injury resulted in reasonable and necessary medical care and other covered expenses.

Furthermore, the Legislature provided a specific remedy for postprocurement fraud in the no-fault act itself. MCL 500.3148(2) permits an insurer to recoup attorney fees "in defending against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation." The fact that the no-fault act provides a specific mechanism for relief in the context of a fraudulent claim further supports that materially different remedies created by the insurance policy are not valid. "It is a general rule of law in Michigan that when a statute creates a new right or imposes a new duty having no counterpart in the common law the remedies provided in the statute for violation are exclusive and not cumulative." *Ohlsen v DST Indus, Inc*, 111 Mich App 580, 583; 314 NW2d 699 (1981), citing *Pompey v Gen Motors Corp*, 385 Mich 537; 189 NW2d 243 (1971).

C

Meemic did not consider the legal underpinnings of *Bahri* or the many cases that have followed it. The Supreme Court mentioned *Bahri* only in a footnote and declined to determine whether and to what extent that case survived its holding. The footnote does contain a

suggestion that the Court might view *Bahri*'s reach differently when the claimant is the named insured:

> The Court of Appeals has upheld a fraud-exclusion provision when the fraud related to proof of loss on a claim rather than fraud in the procurement or execution of the policy. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 425; 864 NW2d 609 (2014); but see *Shelton* [*v Auto-Owners Ins Co*, 318 Mich App [648, 652-655; 899 NW2d 744 (2017)] (limiting *Bahri* to when the claimant is an insured under the defendant's policy). A leading treatise has explained that "to avoid a policy on the ground of fraud or false swearing in the proof of loss, the statement in question must be material." 13A Couch, Insurance, 3d (2019 rev ed), § 197:18, pp 48-49. In this case, however, because there is no allegation of fraud in relation to [the claimant's] claim for benefits, the Court need not address the issue of whether and to what extent fraud related to proof of loss can justify voiding the policy. Moreover, because this case involves fraud by someone other than the claim beneficiary, the Court need not address whether a clause voiding a policy for postprocurement fraud would be valid as applied to fraud by an individual who is *both* a policyholder and the claim beneficiary. [*Meemic*, 506 Mich at 307 n 15.]

Despite this hint that *Bahri* might survive in some form if the claimant was also the policyholder, the Court resoundingly rejected such an approach later in the opinion by explaining that the claimant's relation to the policy did not alter its conclusion that the antifraud provision was inconsistent with the no-fault act:

> [T]he correct framework for deciding this case has nothing to do with the now-abrogated innocent-third-party rule. . . . The dispositive question in this case turns upon the nature of the common-law fraud defense—specifically, that it must relate to the contract's inception—which is irrelevant to [the claimant's] status as a third party. [*Id*. at 309 n 17.]

Thus, *Meemic* did not turn on the fact that the claimant was not a party to the contract, but on the holding that antifraud provisions may not be applied to PIP claims, other than fraud in the inducement.

By addressing *Bahri* only tangentially and declining to adopt its holding, the *Meemic* Court left it to our Court to sort out what now remains of *Bahri*.[4] We conclude that *Bahri* remains good law only to the extent that it is consistent with the no-fault act and common law as explained in *Meemic*. In other words, it applies only in cases of fraud in the inducement.[5]

Our dissenting colleague focuses much of her argument on the evidence of statements made by plaintiff that appear to be false. We agree that given the evidence before us, plaintiff likely testified falsely at one or both depositions. Sorting out the truth is a jury function, however. And here, the task is complicated by the fact that determining whether plaintiff was truthful may

[4] Our dissenting colleague concludes that *Meemic* "expressly exempted this scenario from its holding" because plaintiff is both the policyholder and the claim beneficiary. We agree. But the task before us is to answer the legal question expressly left open by the Court, i.e., whether, given *Meemic*'s holding and reasoning, "a clause voiding a policy for postprocurement fraud would be valid as applied to fraud by an individual who is *both* a policyholder and the claim beneficiary." *Meemic*, 506 Mich at 308 n 15. The dissent fails to offer any explanation how *Bahri* remains viable as applied to postprocurement fraud in light of *Meemic*.

[5] *Meemic* also allowed that a fraud exclusion may be "valid as applied to a party's failure to perform a substantial part of the contract or one of its essential terms." *Meemic*, 506 Mich at 308. Here, however, as *Meemic* demonstrates, there is no basis to conclude that a PIP policy's fraud provision is an essential term, given that the contract would be binding and fully consistent with the no-fault act without the provision. The terms that are essential to a PIP policy are those defined in the act. "As a general rule, Michigan's no-fault insurance system is a comprehensive scheme of compensation designed to provide sure and speedy recovery of certain economic losses resulting from motor vehicle accidents." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 399; 919 NW2d 20 (2018) (quotation marks and citations omitted).

hinge on an assessment of the credibility of others, including her friend for whom she testified in a separate case. Moreover, this case does not involve a single claim for benefits, but many such claims. Sorting out whether plaintiff testified falsely about her eligibility for replacement care benefits, for example, does not tell us whether she was entitled to recover medical benefits for reasonable and necessary medical care. Assessing truth and weighing evidence are not within a judge's purview under MCR 2.116(C)(10). *Sabbagh v Hamilton Psychological Servs, PLC*, 329 Mich App 324, 346; 941 NW2d 685 (2019).

We agree with the dissent that plaintiff's statements are fodder for impeachment and that some are likely admissible as substantive evidence. The question in this case is not *whether* plaintiff committed postprocurement fraud—that is an inherently fact- and credibility-driven analysis. The question is whether the fraud provision in defendant's policy is enforceable against postprocurement fraud so as to enable a court to sustain a preemptive denial of all coverage, even where some or all of the claim is meritorious. A fact-finder is free, and has always been free, to conclude that some or all of a plaintiff's claimed benefits were properly denied by a defendant insurer. And the trial court is free to conclude that the claim "was in some respect fraudulent or so excessive as to have no reasonable foundation," in which case it may award the insurer its attorney fees. MCL 500.3148(2). But the no-fault act makes clear that those determinations must take place at the end of a trial, not before one has begun.

III. CONCLUSION

Meemic held that antifraud provisions in no-fault policies apply to fraud in the inducement but not to allegations of postprocurement fraud. Accordingly, the

policy provision on which defendant and the trial court relied is "invalid and unenforceable" to the degree a no-fault insurer seeks to apply it to allegations of postprocurement fraud in a claim under mandatory coverage, as in this case. *Meemic*, 506 Mich at 316. The order of summary disposition is reversed and the case is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

GLEICHER, P.J., concurred with SHAPIRO, J.

K. F. KELLY, J. (*dissenting*). I respectfully dissent. Because I conclude that plaintiff's request for no-fault benefits did not fall within the parameters delineated in *Meemic Ins Co v Fortson*, 506 Mich 287; 954 NW2d 115 (2020), I would affirm the trial court's order granting summary disposition in favor of defendant. Moreover, I would affirm based on the factual and procedural background of this case.

I. BASIC FACTS AND PROCEDURAL HISTORY

I think it is important to note the factual and procedural background of the instant case; as noted it arises from a motor vehicle accident. In early September 2016, plaintiff was in her vehicle, stopped at a red light, when she was rear-ended by another driver. Her vehicle was pushed into the vehicle stopped in front of her. Plaintiff drove her vehicle to the nearby police department to file a police report.[1]

After the accident, plaintiff asserted she was in pain and in shock. For the following three or four days,

[1] Plaintiff testified that she was able to drive her vehicle after the accident, but it sustained both front- and rear-end damage. Although plaintiff was stopped at the time of the crash, there was no estimation of the speed of the truck that struck her. However, plaintiff stated that

plaintiff stayed in bed, and her daughter helped her to the bathroom and with meals. Plaintiff's daughter took her to an urgent care center, but they were referred to a hospital. Plaintiff claimed that she suffered multiple injuries in the accident, including headaches, ear ringing, and pain in the neck, shoulders, arms, legs, and lower back. She was given controlled substances for pain management and prescribed physical therapy. Plaintiff had a policy of insurance with defendant and made a claim for reimbursement of medical expenses, lost wages, transportation services, replacement services, and attendant care arising from her injuries.

Plaintiff filed suit against defendant, alleging that certain benefits were paid, but had since been terminated, and an unreasonable refusal to pay no-fault benefits in accordance with her policy. Defendant claimed that plaintiff was barred from recovery of benefits through fraudulent statements or misrepresentations, which voided the insurance policy.

Plaintiff testified that she stopped working at AT&T in 2012, after her doctor placed her on disability because of complications from diabetes and high blood pressure. In 2012, plaintiff applied for Social Security disability benefits, and she was approved for approximately $1,880 in monthly benefits in 2013. At the time of the accident, plaintiff worked for the state of Michigan acting as a caregiver for an individual. This work included bathing, dressing, cleaning, meal preparation, and shopping for the individual. Plaintiff worked eight hours a day and initially earned $300 a month, but her final rate of pay was $600 a month. However, plaintiff could not continue this employment because her doctors disabled her from working after the accident.

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the vehicle's airbag did not deploy in the accident. Nonetheless, plaintiff testified that her vehicle was "totaled."

At the time of her deposition in September 2018, plaintiff testified that she still attended physical therapy three times a week, visited a pain doctor once a month, and had injections every two to three months. Although plaintiff could now perform basic hygiene and meal preparation, she was restricted from performing household duties.

In 2019, plaintiff was deposed in an unrelated motor vehicle accident case[2] for services she provided to Steven W. Harmony, Sr. At the start of her deposition, plaintiff acknowledged that she had been deposed previously. When asked if she was ever a party to a lawsuit, plaintiff answered, "No." When questioned about the reason she was deposed, she was initially evasive. Plaintiff eventually answered that she was deposed in a "private case," arising from her being injured, and that she was the plaintiff in an ongoing action against an insurance company. Plaintiff testified that she received attendant care and replacement services, but those services stopped in October 2018.

Plaintiff began working for Harmony in November 2018, and performed case management services for $200 an hour. During the deposition, plaintiff was questioned about her credentials and past work experience in providing case management services to justify her hourly wage. Plaintiff testified that she performed and was compensated for case management and attendant services for Thessalonia Reed[3] for a "couple of years" before his death in 2017, which included making and taking him to appointments and preparing meals. She also testified that she was em-

[2] The case was filed in Macomb Circuit Court, assigned lower court number 2018-002406-NF, and titled *Steven W Harmony, Sr v State Farm Mut Auto Ins Co*.

[3] In her deposition, plaintiff did not disclose that Reed was her father.

ployed part-time from 2016 to 2019 for a party planning company. Additionally, plaintiff testified that she determined the reasonable rate of $200 an hour in light of her "research," but could not recall where she located this information. Although plaintiff was acting as Harmony's case manager, she did not review his medical records before the accident or learn of pre-existing medical conditions. Plaintiff did not receive any special training to act as a case manager and did not know if it was recommended that Harmony acquire a case manager. She also did not know if Harmony was receiving attendant care services when she started as case manager. Plaintiff insisted that she was privately paid $200 an hour for case management services by Reed and that she had a record of the payment.[4]

Harmony confirmed that plaintiff was his case manager since November 2018. They determined that she would be paid $200 an hour in light of her experience, calls to case management companies, and a conversation with a case manager at a Binson's store. Plaintiff scheduled Harmony's appointments and discussed his living situation because he was falling and had difficulty maneuvering stairs. She came over every day for four hours during which they spoke, and she talked on the phone. Plaintiff drove him "wherever he needed to go," including to doctor appointments and the grocery store. He also accompanied her when she drove other people's children to and from school for "extra money." To his knowledge, plaintiff did not have any other jobs in addition to case management and child transportation, but she was seeking election to her local city

[4] When asked if she paid taxes on those case management services, plaintiff asked if counsel was trying to get her in trouble. Additionally, plaintiff gave a description of the difference between attendant care and replacement services. After she answered, plaintiff asked counsel if she was right or wrong.

council. Harmony testified that plaintiff had no physical disabilities and was "in good shape."

In light of the deposition testimony, defendant asserted that the fraud provision of the policy was applicable to preclude plaintiff's recovery of benefits. Defendant also submitted that plaintiff made material misrepresentations about the extent of her injuries and ability to drive and, as a result, plaintiff's policy was void.

Plaintiff argued the fraud provision did not apply because her statements in the Harmony case were separate and unrelated to her claim for benefits. Plaintiff asserted that even if her statements in the Harmony case pertained to her no-fault claim, her policy was not void because there was a question of fact as to whether they could be deemed fraudulent statements, and the trial court could not assess her credibility when deciding the summary disposition motion. Importantly here, plaintiff filed an affidavit, stating she "was removed from disability of work and employment" by her treating physicians in November 2018. Plaintiff revealed that her prior case management experience was for her father, Thessalonia Reed, and that he never paid her $200 an hour and did not have the financial resources to pay her. She explained that she made the statement in her deposition in the Harmony case "to support the amount" that she billed. Further, she worked for her daughter's party planning company on a voluntary basis and never received any compensation.

The trial court noted an affidavit could not rebut the testimony, and plaintiff's failure to be forthright created the problem. The trial court concluded that there was no genuine issue of material fact and granted summary disposition to defendant under MCR 2.116(C)(10). I agree with the trial court.

II. ANALYSIS

A. *MEEMIC*

Although the majority opinion concludes that this case presents a legal question solely controlled by the *Meemic* decision, I disagree. In *Meemic*, Justin Fortson (Justin) was seriously injured when he fell from the hood of a moving vehicle in September 2009. As a result of brain damage, Justin required constant supervision, and his doctors prescribed long-term care. Instead of sending Justin to a brain-injury rehabilitation center, his parents, the codefendants Richard and Louise Fortson, decided to provide 24-hour attendant care themselves and were paid $11 an hour. At the time of the accident, the parents were the named insureds in the policy, and Justin was covered as an "insured person" under the policy's resident relative provision and MCL 500.3114(1). *Meemic*, 506 Mich at 293-294. Between October 2009 and October 2014, the parents submitted bills for attendant care and Meemic paid them. However, in May 2013, Meemic conducted an investigation and learned that between September 2012 and July 2014, Justin was jailed for 233 days and in a drug program for 78 days. Nonetheless, the parents billed Meemic for attendant care for that time period. Consequently, Meemic filed suit against the parents and Justin, seeking to void the policy pursuant to the antifraud provision and relief from continuing to pay Justin's claim. The antifraud provision provided that it was void "if any insured person" has intentionally concealed or misrepresented any material fact or circumstances relating to the insured, the application, or any claim made under it. *Id*. at 294-295.

Meemic filed suit alleging breach of contract, fraud, common-law and statutory conversion, and unjust en-

richment. The Fortsons filed a counterclaim for past and future attendant care benefits. Meemic's initial request for summary disposition was denied premised on the innocent-third-party rule, but after the doctrine was overruled by our Supreme Court, the trial court granted summary disposition. This Court reversed, concluding that the fraud did not occur in the procurement of the policy, and the fraud did not affect the validity of the contract. Additionally, it held that the policy's antifraud provision was invalid because it would allow Meemic to circumvent the payment of statutorily mandated benefits. *Id*. at 295-296.

Our Supreme Court noted that, in the context of mandatory no-fault coverage, a common-law fraudulent procurement defense may be raised. *Id*. at 300. However, the Court went on to clarify that "a provision in an insurance policy purporting to set forth defenses to mandatory coverage is only valid and enforceable to the extent it contains statutory defenses or common-law defenses that have not been abrogated." *Id*. at 302-303. Thus, the Court concluded that the appropriate question was whether a contract-based fraud defense was available by statute or if it was a common-law defense that had not been abrogated. That is, "[i]f the contractual defense is properly derived from either source, it is valid; if not, then it goes beyond what Meemic can assert to avoid mandatory coverage and is invalid and unenforceable." *Id*. at 303.

Our Supreme Court noted that fraud was not provided for in the no-fault act. With regard to the common law, the Court stated that a contract obtained as a result of fraud only allowed the defrauded party to seek rescission or avoidance of the contract related to the inducement. *Id*. at 305. However, with regard to *postprocurement* fraud, the Court noted that

a contractual provision that rescinds a contract because of postprocurement fraud was not invalid in all circumstances. Rather, postprocurement fraud allowed for rescission of a contract when a party failed to perform a substantial part of the contract or one of the essential terms. *Id*. at 307-308. However, mere breach generally did not allow a party to avoid a contract at common law because the facts that warrant rescission must have existed at the time the contract was made. *Id*. at 308.

The *Meemic* Court noted that the sweeping antifraud policy at issue would terminate Justin's benefits "on the basis of the fraudulent activity of anyone who happened to be in or out of the car and entitled to claim under the policy, and the activity could occur years after the policy was entered and relate to any claim or simply to the 'insurance.' " *Id*. at 309. Because the fraudulent activity by the parents did not induce or deceive Meemic into entering into the policy, Meemic did not rely on any misrepresentations at the time the insurance policy was executed in 2009. "In short, Meemic's contract-based fraud defense fails because it is not the type of common-law fraud that would allow for rescission." *Id*. at 310.

However, the facts in *Meemic* are distinct from this case. In *Meemic*, Justin's entitlement to statutory benefits would have been controlled by actions of others; his parents could have caused his benefits to cease. However, in this case, plaintiff, not the insurance company, initiated the suit to recover no-fault benefits. In response, the insurance company sought to avoid paying benefits on the basis of fraud. This plaintiff's entitlement to benefits is controlled by her own actions and pertains to her own submissions regarding services received. Indeed, the *Meemic* Court

acknowledged this factual scenario and declined to include it in the *Meemic* holding.

Specifically, in *Meemic*, *id*. at 304 n 10, the Court noted that fraud by the insured did not preclude relief to the insurance company, stating:

> That is not to say that the no-fault act leaves insurers without recourse. An insurer can reject fraudulent claims without rescinding the entire policy. See generally *Shelton v Auto-Owners Ins Co*, 318 Mich App 648, 655; 899 NW2d 744 (2017). In addition, an insurer may receive attorney fees "in defending against a claim that was in some respect fraudulent or so excessive as to have no reasonable foundation." MCL 500.3148(2). And, in certain narrow circumstances, an insurer can seek to cancel the policy under MCL 500.3220.

More importantly, the *Meemic* Court noted that it was not addressing the circumstance where the fraud was committed by the individual who was both the policyholder and the claimant and the fraud pertained to the claim for proof of loss by stating:

> The Court of Appeals has upheld a fraud-exclusion provision when the fraud related to proof of loss on a claim rather than fraud in the procurement or execution of the policy. See *Bahri v IDS Prop Cas Ins Co*, 308 Mich App 420, 425; 864 NW2d 609 (2014); but see *Shelton*, 318 Mich App at 652-655 (limiting *Bahri* to when the claimant is an insured under the defendant's policy). A leading treatise has explained that "to avoid a policy on the ground of fraud or false swearing in the proof of loss, the statement in question must be material." 13A Couch, Insurance, 3d (2019 rev ed), § 197:18, pp 48-49. In this case, however, because there is no allegation of fraud in relation to Justin's claim for benefits, the Court need not address the issue of whether and to what extent fraud related to proof of loss can justify voiding the policy. Moreover, because this case involves fraud by someone other than the claim beneficiary, the Court need not address whether a clause

> voiding a policy for postprocurement fraud would be valid as applied to fraud by an individual who is *both* a policyholder and the claim beneficiary. [*Id*. at 307 n 15.][5]

In *Meemic*, Justin would have been denied statutory benefits because of the purported deception by his parents. Thus, in light of the sweeping antifraud provision, his entitlement to statutory benefits would have been voided by actions or individuals beyond his control when there was no allegation of collusion. However, in the present case, plaintiff was both the policyholder and the claimant. She submitted a request for replacement services, contending that she could not perform basic tasks and required assistance, but then claimed to provide replacement services for her father and had part-time employment with her daughter in an unrelated lawsuit. Further, she chauffeured children to school for extra money. Plaintiff did not recant providing services to her father or working for her daughter, and did not deny driving children to school for money. She only denied receiving *payment* from her father and daughter. Thus, plaintiff's claim does not pertain to procurement fraud in obtaining the policy or fraud committed by others. Rather, it addresses postprocurement or proof of loss fraud pertaining to her policy and involves her own fraudulent claim for benefits including replacement services when she admittedly was performing replacement services for others.

The purpose of the no-fault act is "to provide accident victims with assured, adequate, and prompt reparations

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[5] The majority opinion recognizes the *Meemic* Court's reservations regarding the decision's application, but essentially concludes that the broadly expressed holding effectively negates this language. In my view, if the *Meemic* Court intended such a broad view, it simply would have removed those footnotes and not expressed those reservations.

at the lowest cost to both the individuals and the no-fault system." *Williams v AAA Mich*, 250 Mich App 249, 257; 646 NW2d 476 (2002). In the no-fault act, insurance companies are required to provide first-party insurance benefits known as personal protection insurance (PIP) benefits for certain expenses and losses. MCL 500.3107; MCL 500.3108. The four general categories of PIP benefits are survivor's loss, allowable expenses, work loss, and replacement services. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). However, to ensure that there is no abuse of the no-fault act and undue costs added to its maintenance that price some insureds out of the system, an insured must submit an accurate sworn statement of loss. A false swearing of loss is fraudulent conduct that must be addressed. This case presents the unique scenario where plaintiff, through counsel, admittedly lied about the need for attendant care and replacements services when examined in light of her provision of those same services to another individual. In my view, *Meemic* expressly exempted this scenario from its holding.

B. FRAUD

Contrary to the majority opinion, I would apply the facts and circumstances to the policy language to conclude that the trial court properly granted summary disposition in light of false or fraudulent statements pertaining to plaintiff's claim for no-fault benefits.

A fraud-exclusion provision in an insurance policy may be enforced when the fraud relates to proof of loss on a claim. See *Bahri*, 308 Mich App at 425.[6] When

[6] I conclude that *Meemic* did not address this factual circumstance and does not present the opportunity for this Court to revisit and

clear and direct evidence demonstrates that a plaintiff did not require replacement services, her claim for PIP benefits is precluded. *Id*. at 426.

In the present case, plaintiff contends her testimony given in the Harmony case was unrelated to her own claim for no-fault benefits pursuant to her insurance policy issued by defendant, and therefore, it did not trigger the fraud exclusion in her policy. The fraud provision in plaintiff's policy states:

> C. Fraud or Concealment
>
> The entire policy will be void if, whether before *or after a loss*, you, any family member, or any insured under this policy has:
>
> 1. Intentionally concealed or misrepresented any material fact or circumstance;
>
> 2. engaged in fraudulent conduct; or
>
> 3. made false statements;
>
> relating to this insurance or to a loss to which this insurance applies. [Emphasis added.]

Irrespective of the fact that the issues differed between plaintiff's cause of action for no-fault benefits and her testimony in the Harmony case, plaintiff was deposed in both cases and gave conflicting sworn testimony directly related to her wages and abilities during the time she sought no-fault benefits for lost

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essentially overrule the *Bahri* decision. This Court held long ago that "[f]alse swearing by an insured will void an insurance policy." *Ramon v Farm Bureau Ins Co*, 184 Mich App 54, 59; 457 NW2d 90 (1990). Indeed, the fraud exclusion may be applied against the policyholder pursuant to their contractual agreement. *Shelton*, 318 Mich App at 652-655. Additionally, rescission of a contract is not necessary to maintain an action for fraud and deceit arising from the agreement because "such action is not based upon the contract but upon the tort committed by means of false and fraudulent representations." *Dinius v Bolibrzuch*, 270 Mich 618, 620; 259 NW 156 (1935) (citation omitted).

wages, transportation services, and replacement services from defendant. Plaintiff advised defendant that she was unable to work,[7] but in her deposition in the Harmony case, she testified that she provided case management services to Reed and worked part-time as a party planner. Further, plaintiff represented to defendant she was unable to drive and required replacement services for household duties, yet according to Harmony, she drove almost daily, drove children to school for compensation, and showed no signs of physical disability. Indeed, plaintiff's mobility was necessary to provide daily case manager services to Harmony. Harmony's deposition testimony corroborated plaintiff's testimony that she provided services to him despite her claims that she required services from others. Because plaintiff's testimony in the Harmony case demonstrated that she was employed and providing services to a family member when she claimed to be disabled and in need of her own household services, plaintiff made false statements relating to a loss to which the policy of insurance applied. Therefore, the fraud exclusion in plaintiff's policy was invoked and barred plaintiff's claim for no-fault benefits.

Likewise, in light of *Meemic*, the majority declines to address plaintiff's contention that there were genuine issues of material fact regarding whether her claim for no-fault benefits was fraudulent or included misrepresentations made for the purpose of defrauding defendant. Despite plaintiff's argument, I would conclude

[7] Plaintiff contends that she was unable to work until November 2018 when restrictions were lifted by her treating physicians. This information was set forth in plaintiff's affidavit. There is no evidence in the lower court record from a medical doctor that plaintiff was released from restrictions. Additionally, at the summary disposition hearing, defense counsel represented that the insurance company was not apprised of any release.

that the trial court properly granted summary disposition on this basis as well.

"[A] witness is bound by his or her deposition testimony, and that testimony cannot be contradicted by affidavit in an attempt to defeat a motion for summary disposition." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 396; 729 NW2d 277 (2006). Here, plaintiff testified in her deposition that she suffered from head, back, neck, leg, and shoulder pain as a result of the accident that required periodic use of a cane, which contradicted her prior testimony and other evidence produced in the Harmony case.

To counter this clear and direct evidence in the Harmony case, plaintiff submitted an affidavit in which she denied being paid by Reed, her father, $200 an hour for taking care of him. Additionally, plaintiff averred that although she did perform work for her daughter's party planning business, she was not paid and provided administrative services such as "phone calling, planning, and scheduling only." Regardless of the fact that she was not paid for her services, plaintiff *failed to deny that she performed those services* for her father and her daughter at the same time that she made claims to defendant for PIP benefits for replacement services and attendant care as a result of her injuries and disability. Further, the affidavit failed to deny that plaintiff drove children to school for extra money as set forth in Harmony's testimony. Although plaintiff's affidavit represents that her disability restriction was lifted in November 2018, when she began to care for and provide services to Harmony, documentary evidence was never submitted by plaintiff to support that assertion. Moreover, the affidavit failed to explain the services that she provided to Reed between 2015 and 2017 when plaintiff claimed to suffer mobil-

ity issues from the accident. Thus, reasonable minds could not differ in light of this clear evidence[8] that plaintiff made fraudulent representations for purposes of recovering PIP benefits and the trial court did not err in granting summary disposition.

I would affirm.

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[8] I reject plaintiff's contention that the trial court improperly assessed the credibility of plaintiff. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Rather, the trial court appropriately reviewed the record evidence and reasonable inferences therefrom to determine if a genuine issue of any material fact existed to warrant a trial. *Id*. Here, *plaintiff's counsel admitted before the trial court that plaintiff lied*. Plaintiff submitted a claim for attendant care and replacement services to defendant. However, in the Harmony case, plaintiff initially denied being a party to any other lawsuit, but eventually admitted that she performed attendant care and replacement services at the same time she represented that she received those services and sought payment from defendant. She only recanted payment for her services to her father, not the submission of a fraudulent proof of loss.

VERITAS AUTOMOTIVE AND MACHINERY LLC v FCA INTERNATIONAL OPERATIONS LLC

Docket No. 346985. Submitted June 9, 2020, at Detroit. Decided January 28, 2021, at 9:30 a.m.

Veritas Automotive and Machinery LLC filed an action in the Oakland Circuit Court against FCA International Operations LLC, formerly known as Chrysler Group International LLC, alleging, among other things, that defendant had violated the federal Automobile Dealer's Day in Court Act (ADDCA), 15 USC 1221 *et seq*., and the state Motor Vehicle Franchise Act (MVFA), MCL 445.1561 *et seq*., when it terminated the parties' distribution agreement. Plaintiff, a Delaware limited-liability company with a principal place of business in Southfield, entered into an agreement with defendant in September 2008 to distribute defendant's products in Iraq. The parties amended the agreement in 2012. Under the amendment, the agreement was to expire in August 2013 unless plaintiff satisfied certain requirements. The parties disputed whether plaintiff met the requirements, but defendant terminated the distributor agreement in August 2013. Plaintiff filed suit, and defendant moved for summary disposition, arguing that plaintiff was not entitled to the protections afforded under the ADDCA and the MVFA because it was a foreign dealer. The trial court, Wendy Potts, J., denied defendant's motion on the grounds that under the ADDCA, an automobile dealer included business enterprises "resident in the United States," and the court could not conclude solely on the basis of the allegations that plaintiff was not resident in the United States. Regarding plaintiff's MVFA claim, the trial court determined that because the complaint alleged that plaintiff had an established place of business in Michigan, plaintiff was a new motor vehicle dealer under the MVFA and was therefore entitled to bring suit under the statute. Defendant appealed.

The Court of Appeals *held*:

1. A cause of action under the ADDCA has four elements: (1) the plaintiff must be an automobile dealer, (2) the defendant must be an automobile manufacturer engaged in commerce, (3) there must be a manufacturer-dealer relationship embodied in

a written franchise agreement, and (4) the plaintiff must have been injured by the defendant's failure to act in good faith. The only element disputed by the parties regarding the sufficiency of the allegations was whether plaintiff was an automobile dealer for purposes of the ADDCA. The ADDCA defines an automobile dealer as any person, partnership, corporation, association, or other form of business enterprise resident in the United States under the terms of a franchise and engaged in the sale or distribution of motor vehicles. The relevant issue in this case was whether plaintiff was "resident in the United States" in light of the fact that the complaint alleged that the conduct at issue occurred in Iraq. "Resident in the United States" is not defined by the statute, but "resident" is commonly defined as to reside or dwell in a place. Because defendant's motion was filed under MCR 2.116(C)(8), the court's analysis was limited to determining whether plaintiff alleged that it was resident in the United States. Because plaintiff alleged that it was a Delaware limited-liability company with a principal place of business in Michigan and its representations had to be accepted as true, the complaint clearly alleged that plaintiff was "resident in the United States." Although defendant correctly argued that legislation enacted by Congress is presumed not to have extraterritorial effect, employing the presumption against extraterritoriality to bar plaintiff's claim via summary disposition would have deprived plaintiff of the opportunity to rebut the presumption. When the pleadings and inferences were viewed in the light most favorable to plaintiff, it was reasonable to infer that the business relationship arose in Michigan and that any breach which might have occurred also took place in Michigan, even if the breach was based on plaintiff's conduct in Iraq. In such scenarios, application of the ADDCA arguably would not be extraterritorial. Additionally, there was too little factual information to conclude that plaintiff's operations in Iraq barred it from the protections of the ADDCA. Therefore, the trial court did not err by denying defendant's motion for summary disposition as to plaintiff's ADDCA claim.

2. The parties' dispute regarding plaintiff's claim under the MVFA turned on whether plaintiff was a "new motor vehicle dealer" under the statute. MCL 445.1565(2) defines this term, in part, as a person, including a distributor, who has an established place of business in Michigan. The MVFA defines "established place of business," in part, as a permanent commercial building located in the state that is open to the public at reasonable times and where a new motor vehicle dealer may legally conduct business, including the display and repair of motor vehicles. While there was no apparent factual dispute that plaintiff had a

permanent commercial building in Michigan, the parties disputed whether, under MCL 445.1563(2), plaintiff could "legally conduct business, including the display and repair of motor vehicles," at its facility in Michigan. This phrase plainly indicates that plaintiff must have the lawful authority to conduct business at its commercial building, which must, at a minimum, permit "the display and repair of motor vehicles." Construing the statute as a whole, the purpose of the statute is to regulate the relationship of motor vehicle manufacturers and retailers in Michigan. Reading the statute to apply to a person or entity not engaged in the sale or repair of motor vehicles in Michigan would run counter to the Legislature's express purposes. Because plaintiff conceded that it did not and could not lawfully display and repair motor vehicles at its Michigan facility and therefore could not satisfy the requirements of MCL 445.1563(2), the trial court should have dismissed plaintiff's MVFA claim.

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

Colombo & Colombo, PC (by *Nicholas J. Ranke*) and *Foley & Lardner LLP* (by *Norman C. Ankers*) for Veritas Automotive and Machinery LLC.

Bodman PLC (by *Thomas J. Tallerico* and *Jane Derse Quasarano*) for FCA International Operations LLC.

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

PER CURIAM. Defendant FCA International Operations LLC, formerly known as Chrysler Group International LLC, appeals by leave granted[1] the trial court's opinion and order denying its motion for summary disposition under MCR 2.116(C)(8). Specifically, defendant argues that two claims brought by plaintiff, Veritas Automotive and Machinery LLC—one under

[1] See *Veritas Auto Machinery LLC v FCA Int'l Operations LLC*, unpublished order of the Court of Appeals, entered May 2, 2019 (Docket No. 346985).

the federal Automobile Dealer's Day in Court Act (ADDCA), 15 USC 1221 *et seq*., and another under Michigan's Motor Vehicle Franchise Act (MVFA), MCL 445.1561 *et seq*.—failed to state a claim upon which relief could be granted. Defendant's argument in this regard primarily focuses on its assertion that plaintiff is a "foreign dealer" for purposes of both acts. We agree in part and disagree in part with defendant. The trial court did not err when it denied summary disposition to defendant as to plaintiff's ADDCA claim, but it did err by denying defendant's motion for summary disposition as to its MVFA claim. We affirm in part, reverse in part, and remand for further proceedings.

I. UNDERLYING FACTS

Plaintiff is a Delaware limited-liability company with a principal place of business in Southfield, Michigan. Plaintiff alleged that it was "engaged in the sale and service of new and used . . . motor vehicles and the sale of vehicle parts manufactured by [defendant]." On September 1, 2008, plaintiff and defendant entered into a written distributor agreement "for an initial fixed term of five years." According to plaintiff, it distributed defendant's products "on the ground in Iraq"; it "invested nearly $60,000,000.00 on land for a dealership, inventory, and personnel"; and "[s]ince the inception of the [distributor agreement]," it had "endured bombings; the constant threat of violence; communication disruptions; and every other imaginable obstacle that could be encountered in a third-world country that recently escaped the grips of a brazen dictatorship and is still dealing with the consequences of ongoing sectarian violence and terrorism."

Plaintiff alleged that it did very well for defendant under the agreement. The parties amended the agree-

ment on May 30, 2012. According to that amendment, the parties' agreement was to expire in August 2013 unless plaintiff satisfied three prerequisites, although the parties dispute whether plaintiff did, in fact, meet those requirements. In any event, defendant terminated the agreement, which led plaintiff to file this lawsuit. Importantly for this case, plaintiff alleged that defendant violated the ADDCA and the MVFA when it terminated the agreement. The complaint did not expressly allege, although it seems to be assumed by all parties, that all of plaintiff's motor vehicle sales took place in Iraq.

Defendant moved for summary disposition under MCR 2.116(C)(8), arguing in relevant part that, as a matter of law, plaintiff was not entitled to the protections afforded under the ADDCA and the MVFA because it was a "foreign dealer." In response, plaintiff pointed to its complaint's allegation that it was not a foreign dealer, as it was a Delaware limited-liability company with a principal place of business in Southfield, Michigan; plaintiff also cited the distribution agreement's title page, which reflected the same information (although with a former address for its principal place of business in Southfield).

The trial court ultimately denied defendant's motion. Regarding the ADDCA claim, the trial court emphasized that the act defined an automobile dealer as including any "form of business enterprise *resident in the United States* . . . ." The trial court determined that it could not "conclude on the basis of the allegations alone that Plaintiff was not 'resident in the United States.' " Accordingly, the court held that defendant was not entitled to summary disposition on plaintiff's claim under the ADDCA.

Regarding the MVFA claim, the trial court found "that the Complaint does allege facts demonstrating that Plaintiff has an established place of business in . . . Michigan" and thus was a "new motor vehicle dealer" under the act. Therefore, the trial court concluded, "Plaintiff is entitled to bring suit under the Michigan Motor Vehicle Dealer Franchise Act." In reaching this conclusion, the trial court was persuaded by the fact that the MVFA merely provided that plaintiff's "principal place of business" *may* display and repair motor vehicles, which, it opined, allowed but did not require the dealer to display and repair vehicles. This appeal followed.

II. STANDARD OF REVIEW

MCR 2.116(C)(8) mandates summary disposition if "the opposing party has failed to state a claim on which relief can be granted." *Harbor Watch Condo Ass'n v Emmet Co Treasurer*, 308 Mich App 380, 384; 863 NW2d 745 (2014).

> A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. When deciding a motion brought under this section, a court considers only the pleadings. [*Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999) (quotation marks and citations omitted).]

Thus, "[a] party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions." *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 305; 788

NW2d 679 (2010).[2] That being said, when a contract is attached to a pleading it "becomes part of the pleadings themselves, even for purposes of review under MCR 2.116(C)(8)." *Laurel Woods Apartments v Roumayah*, 274 Mich App 631, 635; 734 NW2d 217 (2007). "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). Finally, because a motion under MCR 2.116(C)(8) is based on the pleadings, discovery is not a consideration when a court determines whether to grant the motion. See *Maiden*, 461 Mich at 119-120.[3]

This Court likewise reviews de novo a circuit court's interpretation and application of state and federal legislation. *PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 505; 778 NW2d 282 (2009); *Selflube, Inc v JJMT, Inc*, 278 Mich App 298, 306; 750 NW2d 245 (2008). This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's lan-

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[2] Plaintiff attached an affidavit to its response from one of its principals (who is possibly its only principal). As noted, the posture of this case makes it impermissible to consider an affidavit, and we therefore do not address the affidavit in this opinion.

[3] Indeed, our Supreme Court recently reversed a decision of this Court to remand for additional discovery to determine "the nature of plaintiff's claims, which must be ascertained from the complaint itself[.]" *Trowell v Providence Hosp & Med Ctrs, Inc*, 502 Mich 509, 519; 918 NW2d 645 (2018).

> guage, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. [*PNC Nat'l Bank Ass'n*, 285 Mich App at 506, quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

"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). Finally, "[w]hen considering the correct interpretation, the statute must be read as a whole." *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 528; 817 NW2d 548 (2012).

III. AUTOMOBILE DEALER'S DAY IN COURT ACT

Defendant argues that the trial court erred by denying its motion for summary disposition under the ADDCA. We disagree.

A cause of action under the ADDCA has the following elements: "(1) the plaintiff must be an automobile dealer; (2) the defendant must be an 'automobile manufacturer' engaged in commerce; (3) there must be a manufacturer-dealer relationship embodied in a written franchise agreement; and (4) the plaintiff must have been injured by the defendant's failure to act in good faith." *Maschio v Prestige Motors*, 37 F3d 908, 910 (CA 3, 1994), citing 15 USC 1222. Plaintiff's complaint alleged that it was a Delaware LLC with its principal place of business in Michigan. Plaintiff also alleged that it was "engaged in the sale and service of new and used . . . motor vehicles and the sale of vehicle parts manufactured by [defendant]." There is no dispute that, as a manufacturer and seller of vehicles and vehicle parts, defendant is "engaged in commerce." Further, plaintiff stated that it entered into a written

agreement with defendant "for an initial fixed term of five years," and attached to its complaint the parties' agreement, which then became part of plaintiff's pleadings for the purpose of summary disposition. See *Laurel Woods Apartments*, 274 Mich App at 635. Finally, plaintiff alleged that defendant wrongfully terminated the agreement in violation of the ADDCA and provided specific examples of what plaintiff alleged to be defendant's failure to act in good faith. The only element as to which there was a dispute regarding the sufficiency of the allegations was whether plaintiff was an "automobile dealer" for purposes of the ADDCA.

Defendant argues that, as a matter of law, plaintiff cannot be an "automobile dealer" under the act, because the complaint alleged that the conduct at issue occurred in Iraq. The ADDCA defines "[t]he term 'automobile dealer' " as "any person, partnership, corporation, association, or other form of business enterprise resident in the United States or in any Territory thereof or in the District of Columbia operating under the terms of a franchise and engaged in the sale or distribution of passenger cars, trucks, or station wagons." 15 USC 1221(c). Thus, the relevant issue here is whether plaintiff is "resident in the United States," a term which is not statutorily defined.

"All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." MCL 8.3a. Because courts have not construed the term, the term "resident in the United States" has not acquired any technical legal meaning, and thus this Court must interpret it according to its

common and approved usage, and a court may "rely on a dictionary for a definition of words that are not defined in the statute." *Poboursky v Gee*, 249 Mich App 44, 46; 640 NW2d 597 (2001). The general definition of the word "resident" is "a person who resides in a place" or "residing; dwelling in a place." *Random House Webster's College Dictionary* (1992). Because defendant's motion was filed under MCR 2.116(C)(8), our analysis as to whether plaintiff was "resident in the United States" is limited to determining whether plaintiff's complaint alleged that it was. See *Dalley*, 287 Mich App at 304-305.

Plaintiff alleged that it "is a Delaware limited liability company whose principal place of business is located at 29580 Northwestern Hwy., Suite 1000, Southfield, Michigan 48034." As we must accept these representations as true, it is clear that the complaint alleges that plaintiff was "resident in the United States."

Defendant also argues, correctly, that it is presumed that when Congress enacts legislation, it intends for the legislation to have force only in the United States, i.e., it is presumed not to have extraterritorial effect. See *Morrison v Nat'l Australia Bank Ltd*, 561 US 247, 255; 130 S Ct 2869; 177 L Ed 2d 535 (2010) (unless a contrary intention appears, congressional legislation is meant to "apply only within the territorial jurisdiction of the United States") (quotation marks and citation omitted). Moreover, the presumption against extraterritoriality is just that, a presumption. If the facts establish that resolution of the instant dispute would require the extraterritorial application of the ADDCA, plaintiff would bear the burden of showing that the language, purpose, subject matter, or history of the ADDCA clearly expresses congressional intent that the

statute have effect outside the territorial jurisdiction of the United States. See *Morrison*, 561 US at 266 (acknowledging that the presumption against extraterritoriality often is not dispositive, requiring a consideration of the focus of the legislation to determine precisely what it regulated and whether the conduct alleged fell within the statute's purview); *United States v Abu Khatallah*, 151 F Supp 3d 116, 124 (D DC, 2015) ("[T]he burden of making the necessary affirmative showing is on the party seeking to apply a statute extraterritorially."). Employing the presumption against extraterritoriality at this point to bar plaintiff's claim would deprive plaintiff of the opportunity to rebut the presumption.

The pleadings alone do not establish the facts necessary to determine whether application of the ADDCA in this case would be extraterritorial. The applicability of the ADDCA requires the existence of a manufacturer-dealer relationship created by a written agreement. *Lewis v Chrysler Motors Corp*, 456 F2d 605 (CA 8, 1972); *Stansifer v Chrysler Motors Corp*, 487 F2d 59 (CA 9, 1973). The distribution agreement between plaintiff and defendant created the requisite relationship. Viewing the pleadings and inferences in the light most favorable to plaintiff, as this Court is required to do for purposes of a motion under MCR 2.116(C)(8), see *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012); *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 131; 839 NW2d 223 (2013), it is reasonable to infer that the business relationship arose in Michigan. It also is reasonable to infer that any breach which might have occurred would have taken place in Michigan, even if a breach was based on plaintiff's conduct in Iraq; as such, application of the ADDCA arguably would not be extraterritorial. See *Sexton v Ryder Truck Rental, Inc*, 413 Mich 406, 438-439; 320 NW2d 843 (1982)

(holding that where a statute aims to regulate a relationship, and the relationship arose in Michigan and was breached in Michigan, application of the statute to conduct that occurred outside of Michigan does not constitute extraterritorial application).

In addition, it is not clear from plaintiff's factual allegations that its operations in Iraq were such as to bar it from the protections of the ADDCA. According to the parties' distributor agreement, plaintiff could work directly or through an authorized dealer, or both. Section 5.3 of the distributor's agreement is entitled "Authorized Resellers" and addresses, among other things, the requirements an acceptable authorized dealer must meet; plaintiff's obligation to provide defendant with certain information about authorized resellers and to seek defendant's confirmation before appointing an authorized reseller; and plaintiff's obligation to have written agreements with its authorized resellers that mirror plaintiff's distributor agreement with defendant. Further, the agreement between the parties requires plaintiff to:

> (i) provide its Authorized Resellers with appropriate supervision and training;
>
> (ii) actively monitor the performance by each Authorized Reseller of its agreements with [plaintiff] and enforce each Authorized Reseller's obligations under such agreements; and
>
> (iii) use its best efforts to put into place and maintain, and to assist its Authorized Resellers in putting into place and maintaining, effective inventory and retail sale refinancing programs.

Thus, the parties' distribution agreement allowed plaintiff to select and appoint authorized resellers and imposed on plaintiff certain responsibilities to ensure the operational success of its authorized resellers.

Given these responsibilities, and viewing plaintiff's allegation in the light most favorable to plaintiff, it is not clear that plaintiff's allegations about its activities in Iraq refer to direct action or action through its authorized resellers in fulfillment of its responsibilities under the distributor agreement with defendant and any separate written agreements that may have existed with authorized resellers. To be sure, plaintiff does not specifically allege that it appointed and acted through authorized resellers, but it did not have to do so in order to sufficiently state a claim for which relief could be granted. However, viewing plaintiff's allegations in the light most favorable to plaintiff militates against assuming that plaintiff did not enter into agreements with authorized resellers separate from its agreement with defendant, which forms the basis of its ADDCA claim. In other words, there is too little factual information to conclude at this point that the presumption against extraterritoriality bars plaintiff's claim against defendant under the ADDCA.

IV. MOTOR VEHICLE FRANCHISE ACT

Defendant argues that the trial court erred by denying its motion for summary disposition under the MVFA. We agree. Although defendant moved for summary disposition under MCR 2.116(C)(8), we conclude the proper rule actually is MCR 2.116(I)(1). See *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000) ("An order granting summary disposition under the wrong court rule may be reviewed under the correct rule.") (quotation marks and citation omitted).

The parties' dispute with regard to the MVFA turns on whether plaintiff is a "new motor vehicle dealer," which is defined in part as a "person, including a

distributor" that has an "established place of business in this state." MCL 445.1565(2). For purposes of the MVFA, an "established place of business" means a "permanent, enclosed commercial building located in this state that is easily accessible and open to the public at all reasonable times and at which a new motor vehicle dealer may legally conduct business, including the display and repair of motor vehicles, in compliance with the terms of all applicable buildings codes, zoning, and other land-use regulatory ordinances." MCL 445.1563(2).

Michigan is a notice-pleading jurisdiction, which means that a complaint is required to contain only enough information "reasonably to inform the defendant of the nature of the claim against which he must defend." *Iron Co v Sundberg, Carlson & Assoc, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997) (quotation marks and citation omitted). Plaintiff alleged in its complaint that it had "fully and substantially complied with the reasonable and lawful requirements of the [parties'] Agreement"; that defendant's "notice of termination [was] defective under the provisions of MCL 445.1567"; and that defendant's termination of the parties' agreement was "pretextual and without good cause." This is sufficient to "reasonably . . . inform the defendant of the nature of the claim against which [it] must defend." *Iron Co*, 222 Mich App at 124 (quotation marks and citation omitted). In other words, plaintiff was not required to affirmatively allege in its complaint that it had the legal capacity to display and repair motor vehicles in Michigan.

There is no apparent factual dispute that plaintiff has "a permanent, enclosed commercial building" located in Michigan that is "easily accessible and open to the public at all reasonable times." The parties' dispute

revolves around the meaning of the phrase "may legally conduct business, including the display and repair of motor vehicles, in compliance with the terms of all applicable buildings codes, zoning, and other land-use regulatory ordinances." This phrase plainly means that plaintiff must have the lawful authority to conduct business at its commercial building, which at a minimum must permit "the display and repair of motor vehicles." The statute then goes on to provide that if such minimum requirements are met, it is permissible but not mandatory for the person or entity to conduct other business activity at the same location (for example, advertising and financing, as is common for new vehicle dealerships). A plain reading of the express language of the statute makes that point clear. In addition, construing the statute as a whole, see *Mich Props, LLC*, 491 Mich at 528, it is apparent that the point of the statute is to regulate the relationship of motor vehicle manufacturers and retailers in Michigan.[4] Reading the statute to apply to a person or entity which is not engaged in the sale or repair of motor vehicles in Michigan runs counter to the Legislature's express purposes.

Plaintiff has conceded, both below and on appeal, that it did not and could not lawfully display and repair motor vehicles at its Michigan facility. Thus, while the trial court properly denied defendant's motion under MCR 2.116(C)(8) based on the pleadings (and agreement) alone, because plaintiff concedes that it cannot factually satisfy the statutory requirements of MCL 445.1563(2) under what we conclude is its proper interpretation, the trial court should have dismissed plaintiff's MVFA claim pursuant to MCR 2.116(I)(1) ("If the

[4] The statute expressly precludes application "to dealers located outside the state of Michigan." MCL 445.1582.

pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay."). *Wickings*, 244 Mich App at 147.

V. CONCLUSION

The trial court did not err by denying defendant's motion for summary disposition as to plaintiff's ADDCA claim, but it incorrectly denied defendant's motion for summary disposition as to plaintiff's MVFA claim. We remand for the trial court to enter an order granting summary disposition to defendant regarding plaintiff's MVFA claim and for further proceedings not inconsistent with this opinion. We do not retain jurisdiction. We do not award costs, as neither party has prevailed in full.

TUKEL, P.J., and SERVITTO and BECKERING, JJ., concurred.

MacDONALD v OTTAWA COUNTY
BENEDICT v OTTAWA COUNTY

Docket Nos. 350956 and 350989. Submitted December 8, 2020, at Detroit. Decided December 17, 2020. Approved for publication February 4, 2021, at 9:00 a.m. Leave to appeal denied 508 Mich 1026 (2022).

In Docket No. 350956, plaintiffs Patricia and James MacDonald, and in Docket No. 350989, plaintiff Julie Benedict, brought an action in the Ottawa Circuit Court against Ottawa County and Ottawa County Parks and Recreation, alleging that while attending an event at Weaver House in Ottawa County, plaintiffs suffered injuries when an outdoor deck on which they were standing suddenly collapsed. Plaintiffs alleged, in part, that defendants could be held liable for plaintiffs' injuries caused by the deck's collapse in light of the public-building exception to governmental immunity, MCL 691.1406. After a discovery period, defendants moved for summary disposition, arguing that the public-building exception did not apply because plaintiffs' claims arose from a design defect. In the alternative, defendants argued that they did not know about the deck's defective condition. Plaintiffs opposed the motion, arguing that their claims arose from defendants' failure to repair and maintain the deck. The court, Karen J. Miedema, J., granted the motion, determining that the defective condition of the deck arose from a design defect. The court reasoned that the deck failed because laminated veneer lumber (LVL) was used in its design and construction, even though experts for plaintiffs and defendants opined that LVL was not fit for outdoor use. Plaintiffs appealed, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. MCL 691.1407(1) provides that governmental agencies are generally immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1406, the public-building exception to governmental immunity, provides that governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public; this public-building exception applies when a plaintiff proves that (1) a governmental

agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. However, the public-building exception does not support a design-defect claim. A design defect consists of a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose; in contrast, a failure to repair or maintain consists of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed. An action could initially be a design decision, but subsequent improper installation, malfunction, deterioration, or instability could later transform this decision into a failure to repair or maintain. In these cases, although the use of the LVL beam was a design defect, plaintiffs' claims also arose out of defendants' failure to repair and maintain the deck. The design plans for the deck reflected that the builders were to use LVL beams to support the deck's joists, and experts for plaintiffs and defendants opined that LVL was not fit for outdoor use. Notwithstanding this design defect, plaintiffs presented evidence that the deck collapsed because defendants failed to repair and maintain it. The evidence suggested that the deck only collapsed when the LVL beam failed because of rot. Therefore, the evidence demonstrated that the deck collapsed because of deterioration, transforming the design defect into a failure to repair or maintain.

2. Constructive knowledge is knowledge that one using reasonable care or diligence should have and therefore that is attributed by law to a given person. Constructive notice may arise not only from the passage of time itself but also from the type of condition involved or from a combination of the two elements. In these cases, plaintiffs presented evidence demonstrating that if defendants had been reasonably diligent when they made repairs to the deck and discovered that some sections of the deck had become rotted, they should have also discovered the rotted LVL beam. A maintenance worker testified that he had performed repairs to other areas of the deck that were rotted. If that worker had diligently inspected the LVL beam, the evidence suggested that he would have discovered its rotted condition. Therefore, a

genuine issue of material fact existed as to whether defendants were on constructive notice of the deck's dangerous or defective condition.

3. Defendants' argument that they did not have time to rebuild the deck was rejected as misplaced. MCL 691.1406 requires defendants to remedy a defective condition or to take action reasonably necessary to protect the public against the condition. Contrary to defendants' all-or-nothing logic, defendants could have, among other things, simply closed the deck to the public until the deck was inspected, repaired, or replaced. Accordingly, the trial court erred by granting summary disposition in favor of defendants because a genuine issue of material fact existed as to whether defendants failed to take action reasonably necessary to protect the public from the dangerous condition of the deck.

Reversed and remanded for further proceedings.

Seikaly Stewart & Bennett, PC (by *William R. Seikaly*) and *Johnson Law, PLC* (by *David S. Shiener*) for Patricia and James MacDonald.

Nolan & Shafer, PLC (by *Matthew G. Swartz*) for Julie Benedict.

Silver & Van Essen, PC (by *Douglas W. Van Essen* and *Elliot J. Gruszka*) for Ottawa County and Ottawa County Parks and Recreation.

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM. These consolidated personal-injury cases concern the applicability of the public-building exception to governmental immunity, MCL 691.1406, to the collapse of a publicly operated outdoor deck in Ottawa County, Michigan. The issues in both cases are essentially the same and arise from the same facts. In Docket No. 350956, plaintiffs Patricia and James MacDonald, and in Docket No. 350989, plaintiff Julie Benedict, appeal as of right the trial court's order granting summary disposition under MCR 2.116(C)(10) to defen-

dants in both cases. On appeal, plaintiffs[1] argue that the trial court erred by determining that defendants were not liable for the deck's collapse because the deck's failure stemmed from a design defect. Plaintiffs also argue that a genuine issue of material fact existed as to whether defendants had actual or constructive notice of the deck's deteriorated condition. We conclude that although the deck was defectively designed, plaintiffs also sufficiently alleged that it collapsed because of a failure to repair and maintain. We further conclude that a genuine issue of material fact existed as to whether defendants had constructive knowledge of the deck's defective condition. Therefore, we reverse.

In June 2018, plaintiffs filed complaints alleging that while attending an event at Weaver House in Ottawa County, Michigan, they suffered injuries when an outdoor deck they were standing on suddenly collapsed. Defendants operate Weaver House under the authority granted in MCL 123.51. Plaintiffs alleged, in part, that defendants could be held liable for their injuries caused by the deck's collapse in light of the public-building exception to governmental immunity, MCL 691.1406. After a discovery period, defendants moved for summary disposition under MCR 2.116(C)(10), arguing that the public-building exception did not apply because plaintiffs' claims arose from a design defect. In the alternative, defendants argued that they did not know about the deck's defective condition. Plaintiffs opposed the motion, arguing that their claims arose from defendants' failure to repair and maintain the deck. The trial court granted the motion, determining that the defective condition of the deck arose from a design defect. The trial court rea-

[1] We will refer to the MacDonalds and Benedict collectively as "plaintiffs" and will delineate between them when appropriate.

soned that the deck failed because laminated veneer lumber (LVL) was used in its design and construction, even though experts for plaintiffs and defendants opined that LVL was not fit for outdoor use.

We review de novo a trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (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." *Piccione v Gillette*, 327 Mich App 16, 19; 932 NW2d 197 (2019) (quotation marks and citation omitted). A genuine issue of material fact exists when the record, viewed in the light most favorable to the nonmoving party, "leaves open an issue upon which reasonable minds might differ." *Id*. (quotation marks and citation omitted). "Courts are liberal in finding a factual dispute sufficient to withstand summary disposition." *Id*. (quotation marks and citation omitted).[2]

Generally, governmental agencies are immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). "A governmental function is 'an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law.' " *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613-614; 664 NW2d 165 (2003), quoting MCL 691.1401(f). Defendants are governmental agencies that enjoy a presumption of governmental immunity. See *Mack v Detroit*, 467 Mich 186, 204; 649 NW2d 47 (2002).

[2] The MacDonalds argue—for the first time on appeal—that defendants should have sought summary disposition under MCR 2.116(C)(7) (immunity granted by law). However, as defendants point out, our court rules explicitly contemplate a motion under MCR 2.116(C)(10) based on a claim of governmental immunity. See MCR 7.202(6)(a)(v).

The governmental immunity act, however, provides several exceptions to this general immunity. *Lash v Traverse City*, 479 Mich 180, 195 n 33; 735 NW2d 628 (2007). These exceptions are to be narrowly construed. *Maskery*, 468 Mich at 614. In order for a governmental defendant to be liable under the public-building exception, MCL 691.1406,

> a plaintiff must prove that (1) a governmental agency is involved, (2) the public building in question was open for use by members of the public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period. [*Maskery*, 468 Mich at 614-615 (quotation marks and citation omitted).]

In *Renny v Dep't of Transp*, 478 Mich 490, 500; 734 NW2d 518 (2007), our Supreme Court held that the public-building exception does not support a design-defect claim. The *Renny* Court explained at length the differences between design defects and a failure to maintain and repair:

> The first sentence of MCL 691.1406 states that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." This sentence unequivocally establishes the duty of a governmental agency to "repair and maintain" public buildings. Neither the term "repair" nor the term "maintain," which we construe according to their common usage, encompasses a duty to design or redesign the public building in a particular manner. "Design" is defined as "to conceive; invent; contrive." By contrast, "repair" means "to restore to sound condition after damage or injury." Similarly, "maintain" means "to keep up" or "to preserve." Central to the definitions of "repair" and "main-

> tain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. "Design" refers to the initial conception of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts, and the Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception.
>
> The second sentence of MCL 691.1406, which imposes liability on governmental agencies "for bodily injury and property damage resulting from a dangerous or defective condition of a public building," does not expand the duty beyond the repair and maintenance of a public building. The phrase imposes liability where the "dangerous or defective condition of a public building" arises out of the governmental agency's failure to repair and maintain that building. It is not suggestive of an additional duty beyond repair and maintenance. There is no reason to suspect that the Legislature intended to impose a duty to prevent "dangerous or defective condition[s]" in public buildings in a manner wholly unrelated to the obligation clearly stated in the first sentence. [*Id*. at 500-501 (citations omitted).]

Notably, although the *Renny* Court held that "to the extent that [the] plaintiff's claim is premised on a design defect of a public building, it is barred by governmental immunity," it remanded the case because the plaintiff also alleged that the defendant failed to repair and maintain the building. *Id*. at 506-507.

In *Tellin v Forsyth Twp*, 291 Mich App 692, 705-706; 806 NW2d 359 (2011), we sought to further clarify the distinction between a design defect and a failure to repair and maintain:

> A design defect would appear to consist of a dangerous condition inherent in the design itself, such as its characteristics, functioning, and purpose. For example, the ac-

> cumulation of the snow and ice on the sidewalk in *Renny* was not from any malfunction of the roof or problem with its construction, but was a natural effect of the characteristics of the new roof design, which was not intended to divert melting snow and ice.
>
> In contrast, a failure to repair or maintain appears to consist of something caused by extrinsic circumstances, such as a malfunction, deterioration, instability, or a fixture that is improperly secured or otherwise improperly constructed or installed. Reparative or preventative measures may also supplement the existing structure to preserve the existing design. An action could initially be a design decision, but subsequent improper installation, malfunction, deterioration, or instability could later transform this decision into a failure to repair or maintain. [Citations omitted.]

In the present cases, although the use of the LVL beam was a design defect, plaintiffs' claims also arose out of defendants' failure to repair and maintain the deck. See *Renny*, 478 Mich at 500-501; see also *Tellin*, 291 Mich App at 705-706. The design plans for the deck reflected that the builders were to use LVL beams to support the deck's joists. The beams were, therefore, a part of the "initial conception of the [deck], rather than its restoration." *Renny*, 478 Mich at 501. Dale Johnson, hired by defendants to investigate the collapse of the deck, reported that "LVL beams were the wrong material to use in the outdoor environment of this deck," because "LVL lumber is a product that is only intended for interior use in dry conditions."

Notwithstanding this design defect, plaintiffs presented evidence that the deck collapsed because defendants failed to repair and maintain it. As discussed, the *Renny* Court itself implied that a case can involve both a design defect and a failure to repair and maintain. See *Renny*, 478 Mich at 506-507. The record evidence suggests that in normal conditions—or, in its

initial condition—the LVL beam would have supported a normal weight load for a deck. However, when the LVL beam failed, it was only carrying a small fraction of that load. Indeed, Johnson's own conclusion is instructive: "the rotted LVL lumber is the one and only cause of the collapse." Johnson did not conclude that the use of the LVL beam in and of itself caused the deck to collapse. Instead, Johnson's conclusion reflects that, but for the rot in the LVL beam, the deck would not have collapsed. It is also notable that for the first 12 years of its life, the deck did not collapse. It only did so when the LVL beam failed because of rot. Therefore, the evidence demonstrates that the deck collapsed because of deterioration, transforming a design defect into a failure to repair or maintain. See *Tellin*, 291 Mich App at 705-706.

Defendants argue that panels of this Court have concluded that a plaintiff's claim arose out of design defects (and not out of a defendant's failure to repair and maintain) when the "injury-causing defects were inherent to the structure, and no amount of 'restoration' would eliminate the risk of injury inherent in the initial conception of the building." According to defendants, the dispositive fact in the present cases is that when the deck is (was) restored to its initial conception, the defect—the LVL beam itself—would be preserved. Defendants are correct to the extent that, if the deck was rebuilt as it was designed, the design defect would be preserved. But the evidence suggests that the deck did not fail because of the design defect. Instead, the evidence suggests that the deck failed because the LVL beam had deteriorated and was not repaired or maintained.

We also conclude that a genuine issue of material fact existed as to whether defendants had constructive

knowledge of the dangerous or defective condition of the deck. Constructive knowledge is "[k]nowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 197; 694 NW2d 544 (2005) (quotation marks and citation omitted). "Constructive notice may arise not only from the passage of time itself, but also from the type of condition involved, or from a combination of the two elements." *Banks v Exxon Mobil Corp*, 477 Mich 983, 983-984 (2007). "Generally, the question of whether a defect has existed a sufficient length of time and under circumstances that the defendant is deemed to have notice is a question of fact, and not a question of law." *Id*. at 984.

In the present cases, plaintiffs presented evidence demonstrating that if defendants had been reasonably diligent when they made repairs to the deck and discovered that some sections of the deck had become rotted, they should have also discovered the rotted LVL beam. See *Echelon Homes*, 472 Mich at 197. Specifically, Tom Dorton, a maintenance worker, testified that he performed repairs to areas of the deck that were rotted. And although Dorton testified that rot in one section of the deck likely meant that other sections had rot, he admitted that he did not diligently inspect the LVL beam that supported the entire weight of the deck. If Dorton had diligently inspected the LVL beam, the evidence, including an affidavit from plaintiffs' expert, suggests that Dorton would have discovered its rotted condition. Therefore, a genuine issue of material fact existed as to whether defendants were on constructive notice of the deck's dangerous or defective condition.

Finally, we reject as misplaced defendants' argument that they did not have time to rebuild the deck.

MCL 691.1406 requires defendants to remedy a defective condition "or to take action reasonably necessary to protect the public against the condition." Contrary to defendants' all-or-nothing logic, defendants could have, among other things, simply closed the deck to the public until the deck was inspected, repaired, or replaced. Presumably, this much simpler act would have protected the public against the condition. Therefore, a genuine issue of material fact existed as to whether defendants failed to take action reasonably necessary to protect the public from the dangerous condition of the deck.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ., concurred.

PEOPLE v GALLOWAY

Docket No. 352937. Submitted December 9, 2020, at Detroit. Decided December 17, 2020. Approved for publication February 4, 2021, at 9:05 a.m. Leave to appeal denied 507 Mich 934 (2021).

Floyd R. Galloway, Jr., was charged with first-degree premeditated murder, MCL 750.316(1)(a), in connection with the disappearance of Danielle Stislicki in 2016. Defendant was the last person seen with Stislicki, who worked at a building where defendant had been employed as a security guard. During his employment there, defendant had been known to seek out and flirt with Stislicki, and he had once sent her flowers. On December 2, 2016, Stislicki had left work at about 5:00 p.m. and was seen in her workplace parking lot talking to defendant, who had the hood up on his vehicle as if to indicate that he had car trouble. Defendant was then seen in the passenger seat of Stislicki's vehicle by a coworker as Stislicki was leaving the parking lot. Shortly thereafter, her cell phone communicated with the cellular tower nearest to defendant's home in Berkley. After Stislicki failed to arrive at a planned dinner with a friend, the friend contacted Stislicki's parents and they went to Stislicki's apartment, where they found Stislicki's vehicle, purse, identification, and credit cards, but Stislicki and her keys were missing. During a subsequent investigation, defendant told the police that he had worked every weekday in December, but the police later determined that defendant had taken December 2, 2016, off. In addition to other incriminating evidence collected from cell phone records, surveillance cameras, and eyewitness testimony, a search of defendant's house revealed that a patch of carpet had recently been replaced in defendant's bedroom, and DNA analysis of the adjacent area indicated that Stislicki was likely a contributor to the skin-cell DNA on the carpet. Before trial, the prosecution moved to introduce evidence that defendant had attacked, strangled, and attempted to rape a stranger, AT, as she was jogging through the woods in a park about three months before Stislicki disappeared. Defendant had falsely claimed that he was working on the day of that attack. The prosecution argued that evidence of these acts against AT were admissible in this case under MRE 404(b) for the proper purposes of showing motive, intent, preparation, and lack

of mistake or accident; to identify defendant as Stislicki's killer; or to demonstrate a common scheme, plan, or system. The trial court, Phyllis C. McMillen, J., ruled that the other-acts evidence was inadmissible because the circumstances of defendant's assault on AT were too dissimilar to defendant's alleged acts in this case to establish any nonpropensity purpose for admission. The court also concluded that even if the other-acts evidence had been offered for a proper purpose, the probative value of defendant's assault on AT was substantially outweighed by the risk of unfair prejudice under MRE 403. The Court of Appeals granted the prosecution's motion for leave to appeal.

The Court of Appeals *held*:

1. The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts. But MRE 404(b)(1) provides that evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to, the conduct at issue in the case. To introduce other-acts evidence, the prosecution has the burden to establish that it is offered for a proper purpose under MRE 404(b), that it is relevant under MRE 402 as enforced through MRE 104(b), and that its probative value is not substantially outweighed by unfair prejudice. To establish a proper purpose, the prosecution must demonstrate that the other-acts evidence is logically relevant to the stated purpose without relying on an impermissible propensity inference. Other-acts evidence is logically relevant if it is material—that is, it is related to a fact or issue of consequence in the determination of the case—and has probative value, meaning that it has a tendency to make the purported fact of consequence more or less probable than it would be without that evidence. In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, a court examines the similarity between a defendant's other act and the charged offense. When the prosecution's theory of relevance is particularly based on an alleged similarity, there must be a "striking similarity" between the other act and the charged act to be admissible. When the other-acts evidence is offered to show intent, the charged crime and the proffered other acts need only be of the same general category.

2. The trial court did not abuse its discretion by excluding evidence of defendant's assault on AT under MRE 404(b). The trial court used the correct legal standard to conclude that the prosecution failed to establish a proper purpose and, even if it had done so, the threat of an unfair character inference would have rendered the evidence inadmissible under MRE 403. Specifically, the other-acts evidence was not admissible to show that defendant's motive was to sexually assault Stislicki as he had AT because defendant was charged in this case with first-degree premeditated murder, and the fact that defendant assaulted AT does not tend to establish defendant's motive and intent to commit first-degree premeditated murder against Stislicki. The trial court did not abuse its discretion by ruling that the other-acts evidence was also not admissible to prove defendant's identity as Stislicki's killer on the ground that the incidents involving AT and Stislicki were too dissimilar. The test for admitting other-acts evidence for the purpose of proving identity requires that there be substantial evidence that the defendant committed the similar act, that there be some special quality of the act that tends to prove the defendant's identity, that the evidence be material to the defendant's guilt, and that the probative value of the evidence not be substantially outweighed by the danger of unfair prejudice. In this case, the other-acts evidence did not show similar degrees or characteristics of preparation. Defendant had briefly hidden in the woods before attacking AT, whereas defendant allegedly stalked Stislicki by developing an acquaintance with her, texting her, and leaving flowers on her desk. Defendant attempted to drag AT against her will to a nearby river, whereas he allegedly convinced Stislicki to drive him back to his house miles away. The possibility of strangulation was an insufficient link between the two cases, given that the medical examiner did not determine that Stislicki had, in fact, been strangled. Moreover, the trial court did not abuse its discretion by ruling that defendant's work alibis did not distinguish him from a generic criminal or that the physical similarity between the victims was insufficient to identify defendant in any manner not incorporating an impermissible propensity inference. Finally, evidence regarding the attack on AT was not sufficiently similar to support an inference that defendant's alleged premeditated murder of Stislicki was the manifestation of a common plan or scheme. AT was a stranger jogging through the woods whom defendant randomly chose and directly attacked from a hidden spot in the woods, stating that he wanted sex, whereas Stislicki was an acquaintance whom defendant had known for some time and allegedly deceived by feigning car trouble in an open parking

lot in front of witnesses and then allegedly killed in his own home. The evidence of defendant's assault on AT would have been relevant only to show his character or propensity to commit the charged offense, and therefore it was inadmissible.

3. The trial court did not abuse its discretion by determining that the probative value of defendant's attack on AT was substantially outweighed by the risk of unfair prejudice under MRE 403. The other-acts evidence was not particularly probative given the dissimilarity between the defendant's prior acts and his alleged conduct in this case and the abundance of admissible inculpatory evidence on the record, whereas the evidence strongly invited a prejudicial character inference. Given the absence or weakness of any nonpropensity purpose for the evidence, a limiting instruction would not have alleviated the risk of unfair prejudice.

Affirmed.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Scott R. Shimkus*, Assistant Attorney General, for the people.

Ellen Michaels for defendant.

Before: CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM. The prosecution appeals by leave granted[1] the trial court's order excluding other-acts evidence that the prosecution intended to introduce against defendant in his trial on the charge of first-degree premeditated murder, MCL 750.316(1)(a). We affirm.

I. BACKGROUND

This case arises from the disappearance and alleged murder of Danielle Stislicki on December 2, 2016. Defendant had been previously convicted of assault by strangulation or suffocation, MCL 750.84(1)(b), assault

[1] *People v Galloway*, unpublished order of the Court of Appeals, entered April 22, 2020 (Docket No. 352937).

with intent to commit sexual penetration, MCL 750.520g(1), and kidnapping, MCL 750.349, after a September 2016 incident in which he attacked a woman as she was jogging through a park. He was charged with Stislicki's murder while serving 16 to 35 years' imprisonment on those convictions.

Defendant was the last person seen with Stislicki. Defendant was acquainted with Stislicki, as they had previously both worked in the MetLife building on Telegraph Road. Defendant had been a security guard there, and he was known to seek out, or flirt with, Stislicki. He had sent her flowers once. On the day she disappeared, December 2, 2016, Stislicki had left work at about 5:00 p.m. She was seen in her workplace parking lot talking to defendant.[2] Defendant had the hood up on his vehicle as if to indicate that he had car trouble. Defendant was then seen in the passenger seat of Stislicki's vehicle by a coworker as Stislicki was leaving the parking lot and waiting to turn north onto Telegraph Road. Shortly after Stislicki was seen with defendant, her cell phone communicated with the cellular tower nearest to defendant's home in Berkley. Stislicki had made plans to go to dinner with her best friend that evening but failed to attend or respond to any communications. The next day, the friend contacted Stislicki's parents and they went to Stislicki's apartment. Stislicki's parents found Stislicki's vehicle in its normal spot, along with her purse, identification, and credit cards, but Stislicki and her keys were missing. The police were called, and Stislicki was reported missing.

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[2] On that day, defendant's cell phone had communicated with the cellular tower near the MetLife building at 11:14 a.m., and by 11:26 a.m. it had communicated with the cellular tower in the Berkley area. At 3:48 p.m. it was shown to be moving west toward the MetLife building.

During the police investigation, defendant was questioned about Stislicki. He told the police that he had worked every weekday in December, including December 2, 2016, from 3:00 p.m. to 11:00 p.m. He was noticeably shaking at the time. The police later determined that defendant had taken December 2, 2016, off after calling his employer and claiming to have a doctor appointment. Subsequently, the police executed a search warrant at defendant's house and noticed that a patch of carpet had recently been replaced in defendant's bedroom. DNA analysis of carpet adjacent to the replaced patch yielded "very strong support" for the hypothesis that Stislicki was a contributor to the skin-cell DNA on the carpet. It was also discovered that, on December 4, 2016, defendant had purchased a new comforter. Further, it was determined that Stislicki's cell phone had communicated with towers on the route between defendant's house and Stislicki's apartment at about 8:00 p.m. on the night she disappeared—about the same time security cameras captured a vehicle matching the description of Stislicki's moving toward her apartment. The security camera footage at a coffee shop located about a 10-minute walk from Stislicki's apartment showed defendant getting a coffee and using the business's phone at about 8:40 p.m. The police later found Stislicki's keys and her fitness tracker in the area between Stislicki's apartment and the coffee shop. A cab driver testified that she picked defendant up at the coffee shop at about 9:00 p.m. and dropped him off at an apartment complex. That complex was located about 1,000 feet from Stislicki's workplace parking lot, where defendant's vehicle had been parked. At 9:35 p.m., a vehicle matching the description of defendant's vehicle was captured on security cameras on the route to defendant's house. Ulti-

mately, defendant was arrested and then bound over on the charge of first-degree premeditated murder of Stislicki.

Before trial, the prosecution moved to introduce evidence that defendant had strangled and attempted to rape a woman, AT, as she was jogging through the woods in a park about three months before Stislicki disappeared. Defendant had allegedly lain in wait, hiding, before attacking AT from behind and dragging her by the neck into the woods, where he began to strangle her and punch her in the face. Testimony indicated that he wanted to take AT to a nearby river, which was a more isolated location, and have sex with her. Defendant had initially claimed that he was working on the day of that attack, but he was not. The prosecution argued that evidence of these acts against AT were admissible in this case for the proper purposes of showing motive, intent, preparation, and lack of mistake or accident. Further, the evidence was admissible to identify defendant as Stislicki's killer. The prosecution also argued that there were striking similarities in each case, which demonstrated a common scheme, plan, or system. In that regard, the prosecution noted the substantially similar physical appearances of the women as well as defendant's predatory conduct, his assault in a manner that minimized the emission of body fluid, his attempt to isolate his victims, and his use of work as an alibi in both cases. Defendant opposed the admission of the other-acts evidence, arguing that there were no similarities between the random attack on a stranger in a park and what was alleged in this case. He further argued that he and Stislicki were friends, that there was no evidence of sexual assault or strangulation, and that there was no evidence of stalking or predatory conduct in either case. Thus, defendant argued, evidence re-

garding his alleged attack on AT must be excluded as purely propensity evidence.

The trial court ruled that the other-acts evidence was inadmissible under MRE 404(b) because the circumstances of defendant's assault on AT were too dissimilar to defendant's alleged acts in this case to establish any nonpropensity purpose for admission. In particular, defendant's alleged conduct both before and after Stislicki's disappearance bore no resemblance to his conduct toward AT and therefore did not help to prove his identity as Stislicki's killer. Similarly, defendant's attack on AT was not probative of his motive or intent to harm Stislicki because there was nothing tying the two incidents together. The court rejected the prosecution's argument that the preparation and opportunity were the same in both cases because defendant used work as an alibi for the crimes, holding that it was simple criminal planning and any probative value was substantially outweighed by the danger of unfair prejudice. Further, the court rejected the prosecution's argument that the attack on AT showed a common plan or scheme because not only was there no striking similarity between the two acts, "there [was] virtually nothing in common between the incidents." AT was a stranger who was a randomly chosen victim without evidence of stalking behavior, whom defendant strangled and attempted to move to a secluded area for the purpose of sexual assault. In contrast, defendant and Stislicki knew each other, and he purportedly faked car trouble in the parking lot at her work—not a secluded area—and then was seen in Stislicki's vehicle as she drove away. The court ruled that because there were distinct differences between the prior acts and the charged offense, the other-acts evidence was not probative of anything but to show that defendant might have a propensity to commit

murder, and therefore was inadmissible. In the alternative, the court concluded, even if the other-acts evidence had been offered for a proper purpose, the probative value of defendant's assault on AT was substantially outweighed by the risk of unfair prejudice under MRE 403, particularly because of the lack of similarity between the other acts and defendant's alleged conduct in this case. The prosecution sought leave to appeal, which was granted.

II. STANDARD OF REVIEW

A trial court's decision to exclude evidence is reviewed for an abuse of discretion, but preliminary legal issues of admissibility are reviewed de novo. *People v Bass*, 317 Mich App 241, 255; 893 NW2d 140 (2016). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 256 (quotation marks and citation omitted).

III. ANALYSIS

A. MRE 404(B)

The prosecution argues that evidence of defendant's prior assault on a victim "bearing a striking resemblance to [Stislicki]" three months before Stislicki disappeared is admissible for the proper purposes of showing defendant's motive, intent, lack of accident, identity, and common scheme, plan, or system; therefore, the trial court abused its discretion by ruling that such evidence was inadmissible. We disagree.

"The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts." *People v Denson*,

500 Mich 385, 397; 902 NW2d 306 (2017). But MRE 404(b)(1) provides, in relevant part:

> Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The admissibility of other-acts evidence under MRE 404(b) has long been governed by the test our Supreme Court outlined in *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Under *VanderVliet*, the prosecution has the burden to establish the following:

> "First, that the evidence [is] offered for a proper purpose under Rule 404(b); second, that it [is] relevant under Rule 402 as enforced through Rule 104(b); [and] third, that the probative value of the evidence is not substantially outweighed by unfair prejudice[.]" [*Denson*, 500 Mich at 398, quoting *VanderVliet*, 444 Mich at 55.]

Accordingly, when determining whether to admit other-acts evidence, the trial court must first determine whether "the prosecution has articulated a proper noncharacter purpose for admission of the other-acts evidence." *Denson*, 500 Mich at 398. Mechanically "*reciting* a proper purpose does not actually demonstrate the *existence* of a proper purpose . . . ." *Id*. at 400. Second, to decide whether a proper purpose actually does exist, the court must examine the logical relevance of the proffered evidence. *Id*. That is, the prosecutor must explain how and demonstrate that the other-acts evidence is logically relevant to the stated purpose without relying on an impermissible propensity inference. *Id*. at 402. "Other-acts evidence is logi-

cally relevant if two components are present: materiality and probative value." *Id*. at 401. For the other-acts evidence to be material, it must be related to a fact or issue of consequence in the determination of the case. *Id*. For that same evidence to have probative value, it must have a tendency to make the purported fact of consequence more or less probable than it would be without that evidence. *Id*. at 401-402. "The relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *VanderVliet*, 444 Mich at 75.

"In evaluating whether the prosecution has provided an intermediate inference other than an impermissible character inference, we examine the similarity between a defendant's other act and the charged offense." *Denson*, 500 Mich at 402. "The degree of similarity that is required between a defendant's other act and the charged offense depends on the manner in which the prosecution intends to use the other-acts evidence." *Id*. at 402-403. When the prosecution's theory of relevance is particularly based on an alleged similarity, there must be a " 'striking similarity' " between the other act and the charged to be admissible. *Id*. at 403, quoting *VanderVliet*, 444 Mich at 67. For example, when the theory of relevance of the other-acts evidence is to identify the defendant as the perpetrator of the charged crime considering the uncommon or distinctive similarity of the facts and circumstances of both the uncharged and charged offenses, there must be a high degree of—or striking—similarity so as to "earmark [the charged offense] as the handiwork of the accused," i.e., the defendant's "signature." *People v Golochowicz*, 413 Mich 298, 310-312; 319 NW2d 518 (1982) (alteration in original). But when the prosecution does not rely on such alleged similarity for its theory of relevance, a striking similarity need not be

shown. *Denson*, 500 Mich at 403; see also *People v Mardlin*, 487 Mich 609, 620-621; 790 NW2d 607 (2010). "Different theories of relevance require different degrees of similarity between past acts and the charged offense to warrant admission." *Mardlin*, 487 Mich at 622. For example, when the other-acts evidence is "offered to show intent, logical relevance dictates only that the charged crime and the proffered other acts 'are of the same general category.' " *VanderVliet*, 444 Mich at 79-80 (citation omitted).

On appeal, the prosecution first argues that the trial court applied an incorrect legal standard. Specifically, the prosecution argues that other-acts evidence offered for a proper purpose is admissible even if it invites a character inference, and the trial court applied an unfounded rule that other-acts evidence offered for a proper purpose is inadmissible if it also invites a character inference. The prosecution's argument lacks merit. The trial court precisely stated in its opinion the correct legal standard from *Denson* and *VanderVliet*. More importantly, the trial court did not rule that the other-acts evidence was inadmissible under MRE 404(b) because it invited a character inference in spite of its proper purpose. Rather, the trial court ruled that the prosecution failed to establish a proper purpose. It ruled, in the alternative, that even if the prosecution had established a proper purpose under MRE 404(b), the threat of an unfair character inference still rendered the evidence inadmissible under MRE 403. This ruling is entirely consistent with the *VanderVliet* framework. See *Denson*, 500 Mich at 398, quoting *VanderVliet*, 444 Mich at 55. Therefore, the trial court applied the correct law to the facts of this case, and that application is reviewed for an abuse of discretion.

Next, the prosecution provides several different theories of admissibility under MRE 404(b)(1). The

prosecution first argues in its brief on appeal that defendant's "attack on AT shows his motive behind luring [Stislicki] away from her office and to his home and his intent thereafter—to sexually assault her." In that regard, the prosecution notes that defendant's statements to AT during the assault indicated that sex was his goal, and he choked AT until she passed out. Likewise, the prosecution argues, in this case, Stislicki's DNA was found in defendant's bedroom, which suggested that he intended to, or did, also commit a sexual assault against Stislicki. But defendant is charged in this case with first-degree premeditated murder, and the fact that defendant assaulted AT does not tend to establish defendant's motive and intent to commit the crime of first-degree premeditated murder against Stislicki. Simply stated, and as the trial court concluded, there is no intermediate fact linking the charged acts and the previous convictions. See, e.g., *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The prosecution also alleges that defendant's "attack on AT shows that [Stislicki's] disappearance was no accident." In other words, the prosecution argues, defendant's attack on AT was a "practice run" for his attack on Stislicki. However, evidence of such a "practice run" only tends to establish defendant's motive for attacking AT, not his motive and intent to kill Stislicki.

Next, the prosecution argues that the other-acts evidence is admissible to prove defendant's identity as Stislicki's killer. Identity of the perpetrator is an element in every criminal case. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). But the trial court did not abuse its discretion by determining that the incidents involving AT and Stislicki were too dissimilar to warrant admission for the purpose of showing defendant's identity as the common perpetrator. Our

Supreme Court has instructed that, in addition to *Denson*, a reviewing Court "shall apply *Golochowicz* [413 Mich at 310-311] to determine whether the other-acts evidence [is] admissible to prove identity." *People v Chandler*, 502 Mich 879, 880 (2018). " '*Golochowicz* identifies the requirements of logical relevance when the proponent is utilizing a modus operandi theory to prove identity.' " *Id*. at 879, quoting *VanderVliet*, 444 Mich at 66.

> The *Golochowicz* test requires that (1) there is substantial evidence that the defendant committed the similar act (2) there is some special quality of the act that tends to prove the defendant's identity (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. [*People v Waclawski*, 286 Mich App 634, 673; 780 NW2d 321 (2009) (quotation marks and citation omitted).]

In this case, there is substantial evidence that defendant committed the attack on AT because he pleaded guilty to doing so. However, the prosecution has failed to identify "some special quality of the act" that tends to prove defendant's identity. *Id*. As stated earlier, the two cases, by the prosecution's own admission, do not show similar degrees or characteristics of preparation. The prosecution does not explain how the specific facts of each case give rise to recognizable shared elements of "stalking behavior" or isolation and asportation of the victim. In AT's case, defendant briefly hid in the woods before attacking her, whereas in this case, defendant allegedly stalked Stislicki by developing an acquaintance with her, texting her, and leaving flowers on her desk. In AT's case, defendant attempted to drag AT against her will to a nearby river, whereas in this case, he allegedly convinced Stislicki to drive him back to his house miles away. Given those

distinctions, the supposed similarities of stalking behavior or isolation and asportation are too abstractly stated to establish a meaningful connection between the two cases. Further, as the trial court held, the fact of strangulation was an insufficient link between the two cases. AT testified that defendant strangled her, whereas in this case, the medical examiner merely stated that the absence of bloodstains in defendant's bedroom could be consistent with strangulation, although he did not have enough information to determine the cause of Stislicki's death more specifically "than that she was a victim of assault."

The prosecution's theory of admissibility rests ultimately on defendant's false claims that he was at work when the assaults occurred and the arguable similarity of physical appearance between AT and Stislicki, because the prosecution's abstract formulations fail to identify any other specific factual similarities between the two cases. The trial court did not abuse its discretion by determining that defendant's work alibis did not distinguish him from a generic criminal. The abstractly stated physical similarity between the victims, by itself, is insufficient to identify defendant in any manner not incorporating the inferential chain that because defendant assaulted AT, he has a propensity to assault dark-haired white women, and therefore, he murdered Stislicki.

Particularly instructive in this case is *People v McMillan*, 213 Mich App 134; 539 NW2d 553 (1995). In *McMillan*, this Court affirmed the trial court's admission of two prior assaults committed by the defendant. This Court, applying the *Golochowicz* test, reasoned:

> Both the prior and present acts involved the perpetrator's entry into a home when the woman was alone and the door was unlocked. Contrary to defendant's assertion, all three

> acts involved a struggle. In all three cases, the victims lived within walking distance of defendant's residence and, although each case involved the removal of clothing, sexual intercourse did not occur. There was violence against all the victims resulting in injuries above the waist, including the neck. Furthermore, after viewing the photographs of all three victims, the trial court concluded that the victims were similar in appearance. [*Id*. at 138.]

In this case, there are only two victims instead of three. The trial court was not persuaded by the alleged similarity of the victims' appearances. The incidents did not take place in similar locations at a similar distance from defendant's home. The incidents did not share idiosyncratic or unexpected conduct like the removal of clothing without sexual assault. There is no evidence that AT and Stislicki shared similar injuries because Stislicki's body was never recovered. The other-acts evidence is simply not admissible to prove defendant's identity under *Golochowicz*.

Finally, the prosecution argues that the other-acts evidence is admissible because it demonstrates a common plan, scheme, or system. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). "There must be *such a concurrence of common features* that the charged acts and the other acts are logically seen as part of a general plan, scheme, or design." *People v Steele*, 283 Mich App 472, 479; 769 NW2d 256 (2009). "A high degree of similarity is required—more than is needed to prove intent, but less than is required to prove identity—but the plan itself

need not be unusual or distinctive." *People v Smith*, 282 Mich App 191, 196; 772 NW2d 428 (2009).

In this case, as the trial court concluded, evidence regarding the attack on AT was not sufficiently similar to support an inference that defendant's alleged premeditated murder of Stislicki was the manifestation of a common plan or scheme. AT was a stranger jogging through the woods whom defendant randomly chose and directly attacked from a hidden spot in the woods, stating that he wanted sex. To the contrary, Stislicki was an acquaintance whom defendant had known for some time and allegedly deceived by feigning car trouble in an open parking lot in front of witnesses and then allegedly killed in his own home. The prosecution's theory of a common plan seems to rely solely on the fact that Stislicki was petite, dark-haired, and fair-skinned like AT, rather than on any similarity between the criminal acts. Therefore, the trial court did not abuse its discretion by determining that those abstract physical similarities between AT and Stislicki did not persuasively establish a common scheme or plan.

In summary, the trial court did not abuse its discretion by excluding evidence of defendant's assault on AT under MRE 404(b) because "there is an insufficient factual nexus between the prior conviction and the present charged offense" to support any noncharacter theory of admission. *People v Crawford*, 458 Mich 376, 395; 582 NW2d 785 (1998). The evidence of defendant's assault on AT is only relevant to show his character or propensity to commit the charged offense and therefore is inadmissible.

B. MRE 403

The prosecution further argues that the trial court abused its discretion by ruling, in the alternative, that

evidence of the prior assault was more prejudicial than probative under MRE 403 because the evidence was only prejudicial as far as it established defendant's identity as the perpetrator in this case, and any unfair prejudice could be cured by a limiting instruction. We disagree.

Because the other-acts evidence is inadmissible under MRE 404(b), this Court need not address the prosecution's argument that the trial court abused its discretion by, in the alternative, excluding the evidence under MRE 403. Nevertheless, the trial court did not abuse its discretion by determining that the probative value of defendant's assault of AT on any material issue in this case was substantially outweighed by the risk of unfair prejudice.

Our Supreme Court has clearly instructed that " 'Rule 403 determinations are best left to a contemporaneous assessment of the presentation, credibility, and effect of testimony' by the trial judge." *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008), quoting *VanderVliet*, 444 Mich at 81. It has further instructed:

> Assessing probative value against prejudicial effect requires a balancing of several factors, including the time required to present the evidence and the possibility of delay, whether the evidence is needlessly cumulative, how directly the evidence tends to prove the fact for which it is offered, how essential the fact sought to be proved is to the case, the potential for confusing or misleading the jury, and whether the fact can be proved in another manner without as many harmful collateral effects. [*Blackston*, 481 Mich at 462.]

In this case, the trial court determined that the prosecution was unable to establish a direct, nonpropensity pathway from defendant's assault of AT to his

identity as the perpetrator in this case. There is direct evidence that defendant was the last person seen with Stislicki on the day she disappeared, that Stislicki's cell phone communicated with the cellular tower nearest to defendant's house shortly after defendant was seen in her passenger seat, that her DNA was found near a recently replaced patch of carpet in his bedroom, that defendant's cell phone communicated with towers along the route to Stislicki's apartment at the same time security cameras photographed a vehicle like Stislicki's returning to her apartment, and that Stislicki's keys and fitness tracker were discovered between her apartment and the nearby coffee shop, from which defendant took a cab back to his car, stopping first to act as if he were entering an apartment building across the street.

The trial court did not abuse its discretion by determining that the probative value of defendant's dissimilar attack on AT was substantially outweighed by the risk of unfair prejudice. The other-acts evidence is not particularly probative given (1) the dissimilarity between the defendant's prior acts and his alleged conduct in this case and (2) the abundance of admissible inculpatory evidence on the record. On the other side of the MRE 403 balancing test, the evidence strongly invites a prejudicial character inference. Furthermore, given the absence or weakness of any nonpropensity purpose for the evidence, a limiting instruction would not have alleviated the risk of unfair prejudice.

Affirmed.

CAVANAGH, P.J., and JANSEN and SHAPIRO, JJ., concurred.

PEOPLE v PARROTT

Docket No. 350380. Submitted June 2, 2020, at Lansing. Decided February 4, 2021, at 9:10 a.m. Leave to appeal denied 508 Mich 1005 (2021).

David M. Parrott was charged with operating while intoxicated (OWI), MCL 257.625(1), in the 85th District Court. In December 2018, defendant lost control of his vehicle and slid off the roadway. A tow truck driver who was called to extricate defendant's vehicle alerted the police that he suspected defendant of being intoxicated. A law enforcement officer who arrived at the scene also suspected that defendant was intoxicated and administered a preliminary breath test (PBT) with defendant's consent. The result of the PBT showed an unlawful blood alcohol concentration (BAC) of 0.109. The officer placed defendant under arrest for OWI and transported defendant to a hospital, where his blood was drawn for chemical analysis. The result of the blood test showed a BAC of 0.152 grams of alcohol per 100 mL of blood. Defendant retained an expert who planned to testify at trial that when defendant was operating his vehicle on the roadway, his BAC was likely below the legal limit of 0.08 g/dL. Defendant argued before the district court that his PBT result had to be admitted at trial to support his rising BAC defense. Defendant also moved to exclude any reference to his occupation or his display of an identification "badge" at the scene under MRE 401 and MRE 403. The prosecution moved to exclude any reference to the PBT result under MCL 257.625a(2)(b). The district court, Thomas N. Brunner, J., granted the prosecution's motion but denied both of defendant's motions. Defendant appealed in the Manistee Circuit Court. The court, David A. Thompson, J., denied defendant's interlocutory application for leave to appeal. The Court of Appeals granted defendant's interlocutory application.

The Court of Appeals *held*:

1. Under MCL 257.625a(2)(b), PBT results are only admissible to challenge the validity of an arrest or to rebut testimony concerning a defendant's breath alcohol content at the time of the offense. Defendant argued that the statute's restrictions against admitting his PBT result unconstitutionally impeded his right to

present a defense. Although criminal defendants have a constitutional right to a meaningful opportunity to present a defense, this right is not unlimited. A defendant's right to present a defense is subject to reasonable restrictions and may bow to accommodate other legitimate interests in the criminal trial process. The Legislature's purpose in restricting the use of PBT results in criminal trials was to prevent unwarranted convictions based solely on evidence that was unreliable when compared to breath, blood, and urine tests, which may be administered in more controlled environments than PBTs. An operator of a motor vehicle who is arrested for intoxicated driving is required to take a chemical test that is specifically designed to precisely determine the operator's BAC. By contrast, PBTs are normally administered in the field and are tested and calibrated for accuracy less frequently than chemical tests. Additionally, the Legislature has concluded that PBTs are devices primarily used by the police as an investigative tool to determine whether there was probable cause to arrest a suspected intoxicated driver. The Legislature's concern about the reliability of PBTs has broad national consensus, in that most states bar the admission of PBT results at trial because they have concluded that they are inherently unreliable. MCL 257.625a(2)(b) reflects the exercise of legislative authority that is consistent with the government's legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial. Accordingly, the restrictions imposed by MCL 257.625a(2)(b) were not arbitrary, contrary to defendant's assertion, because the Legislature assessed the comparative reliability of PBTs and chemical tests and determined that they are not equivalent. The Legislature also had a legitimate interest in limiting collateral litigation and jury confusion that could arise concerning the admission of comparatively unreliable breath tests. When viewed in this context, MCL 257.625a(2)(b) did not reflect an arbitrary exercise of governmental authority.

2. According to defendant, MCL 257.625a(2)(b) was disproportionate to the purpose it was designed to serve because its exceptions favor the prosecution. Under MCL 257.625a(2)(b)(*iii*), prosecutors can move for admission of PBT results when the result contradicts testimony elicited during a defendant's cross-examination that the defendant's BAC was lower when driving than when the chemical test was administered, thereby rebutting the defendant's assertion of a rising BAC defense. Conversely, defendants can move to admit PBT results under MCL 257.625a(2)(b)(*ii*) when the result contradicts testimony elicited during the prosecutor's cross-examination that the defendant's BAC was higher when the defendant was driving than when the

chemical test was administered, thereby rebutting the prosecution's assertion of a decreasing BAC. Defendant argued that this statutory scheme created an imbalance that favored prosecutors in the successful admission of PBT results because defendants who wished to show that their BAC was lower when they were driving opened the door during their cross-examination to the admission of PBT results that were detrimental to their case. Under the plain language of the statute, however, neither defendants nor prosecutors may use PBT results unless the result rebuts testimony regarding the defendant's BAC at the time of the offense. Because the statute does not provide an advantage to either party, it did not abridge defendant's right to present a defense because it is not arbitrary or disproportionate to the purposes it is designed to serve.

3. The application of MCL 257.625a(2)(b) to this case did not deprive defendant of his constitutional right to present a defense. Defendant argued that if the PBT result was not admitted as evidence he would be unable to rebut the presumption in MCL 257.625a(6)(a) that the amount of alcohol in a person's system as shown by the chemical test is presumed to be the same amount as at the time they were operating the vehicle. Accordingly, defendant argued, he would be deprived of the defense of a rising BAC. Defendant was not deprived of the meaningful opportunity to present a defense by MCL 257.625a(6)(a). Defendant was still free to present evidence concerning his weight and body type and the timing of any alcohol consumption, as well as expert testimony regarding how the body metabolizes alcohol in support of his argument that his BAC was lower when he was driving than when the chemical test was administered. While the PBT result might have helped this defense, defendant was not deprived of a meaningful opportunity to present a defense by its exclusion.

4. Under the Michigan Constitution, the Supreme Court's rulemaking power in matters of court practice and procedure is superior to that of the Legislature. However, the Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence. Statutory rules of evidence that reflect policy considerations limited to the orderly dispatch of judicial business are procedural and violate Const 1963, art 6, § 5. But statutory rules that reflect policy considerations over and beyond matters involving the orderly dispatch of judicial business are substantive, and in the case of a conflict with a court rule, the legislative enactment prevails. Defendant asserted that MCL 257.625a(2)(b) irreconcilably conflicted with MRE 702 and MRE 703. Even assuming such a conflict existed, defendant would not

be entitled to the admission of his PBT result under MRE 702 and MRE 703 because MCL 257.625a(2)(b) is substantive, not procedural, in that it reflects policy considerations over and beyond matters involving the orderly dispatch of judicial business. Additionally, there were legitimate policy reasons underlying the Legislature's decision to allow the admission of PBT results only in limited circumstances. Therefore, even to the extent that MCL 257.625a(2)(b) irreconcilably conflicted with MRE 702 and MRE 703, MCL 257.625a(2)(b) prevailed.

5. Defendant asserted that his vehicle was not found in an area "generally accessible to motor vehicles," MCL 257.625(1), and therefore the OWI charge against him should have been dismissed. Under MCL 257.625(1), operating a motor vehicle while intoxicated is prohibited (1) on a highway, (2) in a place open to the general public, or (3) in a place generally accessible to motor vehicles. The Michigan Vehicle Code, MCL 257.1 *et seq*., does not define the phrase "generally accessible," but the Michigan Supreme Court has held that its plain and ordinary meaning is "usually capable of being reached." The Michigan Vehicle Code defines "motor vehicle" as every vehicle that is self-propelled. Therefore, the statute prohibits an intoxicated person from operating a vehicle in a place that is usually capable of being reached by self-propelled vehicles. The district court did not err when it concluded that the field where defendant's vehicle was found was generally accessible to motor vehicles. While there were apparently some obstacles to the field, such as bushes and other vegetation, it was clear that defendant was able to access the field without extraordinary effort, and photographs from the record did not depict any objects that would prevent a vehicle from entering the field.

6. The law enforcement officer who arrested defendant testified that when he responded to the scene, defendant showed him a badge and asked him if "anything could be done." Defendant also apparently showed his badge to the tow truck driver and indicated that he was a "court officer from down state." Defendant sought to exclude this evidence as not relevant, or even if relevant, as too prejudicial to be admitted under MRE 403. The Court of Appeals has held that a defendant's demeanor, nonresponsive conduct, and statements may be properly admitted as evidence demonstrating consciousness of guilt. In this case, a jury could infer from defendant's conduct and statements that he had attempted to curry favor with law enforcement or avoid arrest. Therefore, defendant's actions were relevant under MRE 401 and MRE 402. Additionally, defendant's actions were not more prejudicial than probative

under MRE 403. Although this evidence could potentially prejudice defendant, MRE 403 only excludes relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. In this case, the probative value of defendant's alleged statement and display of his badge was highly probative and was not substantially outweighed by unfair prejudice because it reflected defendant's consciousness of guilt. Moreover, the district court stated that it would instruct the jury that it could not use evidence of defendant's position as a court officer to determine whether he was guilty. The court's limiting instruction was sufficient to minimize any prejudice and protect defendant's right to a fair trial.

Affirmed.

1. CRIMINAL LAW — RIGHT TO PRESENT A DEFENSE — OPERATING WHILE INTOXICATED — PRELIMINARY BREATH TEST RESULTS.

Under MCL 257.625a(2)(b) of the Michigan Vehicle Code, MCL 257.1 *et seq*., the results of a preliminary breath test (PBT) are only admissible in an intoxicated-driving prosecution to challenge the validity of an arrest or to rebut testimony regarding the defendant's breath alcohol content at the time of the offense; a defendant is not deprived of his or her constitutional right to present a defense when the PBT result is excluded because MCL 257.625a(2)(b) reflects an exercise of legislative authority that is consistent with the government's legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.

2. CRIMINAL LAW — ADMISSION OF THE EVIDENCE — PRELIMINARY BREATH TEST RESULTS — DISPROPORTIONALITY.

MCL 257.625a(2)(b) of the Michigan Vehicle Code, MCL 257.1 *et seq*., provides two exceptions to the general rule that preliminary breath test (PBT) results are not admissible at trial: (1) prosecutors can move to admit a PBT result when the result contradicts testimony elicited during a defendant's cross-examination that the defendant's blood alcohol content (BAC) was lower at the time of driving than when the chemical test was administered, thereby rebutting the defendant's assertion of a rising BAC, and (2) defendants can move to admit a PBT result when the result contradicts testimony elicited during the prosecutor's cross-examination that the defendant's BAC was higher at the time of driving than when the chemical test was administered, thereby rebutting the prosecutor's assertion of a decreasing BAC; because neither the prosecutor nor

> defendant may admit PBT results unless the result rebuts certain testimony regarding the defendant's BAC at the time of the offense, the statute does not provide an advantage to either party and, accordingly, is not disproportionate to the purpose it was designed to serve.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jason Haag*, Manistee County Prosecuting Attorney, and *Jordan Miller* and *Jonathan P. Hauswirth*, Assistant Prosecuting Attorneys, for the people.

The Nichols Law Firm, PLLC (by *Michael J. Nichols*), *Krolczyk and Quinn, PC* (by *Mark Quinn*), and *Speaker Law Firm* (by *Liisa R. Speaker*) for defendant.

Before: CAMERON, P.J., and BOONSTRA and LETICA, JJ.

CAMERON, P.J. In this intoxicated-driving prosecution, defendant, David Mark Parrott, appeals three district court orders that: (1) prohibited defendant from using his preliminary breath test (PBT) results at trial; (2) held that the area in which defendant's vehicle was stuck was, as a matter of law, generally accessible to motor vehicles; and (3) denied defendant's motion in limine to exclude evidence regarding his occupation and display of his "badge." Defendant appealed the orders to the circuit court, which denied his application for leave to appeal. We then granted leave to appeal.[1] For the reasons stated in this opinion, we affirm.

I. BACKGROUND

After leaving a 2018 Christmas Day gathering at approximately 6:20 p.m., defendant lost control of his

[1] *People v Parrott*, unpublished order of the Court of Appeals, entered December 11, 2019 (Docket No. 350380).

car and slid off the roadway. Defendant then "backed down [an] embankment" and into a "flat area" that turned into a field. Defendant spent the next 30 to 35 minutes attempting to return his car to the roadway. Unable to extricate his car, a tow truck driver was called to assist him. Shortly after the tow truck driver arrived at the scene, he called the police because he suspected that defendant was intoxicated. The Manistee County Sheriff's Office dispatched Sergeant Paul Woroniak to the scene at 7:08 p.m. He arrived approximately ten minutes later and saw defendant's car stuck "in the ditch," 5 to 10 feet from the roadway.

Sergeant Woroniak also suspected that defendant was intoxicated. He noted that defendant smelled like alcohol and had "bloodshot[,] . . . watery" eyes and "labored" speech. After defendant denied that he had consumed alcohol, Sergeant Woroniak attempted to administer a field sobriety test to defendant but abandoned the test because defendant was not following his instructions. About this time, defendant showed Sergeant Woroniak "his badge" "[a]nd inquired if anything could be done."[2] Undeterred, Sergeant Woroniak continued his investigation. Defendant consented to a PBT at the scene. The PBT result showed an unlawful blood alcohol concentration (BAC) of 0.109.[3]

Sergeant Woroniak informed defendant that the PBT result suggested that defendant was operating his vehicle with a BAC that was over the legal limit. In response, defendant told Sergeant Woroniak "that he was going to lose a quarter of his pay," and defendant again asked him "what could be done." Sergeant Woroniak placed defendant under arrest for

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[2] Defendant was a district court judge at the time of the arrest.

[3] Sergeant Woroniak testified that his training related to the operation of a PBT required him to truncate the result to 0.10.

operating while intoxicated, MCL 257.625(1), and transported defendant to a hospital where his blood was drawn at 8:08 p.m. The chemical test revealed that defendant's BAC was 0.152 grams of alcohol per 100 milliliters of blood. Defendant was then charged with operating while intoxicated.

In preparation for trial, defendant retained an expert who would testify that, at the time defendant was operating his vehicle on the roadway, his BAC was likely below the legal limit, but it had increased above the legal limit after the accident. Specifically, the expert believed that "at all relevant times prior to about 7:10 p.m., [defendant's] blood-alcohol concentration would be expected to be less than the *per se* level of 0.080g/dL" required for a conviction. Defendant asserted that his PBT result must be admitted at trial because it supported his rising BAC defense.[4]

The district court then decided several motions that are at issue in this appeal. Specifically, the district court granted the prosecutor's motion to exclude any reference to the PBT result at trial under MCL 257.625a(2)(b). The district court denied defendant's motion asking the court to hold that the area where defendant's car was found was not "generally accessible to motor vehicles" under MCL 257.625(1).[5] Lastly,

[4] We note that defendant did not move the trial court for a hearing in accordance with *Daubert v Merrell Dow Pharm, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993). Indeed, defendant's first explicit request for a *Daubert* hearing is in his reply brief on appeal. Such a hearing would have allowed this Court to more thoroughly evaluate whether defendant's PBT result is necessary for the expert to render an admissible opinion or is merely a helpful data point for defendant's rising BAC theory.

[5] The prosecutor charged defendant with either operating his vehicle on a highway *or* operating his vehicle in an area generally accessible to motor vehicles while intoxicated, which could include the 30 to 35 minutes that defendant attempted to get his car back on the roadway.

the court denied defendant's motion to exclude any reference to defendant's occupation and his display of a "badge" under MRE 401 and MRE 403.

Defendant appealed these decisions in the circuit court, which denied defendant's interlocutory application for leave to appeal. This Court then granted his interlocutory application.

II. ANALYSIS

A. RIGHT TO PRESENT A COMPLETE DEFENSE—THE PBT RESULT

Defendant argues that the district court erred when it excluded "the PBT because the application of the evidentiary statute—MCL 257.625a(2)(b)—unreasonably offends [his] [c]onstitutional right to present a complete defense." We disagree.

"We review issues of constitutional law de novo." *People v Benton*, 294 Mich App 191, 203; 817 NW2d 599 (2011). "Preserved evidentiary rulings are reviewed for an abuse of discretion." *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A trial court abuses its discretion when it "chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 217. "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Therefore, "when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law." *Id*.

MCL 257.625a(2)(b) addresses when PBT results are admissible for intoxicated-driving prosecutions.

"Our overriding goal for interpreting a statute is to determine and give effect to the Legislature's intent. The most reliable indicator of the Legislature's intent is the words in the statute." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (citations omitted). "The Legislature is presumed to have intended the meaning it plainly expressed in the statute." *People v Allen*, 499 Mich 307, 315; 884 NW2d 548 (2016).

PBT results are generally not admissible in intoxicated-driving prosecutions. Under MCL 257.625a(2)(b), PBT results are admissible only under the following circumstances:

> (*i*) To assist the court or hearing officer in determining a challenge to the validity of an arrest. . . .
>
> (*ii*) As evidence of the defendant's breath alcohol content, if offered by the defendant to rebut testimony elicited on cross-examination of a defense witness that the defendant's breath alcohol content was higher at the time of the charged offense than when a chemical test was administered under [MCL 257.625a(6)].
>
> (*iii*) As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony elicited on cross-examination of a prosecution witness that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered under [MCL 257.625a(6)].

Therefore, under the Michigan Vehicle Code, MCL 257.1 *et seq*., PBT results "are only admissible to challenge the validity of an arrest or to rebut testimony regarding a defendant's breath alcohol content at the time of the offense." *People v Booker*, 314 Mich App 416, 420; 886 NW2d 759 (2016). As a practical matter, this means that PBT results are rarely admitted at trial for intoxicated-driving prosecutions.

The parties agree that MCL 257.625a(2)(b) prohibits defendant from admitting his PBT result to support his rising BAC defense. The dispute is whether this statutory restriction imposes an unconstitutional impediment on defendant's right to present a complete defense.

"[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986) (quotation marks and citation omitted). Specifically, "[a] criminal defendant must be provided a meaningful opportunity to present evidence in his or her own defense." *People v Bosca*, 310 Mich App 1, 47; 871 NW2d 307 (2015). However, a defendant's right to present a complete defense "is not unlimited and is subject to reasonable restrictions." *People v King*, 297 Mich App 465, 473; 824 NW2d 258 (2012). A defendant's "right to present a complete defense may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Id*. (quotation marks and citation omitted).

> As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve. [*United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998) (quotation marks and citation omitted).]

1. ARBITRARINESS

Defendant first argues that the restrictions in MCL 257.625a(2)(b) are arbitrary. To analyze defendant's claim, we must examine the purpose the statute is designed to serve.

This Court has previously held that "[t]he long-range goal of the drunk driving laws is to reduce the carnage caused by drunk drivers by preventing intoxicated persons from driving." *People v Tracy*, 186 Mich App 171, 179; 463 NW2d 457 (1990). Additionally, this Court has concluded that the Legislature's "purpose of the PBT use restrictions seems to be to prevent unwarranted convictions based solely on evidence obtained from a testing system which is comparatively unreliable; the breath, blood, and urine test to which all drivers impliedly consent are more accurate and may be administered in more controlled environments than PBTs." *Id*. See also *Scheffer*, 523 US at 309 ("State and Federal Governments unquestionably have a legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial.").

In this case, defendant asserts that MCL 257.625a(2)(b) is arbitrary because the statute lacks any "principled or reasoned basis." However, we first recognize that the Legislature has concluded that the results of chemical tests, not PBT results, are admissible for intoxicated-driving prosecutions. See MCL 257.625a(6). An operator of a motor vehicle who is arrested for intoxicated driving is required to take a chemical test that is specifically designed to precisely determine the operator's BAC; the result of this test is admissible at trial as evidence of the operator's BAC. *Id*. The Legislature has concluded that PBTs are different; they are devices primarily used by police as an investigative tool to determine whether there is probable cause to arrest a suspected intoxicated driver. MCL 257.625a(2)(a) and (b)(*i*).[6] And unlike chemical tests, a PBT result is statutorily inadmissible at trial, unless the PBT result

[6] Indeed, even the Legislature's description of the test as *preliminary* reflects that the test is in preparation for something else.

rebuts certain testimony elicited during cross-examination. See MCL 257.625a(2)(b)(*ii*) and (*iii*).

The Legislature's different treatment of these BAC testing devices reflects its assessment that they are not equivalent. As already stated, we have previously recognized that chemical tests "to which all drivers impliedly consent are more accurate [than PBTs] and may be administered in more controlled environments." *Tracy*, 186 Mich App at 179. Conversely, PBTs are "comparatively unreliable." *Id*. PBTs are normally administered in the field, are tested and calibrated for accuracy less frequently than chemical tests,[7] and are primarily designed to assist police officers in making on-the-spot decisions about whether probable cause exists to make an arrest.

Our Legislature's concern about the reliability of PBT results has considerable support in other jurisdictions. Many other states' legislatures have passed similar laws that expressly restrict the admission of PBT results for intoxicated-driving prosecutions because of concerns about the test's reliability.[8] Most

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[7] Mich Admin Code, R 325.2653(1) requires "evidential breath alcohol test instrument[s]" to be "verif[ied] . . . for accuracy at least once each calendar week, or more frequently as the department may require." However, PBT devices are required to be tested and calibrated for accuracy only on a monthly basis. Mich Admin Code, R 325.2653(2).

[8] See, e.g., Colo Rev Stat 42-4-1301(6)(i)(III) (Colorado); DC Code 50-1904.01(c) (District of Columbia); Haw Rev Stat 291E-11(f) (Hawaii); Ind Code 9-30-6-5(d) (Indiana); Iowa Code 321J.5(2) (Iowa); Ky Rev Stat Ann 189A.104(2) (Kentucky); Minn Stat 169A.41(2) (Minnesota); Mo Rev Stat 577.021(3) (Missouri); Nev Rev Stat 484C.150(3) (Nevada); NC Gen Stat 20-16.3(d) (North Carolina); ND Cent Code 39-20-14(3) (North Dakota); 75 Pa Cons Stat 1547(k) (Pennsylvania); RI Gen Laws 31-27-2.3(a) (Rhode Island); Vt Stat Ann, tit 23, § 1203(f) (Vermont); Va Code Ann 18.2-267(E) (Virginia); W Va Code 17C-5-5 (West Virginia); Wis Stat 343.303 (Wisconsin). See also *United States v Iron Cloud*, 171 F3d 587, 590 (CA 8, 1999) ("[A]lmost every state that has addressed the issue has refused to admit [PBT results] for purposes other than probable cause.").

states bar PBT results at trial because they have concluded that the results are inherently unreliable. Our Legislature permits the use of PBTs to assist police officers in determining whether there is probable cause to arrest, but the PBT result may not be admitted in intoxicated-driving trials, unless the result rebuts certain testimony elicited during cross-examination. While defendant questions the logic of this policy, the broad, national consensus favoring the restriction of PBT results lends support to the conclusion that our Legislature has not arbitrarily imposed restrictions on the use of PBT results at trial.[9] We conclude that MCL 257.625a(2)(b) reflects the exercise of legislative authority that is consistent with our government's "legitimate interest in ensuring that reliable evidence is presented to the trier of fact in a criminal trial." See *Scheffer*, 523 US at 309.[10]

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[9] Defendant asks us to adopt an analysis similar to that provided in *Fischer v Ozaukee Co Circuit Court*, 741 F Supp 2d 944 (ED Wis, 2010), which involved the United States District Court for the Eastern District of Wisconsin granting habeas relief and vacating the defendant's intoxicated-driving conviction after the court concluded that Wisconsin's statute barring PBT results at trial violated the defendant's constitutional right to present a defense. However, this opinion is not binding on this Court, and we find its analysis unpersuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) ("Although lower federal court decisions may be persuasive, they are not binding on state courts."). Indeed, we have not found a single appellate court that has adopted the *Fischer* court's analysis. Even the Wisconsin state appellate court continues to uphold Wisconsin's PBT statute. See *State v Giles*, 389 Wis 2d 377; 2019 WI App 65, ¶ 17; 936 NW2d 419 (2019) (an unpublished opinion holding that the federal district court's opinion in *Fischer* is not binding authority and that "the circuit court did not violate [the defendant's] constitutional right to a defense by excluding the PBT results and associated expert testimony").

[10] Defendant asserts that it is illogical to impose a restriction on the admission of PBT results for intoxicated-driving prosecutions while permitting the admission of PBT results in other criminal and civil cases. We disagree. With respect to cases involving minors in posses-

We further conclude that the admission of a second, less reliable BAC test also has the potential to confuse the jury. The prosecution argues that the legislative history of MCL 257.625a(2)(b) suggests an intent to restrict the use of PBT results in order "to prevent unwarranted . . . jury confusion[.]" The prosecution points to a prior version of MCL 257.625a that allowed defendants to admit their PBT results in support of a rising BAC defense.[11] But in 1998, the Legislature

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sion of alcohol, PBT results are admissible to show the presence of alcohol; the *amount* of alcohol is essentially irrelevant so long as alcohol is present in the minor's system. Defendant is correct that PBT results are admissible in prosecutions where the defendant is in possession of a firearm while he or she has a BAC of "0.08 or more grams per 100 milliliters of blood." MCL 750.237(1)(b); *Booker*, 314 Mich App at 419-421. However, as discussed in detail in this opinion, the Legislature's decision to exclude PBT results in intoxicated-driving prosecutions is reflective of a sound policy decision. We will not pass judgment on the Legislature's failure to create a similar policy with respect to prosecutions under MCL 750.237(1)(b).

[11] MCL 257.625a(2)(b), as amended by 1994 PA 450, provided as follows:

> The results of a preliminary chemical breath analysis are admissible in a criminal prosecution for a crime enumerated in section 625c(1) or in an administrative hearing for 1 or more of the following purposes:
>
> (*i*) To assist the court or hearing officer in determining a challenge to the validity of an arrest. This subparagraph does not limit the introduction of other competent evidence offered to establish the validity of an arrest.
>
> (*ii*) As evidence of the defendant's breath alcohol content, if offered by the defendant.
>
> (*iii*) As evidence of the defendant's breath alcohol content, if offered by the prosecution to rebut testimony or other evidence, including but not limited to testimony elicited on cross-examination of a prosecution witness, that is offered or elicited to prove that the defendant's breath alcohol content was lower at the time of the charged offense than when a chemical test was administered pursuant to subsection (6).

amended MCL 257.625a to restrict the use of PBT results at trial such that neither the prosecutor nor the defendant may move to admit PBT results at trial unless the results rebut testimony elicited during cross-examination.[12] The amendment has undoubtedly had an effect on intoxicated-driving trials. For instance, because PBT results are rarely admitted at trial, hearings concerning the accuracy, reliability, and scientific support underlying the PBT, as compared to a chemical test, rarely occur. Furthermore, jury confusion over what weight should be given to the result from a less reliable testing device does not generally occur. We conclude that our Legislature has a legitimate interest in limiting collateral litigation and jury confusion concerning the result of comparatively unreliable breath tests. See *Scheffer*, 523 US at 309. When viewed in this context, MCL 257.625a(2)(b) simply does not reflect an arbitrary exercise of governmental authority.

2. DISPROPORTIONALITY

Defendant next argues that MCL 257.625a(2)(b) is disproportionate to the purpose it is designed to serve because the statute's exceptions favor the prosecution. MCL 257.625a(2)(b) provides two narrow exceptions that allow for the admission of PBT results at trial. Prosecutors can move for the admission of a PBT result when the result contradicts testimony elicited during a defendant's cross-examination that the defendant's BAC was lower at the time of driving than when the chemical test was administered, thereby rebutting the defendant's assertion of a rising BAC. MCL 257.625a(2)(b)(*iii*). And defendants can move for its

[12] See 1998 PA 351, effective October 1, 1999.

admission when the result contradicts testimony elicited during the prosecutor's cross-examination that the defendant's BAC was higher at the time of driving than when the chemical test was administered, thereby rebutting the prosecutor's assertion of a decreasing BAC. MCL 257.625a(2)(b)(*ii*). Defendant argues that defendants are rarely able to introduce their PBT results at trial under this statutory scheme because prosecutors do not cross-examine defense witnesses about a possible declining BAC when (1) the prosecutor knows that the PBT result is higher, not lower, than the result of the chemical test and (2) the prosecutor already has the result of a chemical test that is evidence of intoxication. Defendant asserts that prosecutors are far more successful than defendants when moving to admit PBT results at trial because defendants, eager to show that their BAC was lower at the time of driving, open the door during their cross-examination allowing for the admission of a PBT result that is detrimental to their case. This imbalance, defendant argues, is "diabolical" and renders MCL 257.625a(2)(b) disproportionate. We disagree.

In MCL 257.625a, the Legislature equalized how both defendants and the prosecution can use PBT results. The plain language of the statute treats defendants and the prosecutors the same: neither may use PBT results unless the result rebuts certain testimony regarding the defendant's BAC at the time of the offense. MCL 257.625a(2)(b)(*ii*) and (*iii*). The statute provides neither party an advantage. And even if we were to accept defendant's premise that prosecutors tend to have greater success when moving for the admission of PBT results, any imbalance is due to a defendant's cross-examination that opens the door to an unfavorable PBT result. We fail to see how a defendant's ill-advised cross-examination of a government witness renders a

neutral statute unconstitutionally disproportionate. Accordingly, MCL 257.625a(2)(b) does "not abridge [a defendant's] right to present a defense" because it is "not arbitrary or disproportionate to the purposes [it is] designed to serve." See *Scheffer*, 523 US at 308 (quotation marks and citations omitted).

3. APPLICATION OF MCL 257.625a(2)(b) TO DEFENDANT

Our conclusion that MCL 257.625a(2)(b) is not arbitrary or disproportionate does not end our analysis. We must next consider whether the application of MCL 257.625a(2)(b) in this case would deprive defendant of his constitutional right to present a complete defense.

Defendant argues that prohibiting him from admitting his PBT result will deprive him of a meaningful opportunity to present a complete defense because he will not be able to rebut the presumption in MCL 257.625a(6)(a). MCL 257.625a(6)(a) provides as follows:

> The amount of alcohol or presence of a controlled substance or other intoxicating substance in a driver's blood or urine or the amount of alcohol in a person's breath at the time alleged as shown by chemical analysis of the person's blood, urine, or breath is admissible into evidence in any civil or criminal proceeding and is presumed to be the same as at the time the person operated the vehicle.

Defendant argued before the district court that he intended to produce and qualify an expert witness at trial who would testify that "at all relevant times prior to about 7:10 p.m., [defendant's] blood-alcohol concentration would be expected to be less than the *per se* level of 0.080 g/dL." According to defendant, "the data points of 0.10 and 0.152[,] . . . along with other relevant testimony from witnesses and the simple physiology of the human body[,] will support his defense. . . . " In short, defendant seeks to introduce his PBT result into evi-

dence to support his argument that his BAC was below the legal limit at the time his vehicle left the roadway.

On appeal, defendant argues generally that he will "most likely be deprived of an opportunity to present any defense at all" if the PBT result is not admitted as substantive evidence. Notably, defendant stops short of arguing that he will be deprived of an expert witness if the PBT result is not admitted as substantive evidence at trial. Indeed, there seems to be no dispute that defendant could still present evidence concerning (1) his weight and body type, (2) the quantity and kind of alcohol and food he consumed, (3) the timing of any such consumption, and (4) the time delay between his operation of the vehicle and the blood draw. Defendant could then present expert testimony concerning how the body metabolizes alcohol to support his argument that his BAC was lower at the time he was operating his motor vehicle and increased as time passed. As conceded by defense counsel at oral argument, the issue here is that defendant's chemical test result is so far above the legal limit that the PBT result is necessary because without it the expert's opinion testimony appears speculative. While the PBT result may be helpful to the defense, defendant—like defendants before him—may still present expert testimony that his BAC was lower at the time he was driving because his BAC was increasing as the evening continued. He simply may not use his PBT result to do so.

Therefore, we conclude that defendant is not deprived of a meaningful opportunity to present a complete defense.[13] Consequently, the district court did not

[13] See *Giles*, 2019 WI App at ¶ 17 (holding that "the circuit court did not violate [the defendant's] constitutional right to a defense by excluding the PBT results and associated expert testimony"); see also *State v Shuler*, 168 Ohio App 3d 183, 187; 2006-Ohio-4336; 858 NE2d 1254

err when it held that the PBT result is inadmissible as substantive evidence under MCL 257.625a(2)(b).

B. THE ALLEGED "CONFLICT" BETWEEN MCL 257.625a(2)(b) AND MRE 702 AND MRE 703

Defendant also argues that the PBT results are admissible under MRE 702 and MRE 703 and that MRE 702 and MRE 703 "prevail over" MCL 257.625a(2)(b). We disagree.

Under our Constitution, "the Supreme Court's rule-making power in matters of court practice and procedure is superior to that of the Legislature." *People v McDonald*, 201 Mich App 270, 272; 505 NW2d 903 (1993). "The rules of practice and procedure include the rules of evidence." *Id*. However, the Legislature is not "wholly without power to enact statutes governing the admissibility of evidence. . . ." *Id*. "[T]he Legislature may enact statutory rules of evidence that do not conflict with the Michigan Rules of Evidence, and those statutory rules are enforceable until superseded by the Supreme Court." *Id*. at 273. "[S]tatutory rules of evidence that reflect policy considerations limited to the orderly dispatch of judicial business, i.e., court administration, are procedural and violate Const 1963, art 6, § 5." *People v Watkins*, 491 Mich 450, 474; 818 NW2d 296 (2012) (quotation marks omitted). But "statutory rules of evidence that reflect policy considerations over and beyond matters involving the orderly dispatch of judicial business are substantive, and in the case of a conflict with a court rule, the legislative enactment prevails." *Id*. (quotation marks omitted).

(2006) (holding that the trial court's exclusion of an unreliable PBT result for evidential purposes did not violate the defendant's federal constitutional rights to due process or compulsory process).

Even assuming that MCL 257.625a(2)(b) irreconcilably conflicts with MRE 702 and MRE 703, we conclude that defendant would not be entitled to the relief he seeks, i.e., admission of the PBT result under MRE 702 and MRE 703. This is because MCL 257.625a(2)(b) is substantive—not procedural—in that it reflects "policy considerations over and beyond matters involving the orderly dispatch of judicial business." See *Watkins*, 491 Mich at 474. Indeed, as already discussed in detail, there are legitimate policy reasons underlying the Legislature's decision to allow the admission of PBT results only in limited circumstances. Therefore, even to the extent that MCL 257.625a(2)(b) irreconcilably conflicts with MRE 702 and MRE 703, MCL 257.625a(2)(b) prevails. See *Watkins*, 491 Mich at 472.

C. MOTION TO DISMISS

Defendant next argues that the district court erred by denying his motion to dismiss his criminal charge because, under the plain language of MCL 257.625(1), his vehicle was not found in an area that was "generally accessible to motor vehicles." We disagree.

"Whether a defendant's conduct falls within the scope of a penal statute is a question of statutory interpretation that is reviewed de novo." *People v Rea*, 500 Mich 422, 427; 902 NW2d 362 (2017). "The Michigan Vehicle Code . . . prohibits a person from operating a motor vehicle while intoxicated." *Id*. at 428. MCL 257.625(1) provides, in relevant part, as follows:

> 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.

"Accordingly, MCL 257.625(1) prohibits operating a vehicle while intoxicated in three types of locations:

(1) upon a highway, (2) in a place open to the general public, or (3) in a place generally accessible to motor vehicles." *Rea*, 500 Mich at 428. As relevant to this appeal, whether a particular area is "generally accessible to motor vehicles" "involves a legal question that must be resolved by the court." *Id*. at 428 n 2.

"[T]he Michigan Vehicle Code does not define the phrase 'generally accessible. . . .' " *Id*. at 429. However, our Supreme Court decided that "the plain and ordinary meaning of the phrase 'generally accessible' means 'usually capable of being reached.' " *Id*. at 429-430. The Court further held that

> the word "generally" is an adverb that modifies the adjective "accessible." "Generally" is defined as "in a general manner"; "in disregard of specific instances and with regard to an overall picture"; and "as a rule: USUALLY." The term "accessible" means "providing access"; "capable of being reached: being within reach" and "capable of being used or seen." Therefore, the plain and ordinary meaning of the phrase "generally accessible" means "usually capable of being reached."
>
> This phrase must be considered in its statutory context: "other place . . . generally accessible to motor vehicles." The phrase "generally accessible" modifies the preceding noun phrase "other place." Accordingly, the prohibition in MCL 257.625(1) against operating a vehicle while intoxicated does not apply to every place. Instead, the statute's prohibition applies only to highways, to other places open to the general public, and to other places that are generally accessible—that is, usually or ordinarily capable of being reached. Finally, we must incorporate the phrase "to motor vehicles," which is an adverbial prepositional phrase that modifies "generally accessible." The Michigan Vehicle Code defines "motor vehicle" as "every vehicle that is self-propelled . . . ." Therefore, as a whole, the relevant statutory provision prohibits an intoxicated person from operating a vehicle in a place that is usually capable of

> being reached by self-propelled vehicles. [*Rea*, 500 Mich at 429-431 (citations omitted).]

In this case, defendant argued in his motion to dismiss that the prosecution would be unable to prove that defendant was intoxicated while he was driving on the roadway because he was still absorbing alcohol. Defendant also argued that his intoxication level at the time that his vehicle was in the private field was irrelevant because the private field, which was "surrounded by brush and trees, and consisted of raw, undeveloped and uncultivated land," was not generally accessible to motor vehicles. Defendant further argued that "[t]here [were] no curb cuts, driveways, two-tracks, trails or any other features or structures designed for or adapted to the usual and ordinary access of that part of the field by motor vehicles." Defendant noted that, because of the steep embankment and his inability to extricate the vehicle from the field, "it cannot possibly be said that that area is usually or ordinarily or easily capable of being reached by motor vehicles."

The prosecution responded by arguing that the field was an area that was generally accessible. The prosecution explained that its theory of the case was that defendant's BAC was above the legal limit at the time he was driving on the roadway. Therefore, the prosecution indicated that it intended to prove that defendant was operating his vehicle on a highway and/or in an area generally accessible to motor vehicles while he was intoxicated.

At an evidentiary hearing, the prosecutor asked Sergeant Woroniak to describe "where the vehicle was located in relation to [Chrestensen] Road and Milarch Road when [he] arrived on [the] scene." The following exchange then occurred:

Sergeant Woroniak: . . . [Chrestensen] Road runs east and west, Milarch Road runs north and south. The vehicle was located in a ditch area, which would be off the main travel portion of the roadway, almost equal parts [Chrestensen] and equal parts of Milarch, but in the ditch.

The Prosecutor: What part of the intersection was it in? Was it in the southwest corner, northwest corner, northeast corner, or the southeast corner?

Sergeant Woroniak: Southwest corner.

The Prosecutor: "Southwest corner." So, it would be south of [Chrestensen] road, and west of Milarch Road? Is that what we understood your testimony is?

Sergeant Woroniak: Correct; yes.

The Prosecutor: Approximately, how far from each roadway?

Sergeant Woroniak: Approximately ten feet.

The Prosecutor: "Approximately ten feet"?

Sergeant Woroniak: Five to ten feet, yeah.

* * *

The Prosecutor: Do you remember which way the vehicle was facing, as far as directional travel out? Up here is direction of travel from where it sat (indicating). You know, where was the front of the car facing, what direction?

Sergeant Woroniak: . . . [I]t looked to me that the nose of the vehicle was facing [Chrestensen] Road.

The Prosecutor: Okay. So, to the north-northwest?

Sergeant Woroniak: Correct.

Defendant testified that, after he slid on the snow and into the brush on the edge of the traveled portion of Chrestensen Road on December 25, 2018, he backed his vehicle down the embankment and onto a flat area that turned into a field. In the spring of 2019, defen-

dant took photographs of "the final location of the vehicle," and the photographs were admitted. Defendant testified that one of the photographs depicted a "hole" that was from "the tire rut from [his] right-rear tire." He further testified that "[t]he back of the car would have been immediately behind that, and the side of the car would have extended parallel, along the embankment, with the front of the car facing to the west." Thereafter, the following line of questioning occurred:

> *Defense Counsel*: How far were you from Milarch Road—I'm sorry—[Chrestensen] road?
>
> *Defendant*: From my measurements, from—you say [Chrestensen] Road?
>
> *Defense Counsel*: The road that has the stop sign, sir.
>
> *Defendant*: There were some exhibits attached. I took those measurements, and I tried to take as many photos as possible, to try to be as accurate as possible. And my measurements show that I was—how can I put this—I tried to ascertain the center line of [Chrestensen] Road, by measuring between—there's a curve. You can see a painted curve on both sides of [Chrestensen] Road—yes—and it goes around a corner. So, I attempted to ascertain—the way I ascertained the center line of the road, is that I measured between those two curves, and then divided that in half, and I think they came out to be 17 feet, 9 inches. And then I measured from the same spot at the curve down to the rut. But exactly to the rut, because the rut is actually beyond the curve, and I wanted it to be perpendicular; I didn't want it to be on an angle or to distort the measurement. And, you will see in this picture, I found an arrow, and I put in the ground, and then I put a stick over here, to give the idea where I was measuring to, and the measuring came out to be 17 feet, 3 inches, that's what I added to the 17 feet, 9 inches, indicated to me that my car was 35 feet from the center line of [Chrestensen] Road. The arrow, actually, I think I meant that to be the 33 feet. You can "ballpark it," but it was two feet.

> *Defense Counsel*: And from Milarch, same?
>
> *Defendant*: No, Milarch, I was much farther away. But I stopped measuring because I had a 25-foot tape measure, and I measured from the curve, and I ran it out twice. I guess my recollection of the position of the vehicle is not the same as the officer's, apparently—the Sergeant's.

After the hearing, the district court stated that it would accept supplemental briefing. In defendant's supplemental brief, he requested that the court "order the prosecution of [defendant] for the alleged violation of MCL 257.625(1) be limited to" the period of time before "his vehicle entered [the] field." With respect to whether the field was generally accessible, defendant argued that "[s]imply because an area is 'accessible' . . . does not mean that it is *generally* accessible." Defendant further argued that "[g]enerally accessible doesn't mean occasionally accessible; it doesn't mean sometimes accessible; it doesn't mean accessible with great or unusual effort or by accident; it doesn't mean not ordinarily or not regularly." According to defendant, the area where his vehicle was located was not generally accessible. Specifically, defendant "submit[ted] that . . . areas not designed for vehicular travel, are by their nature, areas a vehicle is not usually capable of accessing." Defendant further noted that the field "contain[ed] natural barriers to entry, including steep embankments, [and] brush and trees along its perimeter." According to defendant, he was only able to enter the field by "mere happenstance and by accident."

Defendant also argued that, even if the prosecutor was permitted to prosecute him for his "conduct in the field," the charge should be dismissed because he presented evidence at the hearing that "his vehicle was not within [the] boundaries of the highway after

he backed down the embankment into the field." Defendant cited MCL 221.20, which provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

Defendant argued that because he presented evidence "that his vehicle was 35 feet from the centerline of Chrestensen and over 50 feet from Milarch," he "made a *prima facie* showing that his vehicle was not within [the] boundaries of the highway after he backed down the embankment into the field." Defendant also argued that review of the video from Sergeant Woroniak's body camera established that Sergeant Woroniak's "distance estimate is simply mistaken." The prosecution also filed a supplemental brief, which largely reiterated the arguments contained in its original responsive pleading.

When the district court later heard oral argument, defense counsel reiterated the arguments contained in the pleadings and referred to testimony provided by Sergeant Woroniak and defendant at the earlier evidentiary hearing. Specifically, defense counsel noted that "when [the] car gets down 35-feet from the center point of [Chrestensen], as [defendant] testified to, that he measured it, and easily almost 50 feet from the

center of Milarch, at that point it was not in an area where it could be operated as defined by the statute." Defense counsel also indicated that it would be understandable if the district court decided that additional testimony was needed before it ruled on the motion. The prosecution requested that, under *Rea*, the district court "find, as a matter of law, that [defendant's] vehicle was found in a place that's generally accessible to motor vehicles. . . ."

The district court ruled:

> I don't think we need more factual evidence on it. You know, we have several exhibits that have been submitted, and [defendant] testified for his observations out there as well; the officer did as well.
>
> The leading case on this, the Court agrees with Counsel that it's *People v Rea*, Michigan Supreme Court case 500 Mich 422, that case does appear to make it as a matter of law for the Court to determine whether the area in question meets the statutory definition of potentially being a place where somebody could drive intoxicated.
>
> In this particular case, the *Rea* court indicated the plain and ordinary meaning of the phrase "generally accessible" means, quote, "usually capable of being reached," end quote. This particular aspect of "generally accessible to motor vehicles," is what we're looking at. "A place generally accessible to motor vehicles," there's multitudes of motor vehicles by definition. Essentially, motor vehicle means, "Every vehicle that is self-propelled." And so, what can we determine about this area at the intersection of [Chrestensen] Road and Milarch Road?
>
> The area in question is, in fact, a place that the Defendant did reach with his vehicle. The standard that *Rea* gave was "usually capable of being reached." We essentially have a road that falls off into a ditch area a little bit, then kind of levels out in, essentially, a field. And the *Rea* case, I think, really gave a rather broad conclusion or interpretation of the statute, "usually capable of being

> reached." I don't see anything particular about this location that makes it a situation other than usually capable of being reached.
>
> So, based upon what the Supreme Court of Michigan is saying in *People v Rea*, the ditch area and field in close proximity to the intersection of [Chrestensen] and Milarch Road, would, in this Court's interpretation, be a place generally accessible to motor vehicles, and would be potentially a location where somebody could be operating a motor vehicle while intoxicated, potentially, depending on the facts in the case. So, that would be my ruling on the question of law as to whether this is a place generally accessible to motor vehicles.

Thus, the district court concluded that the area where defendant's vehicle was located was generally accessible to motor vehicles because it was "usually capable of being reached." The district court then entered an order consistent with its ruling from the bench.

Although the district court did not make specific factual findings concerning how close defendant's vehicle was to the roadway when it came to rest in the field, we can infer from its on-the-record findings that the court accepted Sergeant Woroniak's testimony. Specifically, the district court stated, "[t]he area in question is, in fact, a place that the Defendant did reach with his vehicle. . . . We essentially have a road that falls off into a ditch area a little bit, then kind of levels out in, essentially, a field." The district court also found that "the ditch area and field [were] in close proximity to the intersection of [Chrestensen] and Milarch Road[.]"

Applying the reasoning in *Rea* to this case, we conclude that the district court did not err by concluding that the field where defendant's vehicle was found was generally accessible to motor vehicles. See MCL 257.625(1). Although it appears to be undisputed that

there were some obstacles, such as bushes lining the uncultivated field, it is clear that defendant was nonetheless able to access the field without extraordinary effort. Specifically, defendant testified that, after he slid on the snow into the brush on the edge of the traveled portion of Chrestensen Road, he backed his vehicle down an embankment and onto the flat area that became a field. Indeed, the photographs that were taken by defendant and admitted into evidence do not depict any objects that would prevent a vehicle from entering the field.[14] Thus, there was nothing in the area that prevented defendant's vehicle from entering the field. See, e.g., *Rea*, 500 Mich at 435 (noting that there was "nothing on [the] defendant's driveway that would prevent motor vehicles on the public street from turning into it") (emphasis omitted).

As noted by the district court, testimony at the hearing showed that the area where defendant's vehicle came to rest was in close proximity to two public roadways. Defendant's vehicle certainly had the ability to enter the area a short period of time after he was traveling on the roadway. Although defendant argues on appeal that his vehicle had to be extracted from the field with a tow truck, this does not change the fact that the area was "in a place that [was] . . . capable of being reached by [a] self-propelled vehicle[]." *Id*. at 431. Indeed, it appears from defendant's testimony that he was unable to extract his vehicle because of the snow, because of the incline between the field and the road, and because his rear tire became "stuck." In sum,

[14] Defendant agreed that the photographs were "a fair and accurate depiction of the final resting spot of the vehicle[.]" When asked if there were any differences between the photographs and how the scene appeared on December 25, 2018, defendant responded, "It was early in the season, the brush—the foliage hasn't come up. So pretty much, the only difference that I recall, is there's no snow."

we conclude that the district court did not err by concluding that the area in which defendant's vehicle was found was generally accessible to motor vehicles.

D. EVIDENCE OF DEFENDANT'S CONDUCT AND STATEMENTS

Finally, defendant argues that the district court improperly denied his motion to exclude any reference to his occupation at trial. We review "[p]reserved evidentiary rulings . . . for an abuse of discretion." *Unger*, 278 Mich App at 216.

As discussed, Sergeant Woroniak testified that defendant showed him "his badge" "[a]nd inquired if anything could be done" while Sergeant Woroniak was in the process of completing his investigation. Thereafter, Sergeant Woroniak informed defendant about the PBT result. Defendant stated "that he was going to lose a quarter of his pay" and again asked Sergeant Woroniak "what could be done." Defendant also engaged in similar conduct with the tow truck driver when he allegedly displayed "a badge" to the driver and identified himself as a "court officer from down state."

During pretrial proceedings, defendant filed a motion in limine to preclude the prosecution from introducing evidence that defendant "wanted to 'get out of' getting arrested by advising the law enforcement officers/others at the scene that he [wa]s a court officer or even a judge in the Wayne County area." In his motion, defendant noted that evidence supported that he had displayed a "badge." However, defendant alleged that "[h]is occupation [wa]s not relevant" and that, even if the district court determined that it was marginally relevant, the evidence should be excluded under MRE 403. In response, the prosecution argued that defendant's conduct was relevant and highly probative of his consciousness of guilt.

After hearing oral argument, the district court ruled:

> Well, in looking at this matter, I think generally speaking, statements that Defendants make, or their actions at the time of a traffic stop, are generally information that can go to the jury. In this case, if there are statements and actions by Defendant to make persons on the scene aware of [his] general occupation or line of business to gain potentially some favor, is an argument that the Prosecutor could make, and there's arguments that the Defendant could make as well. But I think the Prosecutor should be able to make an argument of a consciousness of guilt-type statement as to what people say or do when they're in a position that looks like they could be in some trouble.
>
> In terms of prejudicial, any comments against Defendant are prejudicial. I think the question is: Is it just so highly prejudicial, that—is it so highly prejudicial that it can't be probative, that it can't help the jury? There can be a limiting instruction, details of which could be worked out, but certainly along the lines that the Defendant's occupation cannot be taken into account in deciding whether [he] is guilty or not guilty, but I think any statements and conduct by the Defendant at the scene, is something that is relevant, I think it's admissible, and either side can make whatever argument they believe is pertinent to it. So, I think it should be admitted.

Thus, it appears that the district court held that defendant's statements and actions at the scene—including displaying his badge—are admissible. Although the district court was somewhat vague in its ruling, clarification from the district court is not necessary. During oral argument before this Court, the prosecution indicated that it did not intend to introduce evidence that defendant was employed as a district court judge at the time of the offense. The prosecution also indicated that it was only seeking to introduce the conduct and statements that were directed toward Ser-

geant Woroniak. Consequently, we focus our analysis on whether defendant's alleged request to Sergeant Woroniak of whether "anything could be done" and that he presented a "badge" to Sergeant Woroniak are admissible under MRE 401, 402, and 403.

MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 402 provides that "[e]vidence which is not relevant is not admissible." Evidence that reflects a defendant's consciousness of guilt is relevant. *People v Schaw*, 288 Mich App 231, 237; 791 NW2d 743 (2010). "Evidence of an attempt to avoid arrest . . . in a criminal case is relevant, material, admissible, and can lead to an inference of guilt." *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982). A "defendant's demeanor, nonresponsive conduct, and statements" may be properly admitted to evidence consciousness of guilt. *People v Solmonson*, 261 Mich App 657, 667; 683 NW2d 761 (2004). It is ultimately for the jury to determine whether a defendant's conduct was indicative of consciousness of guilt. *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996).

We conclude that, contrary to defendant's assertions, his statements and actions are relevant to proving his consciousness of guilt. In this case, a jury could infer from defendant's conduct that defendant knew he was unlawfully operating a vehicle while under the influence. Defendant's conduct and statements could also support an argument that he was attempting to curry favor with law enforcement and influence the investigation's outcome to avoid arrest. Therefore, we conclude that defendant's conduct of displaying his badge and his statement whether "anything could be done" are relevant.

Defendant's prearrest statement and conduct are also admissible under MRE 403. MRE 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, evidence is not "unfairly prejudicial" simply because it is damaging to a defendant's case. Rather, "unfair prejudice" "refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011) (quotation marks and citation omitted). "Evidence is unfairly prejudicial when . . . [the danger exists] that marginally probative evidence will be given undue or preemptive weight by the jury." *Id*. (quotation marks and citation omitted; first alteration omitted; second alteration in original). "In this context, prejudice means more than simply damage to the opponent's cause. A party's case is always damaged by evidence that the facts are contrary to his contentions, but that cannot be grounds for exclusion." *Schaw*, 288 Mich App at 237 (quotation marks and citation omitted).

We conclude that defendant's alleged statement and conduct of displaying his badge are admissible under MRE 403. Although this evidence could potentially prejudice defendant, MRE 403 only excludes relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In this case, the probative value of defendant's alleged statement and display of

his badge is not substantially outweighed by unfair prejudice because it is highly probative in that it reflects his consciousness of guilt. See *Schaw*, 288 Mich App at 237-238. Additionally, the district court stated that it would provide a limiting instruction, informing the jury that it could *not* use evidence of defendant's position as a court officer to determine whether he was guilty. Because "[i]t is well established that jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), this is sufficient to minimize any prejudice and protect defendant's right to a fair trial. Therefore, the trial court did not abuse its discretion.

Affirmed.

BOONSTRA and LETICA, JJ., concurred with CAMERON, P.J.

SANDSTONE CREEK SOLAR, LLC v TOWNSHIP OF BENTON

Docket No. 352910. Submitted January 6, 2021, at Lansing. Decided February 4, 2021, at 9:15 a.m. Leave to appeal denied 508 Mich 947 (2021).

Sandstone Creek Solar, LLC (Sandstone) and Gary Walters brought an action in the Eaton Circuit Court against Benton Township, seeking a declaratory judgment that an interim zoning ordinance enacted by defendant was invalid (Count I); seeking a declaratory judgment that defendant had improperly imposed a moratorium on projects within the township (Count II); alleging that the interim zoning ordinance imposed exclusionary zoning in violation of MCL 125.3207 of the Michigan Zoning Enabling Act (the MZEA), MCL 125.3101 *et seq*. (Count III); alleging that defendant violated Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*. (Count IV); and seeking a declaratory judgment that defendant's refusal to accept Walters's referendum petition was improper and unlawful (Count V). In 2016, Sandstone began to implement its plan to build a solar-power project in Benton Township for the purpose of generating electricity for sale in the utility market. Sandstone therefore set about acquiring property interests in various parcels in the township, including land owned by Walters. At this time, Benton Township did not have its own zoning ordinance; as a result, zoning and land use in the township was regulated by Eaton County under its zoning ordinance, the Land Development Code, which did not have a comprehensive ordinance applicable to solar-energy systems. Eaton County began the process of amending its Land Development Code to facilitate the anticipated permit application of Sandstone. The Benton Township Board of Trustees adopted a resolution stating that the proposed solar-power project was not consistent with the Land Development Code. Nonetheless, the Eaton County Board of Commissioners amended the county's Land Development Code to permit the solar-power project. The Benton Township Board of Trustees held a special meeting, at which the board adopted a resolution providing that the township would perform its own zoning from that date forward and imposed a moratorium on new permits for one year or until the land-use and zoning ordinances were put in place. Benton Township requested that the Eaton

County Planning Commission "table any matters concerning land use and planning within Benton Township to provide sufficient time for the Township to establish its own zoning ordinance." The Benton Township Planning Commission reviewed a proposed interim zoning ordinance and approved a resolution recommending that the proposed interim zoning ordinance be adopted by the township board. The interim zoning ordinance permitted small-scale solar-energy systems in districts zoned for industrial use and permitted large-scale solar-energy systems in industrial districts by special-use permit. The township planning commission submitted the proposed interim zoning ordinance to the Eaton County Planning Commission. The Benton Township Board of Trustees received comments on the recommended interim zoning ordinance and approved a resolution to accept the interim zoning ordinance from the township planning commission. Walters submitted to the Benton Township clerk a notice of intent to file a referendum petition pursuant to MCL 125.3402, challenging the interim zoning ordinance; that same day, Sandstone filed a complaint in the trial court initiating this case. In addition to the five counts in their second amended complaint, plaintiffs also moved for a preliminary injunction seeking an order compelling defendant to accept Walters's referendum petition, to determine the adequacy of the petition, and to place the interim zoning ordinance on the ballot at the next regular or special election. The trial court, John D. Maurer, J., denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs were not likely to succeed on the merits of the case and that there was no danger of irreparable harm to plaintiffs or harm to the public interest without a preliminary injunction. The trial court dismissed Count V, finding that the MZEA did not provide for a right of referendum of an interim zoning ordinance. The trial court also dismissed Counts I through IV of plaintiffs' second amended complaint. However, the trial court granted plaintiffs partial relief under Count IV of their second amended complaint, which alleged that defendant had failed to comply with the FOIA. The trial court thereafter issued its order denying plaintiffs' motion for preliminary injunction and dismissing plaintiffs' second amended complaint. Plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court did not err by finding that Benton Township's interim zoning ordinance was not subject to a petition for referendum under the MZEA. MCL 125.3201(1) of the MZEA provides, in pertinent part, that a local unit of government may provide by zoning ordinance for the regulation of land develop-

ment and the establishment of one or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens. The MZEA is a standalone, comprehensive zoning statute that was entirely new when first enacted. Therefore, the terms of a statute that the Legislature repealed and replaced in enacting the MZEA did not influence the interpretation of the MZEA. The MZEA involves separate and distinct procedures for the enactment of interim and noninterim ordinances. MCL 125.3401 governs the adoption of zoning ordinances, sometimes referred to as "initial" zoning ordinances, by the legislative body of a municipality. MCL 125.3402 provides the process by which an elector of a county or township may challenge a zoning ordinance by petitioning for referendum. And MCL 125.3404 is the separate section that is dedicated to interim zoning ordinances. Interim zoning ordinances are temporary, limited under MCL 125.3404(4) to one year from their effective date, and renewable for two additional years; by contrast, an initial zoning ordinance does not have an expiration date. Interim zoning ordinances may be given immediate effect under MCL 125.3404, thereby providing a stopgap measure to give the municipality adequate time to develop a permanent zoning ordinance; initial zoning ordinances are not given immediate effect under MCL 125.3401. Furthermore, the provision allowing an interim ordinance to take immediate effect would be defeated if interim ordinances could be automatically suspended upon the filing of a referendum petition. MCL 125.3404 also contains no hearing requirement for an interim zoning ordinance, and there is nothing in the language of MCL 125.3404 indicating that an interim zoning ordinance is subject to referendum. Finally, because the MZEA is plain and unambiguous in mandating separate and distinct procedures for the enactment of interim and initial ordinances, and because the purpose and procedures of MCL 125.3404 for an interim zoning ordinance mandate automatic approval for the temporary time that the interim zoning ordinance exists, there was no need to engage in statutory interpretation of MCL 125.3402(1). Accordingly, the trial court properly held that the right to file a petition for referendum under MCL 125.3402 does not apply to an interim zoning ordinance implemented under MCL 125.3404.

2. The trial court did not abuse its discretion by finding that plaintiffs were not likely to prevail on the merits of Counts I and V of their second amended complaint. The party requesting injunctive relief has the burden to establish that a preliminary injunction is warranted. When determining whether to grant the extraordinary remedy of a preliminary injunction, the trial court

must consider (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the applicant is likely to prevail on the merits, (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party, and (4) whether the public interest will be harmed if a preliminary injunction is issued. A preliminary injunction should not be issued if an adequate legal remedy is available. Economic injuries generally are not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. In addition, the mere apprehension of future injury or damage cannot be the basis for injunctive relief. In this case, plaintiffs argued that defendant did not comply with the required procedural requirements for adopting an interim zoning ordinance. However, MCL 125.3404(1) provides that the township was permitted—but not required—to direct the zoning commission to submit within a specified period of time recommendations as to the provisions of an interim zoning ordinance; the failure to do so did not invalidate the interim zoning ordinance. Given that the planning commission reviewed a recommended interim zoning ordinance seven days later and approved a resolution recommending that the proposed interim zoning ordinance be adopted by the board, it was clear that the planning commission understood that the township board's resolution was a directive to prepare an interim zoning ordinance to provide for immediate zoning within the township. Furthermore, plaintiffs argued that because defendant did not amend its current ordinance or adopt a new ordinance to fully conform to the Michigan Planning Enabling Act (the MPEA), MCL 125.3801 *et seq*., by July 1, 2011, the planning commission "did not exist" and was not authorized to conduct the duties of a planning commission under the MZEA at the time the interim ordinance was developed. However, while MCL 125.3881(3)(b)(*ii*) of the MPEA states that to fully conform to the requirements of the act, the legislative body shall amend the preexisting ordinance creating the planning commission or repeal the ordinance or resolution and adopt a new ordinance by no later than July 1, 2011, the MPEA provides no penalty or remedy if such action is not taken. Because no sanction should 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, no sanction was read into the MPEA. Finally, the trial court did not abuse its discretion by finding that plaintiffs failed to demonstrate that they would suffer irreparable harm if an injunction was not issued. Plaintiffs' loss of property interests in the real estate on which they hoped to build a solar-energy project

constituted a mere apprehension of future injury or damage that could not be the basis for injunctive relief. Sandstone acquired its property interests knowing that the Eaton County zoning ordinance did not provide for solar-energy systems. Accordingly, the trial court did not abuse its discretion by denying plaintiffs' motion for a preliminary injunction.

3. US Const, Am XIV and Const 1963, art 1, § 17 provide that no person shall be deprived of property without due process of law. Due process requires that a party receive notice of the proceedings against it and a meaningful opportunity to be heard. In this case, the trial court's dismissal of Counts I and V did not violate plaintiffs' due-process rights. The trial court heard plaintiffs' arguments fully on those counts at the continued motion hearing, at which plaintiffs availed themselves of the opportunity to present evidence related to their likelihood of success on the merits and submitted their supplemental brief and exhibits supporting their position. Plaintiffs thus had ample notice and an opportunity to be heard regarding the merits of Counts I and V of their second amended complaint. With respect to Count IV, although the trial court dismissed plaintiffs' FOIA claim, the trial court granted plaintiffs' request for relief; therefore, plaintiffs were heard on Count IV. However, with respect to Counts II and III, the record did not reveal that plaintiffs were on notice that the trial court was prepared to consider the dismissal of those claims. Although the record indicated that the parties referred to the motion for preliminary injunction as akin to a discussion of summary disposition, neither party specifically addressed the merits of Counts II and III in their supplemental briefing. Because a trial court's failure to inform the plaintiff that the court is contemplating summary disposition of the plaintiff's claims is a fatal procedural flaw necessitating reversal, the trial court erred by dismissing Counts II and III of plaintiffs' second amended complaint without notice and hearing on those counts.

Trial court's denial of plaintiffs' motion for a preliminary injunction, grant of partial relief to plaintiffs under Count IV of the second amended complaint, and dismissal of Counts I, IV, and V of the second amended complaint affirmed; trial court's dismissal of Counts II and III of the second amended complaint reversed and remanded to the trial court for further proceedings.

ZONING — MICHIGAN ZONING ENABLING ACT — INTERIM ZONING ORDINANCES — PETITIONS FOR REFERENDUM.

MCL 125.3402 of the Michigan Zoning Enabling Act (the MZEA), MCL 125.3101 *et seq*., provides the process by which an elector of

a county or township may challenge a zoning ordinance by petitioning for referendum; MCL 125.3404 of the MZEA is dedicated to interim zoning ordinances; the right to file a petition for referendum under MCL 125.3402 does not apply to an interim zoning ordinance implemented under MCL 125.3404.

Varnum LLP (by *Matthew D. Zimmerman*, *David T. Caldon*, and *Brion B. Doyle*) for Sandstone Creek Solar, LLC, and Gary Walters.

Fahey Schultz Burzych Rhodes PLC (by *William K. Fahey*, *Christopher S. Patterson*, *Matthew A. Kuschel*, and *Jacob N. Witte*) and *Lucas Law, PC* (by *Frederick Lucas*) for Benton Township.

Amicus Curiae:

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

Before: GADOLA, P.J., and BORRELLO and M. J. KELLY, JJ.

GADOLA, P.J. Plaintiffs, Sandstone Creek Solar, LLC (Sandstone) and Gary Walters, appeal as of right the order of the trial court denying their motion for a preliminary injunction, granting in part their claim for relief under Michigan's Freedom of Information Act (FOIA), MCL 15.231 *et seq*., and dismissing their complaint in all other respects. We affirm in part, reverse in part, and remand to the trial court for further proceedings.

I. FACTS

The facts of this case are largely undisputed. According to plaintiffs, Sandstone is a subsidiary of Geronimo Energy, LLC (Geronimo), a renewable-energy development company with its headquarters in Minnesota.

Geronimo is itself a subsidiary of National Grid Ventures and is the renewable-energy platform of National Grid North America, Inc., which, according to plaintiffs, sells electricity and natural gas to millions of consumers in the northeastern United States.

In 2016, Sandstone began to implement its plan to build a solar-power project in Michigan for the purpose of generating electricity for sale in the utility market. Sandstone determined that a desirable location for the power project would be Benton Township, located in Eaton County. Anticipating that the power project would occupy several hundred acres of farmland in Benton Township, Sandstone set about acquiring property interests in various parcels in the township, including land owned by plaintiff Walters.

At the time Sandstone began acquiring property for its power project in 2016, Benton Township did not have its own zoning ordinance; as a result, zoning and land use in the township was regulated by Eaton County under its zoning ordinance, known as the Land Development Code. At that time, the Land Development Code did not have a comprehensive ordinance applicable to solar-energy systems. According to plaintiffs' second amended complaint, when Eaton County became aware of Sandstone's plan to locate the solar-power project in Benton Township, the county began the process of amending its Land Development Code to facilitate the anticipated permit application by Sandstone.

These efforts, however, met with opposition in Benton Township. On May 8, 2017, the Benton Township Board of Trustees adopted a resolution of the Benton Township Planning Commission as Solar Farm Resolution 2017-2. That resolution provided:

> WHEREAS, the proposal for the Solar Farm in Benton/Oneida Townships is not consistent with the current Eaton County Land Development Code (14.1 and 14.5); and
>
> WHEREAS, the proposed Solar Farm is not an agricultural Enterprise but a commercial initiative—which is inconsistent with current zoning designation; and
>
> WHEREAS, it is the position of the Benton Township Planning Commission that any solar farm proposal must conform to the principles of farmland preservation as stipulated in the Benton Township Master Plan and Eaton County Land Development Code; then
>
> Let it be resolved that this position be communicated to the Benton Township Board of Trustees, the Eaton County Planning Commission, and the Eaton County Board of Commissioners for their support. [Formatting altered.]

By letter dated February 20, 2018, Benton Township Supervisor Roger Wickerham advised the Eaton County Planning Commission regarding the county's proposed amendment to its Land Development Code:

> Benton Township stresses the fact that Large Solar Arrays should not be allowed on agriculture zoned property. Large solar arrays are not an acceptable use for farm land, especially prime farm land. . . .
>
> Approving solar arrays on farm land goes strictly against Benton Township's Master Plan which we devoted much time, energy and funds to complete. Large solar arrays installed by a private company for profit on this scale is a commercial use of land and should be on that type of zoned property to comply with our Master Plan. We would urge the County to strongly take this into consideration.

Wickerham urged the county to allow large solar arrays only on property zoned as light industrial and with a special-use permit, consistent with the practice of the neighboring Oneida Township.

Nonetheless, the Eaton County Board of Commissioners amended the county's Land Development Code by adding § 14.39 "to regulate the safe, effective and efficient use of solar energy systems in order to reduce or replace the consumption of electricity supplied by utility companies." Eaton County Land Development Code, § 14.39.2. As amended, the Code permits "Solar Energy Systems, Large or Medium as provided in Section 14.39 of this Ordinance," in limited agricultural districts, by conditional-use permit. Eaton County Land Development Code, § 7.3.4(Z) (formatting altered).

On October 17, 2019, Sandstone submitted a conditional-use permit application to Eaton County, indicating that Sandstone had purchase agreements for approximately 850 acres[1] zoned as limited agricultural in Benton Township. The Benton Township Board of Trustees held a special meeting on October 30, 2019, at which the board adopted a resolution providing that the township would perform its own zoning from that date forward as provided by the Michigan Zoning Enabling Act (the MZEA), MCL 125.3101 *et seq*., and imposed a moratorium on new permits for one year or until the land-use and zoning ordinances were put in place. On November 5, 2019, Benton Township requested that the Eaton County Planning Commission "table any matters concerning land use and planning within Benton Township to provide sufficient time for the Township to establish its own zoning ordinance."

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[1] A typical township is comprised of 36 sections, with each section consisting of 640 acres, for a total of 23,040 acres. Michigan Department of Environmental Quality, *Town Range and Section in Michigan* <http://www.michigan.gov/documents/deq/ogs-oilandgas-mapping-t-r-s_263223_7.pdf> (accessed January 15, 2021) [https://perma.cc/PT27-F664]. In October 2019, Sandstone had already acquired a purchase interest in 850 acres in Benton Township, or about 3.7% of a typical township, for its solar-power project.

The Benton Township Planning Commission met on November 7, 2019, reviewed a proposed interim zoning ordinance, and approved a resolution recommending that the proposed interim zoning ordinance be adopted by the township board. The interim zoning ordinance permitted small-scale solar-energy systems in districts zoned for industrial use and permitted large-scale solar-energy systems in industrial districts by special-use permit. The township planning commission submitted the proposed interim zoning ordinance to the Eaton County Planning Commission "for the purpose of coordinating the zoning ordinance with the zoning ordinances of Eaton County and municipalities with zoning ordinances that have a common boundary with Benton Township no later than November 8, 2019."

On November 11, 2019, the Benton Township Board of Trustees received comments on the recommended interim zoning ordinance and approved a resolution to accept the interim zoning ordinance from the township planning commission as of the date of the meeting. The resolution provided that the board would receive comments from the Eaton County Planning Commission, the Eaton County Community Development Department, township residents, and any other individuals or municipalities for 15 days before the interim zoning ordinance would be considered approved. It also provided that the board would hold a public meeting on or after November 26, 2019, to consider giving the interim zoning ordinance immediate effect. The township planning commission was directed to "initiate steps to prepare a final and permanent zoning ordinance pursuant to the MZEA for consideration of the Township Board while the interim zoning ordinance remains in effect." On November 26, 2019, the Benton Township Board of Trustees convened and adopted a resolution approving the interim zoning ordinance,

giving it immediate effect as of November 27, 2019. Notice of the interim zoning ordinance was published November 30, 2019.

On December 2, 2019, Walters submitted to the Benton Township clerk a notice of intent to file a referendum petition pursuant to MCL 125.3402, challenging the interim zoning ordinance. That same day, Sandstone filed a complaint[2] in the trial court initiating this case. As later amended, the complaint set forth five claims: Count I sought a declaratory judgment that the interim zoning ordinance was invalid because Benton Township had failed to follow the requirements of the MZEA in enacting the interim zoning ordinance, Count II sought a declaratory judgment that Benton Township had improperly imposed a moratorium on projects within the township, Count III alleged that the interim zoning ordinance imposed exclusionary zoning in violation of MCL 125.3207, Count IV alleged a violation of the FOIA, and Count V sought a declaratory judgment that Benton Township's refusal to accept Walters's referendum petition was improper and unlawful.

Plaintiffs also moved for a preliminary injunction seeking an order compelling Benton Township to accept Walters's referendum petition, to determine the adequacy of the petition, and to place the interim zoning ordinance on the ballot at the next regular or special election. The township opposed plaintiffs' motion for a preliminary injunction, contending that no right of referendum existed with respect to an interim zoning ordinance adopted under MCL 125.3404. Because the township at that time had not yet received

[2] The complaint was thereafter amended twice; the second amended complaint added Walters as a plaintiff.

Walters's petition, the township also asserted that plaintiffs' request for relief was not ripe.

The trial court held hearings on plaintiffs' motion for a preliminary injunction on December 20, 2019, and on January 21, 2020. In their supplemental brief submitted to the trial court, plaintiffs sought not only the preliminary injunction as requested in their motion but also a declaratory judgment on Count V of their second amended complaint that the interim zoning ordinance was subject to referendum under the MZEA. Plaintiffs also argued in their supplemental brief that they were entitled to a preliminary injunction on the basis that the township did not follow the procedures of the MZEA, as alleged in Count I of their second amended complaint.

By contrast, Benton Township argued that plaintiffs were not entitled to a preliminary injunction because the interim zoning ordinance was adopted pursuant to MCL 125.3404 and therefore was not subject to referendum. The township also argued that plaintiffs were not entitled to relief regarding their claim that the township failed to follow the procedures outlined in the MZEA because that relief was not requested in plaintiffs' motion, was not relevant to deciding whether the township must accept a petition for referendum, and lacked merit because the township used a proper process to adopt its interim zoning ordinance.

The trial court's scheduling order specified that at the January 21, 2020 hearing, the trial court would consider "Plaintiffs' request for injunctive relief as well as the merits of Count V of Sandstone's Complaint, as amended, which seeks a declaratory judgment with respect to the right to referend an interim zoning ordinance." The trial court also ordered Benton Town-

ship to make an adequacy determination regarding the referendum petition before the January 21, 2020 hearing.

At the conclusion of the hearing, the trial court denied plaintiffs' motion for a preliminary injunction, finding that plaintiffs were not likely to succeed on the merits of the case and that there was no danger of irreparable harm to plaintiffs or harm to the public interest without a preliminary injunction. With respect to plaintiffs' request for a declaratory judgment under Count V of their second amended complaint, the trial court dismissed Count V, finding that the MZEA did not provide for a right of referendum of an interim zoning ordinance.

The trial court also dismissed Counts I through IV of plaintiffs' second amended complaint. The trial court observed that similar to the relief sought in Count V, plaintiffs had requested in Count I that the trial court declare Benton Township's interim zoning ordinance invalid on the alternative basis that the township failed to follow the requirements of the MZEA when adopting the interim zoning ordinance. The trial court dismissed Count I, holding that the interim zoning ordinance was not improperly implemented. The trial court also dismissed Count II of plaintiffs' second amended complaint, which alleged that Benton Township unlawfully imposed a moratorium on projects within the township, and Count III of plaintiffs' second amended complaint, which asserted a claim for exclusionary zoning in violation of MCL 125.3207.

The trial court granted plaintiffs partial relief under Count IV of their second amended complaint, which alleged that Benton Township had failed to comply with the FOIA. The trial court required the township to produce any additional responsive materials on or

before February 21, 2020, and ordered the township to pay plaintiffs $2,000 in costs and attorney fees in satisfaction of the FOIA violation. The trial court summarized its ruling:

> To summarize, it is the order of this court that the township zoning ordinance having been implemented consistent with the Michigan Zoning Enabling Act is valid and cannot be subject to referendum until such a time as an official permanent zoning ordinance is ready to be implemented.
>
> Given the process is somewhat new to the Township board, it is reasonable for them to invoke the temporary . . . moratorium on new permits in the interim zoning.
>
> The fact that the interim zoning ordinance does not allow Sandstone Creek to continue with it's [sic] project as intended or way intended, does not amount to exclusionary zoning, as Sandstone Creek has not shown the presence of a demonstrated need for solar power in or around Benton Township.
>
> And even if the right to referendum did apply to interim zoning ordinance[s] under the Michigan Zoning Enabling Act, Sandstone Creek has not met the requirements for a preliminary injunction as set forth.
>
> However, the Township, as I had previously ordered, will within 30 days under the Freedom of Information Act, will supply that.

The trial court thereafter issued its order denying plaintiffs' motion for preliminary injunction and dismissing plaintiffs' second amended complaint. Plaintiffs now appeal.

II. ANALYSIS

A. RIGHT OF REFERENDUM UNDER THE MZEA

Plaintiffs contend that the trial court erred by finding that Benton Township's interim zoning ordinance

was not subject to a petition for referendum under the MZEA, and that the trial court therefore abused its discretion by denying their motion for a preliminary injunction and dismissing their claim for a declaratory judgment set forth in Count V of their second amended complaint. We disagree.

Municipalities do not have inherent power to regulate land use through zoning. See *Olsen v Chikaming Twp*, 325 Mich App 170, 179; 924 NW2d 889 (2018). Our state's Legislature, as an exercise of police power, may authorize municipalities to enact zoning ordinances. See *Krajenke Buick Sales v Hamtramck City Engineer*, 322 Mich 250, 254; 33 NW2d 781 (1948). In 2006, our Legislature consolidated three previous zoning-enabling acts into the MZEA, see *Olsen*, 325 Mich App at 179, which grants local units of government authority to regulate land development and use through zoning, see *Maple BPA, Inc v Bloomfield Charter Twp*, 302 Mich App 505, 515-516; 838 NW2d 915 (2013).

Specifically, the MZEA provides that "[a] local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens . . . ." MCL 125.3201(1); *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 456; 957 NW2d 47 (2020). " 'Zoning jurisdiction' means the area encompassed by the legal boundaries of a city or village or the area encompassed by the legal boundaries of a county or township outside the limits of incorporated cities and villages. The zoning jurisdiction of a county does not include the areas subject to a township zoning ordinance.' " MCL 125.3102(w). A township that has enacted a zoning ordinance under

the MZEA "is not subject to an ordinance, rule, or regulation" adopted by a county. MCL 125.3209.

In this case, the parties do not dispute that Eaton County exercised zoning powers over Benton Township until Benton Township adopted an interim zoning ordinance under MCL 125.3404. Plaintiffs sought to challenge that interim ordinance by referendum. The central issue in this case is whether the trial court erred by determining that Benton Township's interim zoning ordinance is not subject to a petition for referendum under the MZEA.

We review de novo issues involving the construction of statutes and ordinances. *Bonner v Brighton*, 495 Mich 209, 221-222; 848 NW2d 380 (2014). To determine whether in this case the trial court erred by determining that the interim zoning ordinance is not subject to a petition for referendum under the MZEA, we look first to the provisions of the MZEA, mindful that our primary task when interpreting a statute is to discern and give effect to the intent of the Legislature. See *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014). We do so by first examining the plain language of the statute. *Driver v Naini*, 490 Mich 239, 246-247; 802 NW2d 311 (2011). We read statutory provisions "in the context of the entire act, giving every word its plain and ordinary meaning," *id*. at 247, and we avoid reading any statutory provision in isolation, *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). In doing so, we avoid a construction of the statute that would render any part 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 the language of a statute is clear and unambiguous, we apply the statute as written, and judicial construction is neither required nor permitted.

Ally Fin Inc v State Treasurer, 502 Mich 484, 493; 918 NW2d 662 (2018).

Before the enactment of the MZEA, zoning authority for townships was provided by the now repealed Township Rural Zoning Act (the TRZA), MCL 125.271 *et seq*. Under § 15 of the TRZA, former MCL 125.285, a township board could direct the township's zoning board to submit recommendations regarding the provisions of the interim zoning ordinance "and to submit those recommendations without consideration for sections 7, 8, 9, 11, and 12," which expressly exempted interim township zoning ordinances from the right of referendum. In discussing that statutory section, this Court observed in *Lake Twp v Sytsma*, 21 Mich App 210; 175 NW2d 337 (1970), that "[e]nactment of an original ordinance . . . requires notice, hearings, and submission to the electors" but that the Legislature excepted interim zoning ordinances from that basic rule in MCL 125.285 " '[t]o protect the public health, safety, morals, and general welfare . . . during the period required for the preparation and enactment of an ordinance authorized by this act'," *id*. at 212-213 (emphasis omitted), thus providing for "a stopgap ordinance" while preparations were made to enact a full and complete zoning ordinance, *id*. at 214.

Plaintiffs argue that because MCL 125.3404 of the MZEA does not include that same language of former MCL 125.285, that the township board may direct the township's zoning board to submit recommendations regarding the provisions of an interim zoning ordinance "and to submit those recommendations without consideration for sections 7, 8, 9, 11, and 12," our Legislature must have intended that MCL 125.3404 of the MZEA subject interim zoning ordinances to referendum. Plaintiffs' argument is premised on the prin-

ciple that a statutory amendment signals a change in the meaning of the statute or a desire of the Legislature to correct or clarify the statute amended. See *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009). However, changes in statutory language do not always indicate a change in statutory meaning. *Mich Charitable Gaming Ass'n v Michigan*, 310 Mich App 584, 607; 873 NW2d 827 (2015). Moreover, the MZEA did not amend the TRZA; rather, the MZEA repealed and replaced the TRZA and other zoning-enabling legislation, supplanting the provisions of the TRZA with the provisions of the MZEA. We therefore are not persuaded that all provisions of the MZEA must be read exclusively through the lens of the now repealed TRZA. The MZEA is a standalone, comprehensive zoning statute that was entirely new when first enacted. We are not influenced in this case by the terms of a statute the Legislature repealed and replaced in enacting the MZEA, particularly when we are convinced of the statutory meaning without resort to the language of a repealed act. A review of the provisions of the MZEA reveals that the act involves separate and distinct procedures for the enactment of interim and noninterim ordinances. Section 401 of the MZEA, MCL 125.3401, governs the adoption of zoning ordinances, sometimes referred to as "initial" zoning ordinances, by the legislative body of a municipality. Section 402 of the MZEA, MCL 125.3402, provides the process by which an elector of a county or township may challenge a zoning ordinance by petitioning for referendum. The MZEA dedicates a separate section to interim zoning ordinances. Section 404 of the MZEA, MCL 125.3404, provides:

> (1) To protect the public health, safety, and general welfare of the inhabitants and the lands and resources of a local unit of government during the period required for

> the preparation and enactment of an initial zoning ordinance under this act, the legislative body of a local unit of government may direct the zoning commission to submit, within a specified period of time, recommendations as to the provisions of an interim zoning ordinance.
>
> (2) Before presenting its recommendations to the legislative body, the zoning commission of a township shall submit the interim zoning ordinance, or an amendment to the ordinance, to the county zoning commission or the coordinating zoning committee, for the purpose of coordinating the zoning ordinance with the zoning ordinances of a township, city, or village having a common boundary with the township. The ordinance shall be considered approved 15 days from the date the zoning ordinance is submitted to the legislative body.
>
> (3) After approval, the legislative body, by majority vote of its members, may give the interim ordinance or amendments to the interim ordinance immediate effect. An interim ordinance and subsequent amendments shall be filed and published as required under section 401.
>
> (4) The interim ordinance, including any amendments, shall be limited to 1 year from the effective date and to not more than 2 years of renewal thereafter by resolution of the local unit of government.

Distinctions between an initial ordinance adopted under § 401 and an interim ordinance approved under § 404 exist. For example, interim zoning ordinances are temporary, limited under § 404(4) to one year from their effective date, and renewable for two additional years; by contrast, an initial zoning ordinance does not have an expiration date. Interim zoning ordinances may be given immediate effect under § 404, thereby providing a stopgap measure to give the municipality adequate time to develop a permanent zoning ordinance; initial zoning ordinances are not given immediate effect under § 401.

The purpose of the procedural differences applicable to initial and to interim zoning ordinances is evident from the clearly expressed intent of § 404 to allow local units of government to adopt an interim zoning ordinance "[t]o protect the public health, safety, and general welfare of the inhabitants and the lands and resources of a local unit of government during the period required for the preparation and enactment of an initial zoning ordinance" under the MZEA. MCL 125.3404(1). To achieve that result, § 404 provides clear direction for adopting an interim zoning ordinance, providing that the interim zoning ordinance is considered approved 15 days from the date the interim zoning ordinance is submitted to the legislative body, MCL 125.3404(2), that after approval the interim zoning ordinance may be given immediate effect, and that the interim zoning ordinance "shall be filed and published as required under section 401." MCL 125.3404(3). It appears to us that the clearly stated legislative purpose "[t]o protect the public health, safety, and general welfare . . . during the period required for the preparation and enactment of an initial zoning ordinance"—and the provision allowing an interim ordinance to take immediate effect for that purpose—would be defeated if interim ordinances could be automatically suspended upon the filing of a referendum petition. In other words, the logic that this Court articulated in *Sytsma* applies with equal force today, despite the absence of an express exemption from the right of referendum in the MZEA.

The filing and publishing requirements under § 401, MCL 125.3401, are contained in Subsections (7), (9), and (10) of the statute and provide as follows:

> (7) Following adoption of a zoning ordinance or any subsequent amendments by the legislative body, the zon-

> ing ordinance or subsequent amendments shall be filed with the clerk of the legislative body, and a notice of ordinance adoption shall be published in a newspaper of general circulation in the local unit of government within 15 days after adoption.
>
> * * *
>
> (9) The notice required under this section shall include all of the following information:
>
> (a) In the case of a newly adopted zoning ordinance, the following statement: "A zoning ordinance regulating the development and use of land has been adopted by the legislative body of the [county, township, city, or village] of _____."
>
> (b) In the case of an amendment to an existing zoning ordinance, either a summary of the regulatory effect of the amendment, including the geographic area affected, or the text of the amendment.
>
> (c) The effective date of the ordinance or amendment.
>
> (d) The place where and time when a copy of the ordinance or amendment may be purchased or inspected.
>
> (10) The filing and publication requirements under this section supersede any other statutory or charter requirements relating to the filing and publication of county, township, city, or village ordinances.

A plain reading of MCL 125.3404 reveals no other requirements for the adoption of an interim zoning ordinance. Specifically, § 404 contains no hearing requirement for an interim zoning ordinance, and there is nothing in the language of § 404 indicating that an interim zoning ordinance is subject to referendum.

Plaintiffs argue, however, that all zoning ordinances are subject to referendum because § 402(1) of the MZEA, MCL 125.3402(1), provides that "[w]ithin 7 days after publication of a zoning ordinance under section 401, a registered elector residing in the zoning

jurisdiction of a county or township may file with the clerk of the legislative body a notice of intent to file a [referendum] petition under this section." Plaintiffs argue that because § 404(3) requires an interim zoning ordinance to be "filed and published as required under section 401," an interim zoning ordinance falls within the provision of § 402(1) that permits referendum "[w]ithin 7 days after publication of a zoning ordinance under section 401 . . . ." That is, plaintiffs urge that § 402(1) permits referendum for any zoning ordinance if it is published under § 401, and thus § 402(1) should be read to include publication of an interim ordinance in accordance with § 401 as required by § 404(3). Stated another way, plaintiffs read "publication of a zoning ordinance under section 401" to mean "any ordinance published under section 401" and not "an ordinance under section 401 that has been published."

We decline to construct that meaning from the language of § 402(1). Although the limited phrase "publication of a zoning ordinance under section 401" is perhaps subject to more than one possible meaning, the MZEA's separate and distinct procedures for the enactment of interim and initial ordinances are not. As noted, we read statutory provisions "in the context of the entire act, giving every word its plain and ordinary meaning," *Driver*, 490 Mich at 247, and we avoid reading any statutory provision in isolation, *Robinson*, 486 Mich at 15. Because the MZEA is plain and unambiguous in mandating separate and distinct procedures for the enactment of interim and initial ordinances, and because the purpose and procedures of § 404 for an interim zoning ordinance mandate automatic approval for the temporary time that the interim zoning ordinance exists, there is no need for this Court to engage in statutory interpretation of § 402(1). See *Ally Fin Inc*, 502 Mich at 493. Section 404 addresses

the adoption of interim zoning ordinances and makes no reference to a right of referendum. Section 401 addresses the adoption and amendment of zoning ordinances or initial zoning ordinances, not interim zoning ordinances. And Section 402 subjects zoning ordinances, not interim zoning ordinances, to the right of referendum. We therefore conclude that the trial court properly held that the right to file a petition for referendum under MCL 125.3402 does not apply to an interim zoning ordinance implemented under MCL 125.3404.

B. INJUNCTIVE RELIEF

In the trial court, plaintiffs sought a preliminary injunction compelling Benton Township to accept Walters's referendum petition, to determine the adequacy of the petition, and to place the interim zoning ordinance on the ballot at the next election. Plaintiffs argued that they were likely to succeed under Count V of their second amended complaint asserting that the interim zoning ordinance was subject to referendum and also under the alternative ground set forth in Count I of their second amended complaint that the interim zoning ordinance was invalid because it was improperly enacted. On appeal, plaintiffs contend that the trial court abused its discretion by denying their request for injunctive relief because they were entitled to prevail on Counts I and V. We disagree.

We review a trial court's decision concerning a preliminary injunction for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 32; 896 NW2d 39 (2016). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. at 33-34.

The party requesting injunctive relief has the burden to establish that a preliminary injunction is warranted. MCR 3.310(A)(4); *Slis v Michigan*, 332 Mich App 312, 337; 956 NW2d 569 (2020). A preliminary injunction generally is considered a form of equitable relief intended to maintain the status quo pending a final hearing determining the rights of the parties, *id*. at 336, and is considered an extraordinary remedy, *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274; 856 NW2d 206 (2014). When determining whether to grant the extraordinary remedy of a preliminary injunction, the trial court must consider:

> (1) whether the applicant has demonstrated that irreparable harm will occur without the issuance of an injunction, (2) whether the applicant is likely to prevail on the merits, (3) whether the harm to the applicant absent an injunction outweighs the harm an injunction would cause to the adverse party, and (4) whether the public interest will be harmed if a preliminary injunction is issued. [*Slis*, 332 Mich App at 337.]

A preliminary injunction should not be issued if an adequate legal remedy is available. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008). Economic injuries generally are not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. *Alliance for Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 664; 588 NW2d 133 (1998). In addition, the mere apprehension of future injury or damage cannot be the basis for injunctive relief. *Pontiac Fire Fighters*, 482 Mich at 9.

As discussed, the trial court correctly determined that plaintiffs were not likely to succeed in Count V of their second amended complaint. Plaintiffs contend, however, that they are likely to succeed on the merits

of Count I of their complaint because Benton Township did not follow the procedural requirements outlined in MCL 125.3404 when adopting the interim zoning ordinance, thereby rendering the interim zoning ordinance invalid. Again, MCL 125.3404 provides, in relevant part:

> (1) To protect the public health, safety, and general welfare of the inhabitants and the lands and resources of a local unit of government during the period required for the preparation and enactment of an initial zoning ordinance under this act, the legislative body of a local unit of government may direct the zoning commission to submit, within a specified period of time, recommendations as to the provisions of an interim zoning ordinance.
>
> (2) Before presenting its recommendations to the legislative body, the zoning commission of a township shall submit the interim zoning ordinance, or an amendment to the ordinance, to the county zoning commission or the coordinating zoning committee, for the purpose of coordinating the zoning ordinance with the zoning ordinances of a township, city, or village having a common boundary with the township. The ordinance shall be considered approved 15 days from the date the zoning ordinance is submitted to the legislative body.

Plaintiffs argue that under § 404(1), the township's resolution to provide for its own zoning did not provide sufficient direction to the planning commission to adopt an interim zoning ordinance and did not comply with the required procedural requirements of (1) including the word "interim" in the resolution, (2) directing the planning commission to respond within a specified period of time, and (3) directing the planning commission to provide recommendations on provisions for the ordinance. As the trial court observed, however, the Legislature's use of the word "may" in § 404(1) indicates a permissive, but not mandatory, provision. *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431

(2008). Thus, § 404(1) provides that the township was permitted—but not required—to direct the zoning commission to submit within a specified period of time recommendations as to the provisions of an interim zoning ordinance; the failure to do so does not invalidate the interim zoning ordinance. Further, given that the planning commission reviewed a recommended interim zoning ordinance seven days later and approved a resolution recommending that the proposed interim zoning ordinance be adopted by the board, it is clear that the planning commission understood that the township board's resolution was a directive to prepare an interim zoning ordinance to provide for immediate zoning within the township.

Plaintiffs also argue that the interim zoning ordinance is invalid because Benton Township did not have a valid planning commission that could act as a zoning commission required by § 404(2) to submit its recommended interim zoning ordinance to the county zoning commission. Plaintiffs acknowledge that § 301(1)(b) of the MZEA, MCL 125.3301(1)(b), permits a planning commission created before enactment of the MZEA to exercise the powers and perform the duties of a zoning commission under the MZEA. Section 301(1)(b) provides that each local unit of government shall create a zoning commission unless

> [a] planning commission was, as of June 30, 2006, in existence in the local unit of government and pursuant to the applicable planning enabling act exercising the powers and performing the duties of a county zoning commission created under former 1943 PA 185, of a township zoning board created under former 1943 PA 184, or of a city or village zoning commission created under former 1921 PA 207. Unless abolished by the legislative body, that existing planning commission shall continue and exercise

> the powers and perform the duties of a zoning commission under this act. [MCL 125.3301(1)(b).]

Plaintiffs' assertion that the planning commission was not in existence before June 30, 2006, is not supported by the evidence. As noted by the trial court, Benton Township's master plan reflects that the planning commission participated in the preparation of the August 21, 2001 master plan. The trial court did not err by finding that the township satisfied §§ 301(1)(b) and 404(2) by having a properly constituted planning commission before June 30, 2006, exercising the powers and duties of a zoning commission.

Plaintiffs argue, however, that the township planning commission was not "proper" under the Michigan Planning Enabling Act (the MPEA), MCL 125.3801 *et seq*., at the time the commission developed the interim zoning ordinance. The prior township planning act, along with the municipal planning act and the county planning act, were replaced by the MPEA. MCL 125.3885. MCL 125.3881(3) provides, in pertinent part:

> (3) Unless repealed, an ordinance creating a planning commission under former 1931 PA 285 or former 1945 PA 282 or a resolution creating a planning commission under former 1959 PA 168 continues in effect under this act, and the planning commission need not be newly created by an ordinance adopted under this act. However, all of the following apply:
>
> (a) Beginning on the effective date of this act, the duties of the planning commission are subject to the requirements of this act.
>
> (b) The legislative body shall amend the ordinance, or repeal the ordinance or resolution and adopt a new ordinance, to fully conform to the requirements of this act by the earlier of the following dates:

(*i*) The date when an amendatory or new ordinance is first adopted under this act for any purpose.

(*ii*) July 1, 2011.

Plaintiffs argue that because Benton Township did not amend its current ordinance or adopt a new ordinance to fully conform to the MPEA by July 1, 2011, the planning commission "did not exist" and was not authorized to conduct the duties of a planning commission under the MZEA at the time the interim ordinance was developed.[3] They argue that the interim ordinance is therefore invalid. However, while MCL 125.3881(3)(b)(*ii*) states that to fully conform to the requirements of the act, the legislative body shall amend the preexisting ordinance creating the planning commission or repeal the ordinance or resolution and adopt a new ordinance by no later than July 1, 2011, the MPEA provides no penalty or remedy if such action is not taken. No sanction should 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. *Nickola v MIC Gen Ins Co*, 500 Mich 115, 123; 894 NW2d 552 (2017). We will not read such a sanction into the statute by judicially declaring that the failure to adopt a new ordinance by the designated date renders the planning commission a nullity. The trial court did not abuse its discretion by finding that plaintiffs were not likely to prevail on the merits of Count I of their second amended complaint.

Plaintiffs also argue that they will suffer irreparable harm from the loss of their property interests in the real estate on which they hope to build a solar-energy project. However, the "mere apprehension of future

[3] Plaintiffs do not dispute that the township subsequently reaffirmed and reestablished the planning commission under the MPEA.

injury or damage cannot be the basis for injunctive relief." *Pontiac Fire Fighters*, 482 Mich at 9. As the trial court noted, Sandstone acquired its property interests knowing that the Eaton County zoning ordinance did not provide for solar-energy systems. Application of the township's interim zoning ordinance does not deprive Sandstone of the property interests that existed when it acquired the interests or those interests that existed at the time the interim zoning ordinance was implemented. The trial court did not abuse its discretion by finding that plaintiffs failed to demonstrate that they would suffer irreparable harm if an injunction was not issued.

Plaintiffs further argue that irreparable harm will result from the township's purported deprivation of the rights of its citizens to consider the interim zoning ordinance at a general election. But the township has taken no action to interfere with its citizens' election rights simply by adopting an interim zoning ordinance. Township citizens have the right to seek referendum of a permanent zoning ordinance if one is adopted. No such right exists with respect to an interim zoning ordinance.

Because plaintiffs failed to demonstrate likely success on the merits or to establish irreparable harm, it was not necessary for the trial court to reach the additional factor of balancing the relative interests of the parties. See *Mich AFSCME Council 25 v Woodhaven-Brownstown Sch Dist*, 293 Mich App 143, 148-149; 809 NW2d 444 (2011). Because plaintiffs failed to show that the trial court's denial of their motion for a preliminary injunction falls outside the range of reasonable and principled outcomes, we conclude that the trial court did not abuse its discretion by denying their motion for a preliminary injunction.

C. DISMISSAL OF THE COMPLAINT

Plaintiffs also contend that the trial court erred by summarily dismissing Counts I through IV of their second amended complaint when ruling on their motion for a preliminary injunction. Plaintiffs argue that dismissal of the remaining counts of their complaint at this stage of the proceedings deprived them of notice and an opportunity to be heard and deprived them of an opportunity to amend their complaint.

We review de novo the trial court's application of the court rules and also whether a party has been afforded due process of law. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014). This Court also reviews de novo a trial court's decision on a motion for summary disposition. *Ellison v Dep't of State*, 320 Mich App 169, 175; 906 NW2d 221 (2017).

The United States and Michigan Constitutions provide that no person shall be deprived of property without due process of law. US Const, Am XIV; Const 1963, art 1, § 17. Due process requires that a party receive notice of the proceedings against it and a meaningful opportunity to be heard. *Bonner*, 495 Mich at 235. In this case, the trial court dismissed all counts of plaintiffs' second amended complaint, essentially granting the township summary disposition under MCR 2.116(I). MCR 2.116(I)(1) provides that "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay." Although a trial court may sua sponte grant summary disposition under MCR 2.116(I), the trial court may not do so in contravention of a party's due-process rights. *Lamkin v Hamburg Twp Bd of Trustees*, 318 Mich App 546, 549-550; 899 NW2d 408 (2017).

Here, the trial court's dismissal of Counts I and V did not violate plaintiffs' due-process rights. As discussed, in Count V plaintiffs sought a declaratory judgment that Benton Township's refusal to accept Walters's referendum petition was improper and unlawful. In Count I, plaintiffs offered an alternative ground for granting the relief sought in Count V, asserting that the interim zoning ordinance was invalid because the township failed to follow the procedures outlined in the MZEA for adopting an interim zoning ordinance. In their supplemental brief in support of their motion for a preliminary injunction, plaintiffs sought relief and a declaratory judgment under both Counts I and V of their second amended complaint in addition to seeking a preliminary injunction. The trial court heard plaintiffs' arguments fully on those counts at the continued motion hearing, at which plaintiffs availed themselves of the opportunity to present evidence related to their likelihood of success on the merits and submitted their supplemental brief and exhibits supporting their position. Plaintiffs thus had ample notice and an opportunity to be heard regarding the merits of Counts I and V of their second amended complaint.

With respect to Count IV, although the trial court dismissed plaintiffs' FOIA claim, the trial court granted plaintiffs' request for relief. The record indicates that the parties reached an agreement during the proceedings regarding the FOIA request, and the trial court ordered the township to produce additional documents responsive to plaintiffs' FOIA request on or before February 21, 2020, and to pay certain fees to plaintiffs, while retaining jurisdiction to enforce the order. Plaintiffs clearly were heard on Count IV of their complaint.

With respect to Counts II and III, however, the record does not convince us that plaintiffs were on notice that the trial court was prepared to consider the dismissal of those claims. As noted, in Count II of their second amended complaint, plaintiffs sought a declaratory judgment that Benton Township had improperly imposed a moratorium on projects within the township, while in Count III plaintiffs alleged that the interim zoning ordinance imposed exclusionary zoning in violation of MCL 125.3207. Although the record indicates that the parties referred to the motion for preliminary injunction as akin to a discussion of summary disposition, neither party specifically addressed the merits of Counts II and III in their supplemental briefing. A trial court's failure to inform the plaintiff that the court is contemplating summary disposition of the plaintiff's claims is a fatal procedural flaw necessitating reversal. *Lamkin*, 318 Mich App at 550-551. The trial court therefore erred by dismissing Counts II and III of plaintiffs' second amended complaint without notice and hearing on those counts.

We affirm the trial court's denial of the motion for a preliminary injunction, the trial court's grant of partial relief to plaintiffs under Count IV of the second amended complaint, and the trial court's dismissal of Counts I, IV, and V of the second amended complaint. We reverse the trial court's dismissal of Counts II and III of the second amended complaint, and we remand to the trial court for further proceedings that are consistent with this opinion. We do not retain jurisdiction.

BORRELLO and M. J. KELLY, JJ., concurred with GADOLA, P.J.

In re SEAY

Docket No. 351650. Submitted November 6, 2020, at Detroit. Decided February 4, 2021, at 9:20 a.m.

The Oakland County Prosecuting Attorney petitioned the Family Division of the Oakland Circuit Court, requesting the court to authorize its petition charging respondent with second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (other person under the age of 13). Although respondent was 24 years old when the petition was filed, he was 15 or 16 years old when he allegedly sexually assaulted TS, who was eight years old at that time. Petitioner moved for the family-division court to waive its jurisdiction to the circuit court for respondent to be tried as an adult. The family-division court, Jacob J. Cunningham, J., adopted the referee's recommendation, declined to authorize the petition, and dismissed the case, reasoning that respondent should have been charged initially in circuit court because he was 24 years old and that the circuit could then transfer the case to the family division to conduct a waiver hearing under MCR 712A.4 if it was determined that the offense occurred before respondent's 17th birthday. Petitioner appealed.

The Court of Appeals *held*:

A circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject-matter, jurisdiction. Circuit courts possess subject-matter jurisdiction over a defendant charged with a felony committed as a minor because Michigan circuit courts are courts of general jurisdiction and unquestionably have subject-matter jurisdiction over felony cases. A party may stipulate to, waive, or implicitly consent to personal jurisdiction. Generally, the family division of the circuit court has exclusive jurisdiction over juveniles under 17 years of age who commit criminal offenses. Conversely, the family division does not generally have jurisdiction over a juvenile after he or she has reached the age of 18. However, MCL 712A.3 provides that if during the pendency of a criminal charge against a person in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court

shall transfer the case without delay to the family division of the circuit court of the county in which the other court is situated or in which the person resides. When a case is transferred to the family-division court pursuant to MCL 712A.3, the court has jurisdiction, without regard to the defendant's age at the time of transfer, for the limited purpose of holding a waiver hearing pursuant to MCL 712A.4. Under the procedures set forth in that statute, the family-division court may waive jurisdiction to the circuit court having general criminal jurisdiction over the charged offense. If the family-division court declines to waive jurisdiction, the case must be dismissed. MCL 712A.4(3) requires that before waiving jurisdiction, the family-division court must first determine, on the record, whether there is probable cause to believe that the juvenile committed the offense. If probable cause has been established, MCL 712A(4) requires the court to conduct a hearing, considering specific criteria, to determine if the best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the circuit court. If the family-division court waives jurisdiction, the case is transferred to the criminal division of the circuit court, but if the court does not waive jurisdiction, the case must be dismissed. While the waiver procedures set forth in MCL 712A.3 and MCL 712A.4 contemplate scenarios in which a criminal charge has already been filed against a person in the circuit court and it is thereafter determined that the person committed the offense when he was under the age of 17, the waiver procedures also apply—and the petition must be filed in the family-division court—when it is already known before the petition was filed that the person was a juvenile when they committed the act. In this case, the family-division court erred when it concluded that petitioner had to file the petition in circuit court first and then have the circuit court transfer the case to the family division for a waiver hearing. Accordingly, the family-division court erred by declining to authorize the petition and by dismissing the case without holding a waiver hearing.

Reversed.

LETICA, J., concurring in the result only, wrote separately to urge the Legislature to address the appropriate factors a family-division court should consider when a person allegedly commits a crime like CSC-II while a juvenile but criminal proceedings are not initiated until adulthood, in particular because CSC-II is not included in the list of crimes for which waiver of jurisdiction to the criminal division of the circuit court is automatic.

JURISDICTION — FAMILY DIVISION OF CIRCUIT COURT — WAIVER HEARINGS — JUVENILES — CHARGES FILED AFTER IT IS KNOWN THE JUVENILE OFFENDER IS NOW OVER THE AGE OF 17.

While the family division of the circuit court has exclusive jurisdiction over juveniles under 17 years of age who commit criminal offenses, the family division does not generally have jurisdiction over a juvenile after they have reached the age of 18; if during the pendency of a criminal charge against a person in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court must transfer the case to the family division of the circuit court; when a case is transferred to the family-division court because the person was under the age of 17 at the time of the commission of the offense, the court has jurisdiction, without regard to the defendant's age at the time of transfer, for the limited purpose of holding a waiver hearing pursuant to MCL 712A.4; the waiver procedures set forth in MCL 712A.3 and MCL 712A.4 apply, and the petition must be filed in the family-division court, when it is known before the petition is filed that the person was a juvenile when they committed the act.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Appellate Division Chief, and *Joshua J. Miller*, Assistant Prosecuting Attorney, for petitioner.

Hugh R. Marshall for respondent.

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

PER CURIAM. Petitioner appeals as of right the Oakland Circuit Court family division's order declining to authorize its petition, which alleged one count of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (other person under the age of 13), against respondent and dismissing the case. We reverse and remand.

I. FACTUAL BACKGROUND

This case arises out of respondent's alleged sexual assault of TS that occurred when TS was eight years

old and respondent was 15 or 16 years old. On September 5, 2019, when respondent was 24 years old, a petition was filed in the family division against respondent, alleging he had committed one count of CSC-II. On the same day, petitioner also moved for the family division to waive its jurisdiction to the circuit court for respondent to be tried as an adult. Following a review of the petition, and without a hearing, the referee recommended that the family division not authorize the petition and dismiss the case. The referee concluded that the family division did not have jurisdiction over respondent because, while respondent was 15 or 16 years old when he committed the alleged offense, he was 24 years old when the petition was filed. The referee explained respondent should have been charged in the circuit court initially and that, "[w]hen the adult court determines that the offense occurred prior to [respondent's] 17th birthday, it will transfer the case to the juvenile court to conduct the waiver hearing" under MCL 712A.4. The family division adopted the referee's recommendation and entered an order declining to authorize the petition and dismissing the case.

II. JURISDICTION

On appeal, petitioner argues that the family division erroneously concluded that it did not have jurisdiction over respondent because he was 24 years old when the petition was filed. Petitioner asserts that the family division's rationale for not authorizing the petition and dismissing the case is flawed because the family division had jurisdiction over respondent for the limited purpose of conducting a waiver hearing. We agree.

To preserve an issue for appellate review in juvenile delinquency proceedings, the issue must be raised before, addressed by, and decided by the lower court. *In*

re Killich, 319 Mich App 331, 336; 900 NW2d 692 (2017). Petitioner did not raise this argument in the lower court. Therefore, this issue is not preserved for appellate review.

We first note that "[a] circuit court's authority to exercise jurisdiction over a defendant charged with a felony committed as a minor constitutes a question of personal, not subject matter, jurisdiction. *People v Kiyoshk*, 493 Mich 923 (2013). As stated by our Supreme Court, the circuit court possesses subject-matter jurisdiction over a defendant charged with a felony committed as a minor because "Michigan circuit courts are courts of general jurisdiction and unquestionably have subject matter jurisdiction over felony cases." *Id*. (quotation marks, citation, and brackets omitted). And "a party may stipulate to, waive, or implicitly consent to *personal* jurisdiction." *Id*. at 924 (quotation marks, alteration, and brackets omitted), quoting *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011).

"The legal question of whether a court possesses personal jurisdiction over a party is . . . reviewed de novo." *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). This Court also reviews de novo questions of statutory interpretation. *In re Juvenile Commitment Costs*, 240 Mich App 420, 426; 613 NW2d 348 (2000).

Unpreserved issues, however, are reviewed for plain error affecting a party's substantial rights. *In re D, Minor*, 329 Mich App 671, 701; 944 NW2d 180 (2019). To avoid forfeiture under the plain-error standard, a petitioner must demonstrate that an error occurred, that the error was plain (i.e., clear or obvious), and that the plain error affected substantial rights. *Id*. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of

the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even if all three requirements are met, reversal is only warranted when the plain error resulted in an innocent defendant's conviction or it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *People v Moorer*, 262 Mich App 64, 68; 683 NW2d 736 (2004).

"Generally, the family division of the circuit court (family court) has exclusive jurisdiction over juveniles under seventeen years of age who commit criminal offenses." *People v Conat*, 238 Mich App 134, 139; 605 NW2d 49 (1999). Conversely, the family division does not generally have jurisdiction over a juvenile after he or she has reached the age of 18. MCL 712A.5. However, MCL 712A.3 provides:

> (1) If during the pendency of a criminal charge against a person in any other court it is ascertained that the person was under the age of 17 at the time of the commission of the offense, the other court shall transfer the case without delay, together with all the papers, documents, and testimony connected with that case, to the family division of the circuit court of the county in which the other court is situated or in which the person resides.[1]

In *People v Schneider*, 119 Mich App 480, 484; 326 NW2d 416 (1982) a panel of this Court was called upon to resolve the issue of "whether the court of adult criminal jurisdiction or the juvenile division of the probate court has jurisdiction over a person who allegedly commits a crime prior to his 17th birthday and who obtains the age of 18 prior to the commencement of criminal proceedings against him." The *Schneider*

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[1] MCL 712A.2 provides the family court with authority over a child 14 years of age or older who is charged with a violation of certain enumerated offenses, none of which are at issue in this matter.

Court recognized the apparent conflict between MCL 712A.3 and MCL 712A.5 and determined, "Were we to strictly enforce the age limit provided in MCL 712A.5, the provision for transfer of jurisdiction in MCL 712A.3 would be totally negated in cases where the defendant is 18 years of age or older." *Id*. at 486 (citations omitted). The Court thus held that

> where a case is transferred to the probate court pursuant to MCL 712A.3, the probate court shall have jurisdiction without regard to the defendant's age at the time of transfer. However, such jurisdiction shall be for the limited purpose of holding a waiver hearing pursuant to MCL 712A.4. Pursuant to the procedures set forth in the statute, the probate court may waive jurisdiction to the court having general criminal jurisdiction over the charged offense. If the probate court declines to waive jurisdiction, the case shall be dismissed. We believe this procedure effectuates the legislative intent and, to the extent possible, gives effect to both conflicting statutes. [*Id*. at 486-487 (citations omitted).]

While the *Schneider* case is not binding on this Court because of its publication date, MCR 7.215(J)(1), we find the reasoning sound. It is personal jurisdiction over the juvenile that is being transferred from the family division to the criminal division, and, as previously stated, a person may waive, stipulate to, or consent to personal jurisdiction. *Kiyoshk*, 493 Mich at 924.

MCL 712A.4 governs the procedure the family division is to follow in holding a waiver hearing:

> (1) If a juvenile 14 years of age or older is accused of an act that if committed by an adult would be a felony, the judge of the family division of circuit court in the county in which the offense is alleged to have been committed may waive jurisdiction under this section upon motion of the prosecuting attorney. After waiver, the juvenile may be tried in the court having general criminal jurisdiction of the offense.

Before waiving its jurisdiction, the family division must first determine, on the record, whether there is probable cause to believe that the juvenile committed the offense. MCL 712A.4(3). If the court decides that probable cause has been established, it must then conduct a hearing to determine if the "best interests of the juvenile and the public would be served by granting a waiver of jurisdiction to the court of general criminal jurisdiction." MCL 712A.4(4). MCL 712A.4(4) sets forth specific criteria the court is to consider in making this determination:

> (a) The seriousness of the alleged offense in terms of community protection, including, but not limited to, the existence of any aggravating factors recognized by the sentencing guidelines, the use of a firearm or other dangerous weapon, and the impact on any victim.
>
> (b) The culpability of the juvenile in committing the alleged offense, including, but not limited to, the level of the juvenile's participation in planning and carrying out the offense and the existence of any aggravating or mitigating factors recognized by the sentencing guidelines.
>
> (c) The juvenile's prior record of delinquency including, but not limited to, any record of detention, any police record, any school record, or any other evidence indicating prior delinquent behavior.
>
> (d) The juvenile's programming history, including, but not limited to, the juvenile's past willingness to participate meaningfully in available programming.
>
> (e) The adequacy of the punishment or programming available in the juvenile justice system.
>
> (f) The dispositional options available for the juvenile.

The family division must give "greater weight to the seriousness of the alleged offense and the juvenile's prior record of delinquency than to the other criteria[.]" MCL 712A.4(4); see also MCR 3.950(D) and *People v*

Williams, 245 Mich App 427, 432; 628 NW2d 80 (2001) (describing the procedure regarding waiver).

Following a waiver hearing, "[t]he court shall enter a written order either granting or denying the motion to waive jurisdiction and the court shall state on the record or in a written opinion the court's findings of fact and conclusions of law forming the basis for entering the order." MCL 712A.4(8). If the family division waives jurisdiction, the case shall be transferred to the criminal division of the circuit court. *Schneider*, 119 Mich App at 487. However, if the court does not waive jurisdiction, the case shall be dismissed. *Id*.

Admittedly, the statutes and caselaw governing a court's jurisdiction over an individual who is charged for acts they committed as a juvenile after they reach the age of 18 do not directly address the circumstances presented in this case. The procedures described in MCL 712A.3 and MCL 712A.4 contemplate circumstances in which it is determined, "during the pendency of a criminal charge against a person in any other court," that the person was under the age of 17 when they committed the alleged offense. MCL 712A.3(1). In other words, the procedures described in MCL 712A.3 and MCL 712A.4 contemplate scenarios in which a criminal charge has already been filed against a person in the circuit court and it is thereafter determined that the person committed the offense when he was under the age of 17.

In this case, respondent was 24 years old when this petition was filed in the family court regarding acts he allegedly committed when he was 15 or 16 years old. When petitioner filed the petition, it also moved for the court to waive jurisdiction. At the time of filing the petition, petitioner knew that respondent was under

the age of 17 when he committed the alleged offense and, accordingly, filed the petition in the family division. Thus, this case does not present a situation in which "during the pendency of a criminal charge against a person in any other court," it was ascertained that respondent was a juvenile when he committed the acts. MCL 712A.3(1).

Without holding a hearing, the referee reviewed the petition and recommended that the petition not be authorized and the case be dismissed because the family division did not have jurisdiction over respondent because he was 24 years old. The referee concluded that petitioner should have charged respondent as an adult in the circuit court and, after the circuit court determined that respondent was under the age of 17 when the offense occurred, the circuit court would transfer the case to the family division for a waiver hearing. However, this Court has not[2] and does not take issue with a petitioner filing a petition in the family division against a person who has reached the age of 18 regarding acts he or she committed as a juvenile when it is known before the petition was filed that the person was a juvenile when they committed

[2] In *In re Fultz*, 211 Mich App 299, 301; 535 NW2d 590 (1995), this Court affirmed a probate court's denial of the prosecution's waiver motion filed in its court concerning a 23-year-old defendant who was alleged to have committed criminal sexual conduct before his 16th birthday and the probate court's dismissal of the charges. Our Supreme Court reversed this Court's decision, concluding that the probate court had abused its discretion by denying the waiver motion and dismissing the charges. *People v Fultz*, 453 Mich 937 (1996). Additionally, in two unpublished opinions, this Court has found no error in the petitioner initiating proceedings in the family court against an adult being charged with criminal offenses allegedly committed as a juvenile. See, e.g., *In re Collins*, unpublished per curiam opinion of the Court of Appeals, issued February 20, 2018 (Docket No. 337855); *In re Laspina, Minor*, unpublished per curiam opinion of the Court of Appeals, issued December 19, 2019 (Docket No. 346684).

the acts. Therefore, the family division erred (1) when it concluded that petitioner had to initially file this action in the circuit court for the circuit court to then transfer the case to the family division for a waiver hearing and (2) by not authorizing the petition and dismissing the case without holding a waiver hearing.

Reversed and remanded for the family division to conduct a hearing to determine whether to authorize the petition and hold a waiver hearing. We do not retain jurisdiction.

STEPHENS, P.J., and SERVITTO, J., concurred.

LETICA, J. (*concurring*). I concur in the result. See *In re Fultz*, 211 Mich App 299; 535 NW2d 590 (1995), rev'd 453 Mich 937 (1996). And although I am also persuaded by the reasoning of the majority in *People v Schneider*, 119 Mich App 480; 326 NW2d 416 (1982), I would invite the Legislature to address this situation. See *In re Fultz*, 211 Mich App at 313 (SMOLENSKI, J., concurring in part and dissenting in part) ("Alternatively, I invite the Legislature to address the appropriate factors to be considered by a probate court[1] in a situation, such as this, where a person allegedly commits a crime while a juvenile but criminal proceedings are not initiated until adulthood."); *In re Matson,*

[1] The Michigan Constitution grants the probate court "original jurisdiction in all cases of juvenile delinquents and dependents, except as otherwise provided by law." Const 1963, art 6, § 15. Effective January 1, 1998, the Legislature created the Family Division of the Circuit Court, 1996 PA 388, assigning it jurisdiction over "[c]ases involving juveniles as provided in chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32," MCL 600.1021(1)(e), as amended by 2002 PA 682. At the same time, the Legislature provided that "[a] reference to the former juvenile division of probate court in any statute of this state shall be construed to be a reference to the family division of circuit court." MCL 600.1009.

Minor, unpublished per curiam opinion of the Court of Appeals, issued October 24, 2017 (Docket No. 332780) (SWARTZLE, J., concurring), p 2 ("[T]he Legislature may wish to consider either expanding the family court's jurisdiction to handle cases like this, adding [second-degree criminal sexual conduct] to the list of crimes for which waiver of jurisdiction to the criminal division is automatic, or addressing this type of circumstance in some other way.").