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WOLFENBARGER v WRIGHT

Docket No. 350668. Submitted February 4, 2021, at Detroit. Decided February 11, 2021, at 9:00 a.m.

Terry and Marla Wolfenbarger filed an action in the Monroe Circuit Court against Frank Wright, Jr., asserting claims of negligence, trespass, and nuisance in connection with improvements defendant made to his property; plaintiffs settled other claims they had against Steven Lewis. Defendant moved for summary disposition of plaintiffs' trespass and nuisance claims, arguing that although plaintiffs asserted three separate claims, the gravamen of their complaint was negligence and given that negligence was the only true claim, plaintiffs could not seek noneconomic damages; plaintiffs opposed the motion. The court, Michael A. Weipert, J., granted defendant summary disposition of plaintiffs' trespass and nuisance claims, reasoning that *Price v High Pointe Oil Co, Inc*, 493 Mich 238 (2013), controlled the outcome and that plaintiffs had failed to support their allegations with any facts; the court dismissed plaintiffs' request for noneconomic damages because only the negligence claim remained. Plaintiffs moved for reconsideration and to amend their complaint to plead additional facts to support their claims of trespass and nuisance. The trial court denied both motions. Regarding the motion to amend, the court reasoned that (1) the trespass and nuisance claims had already been dismissed by the court, and the avenue to renew those claims was through the Court of Appeals, (2) the evidence did not justify bringing those claims back in the action, (3) the motion to amend was too late because trial was scheduled to start the next week, and (4) plaintiffs had previously conceded that noneconomic damages were not implicated in their case. In an unpublished order entered August 2, 2017 (Docket No. 338734), the Court of Appeals denied plaintiffs' application for leave to appeal. Plaintiffs moved to amend their complaint again at the close of proofs during the trial, arguing that their claims of trespass and nuisance comported with the evidence presented; the court denied the motion. The jury returned a verdict in favor of plaintiffs on their negligence claim. In accordance with MCR 2.625, plaintiffs filed their verified bill of costs with the clerk of the court, but they did not serve the bill of costs on defendant.

Defendant objected when plaintiffs moved for entry of the verified bill of costs, asserting that plaintiffs had waived the costs when they failed to serve defendant with the document. In response, plaintiffs moved under MCR 2.108(E) to extend the deadline for service of process of the bill of costs on defendant. The court denied plaintiffs' motion to enter the bill of costs, concluding that because MCR 2.625(F) required plaintiffs to serve the bill of costs on defendant "immediately," plaintiff had waived costs. The court also denied plaintiffs' request to extend the service deadline, reasoning that because the requirements of MCR 2.625(F) were mandatory, MCR 2.108(E) was inapplicable. In 2018, plaintiffs sought postjudgment equitable relief in the form of remediation. The court accepted defendant's proposal for remediation and instructed that it would revisit the issue later if necessary. In 2019, after defendant installed culverts to remediate the issue, plaintiffs asserted that defendant's remediation efforts had not solved the water issue and requested that the court order defendant to implement plaintiffs' previously proposed plan. The trial court reviewed defendant's efforts and concluded that defendant had successfully remediated the issues. Plaintiffs appealed.

The Court of Appeals *held*:

1. Trespass is an invasion of a plaintiff's interest in the exclusive possession of their land. To recover for trespass, a plaintiff must establish that the defendant caused an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession; the intrusion must have been intentional. A defendant's unauthorized act of causing excess waters to flow onto another person's property constitutes a trespass. In this case, while plaintiffs sufficiently alleged the intrusion aspect of the trespass claim, plaintiffs failed to plead that the intrusion was intentional; plaintiffs' conclusory allegation that the intrusion was intentional was not sufficient to support their trespass claim. Although the trial court's reliance on *Price* was misplaced because the case was not applicable to whether plaintiffs had properly pleaded claims of trespass or nuisance, the trial court did not err by granting defendant summary disposition of plaintiffs' trespass claim.

2. A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. A defendant is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (1) the other has property rights and privileges in respect to the use or enjoyment interfered with, (2) the invasion results in

significant harm, (3) the actor's conduct is the legal cause of the invasion, and (4) the invasion is either (a) intentional and unreasonable or (b) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. A nuisance claim is different from a negligence claim because nuisance is a condition on the land and not an act or failure to act. In this case, plaintiffs failed to allege that the creation of the alleged nuisance—i.e., that the construction of the road and placement of the pile of dirt resulted in plaintiffs' trees dying and a diminution in property value—was the result of anything other than defendant's negligence. The trial court in this case correctly determined that plaintiffs failed to plead facts in their nuisance claim to distinguish it from their negligence claim. Accordingly, the trial court properly granted defendant summary disposition of plaintiffs' nuisance claim. In addition, plaintiffs failed to dispute that noneconomic damages were not recoverable with a negligence claim (the only remaining claim), and the trial court therefore did not err by ruling that plaintiffs were barred from recovering any noneconomic damages.

3. MCR 2.118(A)(2) provides that a trial court should freely grant leave to amend a complaint when justice so requires. However, a motion to amend may be denied for (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment. Under MCR 2.116(I)(5), if the grounds asserted for summary disposition are based on MCR 2.116(C)(8), (9), or (10), the court shall give the parties an opportunity to amend their pleadings as provided by MCR 2.118 unless the evidence then before the court shows that amendment would not be justified. A motion to amend may be denied if the amendment would be futile, such as when it is legally insufficient on its face. The trial court's stated reasons for denying plaintiffs' motion to amend were erroneous: (1) the court erred as a matter of law when it concluded that plaintiffs could not amend their complaint to properly plead their trespass and nuisance claims; defendant brought the summary-disposition motion under (C)(8), and MCR 2.118 required the court to allow plaintiffs to amend the complaint unless the amendment was otherwise unjustified; (2) the factual allegations in plaintiffs' proposed amended complaint were sufficient to allege that defendant had acted with intent with regard to the trespass claim, and plaintiffs also pleaded the elements of trespass in the proposed amended complaint; (3) given that plaintiffs filed the motion less than one week after the court granted defendant summary

disposition of the claims, plaintiffs' motion to amend was not late even though it was filed a week before trial; even if the motion to amend was unduly late, there was no evidence, with one exception, that plaintiffs acted in bad faith or that defendant would have suffered any actual prejudice; and (4) plaintiffs did not concede that there were no monetary damages; instead, plaintiffs only conceded that damages alone would be insufficient to remedy the matter. Accordingly, the trial abused its discretion by denying plaintiffs' motion to amend. Plaintiffs could not amend the nuisance claim, however, to add a new allegation that defendant's operation caused dust, dirt, and noise to invade plaintiffs' property because it would have prejudiced defendant and deprived him of a fair trial. The case was remanded for further proceedings on plaintiffs' trespass and nuisance claims as stated in their amended complaint, but the nuisance claim was limited to the flow of water onto plaintiffs' property.

4. MCR 2.625(A)(1) provides that costs will be allowed to the prevailing party in an action unless prohibited by statute or by the court rules or unless the court directs otherwise for reasons stated in writing and filed in the action. MCR 2.625(F) provides that costs may be taxed by the court on signing the judgment or may be taxed by the clerk. Under MCR 2.625(F)(2), when costs are to be taxed by the clerk, the party entitled to costs must present to the clerk a bill of costs conforming to Subrule (G), a copy of the bill of costs for each other party, and a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys; that presentation must occur within 28 days after the judgment is signed or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C). In addition, the party presenting the bill of costs shall immediately serve a copy of the bill and any accompanying affidavits on the other parties. Failure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs. The word "shall" in MCR 2.625(F)(2)—"In addition, the party presenting the bill of costs *shall* immediately serve a copy of the bill and any accompanying affidavits on the other parties"—denotes mandatory action, so failure to serve the bill of costs as required by the subrule constitutes noncompliance. The court rules use the terms "present and presentment" differently from the term "serve." Thus, although the court rule expressly mentions that the failure to timely "present" the bill results in a waiver of the right to costs, it does not follow that the failure to comply with other aspects of the rule also constitutes waiver. In

this case, plaintiffs failed to immediately serve the bill of costs on defendant after presenting the bill to the clerk, but that failure did not constitute a waiver of their right to costs. The trial court erred as a matter of law by holding otherwise; the issue of whether the trial court abused its discretion when it denied plaintiffs' motion to extend the deadline was therefore moot.

5. Under the circumstances of this case, the trial court did not clearly err by finding that defendant's remediation efforts successfully restored plaintiffs' property to how it drained before defendant constructed the road on his property.

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

TAXATION OF COSTS — PROCEDURE — COSTS TAXED BY THE CLERK — WAIVER.

MCR 2.625(F) provides that costs may be taxed by the court on signing the judgment or may be taxed by the clerk; under MCR 2.625(F)(2), when costs are to be taxed by the clerk, the party entitled to costs must present to the clerk a bill of costs conforming to Subrule (G), a copy of the bill of costs for each other party, and a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys; that presentation must occur within 28 days after the judgment is signed or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C); the party presenting the bill of costs shall immediately serve a copy of the bill and any accompanying affidavits on the other parties; failure to "present" a bill of costs to the court within the time prescribed constitutes a waiver of the right to costs, but the right to costs is not waived when the party fails to immediately "serve" the bill on the other parties.

Rasor Law Firm, PLLC (by *James B. Rasor* and *Andrew J. Laurila*) for Terry and Marla Wolfenbarger.

DeLoof, Dever, Eby, Wright, Milliman, Bourque & Issa, PLLC (by *Thomas M. Wright*) for Frank Wright, Jr.

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

CAVANAGH, P.J. Plaintiffs appeal as of right orders (1) granting partial summary disposition in favor of

defendant Frank Wright, Jr., and dismissing plaintiffs' claims of trespass and nuisance, (2) denying plaintiffs' motion for leave to amend their complaint, (3) denying plaintiffs' motion for entry of a verified bill of costs, and (4) denying plaintiffs' renewed motion for remediation. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Plaintiffs, Terry and Marla Wolfenbarger, purchased the property located on Foster Lane in LaSalle Township in 1990. Over several years, plaintiffs planted 280 trees on their property. Defendant purchased nearby property in 1995. In approximately 2008, Steven Lewis purchased the lot west of and adjacent to plaintiffs.[1] Because of the vastness of defendant's property interests, it appears he owned land to the west of Lewis, to the south of Lewis and plaintiffs, and to the east of plaintiffs.

According to plaintiffs, they had no issues with water on their property until after defendant constructed a new road or driveway on his property in March 2013. After that time, water started collecting in the southeast corner of their land, oversaturating and thus killing the trees that had been planted there. As of March 2015, 46 trees had died, and as of trial, 79 trees had died. Jeffrey Thierbach, an arborist, testified that all the trees on plaintiffs' land were affected in some manner. Plaintiffs also alleged that their basement started cracking after 2013. They attributed this damage to defendant's actions as well. In addition to constructing the driveway or roadway in early 2013, defen-

[1] Plaintiffs' claims against Steven Lewis were settled; therefore, we refer to Wright as "defendant" in this opinion.

dant also created a pond on his land in the latter half of 2013 that, according to plaintiffs' expert, acted to raise the level of the water table by six feet in the area. Plaintiffs alleged that this resulted in the water table now being several feet higher than the bottom of plaintiffs' basement, and another expert opined that the damage plaintiffs sustained in their basement was consistent with a high water table.

Plaintiffs filed a lawsuit against defendant, alleging claims of negligence, trespass, and nuisance. Plaintiffs' claims in the complaint were based on defendant's construction of a new road on his property and defendant's placement of a pile of dirt on his property. Plaintiffs alleged that these new features, in essence, prevented or dammed the water from leaving their property.

Defendant moved for partial summary disposition, arguing that the trespass and nuisance claims should be dismissed. Defendant maintained that although plaintiffs had listed three separate counts against defendant, the gravamen of plaintiffs' complaint was negligence. And because the claim sounded in negligence, defendant argued that plaintiffs were barred from seeking any noneconomic damages.

Plaintiffs responded, arguing that they had sufficiently alleged intentional conduct by defendant to support their claim of trespass. Plaintiffs also argued that they had sufficiently pleaded a nuisance cause of action because they alleged that their property rights had been interfered with by defendant's actions, i.e., by his building of a road and hill that increased the flow of water onto plaintiffs' property. And because these claims were separate and distinct from a negligence claim, plaintiffs maintained that they are allowable. Further, because the tort claims of trespass and nuisance were

valid, plaintiffs argued, they were entitled to the recovery of noneconomic damages.

At the motion hearing, the parties argued consistently with their briefs, except that plaintiffs changed their argument with respect to the nuisance claim. Plaintiffs' counsel asserted at the hearing that the nuisance claim was based on the fact that defendant was running a large-scale commercial business on his property that created excess noise, traffic, and dirt. The trial court noted that although defendant's motion was purportedly being brought under both MCR 2.116(C)(8) and (C)(10), no evidence had been submitted, so the court was treating the motion as having been brought under MCR 2.116(C)(8). The court stated:

> I did go right to the complaint and I looked at it, and I will agree that there is one paragraph that says that this stuff was done intentionally on the trespass claim, but there's nothing else to support that allegation in the complaint in the least bit. It's just an allegation made that this was done intentional [sic] on the trespass claim and even on the nuisance claim.
>
> We look at paragraph four, which is very telling in this case, in the complaint, this matter involves damages to real and personal property owned by the plaintiffs. That is the negligence claim and that's exactly what this is, a negligen[ce] claim that something was done on the defendant's property that have [sic] impacted the plaintiffs[']s property, and that's all that this case is.
>
> I said this from the beginning of this case, if this is so that the defendants [sic] did something that impacted the plaintiffs here, the Court's obligation here is remediation and bring the plaintiffs back whole. That's exactly what the *Price* [*v High Pointe Oil Co, Inc*, 493 Mich 238; 828 NW2d 660 (2013),] case says here, that's what this case is. This is a *Price* case. I am 100 percent convinced of that and the pleadings show that to this Court. It is not just sufficient in this Court's mind to merely say it was done

> intentionally to try to support a trespass claim or even a negligen[ce] claim, and I cannot find that.

The trial court consequently granted defendant's motion and dismissed plaintiffs' claims of trespass and nuisance. And because only the negligence claim was remaining, the court also dismissed plaintiffs' requests for noneconomic damages.

Plaintiffs moved for reconsideration. Plaintiffs argued that *Price* only addressed whether noneconomic damages were available in a negligence case—it did not state that one cannot allege claims of negligence, trespass, and nuisance simultaneously—and that other cases show it is indeed permissible to allege these claims in one complaint. Plaintiffs also averred in that motion, as well as in a separate motion for leave to file an amended complaint, that assuming they had failed to plead sufficient facts to support their claims of trespass and nuisance, they should be allowed to amend their complaint—and a proposed amended complaint was attached.

At the motion hearing, the trial court acknowledged that a party can bring claims of negligence, trespass, and nuisance in the same action. Despite this, the court ruled:

> This Court already alluded to these allegations were already in the original complaint and the Court granted Summary Disposition, which eliminated the two causes of action, which plaintiff [sic] now seeks to bring back in. So, frankly, in the Court's opinion, the recourse there is the Court of Appeals, if you want those back in. It's not an amendment of the complaint. The evidence before the Court now does not justify bringing those back in. This Court has reviewed everything that has been submitted.

* * *

> This matter is scheduled for trial this next coming Monday and I am not going to grant the Motion to Amend the Complaint. It comes extremely way too late.
>
> Let me point something else out to plaintiff [sic], because plaintiff [sic] is bound by everything that plaintiff [sic] files in this action, it is binding on them. I'll refer you to Plaintiff's [sic] Motion to Exempt the Case from Case Evaluation, Extend Discovery, and Extend Discovery Order, which was filed on November 23, 2015, paragraph seven of that motion states, because plaintiffs[5] claims involve equitable relief, this matter should be removed from Case Evaluation as damages would insufficient/inappropriate to remedy this matter, and that should read would be insufficient/inappropriate to remedy this matter. Plaintiff [sic] has already conceded there are not those kind of damages in this case; that's the Court's position here.
>
> I deny the Motion to Amend the Complaint.

The trial court then added that it had reviewed the motion for reconsideration and found no palpable error, and therefore, that motion was also denied. Plaintiffs sought leave to appeal in this Court, which was denied. *Wolfenbarger v Wright*, unpublished order of the Court of Appeals, entered August 2, 2017 (Docket No. 338734).

Trial started on March 26, 2018 and ended on April 2, 2018. At the close of proofs, plaintiffs moved to amend their complaint to include claims of trespass and nuisance. Plaintiffs argued that amendment was proper because it would comport with the evidence that was introduced at trial. The court denied the motion, saying, "That's the issue you took up to the Court of Appeals which stayed the prior trial. No, I'm not gonna grant that motion."

The jury returned a verdict in favor of plaintiffs on their claim of negligence. Although plaintiffs had requested a minimum of $429,850 to repair their base-

ment and replace the trees, the jury awarded a total of $50,000 in damages.

On August 21, 2018, plaintiffs filed their verified bill of costs, seeking more than $46,000 under MCR 2.625. However, plaintiffs did not serve the bill of costs on defendant. In response to plaintiffs' subsequent motion for entry of the verified bill of costs, defendant objected and argued that the failure of plaintiffs to serve defendant with the bill of costs operated as a waiver of those costs. The trial court ordered supplemental briefing on the matter. In addition to the requested supplemental materials, plaintiffs also moved under MCR 2.108(E)—which allows for the extension of deadlines on account of excusable neglect—to extend the deadline for service of plaintiffs' bill of costs on defendant.

At a subsequent hearing held on the motions, the trial court stated:

> I studied this long and hard. There really is no case law which deals with this issue, but I'll have to be honest with you, when the court rule [MCR 2.625] is so specifically clear that you must, you shall, do something, excusable neglect, neglect, period, does not come into play in this case. It really does not.
>
> * * *
>
> And I am of the opinion, and it's unfortunate in this case, the court rules do take over in this case. And it is mandatory, when you serve your bill of costs, it shall be immediately served on the other party. It was not done here. It cannot be blamed on a paralegal or anything else like that, it just was not done. And I truly believe that, and that's what the Court finds in this case.
>
> * * *
>
> But by failing to comply with this court rule, it does create prejudice on the part of the defendant, because the

> defendants [sic] have the right to rely on this, and not complying with the court rule brings about the prejudice.
>
> I have to agree with defense in this case that the costs were not timely filed, the court rule was not properly followed, therefore, the Court is not going to allow costs in this case. It's a harsh decision. It's an unfortunate decision, but I think it's very clear in the court rules, and that's the Court's ruling.

The trial court also denied plaintiffs' motion brought under MCR 2.108(E) to extend the deadline for serving defendant with the bill of costs. The court ruled that because the requirements of MCR 2.625(F) were mandatory, MCR 2.108(E) simply was inapplicable. Accordingly, the trial court denied plaintiffs costs under MCR 2.625.

On October 24, 2018, in a postjudgment motion, plaintiffs sought equitable relief in the form of remediation. Plaintiffs argued that because defendant had been found to have altered the historic flow of water, he was required to remediate the condition. Plaintiffs included an elaborate remediation plan from their hydrologist expert. Defendant responded that the plan was unwarranted, especially when that same expert testified at trial that a simple culvert under the constructed roadway would suffice. Defendant filed a supplemental response that included a proposal from his expert to remediate the area. After a hearing on plaintiffs' motion, it appears the court concluded that defendant's installation of some culverts under the constructed roadway was adequate for the time being, but the court would revisit the issue if it was later determined that the situation was not remediated.

In a renewed motion for remediation filed on January 9, 2019, plaintiffs argued that the work defendant performed had not functioned as needed because

there still was an accumulation of water on plaintiffs' property. Plaintiffs therefore requested that the court order defendant to implement the remediation plan they had previously proposed. Defendant responded and contended that plaintiffs had failed to show that the culverts did not work because the amount of water after the installation of the culverts was noticeably less than what was reported at trial. Defendant further noted that he also planned to dig a catch basin south of the constructed road and install pumps to pump the water from that basin to the drainage ditch along Dixie Highway. At a January 16, 2019 hearing, the trial court noted that the pictures plaintiffs supplied did not show the presence of any standing water. Regardless, the court opined that another hearing would be needed to determine whether defendant had successfully remediated the situation. To facilitate this decision, the court ordered defendant to hire an independent engineering firm to provide its opinion. However, the court later vacated that order and instead scheduled an evidentiary hearing in which the parties could call their own experts and the trial court could make its determinations.

The trial court held its evidentiary hearing on May 20, 2019. After hearing the efforts defendant had undertaken—which included adding twin culverts under the road, adding a retention basin, and adding pumps to push collected water to the drain at Dixie Highway—the trial court found that defendant had successfully remediated the situation. An order approving remediation was entered on August 29, 2019, which closed the case.

This appeal by plaintiffs followed, challenging the trial court's decisions dismissing their trespass and nuisance claims, denying their request to amend their

complaint regarding those claims, refusing to award costs, and holding that defendant had adequately performed remediation.

II. TRESPASS AND NUISANCE CLAIMS

Plaintiffs argue that the trial court erred by holding that they failed to sufficiently plead trespass and nuisance claims and, thus, also erred by dismissing their claims for noneconomic damages. We disagree. Further, plaintiffs argue that the trial court abused its discretion by denying their motion to amend their complaint to add factual allegations to support their trespass and nuisance claims after they were dismissed under MCR 2.116(C)(8). We agree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). "A motion for summary disposition brought pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint on the allegations of the pleadings alone. When a challenge to a complaint is made, the motion tests whether the complaint states a claim as a matter of law, and the motion should be granted if no factual development could possibly justify recovery." *Id*. (citations omitted).

This Court reviews for an abuse of discretion a trial court's decision regarding a motion to amend the pleadings. *Sanders v Perfecting Church*, 303 Mich App 1, 8-9; 840 NW2d 401 (2013). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. SUMMARY DISMISSAL

1. TRESPASS

"[T]respass is an invasion of the plaintiff's interest in the exclusive possession of his land . . . ." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 59; 602 NW2d 215 (1999) (quotation marks and citations omitted; alteration in original). Recovery for trespass "is available only upon proof of an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession." *Id*. at 67. Further, the intrusion must have been intentional. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 195; 540 NW2d 297 (1995); see also *Adams*, 237 Mich App at 66. Pertinent for this case, "[i]t is beyond dispute that a defendant's unauthorized act of causing excess waters to flow onto another person's property constitutes a trespass." *Wiggins v City of Burton*, 291 Mich App 532, 566; 805 NW2d 517 (2011). "This is because the unauthorized flooding of another person's land constitutes 'an unauthorized direct or immediate intrusion of a physical, tangible object onto land over which the plaintiff has a right of exclusive possession.' " *Id*. at 566-567, quoting *Adams*, 237 Mich App at 67.

In Count IV of their complaint, plaintiffs attempted to allege a count of trespass against defendant. Notably, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691; 822 NW2d 254 (2012). Instead, "the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Id*. at 691-692 (quotation marks and citation omitted). All throughout the

complaint, plaintiffs asserted that defendant caused water to flow onto plaintiffs' land as a result of defendant's building of a gravel road and placement of a large pile of dirt. Thus, these allegations appear to be sufficient to allege the intrusion aspect of the trespass claim. However, as the trial court noted, plaintiffs' allegations fail to show how this intrusion of water was intentional:

> I did go right to the complaint and I looked at it, and I will agree that there is one paragraph that says that this stuff was done intentionally on the trespass claim, but there's nothing else to support that allegation in the complaint in the least bit. It's just an allegation made that this was done intentional [sic] on the trespass claim and even on the nuisance claim.
>
> * * *
>
> . . . It is not just sufficient in this Court's mind to merely say it was done intentionally to try to support a trespass claim . . . .

The paragraph the court was referring to is ¶ 28 of the complaint, which was the sole allegation related to any intentional conduct, and it provides:

> Defendant's trespass through the flow of water, and other damage to [plaintiffs'] Property were done intentionally, recklessly, and wantonly when Defendant knew that the Property and the trees belonged to Plaintiffs and that Defendant had no right to take these actions.

This paragraph, although it uses the word "intentionally," fails to properly allege that defendant intentionally caused water to flow onto plaintiffs' property. First, conclusory allegations are insufficient to state a cause of action; the cause of action must be supported by factual assertions. *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Second, to the extent there was any factual allegation in this paragraph, it only showed that defendant knew that plaintiffs owned their property, including their trees. Importantly, it did not allege that defendant undertook his actions with the intent to direct water onto plaintiffs' property. Therefore, plaintiffs' complaint was insufficient to maintain a claim of trespass, and the trial court did not err by granting defendant's motion for summary disposition on this claim.[2]

2. NUISANCE

"A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land." *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). A defendant

> is subject to liability for private nuisance for a nontrespassory invasion of another's interest in the private use and enjoyment of land if (a) the other has property rights and privileges in respect to the use or enjoyment interfered with, (b) the invasion results in significant harm[,] (c) the actor's conduct is the legal cause of the invasion, and (d) the invasion is either (i) intentional and unreasonable, or (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless, or ultrahazardous conduct. [*Id*. at 304; see also *Terlecki v Stewart*, 278 Mich App 644, 654; 754 NW2d 899 (2008).]

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[2] The trial court's reliance on *Price*, 493 Mich 238, is misplaced. This case is simply inapplicable for deciding whether plaintiffs properly pleaded a claim of trespass or nuisance. The only issue the Supreme Court addressed in *Price* was whether noneconomic damages were available for the negligent destruction of property, and it held that those damages were not. *Id*. at 240. Although the plaintiff in *Price* had initially pursued a claim of trespass, among others, the only claim that went to trial was the negligence claim. *Id*. at 241. It is unexplained why the negligence claim was the only claim to survive to make it to trial. See *id*. Thus, although *Price* addresses why plaintiffs could not seek noneconomic damages after their claims for trespass and nuisance were dismissed, *Price* does not address whether the dismissal of those claims was proper.

In their complaint, plaintiffs alleged, with respect to the nuisance claim, that defendant's gravel road and pile of dirt creates significant water flow onto plaintiffs' property and increases water retention on the property. Notably, the thrust of the claim is that the road and pile of dirt "continue to damage" plaintiffs as a result of the dying of trees and diminution of value of the property. Such an assertion speaks more to monetary damages rather than how the possessor's enjoyment of the land was interfered with. See *Adams*, 237 Mich App at 67. Similar to what this Court stated in *Gibbons v Horseshoe Lake Corp*, unpublished per curiam opinion of the Court of Appeals, issued March 11, 2014 (Docket No. 311754), p 12, plaintiffs in this case "do not allege that the creation of the alleged nuisance was the result of anything other than defendant's alleged negligence, and cannot alternatively claim nuisance under the same facts and law as their negligence claim." Further, a nuisance claim is different from a negligence claim because nuisance is a condition on the land and not an act or failure to act. *Travers Lakes Community Maintenance Ass'n v Douglas Co*, 224 Mich App 335, 346; 568 NW2d 847 (1997). We agree with the trial court that there is nothing in plaintiffs' nuisance claim to distinguish it from plaintiffs' negligence claim. Accordingly, the trial court did not err by granting defendant summary disposition on this claim as well.

Further, plaintiffs do not dispute that noneconomic damages are not recoverable with a negligence claim. See *Price*, 493 Mich at 264. Therefore, with only the negligence claim surviving defendant's motion for partial summary disposition, the trial court did not err by ruling that plaintiffs were barred from recovering any noneconomic damages.

C. LEAVE TO AMEND COMPLAINT

"A trial court should freely grant leave to amend a complaint when justice so requires." *Sanders*, 303 Mich App at 9, citing MCR 2.118(A)(2). However, a motion to amend may be denied for these reasons:

> (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment. [*Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).]

The week before trial, the trial court denied plaintiffs' motion to amend the complaint, stating:

> This Court already alluded to these allegations were already in the original complaint and the Court granted Summary Disposition, which eliminated the two causes of action, which plaintiff [sic] now seeks to bring back in. So, frankly, in the Court's opinion, the recourse there is the Court of Appeals, if you want those back in. It's not an amendment of the complaint. The evidence before the Court now does not justify bringing those back in. This Court has reviewed everything that has been submitted.
>
> * * *
>
> This matter is scheduled for trial this next coming Monday and I am not going to grant the Motion to Amend the Complaint. It comes extremely way too late.
>
> Let me point something else out to plaintiff [sic], because plaintiff [sic] is bound by everything that plaintiff [sic] files in this action, it is binding on them. I'll refer you to Plaintiff's [sic] Motion to Exempt the Case from Case Evaluation, Extend Discovery, and Extend Discovery Order, which was filed on November 23, 2015, paragraph seven of that motion states, because plaintiffs[']s claims involve equitable relief, this matter should be

> removed from Case Evaluation as damages would insufficient/inappropriate to remedy this matter, and that should read would be insufficient/inappropriate to remedy this matter. Plaintiff [sic] has already conceded there are not those kind of damages in this case; that's the Court's position here.
>
> I deny the Motion to Amend the Complaint.

Thus, it appears the trial court denied plaintiffs' motion to amend the complaint for the following reasons: (1) the trespass and nuisance claims already had been dismissed by the trial court, and the avenue to resurrect those claims was through the Court of Appeals; (2) the "evidence" did not show that amendment was proper; (3) the motion to amend was too late; and (4) plaintiffs had previously conceded that (noneconomic)[3] damages were not implicated in this case.

The first reason the trial court provided is erroneous. Just because the trial court had dismissed the trespass and nuisance claims does not mean that plaintiffs could not amend their complaint to properly plead those claims. In fact, our court rules expressly allow for this. MCR 2.116(I)(5) states, "If the grounds asserted are based on subrule (C)(8), (9), or (10), the court *shall* give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." (Emphasis added.) In this instance, the grounds asserted were based on Subrule (C)(8); therefore, the court was required to allow the

[3] Although the trial court did not use the term "noneconomic damages," this appears to be what the court was referring to because there is no apparent significance to the purported concession that "damages" are not at issue in this case. That is because whether plaintiffs were entitled to seek noneconomic damages was a large part of defendant's motion for partial summary disposition and plaintiffs' motion to amend the complaint.

parties an opportunity to amend the complaint under MCR 2.118 unless the amendment would be otherwise unjustified. See also *Yudashkin v Holden*, 247 Mich App 642, 651; 637 NW2d 257 (2001); *Jackson v White Castle Sys, Inc*, 205 Mich App 137, 142-143; 517 NW2d 286 (1994). The trial court's mistaken belief that it was precluded from allowing the revival of these dismissed claims and that the only avenue for doing so was through this Court constitutes an error of law.[4]

The second reason the trial court provided in denying plaintiffs' motion to amend the complaint—that the "evidence" shows that amendment was not proper—can be a valid reason because a motion to amend may be denied if the amendment would be futile. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). An amendment is futile if, among other things, it is legally insufficient on its face. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

Plaintiffs' proposed amended complaint included the following new factual allegations:

> 14. Defendant Wright is an excavator and licensed builder.
>
> 15. Defendant Wright intended to materially increase the flow of water onto the Wolfenbarger property, as his construction of the roadway and depositing of the aforementioned dirt pile ensured that the flow of water onto the Wolfenbarger Property would materially increase.
>
> * * *
>
> 18. Defendant Wright's continued attempts to increase the natural historic flow of water onto the Wolfenbarger

[4] And "[a] court abuses its discretion when it makes an error of law." *Gentris v State Farm Mut Auto Ins Co*, 297 Mich App 354, 364; 824 NW2d 609 (2012).

Property after being put on notice of the nature of the claims in this case further demonstrates his intent in increasing the flow of water onto the Wolfenbarger Property through construction and excavation activities.

* * *

COUNT II

TRESPASS AS TO DEFENDANT FRANK WRIGHT JR.

25. Defendant Wright knew or reasonably should have known that constructing the gravel road in the manner in which he did, depositing the dirt pile in the location he chose, and making additional modifications to his land in the form of berms and dike would result in a material increase to the natural flow of water onto the Wolfenbarger property.

* * *

27. Defendant's trespass through increasing the natural, historic flow of water, and other damage to the Wolfenbarger Property were done intentionally, recklessly, and wantonly when Defendant knew that the Property and trees belonged to Plaintiffs and that Defendant had no right to take these actions.

* * *

COUNT III

NUISANCE AS TO DEFENDANT FRANK WRIGHT JR.

* * *

31. Defendant Wright intentionally and unreasonably constructed the gravel road and deposited the pile of dirt to increase the flow of water onto the Wolfenbarger property and cause significant damage to said property.

When the trial court granted defendant's motion for partial summary disposition under MCR 2.116(C)(8), it held, in pertinent part, that there were no factual allegations to support plaintiffs' conclusory assertions that defendant had acted with the intent to flood plaintiffs' property. But the factual allegations listed in the proposed amended complaint appear to have corrected this deficiency. With regard to the trespass claim, the proposed amended complaint clearly asserted that defendant made the roadway and hill of dirt, along with other modifications to his land, *with the intent to divert water onto plaintiffs' property*. And the fact that defendant is alleged to be an excavator and a licensed builder supports an inference that he would have the knowledge and ability to carry out his intentions. Therefore, amending plaintiffs' complaint in this manner for the claim of trespass was not futile or unjustified.

Further, the elements of nuisance appear to have been pleaded in the proposed amended complaint. First, plaintiffs alleged that they had property rights and privileges in the private use and enjoyment of their property. Second, they alleged that the invasion of their interest caused significant harm. Third, plaintiffs alleged that defendant's conduct was the legal cause of the invasion of their interest in the enjoyment of their land. And finally, plaintiffs alleged that defendant intended the invasion of their interest in the private use and enjoyment of their land. That some facts or elements seem to overlap with the trespass claim is not surprising. See *Terlecki*, 278 Mich App at 653 ("Claims of trespass and nuisance include overlapping concepts and are difficult to distinguish."). Therefore, the amended complaint sufficiently pleaded a claim of nuisance and was not otherwise futile.

For its third reason to deny the motion to amend, the trial court stated that plaintiffs' motion was too late because it was being decided the week before trial was to start. "[U]ndue delay" is a reason to deny a motion to amend. *Lane*, 231 Mich App at 697. But "[a]bsent bad faith or actual prejudice to the opposing party, delay, alone, does not warrant denial of a motion to amend." *Id*. The trial court's reliance on the motion being too late is somewhat perplexing. The trial court granted defendant's motion for summary disposition in an order entered on May 25, 2017. Plaintiffs filed their motion to amend the complaint less than a week later on May 31, 2017. Clearly, plaintiffs were not *unduly* late in bringing their motion when it was brought six days after the trial court dismissed plaintiffs' claims of trespass and nuisance under MCR 2.116(C)(8).

Moreover, assuming for the sake of argument that the amendment was unduly late, there is nothing to show that plaintiffs acted in bad faith or that defendant would have suffered any actual prejudice. Instead of acting in bad faith, it is apparent that plaintiffs were availing themselves of their right to amend their complaint to correct the deficiencies identified in the granting of defendant's motion for partial summary disposition. See MCR 2.116(I)(5). And as already described, the amended complaint did indeed correct the deficiencies in the initial complaint. Regarding prejudice, " '[p]rejudice' in this context does not mean that the allowance of the proffered amendment may cause the opposing party to ultimately lose on the merits." *Weymers*, 454 Mich at 659. Instead, there is prejudice "if the amendment would prevent the opposing party from receiving a fair trial," such as, "for example, the opposing party would not be able to properly contest the matter raised in the amendment because important witnesses have died or necessary evidence has

been destroyed or lost." *Id*. In this instance, there is nothing to show that defendant would have been denied a fair trial if the complaint had been amended. Indeed, just two weeks earlier, plaintiffs' claims of trespass and nuisance were in existence and therefore were claims defendant had to prepare to defend against. Thus, even though defendant had a pending motion to dismiss those claims, he could not have known with certainty that he would not have to defend against them.

However, one aspect of the nuisance claim alleged in plaintiffs' amended complaint would prejudice defendant and thus was improper. Throughout this litigation plaintiffs had alleged that their problems resulted from the modifications defendant made to his land, which, in turn, caused water to flow onto and remain trapped on plaintiffs' land. But in their motion to amend the complaint, plaintiffs added ¶ 32, asserting, "Defendant Wright operates a business out of his property in which heavy machinery and work trucks traverse the gravel road he constructed, which unreasonably causes dust, dirt, and noise to invade the Wolfenbarger property." This was a new allegation that arguably would prejudice defendant. With trial starting imminently, defendant would now have to investigate and gather evidence to defend against this new claim in short order. The addition of this aspect of the amended nuisance claim would hamper defendant's ability to have a fair trial. Therefore, although the motion to amend the complaint was not unduly late, and should have been granted, this specific aspect of the nuisance claim is prejudicial and should not have been allowed to proceed.

The fourth reason the trial court denied plaintiffs' motion to amend their complaint is also erroneous. The

trial court stated that plaintiffs previously had conceded that damages, including noneconomic damages, were not implicated in this case. The "concession" comes from a paragraph in plaintiffs' motion to remove the case from case evaluation, which states:

> Because Plaintiffs[3] claims involve equitable relief this matter should be removed from case evaluation as damages would insufficient/inappropriate to remedy the matter.

The trial court correctly noted that there appears to be a missing word "be," so that it should read "damages would *be* insufficient/inappropriate . . . ." But from context, this paragraph, even if inartfully crafted, cannot be read as a concession that there are *no* monetary (or noneconomic) damages. If one is to take the paragraph as it is written (but with the addition of the word "be"), all it concedes is that damages are insufficient "to remedy the matter." In other words, all plaintiffs were conceding was that damages *alone* would be insufficient to make them whole. Therefore, this paragraph cannot reasonably be read as plaintiffs waiving entitlement to all damages, including noneconomic damages.

In sum, all four of the trial court's reasons for denying plaintiffs' motion to amend their complaint are erroneous, and the trial court abused its discretion by denying plaintiffs' motion. Accordingly, this matter is remanded to the trial court for further proceedings on plaintiffs' claims of trespass and nuisance as set forth in their amended complaint, but the nuisance claim is limited to the flow of water onto plaintiffs' property.

We note and reject defendant's argument raised for the first time on appeal that this Court should affirm on the alternate basis of the election-of-remedies doctrine and collateral estoppel. Defendant notes that

plaintiffs filed a malpractice complaint against their initial attorney and supposedly settled the matter. Defendant maintains that because plaintiffs chose to pursue this remedy through the malpractice action they are barred from seeking any remedy from defendant. See *Barclae v Zarb*, 300 Mich App 455, 486; 834 NW2d 100 (2013). Defendant relies on documents that are not contained in the lower-court record in support of his position, but this Court's review is limited to the record established by the trial court, which may not be expanded on appeal. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). Further, as an error-correcting court, this Court's purpose is to determine if the trial court made an error when it rendered its decision. See *Johnson v VanderKooi (On Remand)*, 330 Mich App 506, 526; 948 NW2d 650 (2019). Because this malpractice case was not known to the trial court and, in fact, was not even in existence at the time the trial court made its decision, the case is wholly irrelevant to whether the trial court made a mistake when it denied plaintiffs' motion to amend the complaint.

III. BILL OF COSTS

Plaintiffs argue that the trial court abused its discretion when it ruled that they had waived their right to costs as the prevailing party. We agree.

A. STANDARD OF REVIEW

A trial court's decision whether to award costs under MCR 2.625(A) is reviewed for an abuse of discretion. *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Edry v Adelman*,

486 Mich 634, 639; 786 NW2d 567 (2010). "The construction and interpretation of court rules present a question of law that this Court reviews de novo." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

B. DISCUSSION

MCR 2.625(A)(1) provides that "[c]osts will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." MCR 2.625(F) describes the procedure for taxing costs:

> (1) Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk as provided in this subrule.
>
> (2) When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk, within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C),
>
> (a) a bill of costs conforming to subrule (G),
>
> (b) a copy of the bill of costs for each other party, and
>
> (c) a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys.
>
> In addition, the party presenting the bill of costs shall immediately serve a copy of the bill and any accompanying affidavits on the other parties. Failure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs.
>
> (3) Within 14 days after service of the bill of costs, another party may file objections to it, accompanied by affidavits if appropriate. After the time for filing objections, the clerk must promptly examine the bill and any

> objections or affidavits submitted and allow only those items that appear to be correct, striking all charges for services that in the clerk's judgment were not necessary. The clerk shall notify the parties in the manner provided in MCR 2.107.
>
> (4) The action of the clerk is reviewable by the court on motion of any affected party filed within 7 days from the date that notice of the taxing of costs was sent, but on review only those affidavits or objections that were presented to the clerk may be considered by the court.

At the heart of this issue is the proper interpretation of the provisions of MCR 2.625(F)(2). This appears to be an issue of first impression. This subsection requires, in pertinent part, a party to "present" a bill of costs "to the clerk" within 28 days after entry of the judgment. It also requires the party to "immediately serve a copy of the bill and any accompanying affidavits on the other parties." Finally, the "[f]ailure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs."

> This Court interprets court rules using the "same principles that govern the interpretation of statutes." Our purpose when interpreting court rules is to give effect to the intent of the Michigan Supreme Court. The language of the court rule itself is the best indicator of intent. If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary. [*In re McCarrick/Lamoreaux*, 307 Mich App 436, 446; 861 NW2d 303 (2014) (citations omitted).]

It is not disputed that plaintiffs timely filed their bill of costs with the clerk. It also is not disputed that plaintiffs failed to serve the bill of costs on defendant. The question is: What result is imposed by the court rules for this failure to "immediately" serve the bill of costs? The trial court ruled that because service was to

be done immediately, it was part of the presentment and that the failure to immediately serve resulted in a waiver. We disagree.

Under the plain language of the court rule, "the party entitled to costs must *present to the clerk*" the bill of costs within 28 days after the judgment is signed. MCR 2.625(F)(2) (emphasis added). Thus, this requirement is clear that the costs must be presented *to the clerk* within the prescribed timeline. Again, there is no dispute that the costs were filed or presented to the clerk within the 28-day period.

However, "[i]n addition, the party presenting the bill of costs *shall* immediately serve a copy of the bill and any accompanying affidavits on the other parties." MCR 2.625(F)(2) (emphasis added). The use of the word "shall" denotes mandatory action. See *Browder v Int'l Fidelity Ins Co*, 413 Mich 603, 612; 321 NW2d 668 (1982). Consequently, plaintiffs' failure to immediately serve the bill of costs on defendant undoubtedly constitutes noncompliance with this portion of the rule.

But whether that noncompliance results in a waiver is another question. The court rule only provides for *one* instance of a party waiving the right to costs and that is the party's "[f]ailure to *present* a bill of costs within the time prescribed . . . ." MCR 2.625(F)(2) (emphasis added). We do not believe that the failure to *serve* defendant constitutes a failure to *present*. The court rule uses the terms "present" and "serve" differently. The reference to "present[ing]" is in the context of presenting to the clerk. See MCR 2.625(F)(2) ("[T]he party entitled to costs must present to the clerk . . . ."). Nowhere does the court rule refer to serving the bill of costs on the opposing party as a "presentment" of the bill of costs. Indeed, the sentence—"In addition, the party presenting the bill of costs shall immediately

serve a copy of the bill and any accompanying affidavits on the other parties,"—clearly shows that "presentment" is separate from "serving." That is apparent with the use of the phrase "[i]n addition," which conveys that the requirement of immediately serving the other parties is an *additional or extra* requirement to the presentment requirement. Therefore, because the court rule only provides for a waiver upon the failure to timely present the bill of costs, it should not be read to also allow for waiver for failing to satisfy *other* aspects of the court rule.

A well-established rule of statutory construction is *expressio unius est exclusio alterius*, which means "the expression of one thing is the exclusion of another[.]" *US Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 5-6; 489 NW2d 115 (1992). And in the context of statutory interpretation, it "means that the express mention of one thing in a statute implies the exclusion of other similar things." *Id*. at 6. Thus, with the court rule expressly mentioning that the failure to timely "present" results in a waiver of the right to costs, it does not follow that the failure to comply with other aspects of the rule also constitutes waiver. If the Supreme Court had intended for other failures to result in waiver, it could have said so. Likewise, if the Supreme Court had desired for "service" to constitute a type of "presenting," then it could have used language to convey that principle, such as, "In addition, the party presenting the bill of costs shall present them to the other parties by immediately serving a copy of the bill and any accompanying affidavits on them." In that instance, the failure to "present" would encompass both presenting to the clerk and presenting to the other parties.

Therefore, under the court rule, only the failure to present a bill of costs to the clerk within the time

prescribed constitutes a waiver of the right to costs. Because plaintiffs did timely present the bill of costs to the clerk, this waiver provision simply is inapplicable. Although plaintiffs failed to comply with the requirement of immediately serving the bill of costs on the opposing party, that failure does not constitute a waiver under the plain language of the court rule, and the trial court erred when it ruled otherwise. Accordingly, we reverse that decision and remand for further proceedings. The issue whether the trial court also abused its discretion when it denied plaintiffs' motion brought under MCR 2.108(E), to allow them to extend the deadline for serving defendant, is moot and need not be addressed. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

IV. REMEDIATION

Plaintiffs argue that the trial court erred by concluding that defendant had remediated the water situation on plaintiffs' property. We disagree.

A. STANDARD OF REVIEW

When reviewing equitable actions, this Court reviews de novo the ultimate decision, but any findings of fact are reviewed for clear error. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). A trial court's findings are clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id*.

B. DISCUSSION

In plaintiffs' complaint, they also sought equitable relief in addition to damages. Although the jury returned a verdict in favor of plaintiffs in the amount of

$50,000, this award or remedy only addressed the monetary damages plaintiffs had sustained up until the time of trial. Consequently, plaintiffs wanted defendant to remediate his property such that the water drained the same way it did before defendant made the modifications to his property.

After conducting an evidentiary hearing, the trial court found that defendant had sufficiently remediated the premises. Specifically, the trial court noted that it was not accepting, i.e., believing, everything that plaintiffs' experts stated. This Court defers to a trial court's credibility determinations. *In re Medina*, 317 Mich App 219, 227; 894 NW2d 653 (2016); see also *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999) ("This Court gives special deference to the trial court's findings when they are based on its assessment of the witnesses' credibility.").

The trial court also found that the situation was successfully remediated for a couple of reasons. The court first noted that the solution of adding a culvert under the road is precisely the solution plaintiffs' expert suggested at trial. This was correct because plaintiffs' civil engineer, Steven Sorensen, testified at trial that the solution to this drainage issue was to add a culvert under the road to let the water in the area "equalize to where it historically was." Although this was the solution Sorensen had suggested, it does not conclusively mean that defendant successfully remediated the situation. If the "fix" did not correct the problem, despite this being what plaintiffs' expert suggested, then it cannot be said that defendant had restored the area to how it functioned before he made the 2013 modifications.

Regarding the effectiveness of defendant's remediation, the court found that it was fully effective. This

finding is not clearly erroneous. Evidence was presented that even before the road was constructed, there was no positive outlet for water in that area to drain, but now there were multiple positive outlets, including (1) the twin culverts (which were sloped to drain from plaintiffs' property to defendant's), (2) a ditch leading to Foster Lane, and (3) pumps and pipes were added to move water to Dixie Highway. In support of the effectiveness of these modifications, evidence was presented that the area would dry out now within a day or so after a big rain. The evidence showed that even before the road was constructed, the area flooded to some degree; however, after the road was constructed, the flooding would last a very long time—up to six weeks. Consequently, with the water now vacating the area within a day or so after serious rains, we are not definitely and firmly convinced that the trial court erred in its finding.

In summary, the trial court did not err by granting defendant's motion for summary disposition on plaintiffs' counts of trespass and nuisance, but the trial court abused its discretion when it denied plaintiffs' motion to amend the complaint before trial. The trial court erred when it determined that plaintiffs' failure to serve defendant with the bill of costs resulted in a waiver of the right to those costs under the court rule. And the trial court did not clearly err by finding that defendant's remediation efforts successfully restored the area to how it drained before the road was constructed.

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

SERVITTO and CAMERON, JJ., concurred with CAVANAGH, P.J.

PEOPLE v THUE

Docket No. 353978. Submitted February 4, 2021, at Detroit. Decided February 11, 2021, at 9:05 a.m.

Michael E. Thue pleaded guilty in the 86th District Court, Michael S. Stepka, J., to assault and battery and was sentenced to one year of probation. As a condition of probation, defendant was not to use marijuana, not even for medical purposes. Defendant, who had a valid medical marijuana registration card, moved to modify the terms of his probation to allow him to use medical marijuana. The district court held a hearing on defendant's motion, during which defendant argued that a person authorized to use medical marijuana under the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., is entitled to special protections, including protection from arrest, prosecution, or penalty of any kind. The district court denied defendant's motion to modify the terms of his probation, stating that it had authority to place restrictions on medication and that the restriction was appropriate in this case. Defendant sought leave to appeal in the Grand Traverse Circuit Court. The circuit court, Thomas G. Power, J., denied leave to appeal. Defendant appealed.

The Court of Appeals *held*:

1. An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy. Generally, a court will not decide moot issues. However, if an issue is one of public significance that is likely to recur yet evade judicial review, it is justiciable. In this case, defendant was sentenced to one year of probation on December 20, 2019; therefore, defendant's term of probation likely ended on December 20, 2020. However, this case was justiciable because the issue whether a sentencing court can prohibit a defendant from using medical marijuana as a condition of probation when the defendant possesses a valid medical marijuana registration card is one of public significance that is likely to recur yet evade judicial review.

2. Under MCL 333.26427(a) of the MMMA, the medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of the MMMA.

Under MCL 333.26427(e), all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marijuana as provided for by the MMMA. MCL 333.26424(a) provides, in pertinent part, that a qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau for the medical use of marijuana in accordance with the MMMA. The issue whether the revocation of probation because of the use of medical marijuana contrary to a condition of probation constitutes a "penalty" under MCL 333.26424(a) was an issue of first impression. In several cases not involving conditions of probation, including *Ter Beek v Wyoming*, 495 Mich 1 (2014), *People v Koon*, 494 Mich 1 (2013), and *People v Latz*, 318 Mich App 380 (2016), Michigan courts have concluded that the MMMA preempts or supersedes ordinances and statutes that conflict with the MMMA. Other states that have similar medical marijuana laws, such as Arizona, Oregon, and Pennsylvania, have held that probation terms prohibiting the use of medical marijuana in compliance with medical marijuana laws are unenforceable and illegal under those laws. In this case, defendant had a valid medical marijuana registration card, and there was no indication that defendant used marijuana in violation of the MMMA; thus, defendant was authorized to use medical marijuana under MCL 333.26427(a). Further, as illustrated by the plain language of MCL 333.26427(a) and (e) as well as the holdings in *Ter Beek*, *Koon*, and *Latz*, a statute or provision of a statute that conflicts with a defendant's right to MMMA-compliant use of marijuana is preempted or superseded by the MMMA. Accordingly, a condition of probation prohibiting the use of medical marijuana that is otherwise used in accordance with the MMMA is directly in conflict with the MMMA and is impermissible. Additionally, the revocation of probation because of MMMA-compliant use of marijuana constitutes a "penalty" under MCL 333.26424(a) of the MMMA. Because probation is a privilege, the revocation of probation is a penalty or the denial of a privilege in contravention of MCL 333.26424(a). Accordingly, the district court erred by prohibiting defendant from MMMA-compliant marijuana use as a term of his probation. Defendant's motion to modify the terms of his probation to allow him to use medical marijuana should have been granted.

Reversed.

1. STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — MEDICAL USE OF MARIJUANA — CONDITIONS OF PROBATION.

Under MCL 333.26427(a) of the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., the medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of the MMMA; under MCL 333.26427(e), all other acts and parts of acts inconsistent with the MMMA do not apply to the medical use of marijuana as provided for by the MMMA; a condition of probation prohibiting the use of medical marijuana that is otherwise used in accordance with the MMMA is directly in conflict with the MMMA and is impermissible.

2. STATUTES — MICHIGAN MEDICAL MARIHUANA ACT — WORDS AND PHRASES — "PENALTY" — REVOCATION OF PROBATION BECAUSE OF THE USE OF MEDICAL MARIJUANA.

MCL 333.26424(a) of the Michigan Medical Marihuana Act (the MMMA), MCL 333.26421 *et seq*., provides, in pertinent part, that a qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau for the medical use of marijuana in accordance with the MMMA; the revocation of probation because of the use of medical marijuana contrary to a condition of probation constitutes a "penalty" under MCL 333.26424(a).

Michael A. Komorn for defendant.

Before: CAVANAGH, P.J., and SERVITTO and CAMERON, JJ.

CAVANAGH, P.J. Defendant appeals by leave granted[1] the circuit court's order denying defendant's application for leave to appeal the district court's denial of his motion to allow him to use medical marijuana while on probation. We reverse the district court's order denying defendant's motion to modify the terms of his probation to allow him to use medical marijuana.

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[1] See *People v Thue*, unpublished order of the Court of Appeals, entered September 29, 2020 (Docket No. 353978).

I. FACTS

On June 25, 2019, defendant was involved in a road-rage incident for which he was charged with assault and battery, MCL 750.81. He ultimately pleaded guilty and was sentenced to one year of probation. As a condition of probation, defendant was not to use marijuana, including medical marijuana. Defendant moved to modify the terms of his probation to allow him to use medical marijuana. The district court held a hearing on defendant's motion, during which defendant argued that a person authorized to use medical marijuana under the Michigan Medical Marijuana Act (the MMMA), MCL 333.26421 *et seq*.,[2] is entitled to special protections, including protection from arrest, prosecution, or penalty of any kind.[3] The prosecution argued that the district court had the ability to place restrictions on a defendant's medication. The district court denied defendant's motion to modify the terms of his probation, holding that it was "bound by the Circuit Court, their appellate jurisdiction and their directive to us that we not allow [probationers to use medical marijuana]." The district court stated that it had the authority to place restrictions on medication and that the restriction was appropriate in this case.

Following the district court's decision, defendant filed an application for leave to appeal in the circuit court. Defendant argued that "[t]he revocation of probation . . . upon the use of medical marijuana consti-

[2] Although the statutory provisions of the MMMA use the spelling "marihuana," we use the conventional spelling "marijuana" in this opinion. See *People v Jones*, 301 Mich App 566, 569 n 1; 837 NW2d 7 (2013).

[3] There is no dispute that defendant had a valid medical marijuana registration card during all relevant times.

tutes the imposition of a penalty" in violation of MCL 333.26424(a)[4] of the MMMA. Defendant also argued that MCL 333.26427(e) of the MMMA overrides Michigan's probation act, MCL 771.1 *et seq*., thus prohibiting the imposition of such a condition. The circuit court denied leave to appeal, and this appeal followed.

II. MOOTNESS

On December 20, 2019, defendant was sentenced to one year of probation, which included the condition that defendant not use marijuana, including medical marijuana. Thus, defendant's term of probation likely ended on December 20, 2020. "An issue is moot when an event occurs that renders it impossible for the reviewing court to fashion a remedy to the controversy." *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). And generally a court will not decide moot issues. *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010). But if an "issue is one of public significance that is likely to recur, yet evade judicial review," it is justiciable. *Id*. (quotation marks and citation omitted). We conclude that such is the case here. As our Supreme Court in *People v Vanderpool*, 505 Mich 391, 397 n 1; 952 NW2d 414 (2020), explained, "[T]he relatively short timelines involved in probation cases compared with the often sluggish pace of the appellate process might make this situation one that is capable of repetition, yet evading review." The issue whether a sentencing court can prohibit a defendant from using medical marijuana as a condition of probation when the defendant possesses a valid medi-

[4] In cases cited later in this opinion, MCL 333.26424(a) of the MMMA is occasionally referred to as "§ 4," and MCL 333.26427 is occasionally referred to as "§ 7."

cal marijuana registration card is one of public significance that is likely to recur yet evade judicial review.

III. ANALYSIS

A. STANDARD OF REVIEW

A trial court's decision setting the terms of probation is reviewed for an abuse of discretion, *People v Malinowski*, 301 Mich App 182, 185; 835 NW2d 468 (2013), which occurs only when the decision "falls outside the range of reasonable and principled outcomes," *People v Franklin*, 500 Mich 92, 100; 894 NW2d 561 (2017) (quotation marks and citation omitted).

"This Court reviews de novo whether the trial court properly interpreted and applied the Medical Marijuana Act." *People v Anderson (On Remand)*, 298 Mich App 10, 14-15; 825 NW2d 641 (2012). "[T]he intent of the electors governs the interpretation of voter-initiated statutes such as the MMMA, just as the intent of the Legislature governs the interpretation of legislatively enacted statutes." *Ter Beek v Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). "The best evidence of that intent is the plain language used, and courts do not evaluate the wisdom of any statute or act. Statutes are read as a whole, and we give every word . . . meaning." *People v Latz*, 318 Mich App 380, 383; 898 NW2d 229 (2016) (quotation marks and citations omitted; alteration in original). "If the statutory language is clear and unambiguous, the inquiry stops." *Id*. (quotation marks and citation omitted).

B. MICHIGAN MEDICAL MARIJUANA LAW

The MMMA provides that "[t]he medical use of marijuana is allowed under state law to the extent that it is carried out in accordance with the provisions of

this act," MCL 333.26427(a), and "[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marijuana as provided for by this act," MCL 333.26427(e). The immunity provision of the MMMA, MCL 333.26424(a), provides, in pertinent part, that "[a] qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marijuana in accordance with this act . . . ."

It is an issue of first impression for this Court whether the revocation of probation because of the use of medical marijuana contrary to a condition of probation constitutes a "penalty" under § 4(a) of the MMMA, making it a violation of the MMMA. However, in several cases not involving conditions of probation, the Michigan Supreme Court and this Court have concluded that the MMMA preempts or supersedes ordinances and statutes that conflict with the MMMA.

In *Ter Beek*, for example, the city of Wyoming adopted a zoning ordinance that prohibited any uses of marijuana contrary to federal, state, or local law. *Ter Beek*, 495 Mich at 5-6. And because the federal controlled substances act (the CSA), 21 USC 801 *et seq*., considers marijuana an unlawful controlled substance, its use was prohibited in the city. *Id*. at 9-10. But the plaintiff, who lived in that city, possessed a medical marijuana registration card and sought to grow and use medical marijuana in his home in accordance with the MMMA. *Id*. at 6. The plaintiff sought a declaratory judgment that the ordinance was preempted by the MMMA because it penalized the plaintiff's use of medical mari-

juana contrary to § 4(a) of the MMMA. *Id*. at 6-7. Our Supreme Court agreed with the plaintiff, holding that § 4(a) of the MMMA—the immunity provision—was not preempted by the CSA, *id*. at 19, and that to the extent the city's ordinance conflicted with § 4(a) of the MMMA, it was preempted by the MMMA, *id*. at 24. The Court noted that although the MMMA does not define the term "penalty," the "term is commonly understood to mean a 'punishment imposed or incurred for a violation of law or rule . . . something forfeited.' " *Id*. at 20, quoting *Random House Webster's College Dictionary* (2000). And the ordinance impermissibly penalized qualifying patients for engaging in MMMA-compliant marijuana use by subjecting them to civil punishment; thus, it was preempted. *Ter Beek*, 495 Mich at 20-21.

In *People v Koon*, 494 Mich 1, 8-9; 832 NW2d 724 (2013), our Supreme Court held that the MMMA supersedes MCL 257.625(8) of the Michigan Vehicle Code, MCL 257.1 *et seq*., which "prohibits a person from driving with any amount of marijuana in his or her system," *id*. at 5. The *Koon* Court asserted that "[t]he 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." *Id*. at 7. The Court noted:

> 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. [*Id*. at 7, quoting MCL 333.26427(e).]

Accordingly, the Court concluded, "the MMMA is inconsistent with, and therefore supersedes, MCL 257.625(8) unless a registered qualifying patient loses immunity because of his or her failure to act in accordance with the MMMA." *Koon*, 494 Mich at 8-9.

Similarly, in *Latz*, the defendant pleaded guilty to illegal transportation of marijuana, MCL 750.474, subject to his right to challenge the legality of that statute as conflicting with the MMMA. *Latz*, 318 Mich App at 382-383. The defendant possessed a valid medical marijuana registration card. *Id*. at 384 n 2. And the MMMA expressly defines the medical use of marijuana as including the transportation of marijuana. *Id*. at 387, quoting MCL 333.26423(h). This Court asserted that "if another statute is inconsistent with the MMMA such that it punishes the proper use of medical marijuana, the MMMA controls, and the person properly using medical marijuana is immune from punishment." *Id*. at 385. Thus, MCL 750.474—which generally prohibits the transportation of marijuana in a motor vehicle unless it is enclosed in a case in the trunk or, if there is no trunk, in a case not readily accessible from the interior of the vehicle—impermissibly conflicts with the MMMA. *Id*. at 383-384, 387. MCL 750.474 "unambiguously seeks to *place additional requirements* on the transportation of medical marijuana beyond those imposed by the MMMA" and "subjects persons in compliance with the MMMA to prosecution despite that compliance." *Id*. at 387. Accordingly, the *Latz* Court concluded, MCL 750.474 is impermissible, and an "MMMA-compliant medical-marijuana patient . . . cannot be prosecuted for violating it." *Id*.

C. MEDICAL MARIJUANA LAWS OF OTHER STATES

Other states that have similar medical marijuana laws have held that probation terms prohibiting the

use of medical marijuana in compliance with medical marijuana laws are unenforceable and illegal under those laws. In *Reed-Kaliher v Hoggatt*, 237 Ariz 119, 121; 347 P3d 136 (2015), for example, the defendant was a "registered qualifying patient" under Ariz Rev Stat Ann 36-2801 of the Arizona Medical Marijuana Act (the AMMA). While the defendant was on probation, his probation officer added a condition to his probation prohibiting him from using marijuana for any reason. *Id*. The defendant sought relief in the superior court of Arizona, arguing that the "AMMA's immunity provision, A.R.S. § 36–2811(B), shield[ed] him from prosecution, revocation of probation, or other punishment for his possession or use of medical marijuana."[5] *Id*. The Arizona superior court denied the defendant's motion.

Subsequently, the Arizona Supreme Court considered the AMMA's application to probationers, noting that "[b]ecause marijuana possession and use are otherwise illegal in Arizona, A.R.S. § 13–3405(A), the drafters sought to ensure that those using marijuana pursuant to AMMA would not be penalized for such use." *Id*. at 122. The court further stated that the "AMMA broadly immunizes qualified patients, carving out only narrow exceptions from its otherwise sweeping grant of immunity against 'penalty in *any* manner, or denial of *any* right or privilege.' " *Id*., quoting Ariz Rev State Ann 36-2811(B). And it was uncontested that the defendant was a registered qualifying patient. *Id*. Further, the court noted, probation was a privilege,

[5] The *Reed-Kaliher* Court noted that under Ariz Rev Stat Ann 36-2811(B), " '[a] registered qualifying patient . . . is not subject to arrest, prosecution or penalty in any manner, or denial of any right or privilege . . . [f]or . . . medical use of marijuana pursuant to [AMMA],' as long as the patient complies with statutory limits on quantity and location of marijuana use." *Reed-Kaliher*, 237 Ariz at 121, quoting Ariz Rev Stat Ann 36-2811(B).

and its revocation was a penalty. *Id*. Thus, a probationary term that prohibited a qualified patient from using medical marijuana pursuant to the terms of the AMMA would constitute the denial of a privilege. *Id*. "Nor may a court impose such a condition or penalize a probationer by revoking probation for such AMMA-compliant use, as that action would constitute a punishment." *Id*.

The Arizona Supreme Court in *Reed-Kaliher* also considered the relationship between the AMMA and Arizona's probation act. The court noted that when granting probation, a trial court only has the authority granted by Arizona's statutes, and "[i]n this case, an Arizona statute, AMMA, precludes the court from imposing any penalty for AMMA-compliant marijuana use." *Id*. The court further concluded that "[w]hile the State can and should include reasonable and necessary terms of probation, it cannot insert illegal ones." *Id*. at 122-123. The court acknowledged that the state has authority to "prohibit a wide range of behaviors, even those that are otherwise legal, such as drinking alcohol or being around children," but "it cannot impose a term that violates Arizona law." *Id*. at 123. Thus, the Arizona Supreme Court concluded, "any probation term that threatens to revoke probation for medical marijuana use that complies with the terms of AMMA is unenforceable and illegal under AMMA." *Id*.

Similarly, the appellate courts in Oregon have held that sentencing courts may not impose probation conditions that conflict with a defendant's rights under the Oregon Medical Marijuana Act. See, e.g., *State v Miller*, 299 Or App 515, 516-517; 450 P3d 578 (2019); *State v Rhamy*, 294 Or App 784, 785; 431 P3d 103 (2018); *State v Bowden*, 292 Or App 815, 818-819; 425 P3d 475 (2018).

Likewise, in *Gass v 52nd Judicial Dist, Lebanon Co*, 659 Pa 590, 595; 232 A3d 706 (2020), the plaintiffs filed a class-action suit seeking declaratory and injunctive relief, challenging a judicial district's policy that prohibited all probationers from using medical marijuana regardless of whether they possessed a medical marijuana card under Pennsylvania's Medical Marijuana Act (the MMA). The plaintiffs argued that the judicial district's policy violated the immunity provision of the MMA, *id*. at 597-598, which provides that no such patient " 'shall be subject to arrest, prosecution or penalty in any manner, or denied any right or privilege, . . . solely for lawful use of medical marijuana,' " *id*. at 593-594, quoting 35 Pa Cons Stat 10231.2103(a). The court recognized that probation was a privilege and its revocation on account of lawful medical marijuana use could be considered a punishment or the denial of a privilege. *Gass*, 659 Pa at 601. Thus, the Pennsylvania Supreme Court held, the judicial district's policy "fails to afford sufficient recognition to the status of a probationer holding a valid medical marijuana card as a patient, entitled to immunity from punishment, or the denial of any privilege, solely for lawful use." *Id*. at 605. Accordingly, the court granted the petition for declaratory and injunctive relief on the ground that the judicial district's policy was contrary to the immunity accorded by the MMA and could not be enforced. *Id*. at 606.

D. APPLICATION

We conclude that provisions of Michigan's probation act that allow a court to prohibit a probationer's MMMA-compliant use of marijuana impermissibly conflict with MCL 333.26427(a) and (e) of the MMMA and

are unenforceable. Further, the revocation of probation because of MMMA-compliant use of marijuana constitutes a "penalty" in violation of MCL 333.26424(a) of the MMMA.

We first address MCL 333.26427(a) and (e) of the MMMA. There is no dispute that defendant had a medical marijuana registration card. There is no indication that defendant used marijuana in violation of the MMMA. Thus, defendant was authorized to use medical marijuana under MCL 333.26427(a). Further, as illustrated by the plain language of MCL 333.26427(a) and (e) as well as the holdings in *Ter Beek*, *Koon*, and *Latz*, a statute or provision of a statute that conflicts with a defendant's right to MMMA-compliant use of marijuana is preempted or superseded by the MMMA. Michigan's probation act permits a court to impose multiple conditions of probation on a defendant under MCL 771.3. However, provisions of the probation act that are inconsistent with the MMMA do not apply to the medical use of marijuana. In other words, a condition of probation prohibiting the use of medical marijuana that is otherwise used in accordance with the MMMA is directly in conflict with the MMMA and is impermissible.

We also conclude that the revocation of probation because of MMMA-compliant use of marijuana constitutes a "penalty" under MCL 333.26424(a) of the MMMA. The MMMA is substantially similar to the medical marijuana acts adopted in other states, including those discussed in this opinion, and immunizes persons from being subject to a penalty of any kind for the lawful use of medical marijuana. And like other states, Michigan has also recognized probation as a privilege. See, e.g., *People v Terminelli*, 68 Mich

App 635, 637; 243 NW2d 703 (1976) (stating that "probation is a privilege, the granting of which rests within the discretion of the trial court"). See also *People v Breeding*, 284 Mich App 471, 479-480; 772 NW2d 810 (2009) ("Probation is a matter of grace, not of right, and the trial court has broad discretion in determining the conditions to impose as part of probation."); *People v Johnson*, 210 Mich App 630, 633; 534 NW2d 255 (1995) ("A sentence of probation is an alternative to confining a defendant in jail or prison and is granted as a matter of grace in lieu of incarceration."). Because probation is a privilege, the revocation of probation is a penalty or the denial of a privilege. Under MCL 333.26424(a), a person is protected from penalty in any manner, or denial of any right or privilege, for the lawful use of medical marijuana. Therefore, a court cannot revoke probation because of a person's use of medical marijuana that otherwise complies with the terms of the MMMA. We note, however, that the MMMA is inapplicable to the recreational use of marijuana, and thus, a trial court may still impose probation conditions related to the recreational use of marijuana and revoke probation for such recreational use as well as for marijuana use in violation of the MMMA. Accordingly, the district court erred by prohibiting defendant from MMMA-compliant marijuana use as a term of his probation; defendant's motion to modify the terms of his probation to allow him to use medical marijuana should have been granted.

Defendant also argues that the court's limitation on his right to use medical marijuana as a term of probation violates his due-process rights. However, when possible, this Court "must interpret statutes to avoid constitutional issues." *People v Anderson*, 330 Mich App 189, 198 n 5; 946 NW2d 825 (2019). In light

of our resolution of this matter, we need not address defendant's constitutional issues.

Reversed. We do not retain jurisdiction.

SERVITTO and CAMERON, JJ., concurred with CAVANAGH, P.J.

INDIANA MICHIGAN POWER COMPANY v COMMUNITY MILLS, INC

Docket No. 350626. Submitted December 2, 2020, at Grand Rapids. Decided December 17, 2020. Approved for publication February 11, 2021, at 9:10 a.m. Leave to appeal denied 508 Mich 1018 (2022).

Indiana Michigan Power Company filed a condemnation action in the Cass Circuit Court against Community Mills, Inc., and others regarding certain real property owned by Community Mills. Plaintiff sought easements across the land in order to rebuild and upgrade an existing transmission line. Plaintiff obtained an appraisal of the property, and on the basis of the appraisal, it submitted a purported good-faith written offer of $84,000 to defendant as just compensation for obtaining the proposed easements. Defendant rejected the offer and moved for summary disposition under MCR 2.116(C)(4), arguing that the trial court lacked subject-matter jurisdiction because plaintiff had failed to make a good-faith offer for all of the property impacted by its taking as required under the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. Defendant asserted that its surrounding property would be affected by the condemnation because plaintiff would have unrestricted ingress and egress to the property in order to access the easements. Defendant also argued that its property rights in the noneasement property, which it could otherwise have used to derive income, would be destroyed by the taking and had not been considered in the written offer. The trial court, Susan L. Dobrich, J., ruled that plaintiff's alleged good-faith offer was inadequate because the appraisal had failed to substantively identify and value all of the various property rights and interests held by defendant. Accordingly, the court concluded that it lacked subject-matter jurisdiction and dismissed the action without prejudice. Plaintiff appealed.

The Court of Appeals *held*:

Under Const 1963, art 10, § 2, private property may not be taken for public use without just compensation. The Constitution further requires compensation to be determined in a court of record. The purpose of the UCPA is to ensure that the Constitu-

tion's guarantee of just compensation is honored. In order to invoke the trial court's jurisdiction under the UCPA, MCL 213.55(1) requires the governmental agency to give fee owners and any other owners of legal property interests a good-faith offer. Conversely, the failure to tender a statutorily compliant good-faith written offer to all fee owners and other owners renders the trial court without subject-matter jurisdiction in the action. The trial court in this case ruled that plaintiff's offer was deficient because the appraisal did not address several unusual aspects of the property that would be impacted by the proposed easements, including ingress and egress rights, defendant's existing operations, and defendant's ability to expand and improve. These alleged deficiencies did not reflect a failure to tender a good-faith written offer. Rather, the alleged deficiencies pertained to determining the proper amount of just compensation. The determination of whether an offer was so unsubstantiated that it could be characterized as revealing a lack of good faith or whether the offer was made in good faith but did not accurately reflect proper just compensation is addressed by MCL 213.55(3)(a). MCL 213.55(3)(a) expressly concerns the assessment of just compensation and contemplates situations like in this case, in which an owner claims that the taking encompasses property other than the property described in the good-faith written offer or claims a right to compensation for damage caused by the taking separate from the value of the property taken and not described in the written offer. The record here did not support a determination that plaintiff tendered the written offer in bad faith. However, although the trial court ruled that it lacked subject-matter jurisdiction to entertain the condemnation action, it effectively concluded that plaintiff's written offer did not amount to just compensation because all aspects of defendant's potential loss had not been considered. Such determinations should be made by the trier of fact during litigation, i.e., when jurisdiction is being exercised. The trial court had subject-matter jurisdiction and erred by granting summary disposition to defendant.

Reversed and remanded.

Carson LLP (by *Calvert S. Miller*) for Indiana Michigan Power Company.

Dickinson Wright PLLC (by *Peter H. Webster*) and *Jared A. Christensen* for defendant.

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

PER CURIAM. In this condemnation action, plaintiff, Indiana Michigan Power Company (IMPC), appeals by right the trial court's order granting summary disposition in favor of defendant Community Mills, Inc., under MCR 2.116(C)(4). On appeal, IMPC argues that the trial court erred in its interpretation and application of the Uniform Condemnation Procedures Act (UCPA), MCL 213.51 *et seq*. The trial court ruled that it lacked subject-matter jurisdiction because IMPC failed to tender a good-faith written offer to obtain easements and rights-of-way over land owned by Community Mills. We conclude that the trial court has subject-matter jurisdiction and that the arguments posed by Community Mills assailing the written offer concerned whether IMPC offered an amount that constituted just compensation and not whether the offer was made in good faith. Accordingly, we reverse and remand for further proceedings.

IMPC filed an eminent-domain complaint requesting the condemnation of certain real property owned by Community Mills. IMPC sought easements across the land for the purpose of rebuilding and upgrading an existing transmission line. IMPC alleged that it engaged the services of Carlson Appraisal Company to conduct an appraisal of the property. On the basis of the appraisal, IMPC submitted a purported good-faith written offer of $84,000 as just compensation for obtaining the proposed easements. There is no dispute that Community Mills rejected the offer.[1] Community

[1] The complaint described the offer as a "single, unitary offer" to all of the named property owners. The other named defendants, who are not parties to this appeal, held various nonfee interests.

Mills moved for summary disposition under MCR 2.116(C)(4), arguing that the trial court lacked subject-matter jurisdiction because IMPC "failed to make a good-faith offer for all property rights impacted by its taking," which is a jurisdictional prerequisite under the UCPA. Community Mills contended that IMPC's so-called "good faith" offer was deficient because it did not fully take into consideration the impact of the condemnation on the remaining surrounding property owned by Community Mills. In its supporting brief, Community Mills maintained that IMPC needed to "make a good faith offer as to **all** the property rights impacted by the taking." This included non-easement property belonging to Community Mills over which IMPC would have unrestricted ingress and egress rights for purposes of accessing the easements, as well as non-easement property that Community Mills could otherwise use to derive income now and in the future. Community Mills argued that "IMPC's taking destroys these property rights, without making any offer of just compensation."

Applying a strict-compliance standard, the trial court ruled that the alleged good-faith written offer was woefully inadequate because the appraisal failed to substantively identify and value all of the various property rights and interests held by Community Mills that would be affected by the condemnation. Concluding that it therefore lacked subject-matter jurisdiction, the trial court dismissed the action without prejudice.

We review de novo the interpretation and application of the UCPA, as well as the question of whether a trial court has subject-matter jurisdiction. *Washtenaw Co Bd of Co Rd Comm'rs v Shankle*, 327 Mich App 407, 412; 934 NW2d 279 (2019). Similarly, this Court reviews de novo a ruling on a motion for summary disposition.

Johnson v VanderKooi, 502 Mich 751, 761; 918 NW2d 785 (2018). MCR 2.116(C)(4) provides for summary disposition when "[t]he court lacks jurisdiction of the subject matter." "When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Weishuhn v Catholic Diocese of Lansing*, 279 Mich App 150, 155; 756 NW2d 483 (2008) (quotation marks and citation omitted).

"Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law." Const 1963, art 10, § 2. "Compensation shall be determined in proceedings in a court of record." *Id*. The purpose of the UCPA is to ensure that the guarantee of "just compensation" found in the Michigan Constitution is honored. *Shankle*, 327 Mich App at 414. Under Michigan law, "just compensation" means the proper amount of compensation for condemned property after taking into account all the factors relevant to market value. *Silver Creek Drain Dist v Extrusions Div, Inc*, 468 Mich 367, 378-379; 663 NW2d 436 (2003). "Although condemnation results in a 'forced sale,' the price the condemning agency is required to pay must approximate that price which a willing buyer would have offered for the property at the time of the taking." *Dep't of Transp v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 142; 700 NW2d 380 (2005). The UCPA is to be strictly construed, and its jurisdictional conditions must be established in fact and cannot rest upon technical estoppel and waiver. *Shankle*, 327 Mich App at 412-413.

At issue in this case is the interpretation and application of and interplay between MCL 213.55(1) and (3)(a), which provide in pertinent part as follows:

> (1) Before initiating negotiations for the purchase of property, the agency shall establish an amount that it believes to be just compensation for the property and promptly shall submit to the owner a good faith written offer to acquire the property for the full amount so established. . . . If there is more than 1 owner of a parcel, the agency may make a single, unitary good faith written offer. . . . The amount shall not be less than the agency's appraisal of just compensation for the property. . . . The agency shall provide the owner of the property and the owner's attorney with an opportunity to review the written appraisal, if an appraisal has been prepared, or if an appraisal has not been prepared, the agency shall provide the owner or the owner's attorney with a written statement and summary, showing the basis for the amount the agency established as just compensation for the property. If an agency is unable to agree with the owner for the purchase of the property, after making a good faith written offer to purchase the property, the agency may file a complaint for the acquisition of the property in the circuit court in the county in which the property is located. . . . The complaint shall ask that the court ascertain and determine just compensation to be made for the acquisition of the described property. . . .
>
> * * *
>
> (3) In determining just compensation, all of the following apply:
>
> (a) If an owner claims that the agency is taking property other than the property described in the good faith written offer or claims a right to compensation for damage caused by the taking, apart from the value of the property taken, and not described in the good faith written offer, the owner shall file a written claim with the agency stating the nature and substance of that property or

> damage. The owner's written claim shall provide sufficient information and detail to enable the agency to evaluate the validity of the claim and to determine its value. The owner shall file the claim within 90 days after the good faith written offer is made pursuant to section 5(1) or 180 days after the complaint is served, whichever is later, unless a later date is set by the court for reasonable cause. If the appraisal or written estimate of value is provided within the established period for filing written claims, the owner's appraisal or written estimate of value may serve as the written claim under this act. If the owner fails to timely file the written claim under this subsection, the claim is barred.

"The purpose in requiring that a condemning authority first offer to purchase property for an amount no less than that which it believes to be full and just compensation is to encourage negotiated purchases of property needed for a public purpose and, thereby, avoid condemnation litigation entirely." *Dep't of Transp v Frankenlust Lutheran Congregation*, 269 Mich App 570, 577; 711 NW2d 453 (2006). "Where such negotiations fail, however, the UCPA fulfills its constitutional purpose by requiring that just compensation for the property taken be determined by a trier of fact in a court of record." *Id*., citing MCL 213.63.[2]

"In order to initially invoke the trial court's jurisdiction, strict compliance with the statutory language of the UCPA require[s] that the fee owners and any other owners of legal property interests be given a good-faith offer." *Shankle*, 327 Mich App at 417. "Because a

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[2] MCL 213.63 provides:

> The jury or the court shall award in its verdict just compensation for each parcel. After awarding the verdict, on request of any party, the court shall divide the award among the respective parties in interest, whether the interest is that of mortgagee, lessee, lienor, or otherwise, in accordance with proper evidence submitted by the parties in interest.

good-faith written offer is a necessary condition precedent to invoking the trial court's jurisdiction in condemnation proceedings under the UCPA, the failure to tender a statutorily compliant good-faith written offer to all fee owners and any other owners of interests in the properties render[s] the trial court without subject-matter jurisdiction over the action." *Id*. at 418; see also *Lenawee Co v Wagley*, 301 Mich App 134, 160; 836 NW2d 193 (2013) ("In accordance with the UCPA, and specifically MCL 213.55, a governmental agency is required to tender a good-faith offer to acquire private property before initiating litigation.").[3]

In this case, the trial court ruled that the offer was deficient because the underlying appraisal purportedly failed to individually address and value several unique aspects of the property that would be impacted by IMPC's easements. The trial court specifically cited (1) "ingress/egress rights," (2) the "impact [on Community Mills's] existing operations," and (3) the "impact on the ability of Community Mills to expand and improve."

We conclude that the deficiencies Community Mills complained of and found by the trial court did not reflect a failure to tender a good-faith written offer. Rather, the alleged deficiencies effectively pertained to ascertaining the proper amount of just compensation. We recognize that there can be a fine line between an offer that is so unsubstantiated that it can be characterized as revealing a lack of good faith and an offer that is made in good faith but does not accurately reflect an amount that equates to just compensation. But the means of defining that line for our purposes is

[3] Making "a good-faith offer is a necessary condition precedent to invoking the jurisdiction of the circuit court in a condemnation action." *Wagley*, 301 Mich App at 160 (quotation marks and citation omitted).

found in the language of MCL 213.55(3)(a), which expressly concerns the assessment of "just compensation." And MCL 213.55(3)(a), as indicated earlier, contemplates a situation in which "an owner claims that the agency is taking property other than the property described in the good faith written offer or claims a right to compensation for damage caused by the taking, apart from the value of the property taken, and not described in the good faith written offer[.]" This is the essence of Community Mills's argument. Moreover, the record does not support a determination that IMPC tendered the written offer in bad faith. Additionally, the trial court ruled that it could not entertain the condemnation action because it lacked subject-matter jurisdiction while at the same time the court effectively concluded that the written offer did not amount to just compensation because all aspects of the loss Community Mills might suffer were not considered. This is part of the determination to be made by the trier of fact during litigation, i.e., when jurisdiction is being exercised.[4] In sum, we hold that the trial court both has subject-matter jurisdiction and that it erred by granting summary disposition in favor of Community Mills.

We reverse and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

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

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[4] MCL 213.59(5) provides in relevant part that a "court shall not delay or deny surrender of possession because of" "[a]n allegation that the agency should have offered a higher amount for the property," MCL 213.59(5)(c), or "[a]n allegation that the agency should have included additional property in its good faith written offer," MCL 213.59(5)(d). A court's determination that it lacks subject-matter jurisdiction because an offer was not high enough or because additional property should have been encompassed by the offer, which reasons were proffered by Community Mills, is wholly inconsistent with MCL 213.59(5)(c) and (d).

PEOPLE v CASWELL

Docket No. 353537. Submitted February 3, 2021, at Grand Rapids. Decided February 11, 2021, at 9:15 a.m. Leave to appeal denied 508 Mich 945 (2021).

Walter J. Caswell, a member of the Mackinac Tribe of Odawa and Ojibwa Indians (the Mackinac Tribe), was charged in the 92d District Court with spearfishing in a closed stream, MCL 324.48715; MCL 324.48711, in Mackinac County. In the Treaty of 1836, a group of Indian tribes, collectively referred to as the Ottawa (or Odawa) and Chippewa Nations, ceded certain land to the federal government in what is now Michigan's eastern Upper Peninsula and western Lower Peninsula; the treaty preserved the tribes' rights to hunt and fish on the ceded lands. The ensuing Treaty of 1855 dissolved the concept of an Odawa/Chippewa Nation and addressed reservation boundaries regarding several different tribes, but it did not affect the fishing rights retained in the 1836 treaty. In 2007, to resolve disputes regarding inland treaty rights, the Department of Natural Resources (DNR) signed a hunting and fishing consent decree with five federally recognized tribes; the Mackinac Tribe, which was not federally recognized, was not a party to the decree. Defendant was spearfishing in a trout stream within the ceded lands subject to the consent decree when he was cited by a DNR conservation officer for fishing in a trout stream out of season and for fishing by illegal means. While defendant's Michigan fishing license did not allow for spearfishing or fishing out of season, defendant's tribal fishing card did allow it. According to the DNR officer who cited defendant, Michigan did not accept the Mackinac Tribe's assertion of treaty rights because the tribe did not sign the 2007 consent decree. Defendant moved to dismiss the charges, asserting as an affirmative defense that he had the right to fish in the stream because he was a member of an Indian tribe or band that had been granted hunting and fishing right by the 1836 and 1855 treaties. The district court, Beth A. Gibson, J., granted defendant's motion, reasoning that the Mackinac Tribe was entitled to rights under the relevant treaties and that the consent decree could not cut off any treaty rights to which defendant was entitled. The prosecutor appealed that decision in the Mackinac

Circuit Court. The circuit court, William W. Carmody, J., reversed and reinstated the charges, concluding that defendant's membership in the Mackinac Tribe did not insulate him from the charges because the tribe was not a federally recognized tribe. Defendant appealed by leave granted.

The Court of Appeals *held*:

A modern-day tribe whose members descend from a tribe that signed a treaty may be referred to as a "signatory tribe," but that designation is usually reserved for the historical tribe whose representatives actually signed a treaty. In contrast, a modern-day tribe that has established its right to exercise the treaty rights of a signatory tribe is often referred to as a "treaty tribe." Membership in a modern-day tribe whose members descend from a signatory tribe does not automatically entitle the modern-day tribe to treaty rights. A tribe's federal-recognition status and its entitlement to exercise treaty fishing rights are two distinct issues because each determination serves a different legal purpose and has an independent legal effect. Federal recognition of Indian tribes is now typically an administrative process of the United States Department of the Interior that is detailed in 25 CFR 83.1 *et seq*. Federal recognition is a prerequisite to a tribe's receipt of federal money for tribal programs, it establishes a government-to-government relationship between the United States and the tribe, and it establishes certain immunities, privileges, and powers. In contrast to the federal-recognition process, an Indian treaty is a binding contract between two sovereign nations: the United States and the Indian tribe. Treaty rights vest at the time the treaty is signed. Indian tribes are entitled to exercise treaty fishing rights even though they are not recognized by the federal government as organized tribes. While the federal government's nonrecognition of a tribe may result in a loss of statutory benefits, that status does not affect vested treaty rights; in other words, a tribe's federal-recognition status does not affect its treaty rights. Treaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure. Continually maintaining an organized tribal structure is the single necessary and sufficient condition for the exercise of treaty rights by a group of Indians. Tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community. However, the reservation of a defining characteristic of the original tribe does not require the tribe to have acquired organizational characteristics it did not possess when the treaties were signed. While changes in tribal policy and

organization attributable to adaptation do not destroy tribal status, the tribe must survive as a distinct community to warrant special treatment. A modern-day tribe is not entitled to exercise treaty rights simply because its members descended from members of a signatory tribe. Instead, the question is whether a tribe is the political successor in interest to the signatory tribe from which it claims descent. This is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure such that some defining characteristic of the original tribe persists in an evolving tribal community. For the limited purpose of a criminal proceeding in which Indian treaty rights are asserted as an affirmative defense, the district court may determine whether a preponderance of the evidence supports a defendant's affirmative defense that he or she was exercising treaty rights as a member of a tribe entitled to exercise treaty rights by being a political successor in interest to a treaty-signatory tribe. In this case, the circuit court erred by conditioning defendant's potential treaty rights on whether his tribe was federally recognized and by rejecting his affirmative defense on that basis. The case was remanded to the district court for an evidentiary hearing to allow defendant an opportunity to establish by a preponderance of the evidence that his tribe was a political successor in interest to a signatory tribe of the 1836 treaty.

Circuit court order vacated; case remanded to the district court for further proceedings.

1. TREATY RIGHTS — FEDERAL RECOGNITION OF TRIBE NOT REQUIRED.

A tribe's federal-recognition status and its entitlement to exercise treaty fishing rights are two distinct issues; a tribe's federal-recognition status does not affect its treaty rights.

2. TREATY RIGHTS — TREATY-TRIBE STATUS — POLITICAL SUCCESSOR IN INTEREST TO SIGNATORY TRIBE.

Treaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure; a modern-day tribe is not entitled to exercise treaty rights simply because its members descended from members of a signatory tribe; to exercise treaty rights, a modern-day tribe must establish that the tribe is the political successor in interest to the signatory tribe from which it claims descent, meaning that it must be established that a group of citizens of Indian ancestry is descended from a treaty

> signatory and has maintained an organized tribal structure such that some defining characteristic of the original tribe persists in an evolving tribal community.

J. Stuart Spencer, Prosecuting Attorney, and *Zackary A. Sylvain*, Assistant Prosecuting Attorney, for the people.

Stephen A. Cooley, J.D. PLLC (by *Stephen A. Cooley*) for defendant.

Amici Curiae:

Courtney A. Kachur and *Morisset Schlosser Jozwiak & Somerville* (by *Mason D. Morisset*) for the Sault Ste. Marie Tribe of Chippewa Indians.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kelly M. Drake*, Assistant Attorney General, for the Department of Natural Resources.

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

PER CURIAM. Defendant, Walter Joseph Caswell, is a member of the Mackinac Tribe of Odawa and Ojibwa Indians (the Mackinac Tribe). In October 2018, a Department of Natural Resources (DNR) conservation officer cited defendant for spear fishing in a closed stream in violation of MCL 324.48715 and MCL 324.48711.[1] Defendant moved to dismiss the charges on the ground that he was a member of an Indian tribe or band granted hunting and fishing rights by 1836 and 1855 treaties with the United States federal govern-

[1] MCL 324.48715 was repealed by 2018 PA 529, effective December 28, 2018. However, at the time of the offenses, the statute was in effect. MCL 324.48711 was amended by 2018 PA 529 as well, but the changes were mainly editorial and do not affect this case.

ment. The 92d District Court granted defendant's motion after concluding that the Mackinac Tribe was entitled to rights under the relevant treaties. The prosecutor appealed, and the Mackinac Circuit Court reversed on the ground that the Mackinac Tribe was not federally recognized and that federal tribal recognition is a matter for initial determination by the United States Department of the Interior. We granted defendant's delayed application for leave to appeal.[2] For the reasons explained in this opinion, we vacate the circuit court's order and remand the case to the district court for an evidentiary hearing consistent with this opinion.

I. PERTINENT FACTS AND PROCEEDINGS

In the Treaty of 1836, a group of Indian tribes, collectively referred to as the Ottawa (or Odawa) and Chippewa Nations, ceded to the federal government nearly 14 million acres in what is now Michigan's eastern Upper Peninsula and western Lower Peninsula. *People v LeBlanc*, 399 Mich 31, 38; 248 NW2d 199 (1976). The treaty preserved the tribes' rights to hunt and fish on the ceded lands. *Id*.at 38, 41. In the Treaty of 1855, the federal government dissolved the concept of an Odawa/Chippewa Nation and addressed reservation boundaries regarding several different tribes. *Mackinac Tribe v Jewell*, 829 F3d 754, 755; 424 US App DC 236 (2016). The 1855 treaty did not affect the fishing rights retained in the 1836 treaty. See *LeBlanc*, 399 Mich at 55-58.

During the next 150 years, disputes arose concerning the hunting and fishing rights under the treaties.

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[2] *People v Caswell*, unpublished order of the Court of Appeals, entered July 13, 2020 (Docket No. 353537).

In an attempt to resolve disputes regarding inland treaty rights (as opposed to fishing rights on the Great Lakes), the Michigan DNR signed a hunting and fishing consent decree in 2007 with five federally recognized tribes. The decree, known as the 2007 Inland Consent Decree (Consent Decree), defines the extent of inland hunting, fishing, and gathering rights for tribal members. Under the Consent Decree, the tribes generally regulate hunting and fishing seasons for their tribal members and may also regulate hunting and fishing methods, including spear fishing.[3]

Defendant was spear fishing in a Mackinac County stream within the ceded lands subject to the Consent Decree when the conservation officer cited him for fishing in a trout stream out of season and fishing by illegal means. At the time, defendant had a fishing license issued by the state of Michigan, but the license did not allow spearfishing or fishing out of season. Defendant also had a tribal fishing card issued by the Mackinac Tribe, which apparently allowed spearfishing and had no seasonal limitation.

As indicated, defendant moved to dismiss the charges on the ground that he is a member of a tribe with hunting and fishing treaty rights. At the hearing on the motion to dismiss, the DNR conservation officer testified that the state of Michigan does not accept the Mackinac Tribe's assertion of treaty rights because the Mackinac Tribe was not a signatory to the Consent Decree. The officer testified that only members of the five tribes that signed the Consent Decree could hunt, fish, and gather

[3] See generally Michigan Department of Natural Resources, *2007 Inland Consent Decree FAQs*, available at <https://www.michigan.gov/documents/dnr/2007_Inland_Consent_Decree_FAQs_9.28.17_604502_7.pdf> (accessed February 3, 2021) [https://perma.cc/ZGB5-74LX].

in the area ceded to Michigan in the 1836 treaty and that he did not believe the Mackinac Tribe was associated with any of those five tribes.

Barry Wallace Adams testified on defendant's behalf. He identified himself as the "Chairman of the Mackinac Tribe of Odawa," which was referred to as the Mackinac Tribe, and he affirmed that defendant was a member of the tribe. He testified that the Mackinac Tribe was descended from "Ainse Band . . . . Band 15 and 16, Point of St. Ignace, and the Band 16 is Pointe of Aux Chenes" and that it was a signatory to the 1836 and 1855 treaties. He indicated that the modern-day Mackinac Tribe consisted of Ojibwa excluded from the Sault Ste. Marie Tribe of Chippewa Indians after it closed its rolls. It is not clear from Adams's testimony when or under what precise circumstances this occurred.

Defendant also submitted three documents for admission as exhibits. He first submitted a copy of his "Tribal Subsistence Harvesting License." The license was issued by the Mackinac Tribe of Odawa and Ojibway Indians, with a Durant Census Record number indicating that he was a member of Band 16. Next, he submitted a "Certificate of Degree of Indian Blood" from the United States Department of the Interior Bureau of Indian Affairs. This document certified defendant as "1/64 Mackinac Band Chippewa Indian" and stated that his "maternal great-great-great-grandmother, Mrs. Antoine Paquin, is listed as number No. 342 on the 1836 Census Register of the Ottawa and Chippewa Nations." The letter also informed defendant that, although the document verified his Indian descent, verification did not entitle him to tribal membership. Lastly, defendant submitted his tribal membership card, which identified him as "A Member of

The Mackinac Tribe of Odawa and Ojibwa Indians Bands 11 thru 17 and Cheboygan Bands."

The district court ruled in defendant's favor. The court found that "the Mackinac Tribe was a signatory to [the 1836 and 1855] treaties" because it had not been "disputed either through testimony or through written briefs that were submitted to the Court."[4] It further found that defendant had proved he was a member of the Mackinac Tribe and possessed a valid tribal fishing license. Thus, it framed the controlling legal issue as "whether or not members of a tribe federally recognized or otherwise can be divested of their hunting, fishing, gathering rights afforded to them in the 1836 and 1855 treaties with the United States." On the basis of its review of United States Supreme Court decisions governing the interpretation of treaties, the district court rejected the DNR's position that the Consent Decree cut off any treaty rights to which defendant might be entitled. The court expressed that it was "at a loss as to how the state has authority to divest members of the tribes that were not signatories to the 2007 [Consent Decree], understanding that tribal hunting, fishing, gathering rights are given in the 1836 and 1855 treaty." The court concluded,

> [O]nce tribal members receive hunting, fishing, gathering rights under treaty, they continue regardless of further state regulation.
>
> Therefore, the Court will concur with the Defendant and dismiss the matter, as the restriction of hunting,

[4] One sentence in the district court decision contains an apparent scrivener's error. The court found that the Mackinac Tribe was a signatory to the 1836 and 1855 treaties, but in a scrivener's error the court later wrote, "The fact that the Mackinac Tribe of Odawa and Ojibwa Indians was not [sic] a signatory was not disputed either through testimony or through written briefs that were submitted to the Court."

> fishing, gathering rights in this case to tribal members who were not signatories to the 2007 compact violates the essence of the intent of the signatories in the 1836 and 1855 treaties.

The prosecutor appealed the district court's ruling. On appeal, the Mackinac Circuit Court ruled in the prosecution's favor, reversing the district court and reinstating the charges against defendant. In its opinion, the circuit court opined that "it need not look further than the most recent case involving the Mackinac Tribe in *Mackinac Tribe v Jewell*, 829 F.3d 754 (2016) for direction in resolving the matter before the Court." Relying on *Jewell*, the circuit court observed that the Mackinac Tribe was not a federally recognized tribe and concluded that the matter of federal tribal recognition is reserved to the United States Department of the Interior. We granted defendant's delayed application for leave to appeal.

II. ANALYSIS

As the parties acknowledge, this case presents an issue of first impression in Michigan. We must ascertain the proper legal framework in which to assess whether a defendant is entitled to assert their tribal status as a defense to state fishing regulations.

Defendant claims the circuit court erred by relying on *Jewell* as its legal foundation when reversing the district court's order dismissing the charges against him. *Jewell* involves federal recognition of the Mackinac Tribe, but according to defendant, whether a tribe is federally recognized has no bearing on whether the tribe is entitled to exercise treaty rights. Defendant contends that because there is no dispute that the Mackinac Tribe was a "signatory" to the 1836 and 1855 treaties, and he is a member of the Mackinac

Tribe with a valid tribal fishing license, he is entitled to exercise treaty fishing rights and to assert that fact as an affirmative defense to the criminal charges filed against him. While defendant concedes Michigan has the power to regulate fishing, he notes that it may not impose regulations restricting the exercise of treaty fishing rights absent an established conservational necessity, which has not been established here. Accordingly, he argues that the circuit court should have affirmed the district court's dismissal of the charges against him. The prosecution contends the circuit court properly rejected defendant's argument because the Mackinac Tribe is not federally recognized.

As an initial matter, we observe that a modern-day tribe whose members descend from a tribe that signed a treaty may be, but is not typically, referred to as a "signatory tribe." That designation is usually reserved for the historical tribe whose representatives actually signed a treaty. See, e.g., *United States v Washington*, 641 F2d 1368, 1372 (CA 9, 1981) (*Washington II*) (referring to modern-day tribes whose members indisputably descend from tribes that signed the relevant treaties as "a group of Indians descended from a treaty signatory"). A modern-day tribe that has established its right to exercise the treaty rights of a signatory tribe is often referred to as a "treaty tribe" (sometimes, "treaty Indians"). See *United States v Washington*, 520 F2d 676, 686, 692-693 (CA 9, 1975) (*Washington I*). For purposes of clarity, this is how we will use these terms. In accordance with this usage, the Mackinac Tribe is not a "signatory" to the 1836 and 1855 treaties, even though some of its members appear to be descendants of a signatory tribe. The issue is whether it qualifies as a treaty tribe.

Having said that, we agree with defendant that whether the Mackinac Tribe is federally recognized has no bearing on whether it is entitled to treaty fishing rights. However, we disagree that membership in a modern-day tribe whose members descend from a signatory tribe automatically entitles the modern-day tribe to treaty rights.[5] As discussed later in this opinion, we conclude that the dispositive issue is whether the Mackinac Tribe is a political successor in interest to a signatory tribe, entitling defendant to an affirmative defense on the basis of his tribal status. Neither the circuit court nor the district court addressed this issue.

A. STANDARDS OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision on a motion to dismiss charges against a defendant. *People v Parlovecchio*, 319 Mich App 237, 239-240; 900 NW2d 356 (2017). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Id*. at 240 (quotation marks and citation omitted). In addition, "[a]n abuse of discretion occurs when, for example, a trial court premises its decision on an error of law." *People v Parker*, 319 Mich App 664, 669; 903 NW2d 405 (2017). This Court reviews de novo both questions of law and questions of constitutional law. *People v Bensch*, 328 Mich App 1, 4 n 2; 935 NW2d 382 (2019); *People v Gaines*, 306 Mich App 289, 304; 856 NW2d 222 (2014).

[5] Treaty rights do not belong to individual Indians even if they are descendants of treaty-signatory tribes. See *Washington v Wash State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658, 675, 679; 99 S Ct 3055; 61 L Ed 2d 823 (1979), mod sub nom *Washington v United States*, 444 US 816 (1979). However, treaty rights can be asserted by individual members of the tribe. *United States v Winans*, 198 US 371, 381; 25 S Ct 662; 49 L Ed 1089 (1905).

Finally, this Court reviews for clear error the trial court's findings of fact in a motion to dismiss. See *People v Vansickle*, 303 Mich App 111, 114; 842 NW2d 289 (2013). Clear error occurs when the reviewing Court is "left with a firm conviction that the trial court made a mistake." *Id*. at 115.

B. FEDERAL RECOGNITION AND ENTITLEMENT TO TREATY RIGHTS

Federal recognition of a tribe and a tribe's entitlement to treaty rights are two distinct issues. Federal recognition of Indian tribes is now typically an administrative process of the United States Department of the Interior Bureau of Indian Affairs. 25 CFR 83.1 *et seq*. The process and criteria are listed in Part 83 of the applicable federal regulations. To be federally recognized, a group must submit a petition demonstrating various historical and cultural criteria. 25 CFR 83.11. Federal recognition is a prerequisite to a tribe's receipt of federal money for tribal programs; it establishes a government-to-government relationship between the United States and the tribe, and it establishes certain immunities, privileges, and powers. 25 CFR 83.2.

In contrast to the administrative process of federal recognition, an Indian treaty is a binding "contract between two sovereign nations." *Washington v Wash State Commercial Passenger Fishing Vessel Ass'n*, 443 US 658, 675; 99 S Ct 3055; 61 L Ed 2d 823 (1979), mod sub nom *Washington v United States*, 444 US 816 (1979). Treaty rights vest at the time the treaty is signed. *Washington I*, 520 F2d at 692. Once a treaty is signed, only Congress has the authority to abrogate the treaty, and only if Congress has stated an unequivocal intent to abrogate. See *United States v Dion*, 476 US 734, 738-740; 106 S Ct 2216; 90 L Ed 2d 767 (1986).

As we already noted, no Michigan appellate court has addressed the issue of the relationship, if any, between federal tribal recognition and the assertion of treaty rights. However, a series of decisions from the United States Court of Appeals for the Ninth Circuit has established that a tribe's federal-recognition status and its entitlement to exercise treaty fishing rights are separate issues.[6]

In *Washington I*, 520 F2d at 683, 693, the Ninth Circuit affirmed that "the state and its agencies can regulate off-reservation fishing by treaty Indians at their usual and accustomed grounds only if the state first satisfies the court that the regulation is reasonable and necessary for conservation." Pertinent to the instant case, the Ninth Circuit also affirmed that two tribes (the Stillaguamish and the Upper Skagit) were entitled to exercise treaty fishing rights even though they were not recognized by the federal government as organized tribes. *Washington I*, 520 F2d at 692-693. The federal appeals court explained, "Nonrecognition of the tribe by the federal government . . . may result in loss of statutory benefits, but can have no impact on vested treaty rights." *Id*. Thus, *Washington I* established that the questions of whether a tribe is federally recognized and whether it is entitled to exercise treaty rights are two distinct inquiries and that a tribe does not have to be federally recognized to be entitled to exercise treaty rights.

Following the Ninth Circuit's ruling in *Washington I*, other tribes that were not federally recognized inter-

[6] Although we are not bound by the Ninth Circuit's decisions, we may consider them as persuasive authority. See *People v Walker (On Remand)*, 328 Mich App 429, 444-445; 938 NW2d 31 (2019) (quotation marks and citation omitted).

vened in the *Washington II* litigation[7] to assert treaty fishing rights. In *Washington II*, 641 F2d at 1371-1372, the Ninth Circuit affirmed that five intervenor tribes were not treaty tribes but ruled that the fact the intervenors were not federally recognized was not determinative. Thus, the Ninth Circuit confirmed that whether a tribe was entitled to exercise treaty rights was unrelated to whether it was federally recognized.

That federal-recognition and treaty-tribe status are separate issues was again confirmed in cases involving the Samish Tribe, one of the five intervenor tribes deemed not to be a treaty tribe in *Washington II*. In *Greene v United States*, 996 F2d 973 (CA 9, 1993) (*Greene I*), the Tulalip Tribes sought to intervene in an action between the Samish Tribe and the Department of the Interior regarding the Samish Tribe's effort to obtain federal recognition. *Greene I*, 996 F2d at 975. The Tulalip argued that federal recognition of the Samish would lead to claims by the Samish that it could exercise treaty fishing rights; this, in turn, would lead to the dilution of treaty fishing rights. *Id*. at 976. The district court had denied intervention because the action "did not implicate treaty claims." *Id*. at 975. In affirming the district court's ruling, the Ninth Circuit again stressed that federal recognition was not a prerequisite to being entitled to exercise treaty fishing rights and observed that a number of nonrecognized Washington tribes have treaty rights. *Id*. at 976-977, citing *Washington I*, 520 F2d at 692-693. See also *Greene v Babbitt*, 64 F3d 1266, 1270 (CA 9, 1995) (*Greene II*) (holding that recognition of a tribe "for

[7] The Ninth Circuit remanded the litigation to the district court, which had "retained continuing jurisdiction to provide advance judicial scrutiny of all future state regulations affecting Indian treaty fishing rights." *Washington I*, 520 F2d at 682, 693.

purposes of statutory benefits is a question wholly independent of treaty fishing rights").

Finally, in *United States v Washington*, 593 F3d 790, 792-793 (CA 9, 2010) (*Washington IV*), the Ninth Circuit en banc addressed the question of whether, after obtaining federal recognition, the Samish Tribe should be able to reopen the denial of its treaty claims in *Washington II*.[8] The Ninth Circuit held that it should not, explaining:

> In *Greene II*, we denied any estoppel effect of *Washington II* on the Samish Tribe's recognition proceeding, because treaty litigation and recognition proceedings were "fundamentally different" and had no effect on one another. *Greene II*, 64 F.3d at 1270. Our ruling was part of a two-way street: treaty adjudications have no estoppel effect on recognition proceedings, and recognition has no preclusive effect on treaty rights litigation. Indeed, to enforce the assurance in *Greene II* that treaty rights were "not affected" by recognition proceedings, the fact of recognition cannot be given even presumptive weight in subsequent treaty litigation. To rule otherwise would not allow an orderly means of protecting the rights of existing treaty tribes on the one hand, and groups seeking recognition on the other. [*Washington IV*, 593 F3d at 800-801.]

These decisions from the Ninth Circuit persuasively distinguish a tribe's federal-recognition status from its entitlement to exercise treaty rights because "each determination serves a different legal purpose and has an independent legal effect." *Id*. at 795 (quotation marks omitted), quoting *Greene I*, 996 F2d at 976. Put

[8] The Ninth Circuit met en banc to resolve a conflict between *United States v Washington*, 394 F3d 1152 (CA 9, 2005) (*Washington III*), which held that federal recognition "was an extraordinary circumstance justifying the reopening of *Washington II*" and its line of cases holding that "federal recognition is an independent process that has no effect on treaty rights." *Washington IV*, 593 F3d at 793.

simply, federal recognition is not a threshold condition a tribe must establish in order to exercise treaty fishing rights, nor does treaty-tribe status entitle a tribe to federal recognition. *Washington IV*, 593 F3d at 795. While we are not bound by the Ninth Circuit's decisions, see *People v Walker (On Remand)*, 328 Mich App 429, 444-445; 938 NW2d 31 (2019), the Ninth Circuit has handled far more of these cases than apparently any other federal Circuit Court of Appeals in the country, and its reasoning is sound. We agree with its rationale and conclude that a tribe's federal-recognition status does not affect its treaty rights.

Given that the Mackinac Tribe's nonrecognition status has no bearing on whether it is entitled to exercise treaty fishing rights, and thus no bearing on defendant's affirmative defense, we hold that the circuit court erred when it relied on *Jewell* and reinstated the charges against defendant. The legal issue in *Jewell* is unrelated to the issue at hand. In *Jewell*, 829 F3d at 755, the Mackinac Tribe sought to compel the Secretary of the Interior to allow the tribe to organize under the Indian Reorganization Act (IRA), 25 USC 476(a). When the Secretary rejected the tribe's petition, the tribe filed suit in the federal district court, asking the court to "declare it a federally recognized Indian tribe and to order the Secretary to conduct an election under the IRA." *Jewell*, 829 F3d at 756-757. The federal district court denied the request, and the United States Court of Appeals for the District of Columbia Circuit affirmed, concluding that the tribe must exhaust administrative remedies before seeking judicial review. The court stated, "[W]hen a court is asked to decide whether a group claiming to be a currently recognized tribe is entitled to be treated as such, the court should for prudential reasons refrain from decid-

ing that question until the Department has received and evaluated a petition under [25 CFR 83]." *Id*. at 757.

The circuit court in the case at bar appears to have determined that, under *Jewell*, the administrative concept of federal tribal recognition is equated with the contractual and sovereignty-based concepts of tribal treaty rights. As already discussed, these are two distinct concepts; federal recognition has no bearing on treaty-tribe status, and vice versa. However, that does not mean the district court properly determined that defendant's membership in the Mackinac Tribe entitles him to dismissal of the charges. The same Ninth Circuit decisions supporting defendant's assertion that federal-recognition status is irrelevant also lay out the necessary analysis to determining whether a tribe constitutes a treaty tribe.

C. TREATY-TRIBE STATUS

That members of a modern-day tribe are found to have descended from members of a signatory tribe does not, without more, entitle the modern-day tribe to treaty-tribe status. Rather, "treaty-tribe status is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure." *Washington II*, 641 F2d at 1371 (quotation marks omitted), quoting *Washington I*, 520 F2d at 693. Continually maintaining an organized tribal structure is the "single necessary and sufficient condition for the exercise of treaty rights by a group of Indians . . . ." *Washington II*, 641 F2d at 1372. "This single condition," explained the Ninth Circuit,

> reflects our determination that the sole purpose of requiring proof of tribal status is to identify the group asserting treaty rights as the group named in the treaty. For this

> purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community. [*Id*. at 1372-1373.]

The preservation of a defining characteristic of the original tribe does not mean the tribe has to "have acquired organizational characteristics it did not possess when the treaties were signed." *Id*. at 1373. Further, "changes in tribal policy and organization attributable to adaptation do not destroy tribal status." *Id*. Nor does the degree of assimilation inevitable in response to shifts in federal policy between favoring tribal autonomy and seeking to destroy it "entail the abandonment of distinct Indian communities." *Id*. Nevertheless, "[t]o warrant special treatment, tribes must survive as distinct communities." *Id*.

These principles are derived from and illustrated in *Washington II*, which affirmed a federal district court ruling that five tribes, indisputably descended from treaty-signatory tribes, could not establish treaty-tribe status. See *United States v Washington*, 476 F Supp 1101 (WD Wash, 1979). The federal appeals court noted that the five tribes

> point to their management of interim fisheries, pursuit of individual members' treaty claims, and social activities as evidence of tribal organization. But the district court specifically found that the appellants had not functioned since treaty times as "continuous separate, distinct, and cohesive Indian cultural or political communities." [*Washington*,] 476. F. Supp. at 1105, 1106, 1107, 1109, 1110.
>
> After close scrutiny, we conclude that the evidence supports this finding of fact. Although the appellants now have constitutions and formal governments, the governments have not controlled the lives of the members. Nor have the appellants clearly established the continuous informal cultural influence they concede is required. [*Washington II*, 641 F2d at 1373 (brackets omitted).]

As the foregoing caselaw establishes, a modern-day tribe is not entitled to exercise treaty rights simply because its members descended from members of a signatory tribe. The dispositive issue in this case is whether the Mackinac Tribe is the political successor in interest to the signatory tribe from which it claims descent. To be a political successor in interest requires demonstrating that "some defining characteristic of the original tribe persists in an evolving tribal community." *Id*. at 1372-1373. The district court erred by assuming that the Mackinac Tribe possessed treaty rights merely because some of its members were descended from signatory tribes of the relevant treaty and by assuming that defendant's entitlement to exercise those rights as a member of the tribe provided him with a valid affirmative defense to the charges against him.

Most of the prosecution's arguments in favor of upholding the circuit court's ruling suffer from the same infirmity as the court's ruling: they equate the right to exercise vested treaty rights with federal recognition. As already explained, these are not the same thing. In addition, the prosecution argues that only a federal court can determine if the Mackinac Tribe is a political successor in interest to a treaty-signatory tribe. On that point, we disagree. We conclude that for the limited purpose of its relevance in this criminal proceeding, the district court can determine whether a preponderance of the evidence supports defendant's affirmative defense that he was exercising treaty fishing rights as a member of a tribe entitled to exercise treaty rights by being a political successor in interest to a treaty-signatory tribe. See *Washington v Posenjak*, 127 Wash App 41, 49; 111 P3d 1206 (2005) (determining that the defendant could not avoid prosecution for hunting off-reservation and out

of season because he failed to prove that the tribe of which he was a member was a treaty tribe).

III. CONCLUSION

We conclude that the circuit court erred when conditioning defendant's potential treaty rights on whether his tribe is federally recognized, and we vacate the circuit court's order. But because the district court did not evaluate the case under the proper legal framework, which we adopt in this ruling, we remand the matter to the district court for an evidentiary hearing to allow defendant an opportunity to establish by a preponderance of the evidence that his tribe is a political successor in interest to a signatory tribe of the 1836 treaty. This is established when a group of citizens of Indian ancestry is descended from a treaty signatory and has maintained an organized tribal structure such that some defining characteristic of the original tribe persists in an evolving tribal community.

Vacated and remanded to the district court. We do not retain jurisdiction.

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

PEOPLE v SMITH

Docket No. 346044. Submitted May 7, 2020, at Lansing. Decided February 18, 2021, at 9:00 a.m. Leave to appeal denied 508 Mich 895 (2021).

Alonte Perton Smith was convicted following a jury trial in the Saginaw Circuit Court of one count of assault with intent to murder (AWIM), MCL 750.83; two counts of possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b; one count of felon in possession of a firearm, MCL 750.224f; and one count of tampering with an electronic-monitoring device, MCL 771.3f. The trial court, Andre R. Borrello, J., sentenced defendant as a fourth-offense habitual offender to serve 40 to 50 years in prison for AWIM, 5 years in prison for felony-firearm, 4 to 20 years in prison for felon in possession, and 2 to 15 years in prison for tampering with an electronic-monitoring device. The trial court subsequently resentenced defendant to 40 to 62 years in prison for AWIM after concluding that it had erred in imposing the original sentence of 40 to 50 years because the minimum sentence was more than 2/3 of the maximum sentence. Defendant appealed his convictions and sentences, except for his conviction and sentence for tampering with an electronic-monitoring device. While the appeal was pending, defendant moved to remand for an evidentiary hearing. The Court of Appeals denied defendant's motion to remand.

The Court of Appeals *held*:

1. The trial court erred as a matter of law when it resentenced defendant to a higher maximum sentence for his AWIM conviction. Defendant's sentence for AWIM was not subject to the 2/3-rule of MCL 769.34(2)(b), and defendant was entitled to have his original sentence reimposed on remand.

2. Defendant argued that his trial counsel was ineffective with regard to his questioning of various witnesses and for failing to call a certain witness. Defendant failed, however, to establish that defense counsel's performance was deficient in this regard and that the deficient performance prejudiced the defense.

3. Defendant also argued that defense counsel was ineffective for failing to object to the admission of evidence from Facebook on

grounds of hearsay. Although trial counsel did not use the word "hearsay" in objecting to the admission of this evidence, the trial court understood defense counsel to have raised a hearsay objection, and the court cited the hearsay rule when it discussed the evidence. Accordingly, the sum and substance of defense counsel's objection included the ground of hearsay.

4. Defendant next asserted that trial counsel was ineffective for failing to request a jury instruction for assault with intent to do great bodily harm as a lesser included offense of AWIM, and for failing to request the mere-presence instruction. A rational view of the evidence did not support a finding that the shooter lacked the intent to murder. The evidence showed that the passenger-side door of the vehicle (where the victim was seated) had multiple bullet holes, and the victim was shot more than 10 times. Although the victim survived the shooting without life-threatening injuries, there was no evidence that the shooter did not intend to kill the occupants of the vehicle. Therefore, defendant did not establish that he was entitled to an instruction on the lesser included offense. Additionally, defendant did not argue at trial that he lacked the intent to murder, but rather that he was not the shooter. The decision by trial counsel not to request an instruction on the lesser included offense was therefore a reasonable trial strategy. With respect to the mere-presence instruction, defendant asserted that it would seem to have assisted the defense in light of the GPS evidence, and he noted that no one had positively identified him as the shooter. However, defendant did not argue, and there was nothing in the evidence to suggest, that he had a valid reason to be in the area when the shooting occurred. In fact, as a condition of his parole at the time of the shooting, defendant was on a GPS tether and was not permitted to go anywhere at night. Moreover, as noted, the defense argued that defendant was not the shooter, not that he was merely present at the time of the shooting. Therefore, the record did not support that trial counsel was ineffective for failing to request a mere-presence instruction.

5. Defendant challenged the authentication of evidence taken from the Facebook pages of nonparties who did not testify at trial. A parole agent testified regarding the posts and stated that they pertained to defendant, which defendant argued was not sufficient to authenticate them under MRE 901. In order to authenticate an evidentiary exhibit under MRE 901(a), the proponent of the exhibit must first present evidence sufficient to support a finding that the matter in question is what its proponent claims it to be. If the trial court determines that this condition has been

satisfied, then the evidence is authenticated under MRE 901(a) and is submitted to the jury. When there is conflicting evidence relating to the genuineness of the evidence, such issues are for the jury to decide and go to the weight of the evidence, not its admissibility. In this case, review was limited to the first stage of the authentication process: if the trial court did not abuse its discretion by authenticating the evidence, then it was left to the jury as fact-finder to determine the weight and reliability of the Facebook evidence. For purposes of MRE 901(a), photographic evidence from social media may be analyzed similarly to a photograph taken from a newspaper or other traditional source. But the prosecutor in this case used the Facebook posts mainly to link defendant with the nickname Brick Head, as well as to show that defendant was affiliated with a gang. Merely considering the distinctive features of the photographs in the posts, pursuant to MRE 901(b)(4), would not have been sufficient to authenticate the posts for the purpose of connecting defendant to the nickname. But under 901(b)(1), evidence may also be authenticated through testimony that a matter is what it is claimed to be. A parole agent testified that he had viewed the posts on Facebook while investigating defendant's potential involvement in the shooting and that he was familiar with defendant. Although a close call, the trial court did not abuse its discretion by authenticating the Facebook posts. The testimony of the parole agent established that the exhibits were accurate depictions of what he claimed they were, and he testified that he had personal knowledge of defendant and defendant's affiliates, including the ones pictured in the Facebook posts. Moreover, nothing on the face of the posts suggested that they were fake or from accounts that had been hacked, which would have undermined the prima facie case for admission. Therefore, it was not an abuse of discretion for the court to conclude that a reasonable juror could determine that the exhibits from Facebook were what the prosecutor claimed them to be—Facebook pages viewed by the parole agent, which he believed were associated with defendant's affiliates.

6. Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements that were offered for the truth of the matter asserted. The Facebook posts offered at trial included comments made by persons who were not parties and who did not testify. The pertinent part of each comment included or referred to the nickname Brick Head, and "Brick Head" or some variation was superimposed on defendant or close to his image in the photographs. The clear inference was that defendant was known as Brick Head, and therefore, the posts were offered to establish the

truth of the matter asserted, i.e., that defendant was called Brick Head by his associates. No exception to the hearsay rule was applicable to the comments, and therefore, the trial court abused its discretion by admitting the comments into evidence. Regardless, defendant was not entitled to automatic reversal on this basis because the evidence from the Facebook posts was cumulative to other evidence that was properly admitted, including the parole agent's testimony that he knew defendant by the nickname Brick Head. Given the cumulative nature of the evidence and all of the evidence that placed defendant at the scene of the offense and that provided him with motive to commit the shooting, the erroneous admission of the hearsay evidence was harmless and did not deprive defendant of due process.

7. Defendant also objected to the admission of the Facebook posts on the ground that they included content indicating defendant's association with a gang. Gang-related evidence cannot be admitted to show that a person acted in conformance with gang membership, MRE 404(a), but it may be admissible for a nonconformity purpose under MRE 404(b)(1), such as to show proof of motive. In this case, the prosecutor used the gang-related evidence to establish defendant's connection to Amos, which hinged on defendant's affiliation with a gang that had a rivalry with the gang with which the intended victim, Kinnard, was associated. The gang-related evidence was relevant to show motive and absence of mistake and related to specific attributes of the crime, rather than merely to show that defendant acted in conformance with gang membership. Therefore, the admission of this evidence did not violate MRE 404. The evidence also did not violate MRE 403. The Facebook posts, including the comments and photographs, were not particularly shocking or gratuitous. A video posted by Kinnard to Facebook, in which she used various homophobic slurs against defendant, contained offensive language, but this language was not obviously gang-related. Moreover, Kinnard used the offensive language against defendant, not the other way around. Therefore, even if a juror was offended by the language in the video, the record did not suggest that such a juror would have held the offensive language against defendant.

Affirmed in part; AWIM sentence reversed and case remanded to the trial court for that court to reimpose the original sentence of 40 to 50 years of imprisonment on the AWIM conviction.

EVIDENCE — AUTHENTICATION — SOCIAL MEDIA.

Under MCR 901(a), the requirement of authentication or identification as a condition precedent to admissibility is satisfied by

> evidence sufficient to support a finding that the matter in question is what its proponent claims; for purposes of MRE 901(a), photographic evidence from social media may be analyzed similarly to a photograph from a newspaper or other traditional print source; regardless of source, a photograph may be authenticated by, for example, considering its appearance, contents, substance, internal patterns, or other distinctive characteristics; a social-media post that will be used as evidence linking a person to a name, rather than as mere photographic evidence, may be authenticated through the testimony of a witness with knowledge that the matter is what it is claimed to be even if the post was purportedly made by an individual who will not testify.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John McColgan*, Saginaw County Prosecuting Attorney, and *Carmen R. Fillmore*, Assistant Prosecuting Attorney, for the people.

Lee A. Somerville for defendant.

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

SWARTZLE, P.J. Defendant shot the wrong person. Defendant and the intended victim were in rival Saginaw-area gangs, and the intended victim had recently made homophobic slurs against him in a Facebook Live video. As revenge, defendant shot the actual victim, a woman whom he mistook for the rival-gang member. This was the prosecutor's theory in the criminal trial, and in support, the prosecutor relied on various Facebook posts and the video. Yet most of the statements in the Facebook posts were made by third parties who did not testify at trial, and all of the Facebook evidence came from the Facebook pages of nontestifying third parties.

Although a close call, the trial court did not abuse its discretion in authenticating the Facebook evidence. Yet the trial court did abuse its discretion in admitting

several hearsay statements from that evidence. We conclude, however, that while the hearsay statements should not have been admitted, they were merely cumulative to other admissible, nonhearsay evidence. Finding no other error justifying reversal or a new trial, we affirm defendant's convictions, though we do reverse and remand on a sentencing issue.

I. BACKGROUND

This case arises from a shooting that occurred in the early-morning hours of February 9, 2017. The victim was shot more than 10 times while seated in the front-passenger seat of a vehicle in the driveway of her home. Although no eyewitness could identify the shooter, data from defendant's GPS tether showed that he was present at the scene when the shooting occurred. The prosecutor argued that defendant was a member of a gang and that he shot the victim after mistaking her for Amaris Kinnard, a rival-gang member with whom he had been feuding on Facebook. The prosecutor introduced statements purportedly made by third parties on Facebook to prove that defendant went by the nickname "Brick Head" and introduced a video purportedly posted by Kinnard on Facebook Live to prove that she had disparaged Brick Head online, giving rise to defendant's motive to shoot her. Neither Kinnard nor any of the other third parties who made these statements was called as a witness. The focus on appeal is the admissibility and use of the Facebook evidence, though defendant does raise other, non-Facebook related claims that we address.

A. THE SHOOTING

Late in the evening of February 8, 2017, Tamika Amos, Joy Matthews, and Dorothy Cooper were hang-

ing out together. Sometime around midnight, the women decided to visit a convenience store to purchase alcohol. Matthews drove her vehicle to the store, with Amos in the front-passenger seat. Cooper accompanied the two women to the store, but traveled in a separate vehicle. Amos entered the store and then returned to Matthews's vehicle. As the women drove away from the store, Cooper led the way in her vehicle and Matthews followed in her vehicle, with Amos as her front-seat passenger.

As soon as she left the store's parking lot, Matthews noticed that a white vehicle "zoomed up behind" her vehicle and followed closely behind her rear bumper. Matthews could not discern the make or model of the white vehicle, how many doors it had, or how many occupants were inside it. Matthews made two turns after leaving the store, and the white vehicle made the same two turns. While on South 24th Street, just as she crossed Cherry Street, Matthews noticed that the white vehicle was no longer behind her. Matthews pulled into the driveway of Amos's home, which was close to Cherry Street. She placed the vehicle in park, turned off the headlights, and sat talking to Amos for several minutes.

In addition to Matthews's observations, both Amos and Cooper also noticed that a white vehicle had followed Matthews's vehicle after they left the store. Amos testified that when Matthews pulled her vehicle into the driveway of Amos's home, the white vehicle pulled into a nearby driveway and turned off its headlights. Cooper was not able to see how many occupants were in the white vehicle, but she also saw it pull into a driveway. None of the three women noticed a person getting out of the white vehicle after it parked.

Matthews testified that she and Amos sat in her vehicle, talking for several minutes. Then gunshots rang out. One of her vehicle's windows was shot out, and steady shots kept coming at the passenger door of the vehicle. Amos indicated that she had been shot, and Matthews attempted to flee by driving around the house to the backyard, where she struck a tree. Meanwhile, Amos testified that she was seated in the front-passenger seat of Matthews's vehicle, with her window up. She saw a dark figure standing a few feet away in her neighbor's yard, and she saw the flash of a firearm. Because it was dark, she could not identify the race of the shooter. Amos was shot more than 10 times, though she survived the attack.

Neither Matthews, Amos, nor Cooper could identify defendant as the shooter, and none of them knew defendant. There was no testimony that any of the women were members of a gang or that defendant had a gang-related motivation to shoot any of them. Furthermore, both Matthews and Amos denied that they had any enemies or problems with anybody at the time of the shooting.

B. THE POLICE INVESTIGATION

1. THE SCENE OF THE SHOOTING

Buena Vista Township Police Department Officer Anthony Teneyuque was dispatched to the scene of the shooting at approximately 12:32 a.m. He observed that Amos was "writhing in pain" and that she had bullet holes in her legs, as well as significant injuries to her right hand. Amos told him that she and Matthews had been sitting in Matthews's vehicle when somebody started shooting. Officer Teneyuque observed numerous bullet holes in the passenger door of the vehicle. Officer

Teneyuque spoke with Matthews, who told him that she and Amos had been at a local convenience store, and although they had not encountered any problems with anyone at the store, they had noticed a white vehicle follow them home.

After speaking with Amos and Matthews, Officer Teneyuque searched the driveway and front yard, where he found broken glass from the vehicle's shattered window. He found spent shell casings that had been discharged from a handgun, located approximately 10 to 15 feet from the spot where Matthews's vehicle had been parked. He found the shell casings in a grassy area containing a fence post, near the driveway of the neighbor's house. Another police officer collected 14 spent shell casings that had been fired from a 40-caliber handgun. Officer Teneyuque estimated that the shooter was standing within five feet from the location of the shell casings when the shooter fired the handgun at Amos. No handgun was ever recovered, and the prosecutor presented no evidence that defendant was found in possession of a 40-caliber handgun.

2. TETHER EVIDENCE

Three witnesses testified that data from defendant's GPS tether placed him at the scene of the shooting when it occurred. Several witnesses also provided circumstantial evidence that defendant had covered his GPS-tether unit with tinfoil on the night of the shooting in a partially successful attempt to block the unit's signal from connecting with GPS satellites. The prosecutor presented this evidence for two purposes: to prove that defendant was present at the scene of the shooting when it occurred, and to prove that defendant committed the criminal offense of tampering with an electronic-monitoring device.

Gary Lutkus, a parole agent for the Michigan Department of Corrections (MDOC), testified that defendant was on parole on February 8–9, 2017, that he served as defendant's parole officer, and that defendant was monitored by a GPS tether at that time. Agent Lutkus testified that defendant had been "on and off" a GPS tether at different periods in time because defendant "went to jail on a violation" and that defendant was placed back on a GPS tether "after serving a jail sentence." The trial court promptly instructed the jury to "ignore and disregard" Agent Lutkus's testimony that defendant had been incarcerated and instructed the jury that "when [defendant] was on the tether device is the only relevant information you are to consider."

Walter Wysopal, also a parole agent for the MDOC, testified that he regularly operated a software program to monitor GPS-tether units worn by parolees. After he learned about the shooting in this case, he searched that software program for the address where the shooting had occurred. According to Agent Wysopal, the software program indicated that defendant's GPS-tether unit was present at the scene of the shooting. Agent Lutkus explained that, because defendant was not permitted to leave his residence at night, defendant had violated the conditions of his tether by being present at Amos's home on the night of the shooting.

Jessica Reuschel, another agent with the MDOC, testified that she worked in that agency's electronic-monitoring center, where she specialized in monitoring individuals under MDOC jurisdiction who were wearing a tether. The trial court qualified Agent Reuschel as an expert regarding the electronic-monitoring maps and systems associated with the tracking of GPS tethers. She testified about a map that was displayed to the jury, showing the location of defendant's tether

at various points in time on February 8–9, 2017. She further testified that the tether was still attached to defendant at that time because the computer system had never generated an alert for a broken strap.

Agent Reuschel explained that at 10:00 p.m. on February 8, the tether was located at defendant's home and it was stationary. At 11:46 p.m., defendant's tether remained at his home and it was stationary. But at 12:01 a.m. on February 9, the GPS satellites lost communication with defendant's tether. Agent Reuschel explained that this loss of signal could have occurred because something interfered with the transmission between the tether and the GPS satellites. Defendant's tether next registered with the satellites at 12:28 a.m. and 15 seconds, and the tether was then located off Cherry Street between South 23rd and 24th Streets, moving at a speed of six miles per hour. At 12:28 a.m. and 45 seconds, the tether stopped moving. Then at 12:29 a.m., the tether began moving away from Amos's home at a speed of nine miles per hour. (As stated earlier, the police were dispatched to the scene at 12:32 a.m.) According to Agent Reuschel, the GPS signal showed that the tether reappeared at defendant's home a few moments later. Andrew Menichino also testified as an expert in GPS-tether devices. Menichino testified that he had accessed his company's GPS records to determine defendant's whereabouts between midnight and 12:30 a.m. on the night of the shooting. His testimony closely tracked that of Agent Reuschel.

Agent Lutkus and another parole officer, Agent Thomas McNeil, visited defendant's home on February 13, 2017, after learning that defendant had violated the restrictions of his tether on the night of the shooting. Defendant was not home at the time, but the

agents received permission to search the home. Agent Lutkus found an empty box that had contained tinfoil in defendant's basement bedroom, while Agent McNeil found three or four balls of tinfoil in a trash can on the front porch. According to Agent McNeil, it is common for individuals on GPS tethers to cover their units with tinfoil to prevent a signal from transmitting. Agent McNeil testified that the tinfoil in the trash can measured "just big enough to cover our GPS units," but not large enough to have contained food, and it was free of any food residue.

3. THE SUSPECT VEHICLE

Detective Sergeant Greg Klecker testified that he had obtained the surveillance video from the store that Amos, Matthews, and Cooper visited on the night of the shooting. The store owner authenticated the video, which was admitted into evidence without objection.

The video showed Amos enter and then exit the store. The video also showed a white vehicle approach from the west. The vehicle appeared to wait for Amos to exit the store and then followed Matthews's vehicle. Detective Sergeant Klecker captured still images of the suspect vehicle from the video, and he testified that the vehicle matched the description that Matthews, Amos, and Cooper had given of the white vehicle that had followed them home from the store.

Detective Sergeant Klecker further testified that, several months later, he had observed a white vehicle in the driveway of defendant's residence. He believed that the vehicle had "[s]triking similarities" to the vehicle shown in the store's surveillance video. The trial court admitted into evidence photographs that Detective Sergeant Klecker took of the white vehicle at defendant's residence.

4. FACEBOOK EVIDENCE

On the third day of trial, the prosecutor sought to introduce into evidence some Facebook posts to establish that defendant was affiliated with a gang and that he had a gang-related motive to commit the shooting. The prosecutor argued that the proposed evidence was critical to show that defendant went by the nickname Brick Head and to establish a link between the shooting and a video posted to Facebook by Kinnard, which would support the theory that the shooting was gang-related. The prosecutor further argued that the evidence was admissible based on the anticipated testimony of Agent Wysopal, who was "an embedded agent that researches these gang members," and who had obtained statements and photographs from the Facebook pages of various third parties.

Defense counsel objected to the proposed evidence, and the trial court heard argument regarding its admissibility outside the presence of the jury. Although defense counsel did not use the words "authentication" or "hearsay," it is clear from the record that counsel's objections were based, in part, on those grounds. Defense counsel argued, for example, that the Facebook evidence was "not admissible because they're statements by other people" and there was no way to determine whether these people were "reliable." Defense counsel also argued that admitting the comments from the posts in which defendant was referred to as Brick Head would not be "appropriate" because the comments "are from other people who are writing . . . about what is in the photo. Whether they know it's true or not, or whoever they are or whatever they are, they're writing comments about something they have seen" but they would not be appearing as witnesses. Counsel rhetorically asked, "How are these

admissible? Who's going to tie them in?" In response, the prosecutor reiterated that the evidence would be used to show defendant's identity as Brick Head, as well as his gang affiliation. He offered that Agent Wysopal could authenticate the exhibits.

The trial court examined caselaw involving gang-related evidence, authentication, and hearsay. After briefly discussing our Supreme Court's opinion in *People v Bynum*, 496 Mich 610; 852 NW2d 570 (2014), the trial court explained that gang-related evidence could be admissible if it went to a relevant issue, such as motive. The trial court recognized that the prosecutor wanted to use the evidence to establish defendant's pseudonym and gang membership, both of which went to motive. The trial court made clear that, if the evidence was admitted, it could only be used by the prosecutor for a proper purpose, rather than to show that defendant acted in conformity with being a gang member. As for authentication and hearsay, the trial court noted concerns about hacking and fake accounts and indicated that defense counsel's arguments were well-taken, but concluded that the arguments in this case went to weight, not admissibility. The trial court reserved a final ruling until the evidence was offered and any additional objections were made.

When Agent Wysopal began to testify regarding statements and photographs that he had discovered on Facebook, defense counsel renewed his earlier objections. The trial court ruled: "All right. Based on the record that we created earlier, I'm going to allow the questioning at this time." The trial court then clarified that the Facebook evidence was "admitted for the purposes that we discussed earlier . . . and no other purposes at this time."

The trial court qualified Agent Wysopal as an expert regarding street gangs in the Saginaw area. Agent Wysopal testified that he knew defendant "for quite some time since he's been out on parole" and that defendant was affiliated with the East Side Gang. As for the street name Brick Head, Agent Wysopal explained that he had known defendant by that name "for quite some time" and no one else went by that name. Agent Wysopal was familiar with Kinnard, and he knew her to be a member of a gang called the Townhouse Bloomfield Family. The agent testified that the East Side Gang and the Townhouse Bloomfield Family were rival gangs, that the location of the shooting was in the latter gang's territory, and that the location was not a safe place for a member of the East Side Gang.

Agent Wysopal explained that he searched defendant's Facebook page as well as the Facebook pages of various individuals with whom he believed defendant to be associated. The prosecutor did not offer into evidence any photographs or statements posted to defendant's own Facebook page. The prosecutor did, however, offer into evidence four exhibits that Agent Wysopal had printed from the Facebook pages of third parties:

- Exhibit 11A purported to be a print-out of a Facebook post from the page of a person named "Frederick Sutton." Neither side called Sutton to testify. The exhibit included a photograph of a male and female with the nickname "BRICK-HEAD" superimposed on the photograph. Agent Wysopal identified the male as defendant. There was a single comment above the photograph—"Y'all know we going dumb free my boy B." There were several comments below the photograph, but these comments were redacted, so the jury never saw them. The post is dated June 30 of what appears to be 2017.

- Exhibit 11B purported to be a print-out of a Facebook post from the page of a person named "JayyMann Green." Neither side called Green to testify. The exhibit contained a photograph of defendant with other individuals whom Agent Wysopal identified as members of the East Side Gang. Several of the individuals appear to making "gun signs" with their hands, as the agent noted. The only comment shown to the jury was immediately above the photograph—"It Ain't Blood If Don't Bleed Ya Understand Me NTD." The post is dated December 3, 2016.
- Exhibit 11C purported to be a print-out of a Facebook post from the page of a person named "Shaq B Laflair." Neither side called Laflair to testify. The exhibit contained a photograph of defendant with an unidentified third party. The only comment shown to the jury was immediately above the photograph—"ME & Brick Lontae Smith BOOLIN." The post is dated November 20, 2016.
- Exhibit 11E purported to be a print-out of a Facebook post from the page of a person named "Uniqua Wicker." Neither side called Wicker to testify. The exhibit contained a photograph of defendant with several other individuals. Agent Wysopal testified that defendant was using his hands to display the symbol of the East Side Gang. There were multiple comments posted on the page, but all were redacted except one. The jury saw the following comment by a person identified as "Darius Steele"—"Happy birthday to my baby brickhead." Agent Wysopal acknowledged that the comment was dated July 9, 2012.

Agent Wysopal confirmed that the four exhibits were accurate copies of the Facebook posts that he viewed

when investigating defendant's potential involvement in the shooting. After a brief voir dire by defense counsel, the trial court admitted the exhibits for the purposes it had earlier discussed with counsel.

The prosecutor then offered into evidence a Facebook Live video purportedly posted by Kinnard. Agent Wysopal testified that he viewed Kinnard's Facebook page in the course of a separate investigation not involving defendant, during which he stumbled across the video that had been posted by Kinnard on January 21, 2017. Agent Wysopal explained that Kinnard was "disrespecting" defendant in the video. Over defense counsel's objection, the trial court admitted the video into evidence. Although the trial transcript does not contain a verbatim transcript of the video or the portions of the video played for the jury, the prosecutor summarized the contents of the video for the trial court—when the jury was out of the courtroom—as follows:

> Amaris Kinnard is a—testimony will show that she's a Townhouse Bloomfield Family Gang member. She—in this video that she posted on January 21st of 2017, a couple weeks before the shooting, she's calling Mr. Alonte Smith, who's shown to be an east-sider in these Facebook posts, saying that—alleging him of his sexual preferences, calling him a gay thug, a gay gangbanger, saying that she's not taking this video down until he takes the photo down of her. We were unable to locate that photo, but this video is taking place in realtime and there's several people following it.
>
> She indicates—she—one of the followers, Brick Head, who is linked as Alonte Smith through these Facebook posts, he types, you know, me on this number, all's you are doing is you talk about me, and, finally, at some point, he says TBF, which testimony will show stands for Townhouse Bloomfield Family, dash, OMW, on my way, indicating that he's on her [sic] way to straighten this out is what the prosecution's theory is.

> Now, these—this is instrumental because we believe that this is a motive for the shooting and this is gang-related, and TBF, indicating on my way and her calling him, calling Mr. Smith, the defendant, a gay gangbanger, [he] has no credibility and he's a gay thug, and she goes on for 21 minutes calling him out, so we believe this is gang-related.

Although listed on the prosecution's witness list, the prosecutor did not call Kinnard as a witness to authenticate the video. The video presented the only evidence that Kinnard had engaged in a dispute with defendant or that she had disparaged him online.

The prosecutor did not play the entire video (which is nearly 24 minutes in duration), but instead only played a few clips for the jury. The transcript indicates each of the points in time that the video was played. The prosecutor explained to the trial court that some portions of the video contained "prejudicial information that's not pertinent" to the trial. A subsequent exchange outside of the jury's presence at the close of proofs indicated that Kinnard's video referenced the fact that defendant had previously spent time in prison.

In addition to the video itself, several comments were made alongside the video. Agent Wysopal specifically testified that one of the comments was by Brick Head, who posted a comment during the live video, stating "TBF, OMW." According to Agent Wysopal, that meant "Townhouse Bloomfield Family, on my way." In addition, Agent Wysopal testified that Brick Head posted another comment, stating, "I got little niggas."

To support the theory that defendant had intended to shoot Kinnard but had shot Amos by mistake, the prosecutor then presented Detective Sergeant Klecker's testimony that he had obtained photographs of both

Kinnard and Amos through the Law Enforcement Information Network. The trial court admitted both photographs into evidence. According to Detective Sergeant Klecker, there was a "striking similarity" between the two women in terms of "complexion, hair, and height," except that one woman was four inches taller than the other. In addition to the photographs, the jury was able to observe Amos when she testified and to observe Kinnard in her video.

C. VERDICT AND SENTENCE

After the close of proofs, the prosecutor and defense counsel made closing statements. The prosecutor made a point of directing the jury's attention to the video from the convenience store that showed the white vehicle that followed Amos and her friends. The prosecutor described a third brake light in the middle of the vehicle's rear-end, and asked the jury to compare that to the picture of the white vehicle found at defendant's residence. Defense counsel objected to how the prosecutor was using the video to make the point rather than still photographs, but the trial court overruled the objection. After the prosecutor summarized the remaining evidence and the prosecution's theory, defense counsel offered his closing. He argued that the prosecution's theory had evidentiary weaknesses, including the lack of certain key witnesses or motive. Defense counsel maintained that there was insufficient evidence to identify defendant as the shooter beyond a reasonable doubt. The prosecutor offered brief rebuttal, and then the trial court instructed the jury. When asked by the trial court if there were any objections to the instructions, defense counsel responded, "None on behalf of the defense."

The jury convicted defendant of one count of assault with intent to murder (AWIM), MCL 750.83; two counts of possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b; one count of felon in possession of a firearm, MCL 750.224f; and one count of tampering with an electronic-monitoring device, MCL 771.3f.

The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to a term of 40 to 50 years in prison for the AWIM conviction, 5 years in prison for each of the felony-firearm convictions, 4 to 20 years in prison for the felon-in-possession conviction, and 2 to 15 years in prison for the conviction of tampering with an electronic-monitoring device. At a subsequent hearing, the trial court stated that it had erred by sentencing defendant to a term of 40 to 50 years in prison for the AWIM conviction because the minimum sentence was more than two-thirds of the maximum sentence for that conviction and therefore violated MCL 769.34(2)(b). In accordance with this explanation, the trial court resentenced defendant, without objection, to a term of 40 to 62 years in prison for the AWIM conviction, leaving defendant's other sentences unchanged.

D. APPEAL

Defendant appealed as of right from his convictions and sentences, with the exception of tampering with an electronic-monitoring device. While this appeal was pending, defendant moved to remand for an evidentiary hearing. In support of the motion and appeal, defendant swore in an affidavit that he had approached his defense counsel at trial with, among other things, the following concerns:

- he asked defense counsel to request a mere-presence jury instruction;
- he asked defense counsel to ask Amos if she knew defendant "because her father-in-law is [defendant's] father's best friend";
- he asked defense counsel to point out to the jury that "the white car in the video had a third brake light, while [defendant's] father's Impala SS does not"; and
- he asked defense counsel to call Kinnard as a witness to establish that she and defendant went to high school together, and they "play with each other on Facebook to see who gets the most views."

Defendant did not provide an affidavit from either Amos or Kinnard in support of his motion. The motion for remand was denied. *People v Smith*, unpublished order of the Court of Appeals, entered July 29, 2019 (Docket No. 346044).

After oral argument, this Court ordered the prosecutor to file a brief and provide this Court with the video, photographic, and documentary exhibits offered at trial. With the Court having received and reviewed the exhibits, the appeal is now ready for resolution.

II. ANALYSIS

On appeal, defendant first claims that the trial court erred as a matter of law when it resentenced him to a higher maximum sentence, and the prosecutor now concedes that this was error. The Court agrees with the parties that defendant's sentence for AWIM is not subject to the ⅔-rule of MCL 769.34(2)(b) and, as a result, defendant is entitled to have his original sentence reimposed on remand. *People v Floyd*, 490 Mich 901, 902 (2011).

Defendant next claims that he was denied the effective assistance of trial counsel and that the trial court made several reversible evidentiary errors. As explained below, these latter claims are without merit. (Given our holding that defendant is entitled to resentencing, we decline to reach defendant's related claim that his defense counsel was ineffective for not objecting at the first resentencing hearing.)

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right includes the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016). Defendant moved earlier to remand this matter for an evidentiary hearing alleging, among other things, that trial counsel was ineffective. This Court denied the motion, so we review defendant's ineffective assistance of counsel claims for errors apparent on the record, though we retain the authority to remand for an evidentiary hearing if one is needed. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

To establish a claim of ineffective assistance of counsel, defendant must show that: (1) defense counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). Defense counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d

706 (2007). Defendant bears a heavy burden to show that counsel made errors so serious that counsel was not performing as guaranteed by the Sixth Amendment, and defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Jordan*, 275 Mich App at 667.

1. INEFFECTIVE ASSISTANCE OF COUNSEL—WITNESSES

Defendant's first ineffective assistance of counsel claim involves the testimony of Amos, Detective Sergeant Klecker, and Kinnard. With respect to Amos, defendant asserts that he knows her, though he concedes on appeal that it is "through a tenuous relationship." If defense counsel had asked her about their acquaintance, her response would have gone against the prosecutor's theory that he mistook her for Kinnard.

Even assuming for the sake of argument that defendant had a relationship with Amos, we agree that it is, indeed, a tenuous one. Given the physical similarities between the two women, the fact that the shooting took place around midnight, and Matthews's testimony that the lights on her vehicle were off, defendant could have easily mistaken the two women, even assuming that defendant (somewhat) knew Amos. Defense counsel could have decided to avoid this topic so as not to reiterate the circumstances suggesting mistaken identity, or to avoid the risk that Amos would deny the

existence of this tenuous relationship. Trial strategy is left to the sound judgment of trial counsel. *Rockey*, 237 Mich App at 76-77.

With respect to Detective Sergeant Klecker, defendant argues that defense counsel should have asked him whether the vehicle in the surveillance video had a third brake light. Defendant notes that during closing argument, the prosecutor referred to the "third brake light" on the vehicle in the surveillance video and noted that it was similar to the light on the vehicle found at defendant's residence. Defendant has not, however, shown that he was prejudiced by the lack of such a question, given that photographs of both vehicles were introduced into evidence and available for the jury to review.

Defendant further faults defense counsel for failing to call Kinnard as a witness. He notes that she was listed as a witness by the prosecutor, who decided not to call her. In his affidavit, defendant asserts that he and Kinnard attended high school together and that they "play with each other on Facebook to see who gets the most views." Defendant claims that he asked his lawyer to call Kinnard as a defense witness to show that they were not enemies, contrary to the prosecutor's theory. Defendant did not, however, provide an affidavit from Kinnard with his motion to remand to support his assertions regarding their relationship, nor has he pointed to any evidence in the record that demonstrates he and Kinnard had a friendly (or, at the very least, benign) relationship. Moreover, defense counsel may have hoped that the lack of in-person testimony would undercut the prosecutor's attempt to show that Kinnard and Amos resembled each other. On the basis of this record, defendant has not overcome

the presumption that trial counsel's decision not to call Kinnard as a witness was sound trial strategy. *Carbin*, 463 Mich at 600.

2. INEFFECTIVE ASSISTANCE OF COUNSEL—FACEBOOK EVIDENCE

Next, defendant claims that defense counsel provided ineffective assistance by failing to object to the admission of Facebook evidence on grounds of hearsay. Defendant acknowledges that trial counsel objected to this evidence, but faults him for failing to do so on hearsay grounds.

This claim is without merit because, although trial counsel did not say the word "hearsay" or cite the relevant court rule, he did argue that the Facebook evidence was "not admissible because they're statements by other people" and there was no way to determine whether these people were "reliable." The trial court understood defense counsel to have raised a hearsay objection, and the trial court cited the hearsay rule during its discussion of the evidence. Thus, while the hearsay objection could have been more explicit, the sum and substance of trial counsel's objection included that ground.

3. INEFFECTIVE ASSISTANCE OF COUNSEL—JURY INSTRUCTIONS

Moving to the jury instructions, defendant faults trial counsel for failing to request an instruction for assault with intent to do great bodily harm as a lesser included offense of AWIM. He also claims that his trial counsel should have requested a mere-presence jury instruction. Both arguments fail.

Considering the lesser-included instruction first, "a trial court, upon request, should instruct the jury regarding any necessarily included lesser offense . . . if

the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it." *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). In this case, a rational view of the evidence did not support a finding that the shooter did not intend to murder the intended target.

To convict a defendant of AWIM, the jury must find that the defendant had the intent to murder the victim. MCL 750.83. To convict a defendant of assault with intent to do great bodily harm, the jury would have to conclude that the defendant did not intend to murder the victim, but did intend to cause great bodily harm. MCL 750.84. The evidence showed that the window of Matthews's vehicle was shot out, the passenger door had multiple bullet holes, and Amos was shot more than 10 times. Although Amos did not sustain life-threatening injuries, there was no evidence that the shooter did not intend to kill the occupants of the vehicle, especially in light of the number of shots fired and the location of the shots, which were clearly aimed at the passenger. Thus, defendant has not established that he was entitled to a lesser included offense instruction because the instruction was not supported by a rational view of the evidence.

Further, defendant's theory of the case was that he was not the shooter, not that he lacked the intent to murder. Defense counsel might have decided not to request a lesser included offense instruction to emphasize that defendant did not, in fact, commit the offense, regardless of intent. As the evidence was largely circumstantial, this was a reasonable trial strategy, and defendant has not shown that defense counsel was ineffective for this reason. See *Carbin*, 463 Mich at 599-600.

With respect to the mere-presence jury instruction, the model instruction provides as follows: "Even if the defendant knew that the alleged crime was planned or was being committed, the mere fact that [he / she] was present when it was committed is not enough to prove that [he / she] assisted in committing it." M Crim JI 8.5. Defendant points out that no witness positively identified him as the shooter, and the instruction would "seem" to have "assisted the defense, once the GPS evidence was introduced."

Yet it is unclear how this instruction would have aided defendant at trial. He has not argued, nor is there anything in the record to suggest, that he had a valid reason to be in the area when the shooting took place. In fact, as conditions of his parole, defendant was on a GPS tether and was not permitted to go anywhere at night. Nor has defendant argued that he was present or witnessed the shooting; again, his defense was not one of mere presence, but rather that he was not the shooter. Thus, there is nothing in the record showing that defendant's trial counsel was ineffective for not asking for the mere-presence instruction.

B. EVIDENTIARY CLAIMS

Moving from the ineffective assistance of counsel claims to the evidentiary ones, defendant raises claims based on authentication, hearsay, and gang-related propensity evidence. He does not, however, make a claim on appeal related to any reference—express or veiled—regarding his prior criminal record voiced during trial.

This Court reviews a trial court's decision to admit or deny evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). We

review de novo preliminary questions of law, such as whether a rule of evidence or statute precludes the admission of particular evidence, and it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. *Bynum*, 496 Mich at 623. Yet a trial court's decision on a close evidentiary question cannot, by definition, qualify as an abuse of discretion. *Layher*, 464 Mich at 761.

1. AUTHENTICATION OF FACEBOOK EVIDENCE

Defendant initially challenges the authentication of the four "still" Facebook posts, i.e., Exhibits 11A, 11B, 11C, and 11E. Defendant stresses that the Facebook posts were alleged to have come from others' accounts, not his own account. None of the purported account owners testified, and defendant argues that Agent Wysopal merely testified that the posts pertained to defendant, which was insufficient to authenticate them under MRE 901.

Authentication of an evidentiary exhibit is a two-stage process. First, under MRE 901(a), the proponent of the exhibit has the burden to present "evidence sufficient to support a finding that the matter in question is what its proponent claims." At the first stage, the trial court must determine whether the proponent of the evidence has made "a prima facie showing that a reasonable juror might conclude that the proffered evidence is what the proponent claims it to be." *Mitchell v Kalamazoo Anesthesiology, PC*, 321 Mich App 144, 155; 908 NW2d 319 (2017) (citation omitted). This stage is reserved exclusively for the trial court, though it is not a particularly "exacting" standard. 31 Wright and Gold, Federal Practice and Procedure: Evidence (2000), § 7104, p 36. As one commentator explained with regard to the federal counterpart to

MRE 901(a), "The judge should permit the evidence to go to the jury unless the showing as to authenticity is so weak that no reasonable juror could consider the evidence to be what its proponent claims it to be." *Id*.; see also *id*. at § 7102, p 15 (describing the first condition as "a minimal showing").

If the first condition is satisfied, then "the evidence is authenticated under MRE 901(a) and may be submitted to the jury." *Mitchell*, 321 Mich App at 155. At this second stage, the jury remains the ultimate fact-finder, and the jury decides whether the evidence is reliable and what weight to give the evidence, if any. *Id*. at 156. "When a bona fide dispute regarding the genuineness of evidence is presented, that issue is for the jury, not the trial court." *Id*. "In other words, conflicting evidence on genuineness goes to weight, not admissibility, so long as some reasonable person could believe that the item is what it is claimed to be." *Id*. (cleaned up).

On appeal, our review is limited to the first stage. If there was no abuse of discretion by the trial court in authenticating the evidence under MRE 901(a), then it was left to the jury as fact-finder to determine the reliability and weight of the Facebook posts. And yet, while the showing at the first stage is not a particularly rigorous one, we are mindful that in the age of fake social-media accounts, hacked accounts, and so-called deep fakes, a trial court faced with the question whether a social-media account is authentic must itself be mindful of these concerns. In this case, the trial court considered several unpublished decisions of this Court to glean guidance on how Facebook pages should be analyzed. The trial court noted concerns regarding fake social-media accounts, and it also recognized that the caselaw it reviewed involved posts purportedly

made by the defendant, unlike the present case where all four posts were from other persons who did not testify. The trial court concluded, however, that the reasoning in those cases could be extended to this case, and the court conditionally authenticated the posts subject to any further objection that defense counsel might have when the prosecutor moved for admission of the posts.

It is important to recognize that the prosecutor did not use the posts solely as photographic evidence to identify defendant. When used as photographic evidence, there is little to distinguish the analysis of a photograph taken from a newspaper or other traditional source from one taken from a social-media account for purposes of MRE 901(a). See *United States v Farrad*, 895 F3d 859, 876-878 (CA 6, 2018) (applying traditional analysis for authenticating photographic evidence to photograph taken from a Facebook page under FRE 901(a)); *United States v Thomas*, 701 F Appx 414, 418-420 (CA 6, 2017) (same). Regardless of source, a picture can be authenticated, for example, by considering the "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics" under MRE 901(b)(4).

But here, the key point that the prosecutor teased from the exhibits was that defendant (pictured) was known by the nickname Brick Head (written by someone next to the picture). While one picture was used to show that defendant was affiliated with the East Side Gang (Exhibit 11B, discussed separately in the next section), the main purpose of the posts was to affiliate defendant with the nickname. There was, in other words, more to the Facebook exhibits than just photographic evidence. Merely considering the distinctive features of the photographs alone would not have been

sufficient to authenticate the social-media posts for the purpose of linking the person with the name.

Another way to authenticate evidence is through "[t]estimony that a matter is what it is claimed to be." MRE 901(b)(1). Here, Agent Wysopal was qualified as an expert in Saginaw street gangs. He testified that he went to defendant's Facebook page and then went to the Facebook pages of defendant's affiliates with the East Side Gang. The agent testified that the four exhibits accurately depicted the Facebook posts that he had viewed when investigating defendant's potential involvement in the shooting. He was familiar with defendant, identified him in the photographs, and noted that defendant flashed a gang symbol with his hands in one of the photographs. On cross-examination, Agent Wysopal acknowledged that one of the posts was dated more than five years before the shooting, and he noted that the posts were not from defendant's Facebook page.

Although a close call, we conclude that the trial court did not abuse its discretion by authenticating the four Facebook posts. The testimony of Agent Wysopal established that the exhibits were accurate depictions of what he claimed they were—four Facebook posts that he had viewed when investigating defendant's possible connection with the shooting. Agent Wysopal had personal knowledge of defendant and defendant's affiliates, including those who were pictured in the posts. Importantly, Agent Wysopal had known defendant as Brick Head for "quite some time," which reinforced the authenticity of the posts that likewise connected defendant with that nickname. Moreover, there is nothing on the face of the posts that would suggest that they were faked or hacked so as to undermine the prima facie case for admission. It was

not an abuse of discretion, therefore, for the trial court to conclude that a reasonable juror might conclude that the four exhibits were what the prosecutor and Agent Wysopal claimed they were—the Facebook pages that the agent viewed, printed, and believed were associated with defendant's affiliates.

Our conclusion does not discount the possibility that evidence from social media might, in fact, be inaccurate, hacked, or faked. As technology advances, trial courts and lawyers will need to be vigilant when considering questions of authenticity, at both the first and second stages. But as explained, it was not an abuse of discretion to conclude that the prosecutor had made the necessary prima facie case for admission of the four Facebook posts, and therefore it was proper to leave questions about the reliability and weight of these exhibits in the collective hands of the jury.

2. HEARSAY IN FACEBOOK EVIDENCE

Although the four Facebook posts pass the test of authenticity on appeal, they (mostly) fail the test of hearsay. Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception" to the hearsay rule. *United States v Browne*, 834 F3d 403, 415 (CA 3, 2016); see also MRE 802.

The statement of a party-opponent offered against that party at trial is not hearsay. MRE 801(d)(2). With respect to Exhibits 11A, 11C, and 11E, the Facebook posts had comments made by persons who were not

parties and who did not testify. Thus, this was *not* a circumstance where Facebook comments of defendant were introduced against him (unlike with Exhibit 11B and the Facebook video, as explained below), so MRE 801(d)(2) is inapplicable. The pertinent part of each comment—"BRICKHEAD," "Brick Lontae Smith," and "brickhead"—was written by a third party and superimposed on the photograph of defendant or set closely adjacent to the photograph of him. The clear inference to be made from each exhibit was that defendant was known by his associates as Brick Head. Thus, these comments, coupled with the photographs, were offered by the prosecutor to establish the truth of the matter asserted, i.e., that defendant was called Brick Head. There was no exception to the hearsay rule applicable to the comments, and therefore, the trial court abused its discretion by admitting the comments into evidence. *Bynum*, 496 Mich at 623; *Layher*, 464 Mich at 761.

Exhibit 11B differed from the other three exhibits in that the name Brick Head or its variant was not shown to the jury. (There is a comment referring to "brick," but that and other comments were redacted from the version shown to the jury.) The written statement in Exhibit 11B—"It Ain't Blood If Don't Bleed Ya Understand Me ,,, NTD"—was not offered for the literal truth of the matter asserted, but rather as evidence of gang affiliation. In the photograph, defendant is shown with others in the East Side Gang, as identified by Agent Wysopal. Generally speaking, a photograph of someone is not a "statement" for hearsay purposes. See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 204; 579 NW2d 82 (1998). While nonverbal conduct can sometimes be considered a "statement" for hearsay purposes when that conduct

"is intended by the person as an assertion," MRE 801(a), the only nonverbal conduct identified by Agent Wysopal in those photographs was handgun gestures. (Although not mentioned by the agent, there is one person holding cash, and another person who could be making the East Side Gang symbol, though the latter is unclear.) There is nothing in the record to suggest that these symbols were intended as statements offered for the truth of some matter asserted, and neither the prosecutor nor the agent argued as such. Thus, admission of Exhibit 11B did not violate the rule against hearsay.

It is unclear whether defendant also challenges the Facebook video evidence on hearsay grounds. There is no hearsay argument offered with respect to the video in his appellate brief. Thus, the claim is abandoned. *People v Iannucci*, 314 Mich App 542, 547; 887 NW2d 817 (2016). In any event, the stream of homophobic slurs by Kinnard were not offered to prove defendant's sexual orientation, but rather to show that defendant had a motive for attacking Kinnard or someone whom he mistook for her. The prosecutor also highlighted several comments purportedly made by defendant, but again, those comments were exempt from the definition of hearsay under MRE 801(d)(2).

3. GANG-RELATED EVIDENCE

Before considering the impact of the inadmissible hearsay evidence in Exhibits 11A, 11C, and 11E, we take up defendant's claim involving gang-related evidence. While defense counsel did not expressly object to the gang-related evidence based on propensity grounds, the trial court understood that this was an issue that needed to be addressed before the evidence could be admitted. Given this, the matter was pre-

served for appellate review, and now defendant argues on appeal that the evidence was irrelevant and unduly prejudicial.

Generally speaking, evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; MRE 402. Relevant evidence can be excluded, however, if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403. Moreover, gang-related evidence cannot be admitted to show that a person acted in conformance with gang membership. MRE 404(a); *Bynum*, 496 Mich at 630. Gang-related evidence could, however, be admissible if it is used for a nonconformity purpose, such as to show "proof of motive . . . or absence of mistake or accident." MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (setting forth relevant factors when considering other-acts evidence).

In a murder case, proof of motive is always relevant, even if not always necessary. *Bynum*, 496 Mich at 630. Here, the prosecutor used the gang-related evidence to prove a crucial link in the chain of inference regarding motive. There was no evidence that defendant had any animosity toward Amos, nor was there any evidence that would otherwise suggest that defendant would target her. Therefore, to make sense of what otherwise appeared to be senseless, the prosecutor offered a theory of mistaken identity to the jury, and that theory critically hinged on defendant being affiliated with a gang that was a rival to the gang with which Kinnard, the intended victim, was affiliated. While there was certainly evidence of personal animosity between defendant and Kinnard based on the slurs the latter made about the former, the evidence of their respective

gang affiliations reinforced the assertion that there was animosity between the two. The evidence also explained the context of defendant's Facebook comment, "TBF, OMW"; "OMW" is a common acronym for "on my way," but only Agent Wysopal's testimony provided the inferential link between "TBF" and "Townhouse Bloomfield Family." Finally, the gang-related evidence undermined any argument that defendant was simply in the wrong place at the wrong time, as Agent Wysopal's testimony made clear that the shooting took place in an area that would be considered enemy territory of someone affiliated with the East Side Gang. The gang-related evidence was relevant, both to motive and absence of mistake, and it went to specific attributes of this crime, rather than merely to show that defendant acted in conformance with being affiliated with a gang. Accordingly, its admission did not violate MRE 404.

Nor did its admission violate MRE 403. The four Facebook posts, including the comments and photographs, were not particularly shocking or gratuitous. The Facebook video definitely had some vile homophobic slurs, but those slurs were not obviously gang-related, and they were made by Kinnard against defendant, not the other way around. Thus, even if a juror was offended by the language used in the video, there is little to suggest that the juror would have held the offensive language against defendant, as opposed to drawing a negative inference against Kinnard. The evidence was prejudicial against defendant's defense, but it was not *unfairly* prejudicial, nor did it implicate any other reason for excluding evidence under MRE 403.

With respect to other-acts evidence like the gang-related evidence here, "the trial court, upon request,

may provide a limiting instruction under MRE 105." *Knox*, 469 Mich at 509. Defense counsel did not ask for a limiting instruction, and when asked by the trial court whether there was any objection to the instructions given to the jury, defense counsel responded, "None on behalf of the defense." "By expressly approving the jury instructions, defendant waived review of the alleged instructional error." *People v Head*, 323 Mich App 526, 537; 917 NW2d 752 (2018). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (cleaned up). Moreover, defendant has not raised this as one of his ineffective assistance of counsel claims on appeal. Accordingly, we find no reversible error with respect to the gang-related evidence.

4. IMPACT OF IMPERMISSIBLE HEARSAY EVIDENCE

Turning back to Exhibits 11A, 11C, and 11E, the admission of evidence in violation of the hearsay rule does not result in an automatic reversal. Under MCL 769.26, our Legislature set out the standard that appellate courts use when considering the impact of improperly admitted evidence in a criminal trial:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

For a "preserved, non-constitutional error," we consider "whether, absent the error, it is more probable

than not that a different outcome would have resulted." *People v Gursky*, 486 Mich 596, 619; 786 NW2d 579 (2010) (cleaned up). The defendant has the burden "to show that the error resulted in a miscarriage of justice." *Id*. If the defendant cannot meet the burden, then the error is harmless and does not warrant reversal of the conviction. *Id*. With respect to constitutional due process, reversal based on evidentiary errors is not appropriate unless the trial was "infused . . . with unfairness." *Estelle v McGuire*, 502 US 62, 75; 112 S Ct 475; 116 L Ed 2d 385 (1991).

Exhibits 11A, 11C, and 11E were used by the prosecutor to prove that defendant went by the nickname Brick Head. Apart from this evidence, as a parole agent and expert in Saginaw-area gangs, Agent Wysopal testified that he knew defendant as Brick Head. Defendant's trial counsel did not offer any specific objection to the agent's testimony on this issue, nor does there appear to have been a valid ground for doing so. Thus, the hearsay evidence was cumulative to other evidence that was properly admitted. The three exhibits were not particularly striking or prejudicial, and while the issue of defendant's nickname was a key part in the inferential chain linking defendant with the dispute with Kinnard, the untainted testimony of Agent Wysopal was strong, unequivocal evidence on this issue. Given the cumulative nature of the hearsay evidence, as well as all of the other evidence that placed defendant at the scene of the crime and provided him with motive for the shooting, we hold that the erroneous admission of the three exhibits was harmless. *Gursky*, 486 Mich at 620. Similarly, the admission of the hearsay evidence did not infuse the trial with unfairness, and therefore there was no deprivation of due process. *Estelle*, 502 US at 75.

III. CONCLUSION

The increasing ubiquity of social media in our lives will require trial courts to be especially mindful of the rules of evidence when assessing whether and on what basis to admit social-media evidence. In this case, the trial court was mindful of this, and it explored several aspects of the Facebook evidence offered by the prosecutor, including authenticity, hearsay, and relevance. While we conclude that the trial court erred with respect to admitting several hearsay statements, the error was harmless. We do, however, reverse defendant's AWIM sentence and remand to the trial court to reimpose the original sentence of 40 to 50 years of imprisonment on that conviction. In all other respects, we affirm and do not retain jurisdiction.

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

PF v JF

Docket No. 351461. Submitted February 9, 2021, at Detroit. Decided February 25, 2021, at 9:00 a.m. Opinion as amended by the unpublished Court of Appeals order entered March 12, 2021.

PF filed a petition for a personal protection order (PPO) against her ex-husband, JF, in the Macomb Circuit Court. The petition cited and relied on six incidents that allegedly justified the issuance of a PPO. The court, Rachel Rancilio, J., granted summary disposition to respondent under MCR 2.116(C)(7) with respect to the initial five incidents, concluding that they could not be the basis for a PPO under the doctrine of res judicata because the St. Clair Circuit Court had already denied petitioner's request for a PPO based on those five incidents. As to the sixth incident, which occurred after the earlier PPO request had been rejected, the court concluded that it did not warrant a PPO under MCL 600.2950. Petitioner appealed.

The Court of Appeals *held*:

1. The circuit court erred by granting summary disposition or involuntary dismissal on the basis of res judicata with respect to the initial five incidents described in the PPO petition. MCL 600.2950(1)(j) provides that an individual may petition the family division of circuit court to enter a PPO to restrain or enjoin a former spouse from engaging in conduct that is prohibited under MCL 750.411h, which addresses the crime of stalking. "Stalking" is defined in MCL 750.411h(1)(d) as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(a) defines a "course of conduct" as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose," and MCL 750.411h(1)(c) defines "harassment" as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." MCL

600.2950(4) provides that a court shall issue a PPO if it determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit the offense of stalking. In determining whether reasonable cause exists, a court is required to consider documents, testimony, other proffered supporting evidence, and whether the individual to be restrained or enjoined has previously committed or threatened to commit the crime of stalking, among a variety of other acts or conduct enumerated in MCL 600.2950(1)(a) through (*l*). The doctrine of res judicata bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. In this case, had petitioner sought a PPO on the basis of the same five incidents that were presented to the St. Clair Circuit Court and nothing more, then the doctrine of res judicata would plainly have applied and precluded petitioner from obtaining a PPO. However, petitioner alleged a sixth incident that was not, and could not have been, alleged in the St. Clair Circuit Court, which opened the door for consideration of the prior five incidents in conjunction with the sixth incident. It was the sixth incident that drove petitioner to again seek the assistance of a court in an effort to obtain a PPO against respondent, and the sixth incident could not be viewed in isolation or a vacuum; rather, the pattern of conduct between and involving the parties, including the first five incidents, had to be examined in its entirety. The earlier incidents could give explanation or context to the sixth incident by providing insight on intent, continuity of purpose, the reasonableness of beliefs, and states of mind or feelings relative to terror, fright, intimidation, threats, harassment, and molestation under MCL 750.411h(1)(d). Because stalking entails a course or pattern of conduct that involves continuing or repeated harassment arising out of separate noncontinuous acts, multiple acts or a series of acts are necessarily required to issue a PPO based on stalking conduct, and any one of the acts can shed light on the other acts. To rule that res judicata precluded consideration of the first five incidents in relation to whether a PPO should be issued predicated on stalking activity would effectively be subverting the intent of the Legislature in enacting MCL 600.2950. Accordingly, the dismissal was reversed and the case was remanded to the circuit court to again adjudicate the PPO petition, taking into consideration the five earlier incidents and any other pertinent history between the parties.

2. Whether the circuit court abused its discretion by denying petitioner's request for a PPO and whether petitioner was entitled to a PPO on the basis of all six incidents was not addressed

so that the circuit court could reconsider the PPO request in the first instance under the correct standard.

Reversed and remanded for further proceedings.

ACTIONS — PETITIONS FOR PERSONAL PROTECTION ORDERS — STALKING — RES JUDICATA.

When considering a petition for a personal protection order under MCL 600.2950(1)(j), a court is not barred by the doctrine of res judicata from considering incidents involving stalking conduct prohibited by MCL 750.411h that were alleged in a previous unsuccessful petition for a personal protection order as long as there is at least one incident in the petition under consideration that was not, and could not have been, alleged in the previous petition.

Lakeshore Legal Aid (by *Mireille Phillips* and *Kathleen Halloran*) and Michigan Advocacy Program (by *Emily Jackson Miller*) for petitioner.

Lucido & Manzella, PC (by *Vincenzo Manzella* and *Angelo Donofrio*) for respondent.

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

MARKEY, J. Petitioner appeals by right the circuit court's order denying her petition for a personal protection order (PPO) that she sought against respondent. The petition cited and relied on six incidents that allegedly justified the issuance of a PPO. The circuit court granted summary disposition in favor of respondent with respect to the initial five incidents, concluding that they could not be the basis for a PPO under the doctrine of res judicata because a circuit court in a neighboring county had already denied petitioner's request for a PPO that was based on those incidents. Petitioner argues that the court erred by applying res judicata. As to the sixth incident, which occurred after the earlier PPO request had been rejected, the circuit court concluded that it did not warrant a PPO under

MCL 600.2950. Petitioner contends that the circuit court erred in reaching that conclusion. We reverse and remand for further proceedings.

The parties were married in 1988 and divorced in 2012. Petitioner and respondent have eight children together, only one of whom, a teenage son, remained a minor during the proceedings. Petitioner had physical custody of their son, and the parties shared legal custody. Respondent had not been in contact with the minor child since 2014. In 2017, respondent was convicted of attempted eavesdropping on petitioner, and he was sentenced to two years' probation that prohibited contact with petitioner. But respondent was released from probation and the no-contact order in 2018.

In September 2019, petitioner filed a PPO petition against respondent in the neighboring St. Clair Circuit Court. Petitioner asserted that there were five incidents involving respondent that occurred in September 2019 and warranted the issuance of a PPO against respondent. Two of the incidents concerned respondent's attendance at the minor child's soccer games, even though respondent did not have direct contact with petitioner or the parties' son. Additionally, there were two incidents in which respondent drove by petitioner's house after attending the child's soccer games. Respondent alleged that he merely drove by the house to reminisce and did not know whether petitioner even still lived there. The fifth incident regarded a situation in which respondent contacted one of the adult children and asked her to meet with him. The parties' daughter declined the invitation and asked not to be contacted again, yet respondent subsequently sent her an e-mail. The St. Clair court did not hold a hearing and denied the PPO petition. The court stated

that "petitioner has been interviewed, the petitioner's claims are sufficiently without merit, and the action should be dismissed without a hearing." The St. Clair court also reasoned that there was "no contact between the parties" and "no . . . evidence of [respondent] being a credible threat[.]"

Three days later, petitioner filed the instant PPO petition against respondent in the Macomb Circuit Court. Petitioner again set forth the five incidents that had been presented to the St. Clair court, along with an additional incident, all of which allegedly warranted a PPO. The additional or sixth incident took place the day after petitioner's first PPO request had been denied and involved respondent's attendance at another soccer game in which the minor child was participating. Respondent took a photograph or video with his cellphone during the sporting event. Petitioner alleged that respondent sat in front of her on the bleachers and snapped a picture of her, flipped her off, and called her a "bitch" in the parking lot. Respondent claimed that he simply took a video of the minor child playing soccer and denied taking or directing any action toward petitioner.

The circuit court denied petitioner's request for an ex parte order. At an evidentiary hearing on the PPO, petitioner argued that respondent's recent stalking conduct and his history of abusive behavior caused petitioner to suffer reasonable apprehension of violence, warranting a PPO under MCL 600.2950. Petitioner testified with respect to the six incidents and a history of physical, verbal, and sexual abuse by respondent throughout their relationship. Additionally, petitioner testified in depth regarding an incident in 2011. According to petitioner, respondent became angry with one of their children and attempted to push the child's

head under water in the kitchen sink and sprayed her with the sink's hose as petitioner and another child tried to pull respondent away. When respondent let the child go, respondent started shoving petitioner and both children into kitchen cupboards. Petitioner testified that as respondent was leaving, he picked up a bag of glass bottles and threw them at petitioner, causing them to shatter as they struck her in the head. Respondent also chased one of the children across the yard while shouting expletives. After respondent entered his vehicle, petitioner and her children went into the home and locked the doors. Respondent forgot his glasses and attempted to retrieve them from the house. But no one would unlock a door, so he proceeded to kick in a back door.

At the conclusion of petitioner's testimony, respondent moved to dismiss the case, arguing that petitioner was relying on facts asserted in her first PPO petition that had been rejected, that she was engaging in forum-shopping for a PPO, and that petitioner had not established a reasonable apprehension of violence. Respondent contended that res judicata barred the PPO action. In response, petitioner maintained that the filing of the first PPO petition did not preclude her from filing the second petition in an effort to stay safe. The circuit court denied respondent's motion. The court stated, "I feel like you're making a motion for summary disposition and I'm going to deny it at this point because it's an issue of fact and credibility as to whether or not she felt threatened reasonably or not."

Respondent then took the stand to testify. He denied taking a picture of petitioner, flipping her off, calling her names, or abusing her during their marriage. With regard to the 2011 incident, respondent admitted that "things were getting heated," so he attempted to leave

the house. He denied both holding his child's head under water in the kitchen sink and throwing glass bottles at petitioner. Respondent admitted that he sprayed the one child with the kitchen sink hose, but this was only after the children had spit in his face and were disrespectful. Respondent also claimed that the bag of returnable bottles ripped and were thrown when petitioner attempted to grab them away from respondent. Respondent argued that a PPO was not warranted because petitioner's case was barred by res judicata, and that even to the extent that it was not barred, respondent's actions would not have caused a reasonable person to be fearful. At the end of the hearing, the circuit court took the matter under advisement.

The circuit court subsequently issued a written opinion and order denying petitioner's request for a PPO. The court, referring back to respondent's motion to dismiss that was made during the evidentiary hearing, decided it anew, treating it as a motion for summary disposition under MCR 2.116(C)(7) based on res judicata. The circuit court granted the "motion for summary disposition pursuant to MCR 2.116(C)(7) under the theory of res judicata as [to] the initial five incidents contained in the [p]etition."[1] The circuit court then moved on to substantively assess whether the

[1] Technically, the court's action in revisiting the issue did not implicate summary disposition under MCR 2.116; rather, it concerned involuntary dismissal under MCR 2.504(B)(2), which provides, in pertinent part:

> In an action, claim, or hearing tried without a jury, after the presentation of the plaintiff's evidence, the court, on its own initiative, may dismiss, or the defendant, without waiving the defendant's right to offer evidence if the motion is not granted, may move for dismissal on the ground that on the facts and the law, the plaintiff has no right to relief.

sixth incident, which was not barred by res judicata, supported the issuance of a PPO. The court denied the request for a PPO based solely on the sixth incident, reasoning as follows:

> [Respondent's] presence in a public place, where he did not attempt to interact with either Petitioner or the minor child, shows no indication of future harm to Petitioner. Further, although Respondent appeared within Petitioner's sight at the minor child's game on September 18, 2019 [sixth incident], both parties were in a public place from which Respondent has not been banned and he did not take any other prohibited action pursuant to MCL 750.411h which might be considered a course of conduct to satisfy the statutory standard for stalking.
>
> This Court is required to issue a personal protection order only if it determines that there is reasonable cause to believe that the Respondent may commit one or more of the acts listed in MCL 600.2950(1). Petitioner presented no evidence that Respondent has shown any sign of an intent to: . . . engag[e] in conduct that is prohibited under MCL 750.411h[] or any other . . . conduct that imposes upon or interferes with Petitioner's personal liberty or that causes a reasonable apprehension of violence. The Petition's allegations and the testimony offered at the hearing would not cause a fair-minded person of average intelligence to believe that Respondent could commit one of the acts prohibited by MCL 600.2950.

Petitioner now appeals by right.[2]

See *Samuel D Begola Servs, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995). Res judicata can, of course, provide a basis for dismissal under MCR 2.504(B)(2).

[2] Neither party has filed any supplemental motion or pleading with this Court, nor has either party submitted correspondence asserting that events have transpired rendering the issues on appeal moot. See *Paquin v St. Ignace*, 504 Mich 124, 131 n 4; 934 NW2d 650 (2019) ("No motion or other pleading has claimed mootness . . . ."). Accordingly, we shall proceed to ascertain whether the circuit court erred by failing to issue a PPO. Moreover, even if moot, we may still address an issue of

On appeal, petitioner first argues that the circuit court erred by granting summary disposition or involuntary dismissal on the basis of res judicata with respect to the initial five incidents described in the PPO petition. Petitioner additionally contends that the circuit court abused its discretion by denying her petition for a PPO in light of the compelling evidence that she presented. "An appellate court reviews de novo a trial court's ruling on a motion for an involuntary dismissal." *Adair v Michigan*, 497 Mich 89, 99; 860 NW2d 93 (2014).[3] "The question whether res judicata bars a subsequent action is reviewed de novo by this Court." *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). This Court reviews for an abuse of discretion a trial court's decision regarding whether to issue a PPO. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Id*. A court necessarily abuses its discretion when it makes an error of law. *TM v MZ (On Remand)*, 326 Mich App 227, 235-236; 926 NW2d 900 (2018). Factual findings underlying a PPO ruling are reviewed for clear error. *Hayford*, 279 Mich App at 325. "The clear-error standard requires us to give deference to the lower court and find clear error only if we are nevertheless left with the definite and firm conviction that a mistake has been made." *Arbor Farms, LLC v Geostar Corp*, 305 Mich App 374, 386-387; 853 NW2d 421 (2014) (quotation marks and citation omitted).

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public significance that is likely to recur yet evade judicial review. *People v Richmond*, 486 Mich 29, 37; 782 NW2d 187 (2010). This principle or exception is applicable under the circumstances in this case, which is part of the reason that we have opted to publish this opinion.

[3] We also review de novo a summary-disposition ruling. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018).

"[B]y commencing an independent action to obtain relief under this section, . . . an individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin a . . . former spouse . . . from . . . [e]ngaging in conduct that is prohibited under . . . MCL 750.411h . . . ." MCL 600.2950(1)(j). MCL 750.411h addresses the crime of stalking.[4] "Stalking" is defined as a "willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." MCL 750.411h(1)(d). And a "course of conduct" is "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). "Harassment" is defined as "conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress." MCL 750.411h(1)(c).

"The court shall issue a personal protection order . . . if the court determines that there is reasonable cause to believe that the individual to be restrained or enjoined may commit" the offense of stalking. MCL 600.2950(4). In determining whether reasonable cause exists, a court is required to consider documents, testimony, other proffered supporting evidence, and

[4] While there are numerous acts and offenses that can serve as the factual basis for a PPO, MCL 600.2950(1)(a) through (*l*), our focus is on stalking because petitioner's arguments below and on appeal primarily accuse respondent of engaging in stalking. During closing argument, petitioner's counsel asserted that "what he's been doing clearly has established that he's stalking."

"[w]hether the individual to be restrained or enjoined has previously committed or threatened to commit" the crime of stalking, among a variety of other acts or conduct enumerated in MCL 600.2950(1)(a) through (*l*). MCL 600.2950(4)(a) and (b).

In *Adair*, 470 Mich at 121, our Supreme Court recited the factors applicable to determining whether a claim is barred by res judicata:

> The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) *the matter in the second case was, or could have been, resolved in the first*. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the *same transaction* that the parties, exercising reasonable diligence, could have raised but did not. [Citations omitted; emphasis added.]

"[T]he doctrine of res judicata is a judicially created doctrine that serves to relieve parties of the cost and aggravation of multiple lawsuits, conserve judicial resources, and encourage reliance on adjudication by preventing inconsistent decisions." *Adam v Bell*, 311 Mich App 528, 531; 879 NW2d 879 (2015) (citation omitted). Res judicata is not intended to lighten the loads of state courts by precluding lawsuits whenever possible; rather, the purpose of the doctrine is to promote fairness. *Id*. We will not apply res judicata "when to do so would subvert the intent of the Legislature." *Id*. at 531-532.

In this case, had petitioner sought a PPO on the basis of the same five incidents that were presented to the St. Clair Circuit Court *and nothing more*, then the doctrine of res judicata would plainly have applied

and precluded petitioner from obtaining a PPO. Petitioner, however, alleged a sixth incident that had not been, and could not have been, alleged in the St. Clair Circuit Court. And those new allegations regarding the sixth incident, in our view, opened the door for consideration of the prior five incidents *in conjunction with* the sixth incident.

The sixth incident drove petitioner to again seek the assistance of a court in an effort to obtain a PPO against respondent. And the sixth incident could not be viewed in isolation or a vacuum; rather, the pattern of conduct between and involving the parties, including the first five incidents, had to be examined in its entirety. The earlier incidents could give explanation or context to the sixth incident by providing insight on intent, continuity of purpose, the reasonableness of beliefs, and states of mind or feelings relative to terror, fright, intimidation, threats, harassment, and molestation. As indicated, stalking entails a course or pattern of conduct that involves continuing or repeated harassment arising out of separate noncontinuous acts, MCL 750.411h(1), thereby justifying the issuance of a PPO to halt the ongoing conduct. Stated otherwise, multiple acts or a series of acts are necessarily required to issue a PPO based on stalking conduct, and any one of the acts can shed light on the other acts. One incident can change the dynamics and meaning of surrounding incidents.[5]

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[5] For example, there could be three incidents between parties that outwardly appeared innocent, but then a fourth incident makes absolutely clear that the earlier incidents were not innocent and instead involved acts undertaken with a nefarious intent or purpose. Or the fourth incident, standing alone, could appear entirely innocent, but when the prior three incidents are considered in conjunction with the fourth incident, the fourth incident could be construed as entailing unlawful activity.

We recognize that the transactions raised in the first PPO suit overlapped with all but one of the transactions raised in the instant PPO suit. But were we to rule that res judicata precluded consideration of the first five incidents in relation to whether a PPO should be issued predicated on stalking activity, we would effectively be subverting the intent of the Legislature in enacting MCL 600.2950. See *Adam*, 311 Mich App at 531-532 (stating that res judicata cannot be applied to subvert legislative intent). The common law, which includes the doctrine of res judicata, *William Beaumont Hosp v Wass*, 315 Mich App 392, 398; 889 NW2d 745 (2015), governs unless it has been abrogated by a statute, *Albro v Allen*, 434 Mich 271, 286 n 6; 454 NW2d 85 (1990). Indeed, as quoted earlier, MCL 600.2950(4)(b) requires a court to consider "[w]hether the individual to be restrained or enjoined *has previously committed or threatened to commit* 1 or more of the acts" enumerated in MCL 600.2950(1). (Emphasis added.) Additionally, when a PPO request is sought on the basis of stalking conduct, the stalking statute, MCL 750.411h, must be examined and it requires, as noted, a course or pattern of conduct. MCL 600.2950 and MCL 750.411h dictate contemplation of all relevant present and past incidents arising between the parties. Moreover, the common-law doctrine of res judicata cannot be employed to undermine our Legislature's intent.[6] A circuit court needs to have the ability to examine and consider the totality of the circumstances when ruling on a PPO petition. The past

[6] We conclude that legislative intent is not offended by dismissing a PPO action on the basis of res judicata when the very same group of incidents or transactions was alleged in a previous PPO action. Furthermore, had the "sixth" incident in this case actually occurred before the first PPO action was filed, such that it could have been raised but was not, we would conclude that res judicata would bar the subsequent PPO action involving the six incidents.

history of the parties is a necessary consideration when evaluating whether a PPO should be issued. We reverse and remand the case to the circuit court to again adjudicate the PPO petition, taking into consideration the five earlier incidents and any other pertinent history between the parties.

We decline to address whether the circuit court abused its discretion by denying the PPO request based solely on the sixth incident, nor will we address whether petitioner was entitled to a PPO on the basis of all six incidents and prior history. As reflected in our discussion, the sixth incident cannot be viewed in isolation—the five earlier incidents and other relevant history must also be taken into consideration. This is not how the circuit court analyzed the case, and it would not be appropriate for us to engage in the analysis or examination in the first instance.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction. We decline to tax costs under MCR 7.219.

SWARTZLE, P.J., and TUKEL, JJ., concurred with MARKEY, J.

WEST MICHIGAN ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH v CITY OF GRAND RAPIDS

Docket No. 352703. Submitted February 9, 2021, at Detroit. Decided February 25, 2021, at 9:05 a.m.

Petitioner, the West Michigan Annual Conference of the United Methodist Church, applied for a tax exemption under MCL 211.7s for a residential house (the residence) owned by petitioner and lived in by Reverend Doctor Margie Crawford. Crawford, an ordained minister who worked for petitioner in an administrative capacity in the church hierarchy, did not serve any specific congregation but instead served as the district superintendent overseeing petitioner's Midwest district, which encompassed 91 individual churches. Respondent, the city of Grand Rapids, denied petitioner's application. Petitioner then made the same request for a tax exemption before the appropriate local board of review, but the board of review also denied petitioner's request. Petitioner appealed that decision in the Michigan Tax Tribunal (the MTT). Respondent moved for summary disposition, arguing that the residence did not meet the statutory definition of "parsonage" under MCL 211.7s because Crawford did not minister to a specific congregation. Petitioner responded that Crawford was not required to minister to a specific congregation for the residence to qualify as a parsonage. The MTT, Steven M. Bieda, J., agreed with petitioner and granted it summary disposition, concluding that the residence qualified as a parsonage. Respondent appealed.

The Court of Appeals *held*:

MCL 211.7s provides that houses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and any parsonage owned by a religious society of this state and occupied as a parsonage are exempt from taxation under the General Property Tax Act, MCL 211.1 *et seq*. MCL 211.7s further provides that houses of public worship include buildings or other facilities owned by a religious society and used predominantly for religious services or for teaching the religious truths and beliefs of the society. The language of MCL 211.7s has remained essentially unchanged since its original enactment in 1893. Three cases have addressed and defined the term

"parsonage"—*St Joseph's Church v Detroit*, 189 Mich 408 (1915), *St Mathew Lutheran Church v Delhi Twp*, 76 Mich App 597 (1977), and *St John's Evangelical Lutheran Church v Bay City*, 114 Mich App 616 (1982). Only *St Joseph's*, which was decided by the Supreme Court, retains its precedential authority; the other two Court of Appeals cases were decided before 1990 and therefore are persuasive authority. *St Joseph's* defined "parsonage" as the residence of a parson; it did not hold that the resident of a parsonage must minister to a particular congregation. *St Mathew* held that ordination was the key to whether an individual qualified as a minister; however, that opinion did not shed much light on how the Court determined that fact. *St John's* concluded that the parsonage exemption applies to a residence of the pastor or their assistants who are ordained teaching ministers for a particular congregation, and it was the "for a particular congregation" language on which respondent relied for its argument that the residence was not exempt. However, the origin of the "for a particular congregation" language was unclear, and *St John's* did not expressly tie it to any of the various definitions of "parsonage" it cited. A more reasonable reading of the "for a particular congregation" language refers not to the definition of parsonage but rather to the requirement that the residence be used as a parsonage. In the context of *St John's*, which involved a local minister of a local church, a residence could only be used as a parsonage if it was associated with "a particular congregation," given that there was no indication that a supervisory church hierarchy existed, as in the present case. Thus, given the facts of *St John's*, a residence could be a "parsonage" only if it was supplied to a "minister" associated with a particular church or congregation because there was no other manner in which a residence could be used as a parsonage. Crawford's residence, by contrast, could be used as a parsonage because it was a church-owned property occupied by an ordained minister serving church functions but whose ministerial duties involved administrative functions for numerous congregations. In this case, there was no question that Crawford was a fully ordained minister. It was further undisputed that the residence was owned by petitioner, a religious society; that the residence was occupied by a parson, Crawford; and that the residence was used as a parsonage because Crawford was an actively practicing minister of the religious society. Accordingly, the residence fully satisfied the requirements for exemption under the plain language of MCL 211.7s. The MTT correctly applied the definition of "parsonage" and committed no error of law; therefore, summary disposition in favor of petitioner was proper.

Affirmed.

SWARTZLE, P.J., concurring, fully concurred in the majority's opinion but wrote separately to address the directive that courts must give respectful consideration to an agency's statutory interpretation and the related directive that courts should not deviate from that interpretation without cogent reasons for doing so. Judge SWARTZLE stated that there is no good jurisprudential reason for singling out the agency's interpretation as being deserving of respectful consideration or for approval absent cogent reasons favoring an alternative interpretation. He further stated that the directives add nothing in substance to what courts should do in every case involving statutory interpretation—give respectful consideration to the interpretations offered and select an interpretation supported by the most cogent reasons.

TAXATION — GENERAL PROPERTY TAX ACT — PARSONAGE EXEMPTION — WORDS AND PHRASES — "PARSONAGE."

MCL 211.7s provides that houses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and any parsonage owned by a religious society of this state and occupied as a parsonage are exempt from taxation under the General Property Tax Act, MCL 211.1 *et seq*.; MCL 211.7s further provides that houses of public worship include buildings or other facilities owned by a religious society and used predominantly for religious services or for teaching the religious truths and beliefs of the society; MCL 211.7s has no requirement that in order for a residence to constitute a "parsonage," its resident must be a pastor who ministers to a particular congregation; so long as the resident is a minister who is not retired or otherwise unconnected to church functions, such a home is used as a parsonage and therefore qualifies for the exemption.

Lennon, Miller, O'Connor & Bartosiewicz (by *Andrew J. Vorbrich* and *Christopher D. Morris*) for the West Michigan Annual Conference of the United Methodist Church.

Toby Koenig and *Jason C. Grinnell*, Assistant City Attorneys, for the city of Grand Rapids.

Before: SWARTZLE, P.J., and MARKEY and TUKEL, JJ.

TUKEL, J. Since 1893, the General Property Tax Act has generally excluded a "parsonage" from being subject to the property tax. In this case, respondent, the city of

Grand Rapids, argues that a home owned by petitioner and lived in by Reverend Doctor Margie Crawford, an ordained minister who does not have a designated congregation but who occupies an administrative role overseeing multiple congregations for petitioner, does not meet the statutory definition of "parsonage." The Michigan Tax Tribunal (the MTT) disagreed, upholding the exemption. Respondent thus appeals as of right the MTT's order which denied respondent's motion for summary disposition under MCR 2.116(C)(10) and which granted summary disposition under MCR 2.116(I)(2) to petitioner, the West Michigan Annual Conference of the United Methodist Church.

In essence, the dispute boils down to which of two possible interpretations of the term "parsonage" is correct: does that term require that (1) property be owned by a religious society and occupied by an ordained minister who serves a particular congregation; or (2) does property owned by a religious society and occupied by an ordained minister who does not serve a particular congregation, but who otherwise works as a minister on behalf of the religious society also qualify. Respondent argues for the first option, while petitioner argues that the second, more expansive, possibility applies. We agree with petitioner that given the undisputed facts of this case and the legal definition of parsonage, the house qualifies for the tax exemption. We therefore find no legal error in the MTT's grant of summary disposition to petitioner, and we affirm its order.

I. UNDERLYING FACTS

The basic facts of this case are straightforward and agreed to by the parties. Rev. Dr. Crawford is an ordained minister who works for petitioner in an admin-

istrative capacity in the church hierarchy. Rev. Dr. Crawford does not serve any specific congregation but instead occupies an administrative role as the District Superintendent overseeing petitioner's Midwest District, which encompasses 91 individual churches. In her role as District Superintendent, Rev. Dr. Crawford "oversee[s] the total ministry of the clergy and of the churches in the communities of the District." As part of this function, Rev. Dr. Crawford gives at least one guest sermon per year at each of the churches in her district; she also provides pastoral care "to anyone with a physical or mental ailment within [her] District" and could be "called upon to serve as Chaplain, if needed."

Rev. Dr. Crawford lives in a residential house owned by petitioner and located in Grand Rapids (the residence). Petitioner applied for tax exemption for the residence for tax year 2019, but respondent denied petitioner's application and assessed the residence as having a taxable value of $98,200. Petitioner then made the same request for tax exemption "before the appropriate local Board of Review," but the Board of Review also denied petitioner's request. Petitioner then appealed that decision to the MTT.

Respondent eventually moved for summary disposition and argued that the residence did not qualify as a "parsonage" under MCL 211.7s because Rev. Dr. Crawford does not minister to a specific congregation.[1] Petitioner responded that Rev. Dr. Crawford was not re-

[1] MCL 211.7s provides:

> Houses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and any parsonage owned by a religious society of this state and occupied as a parsonage are exempt from taxation under this act. Houses of public worship includes buildings or other facilities owned by a religious society and used predominantly for religious services or for teaching the religious truths and beliefs of the society.

quired to minister to a specific congregation for the residence to qualify as a parsonage. The MTT agreed with petitioner and granted it summary disposition, concluding that the residence qualifies as a parsonage. This appeal followed.

II. STANDARD OF REVIEW

Unless there is fraud, this Court's review of MTT "decisions is limited to determining whether the MTT erred in applying the law or adopted a wrong legal principle." *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 627; 752 NW2d 479 (2008). If this Court's "review requires the interpretation and application of a statute, that review is de novo." *Power v Dep't of Treasury*, 301 Mich App 226, 230; 835 NW2d 622 (2013). "Though this Court will generally 'defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer,' that deference will not extend to cases in which the tribunal makes a legal error. Thus, agency interpretations are entitled to 'respectful consideration' but cannot control in the face of contradictory statutory text." *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017) (citations omitted).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a complaint and is reviewed de novo. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 205-206; 815 NW2d 412 (2012). This Court reviews 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." *Patrick v Turkelson*, 322 Mich App 595, 605; 913 NW2d 369 (2018) (quotation marks and citation omitted). Summary disposition "is appropriate . . . if there is no genu-

ine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. (quotation marks and citation omitted). "There is a genuine issue of material fact when reasonable minds could differ on an issue after viewing the record in the light most favorable to the nonmoving party." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). "Only the substantively admissible evidence actually proffered may be considered." *1300 Lafayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009) (quotation marks and citation omitted).

Finally, "[s]ummary disposition is properly granted to the opposing party [under MCR 2.116(I)(2)] if it appears to the court that that party, rather than the moving party, is entitled to judgment." *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). "Additionally, statutory interpretation is a question of law subject to review de novo." *Mich Milk Producers Ass'n v Dep't of Treasury*, 242 Mich App 486, 491; 618 NW2d 917 (2000).

III. ANALYSIS

The MTT correctly applied the general definition of "parsonage"—that is, the home of a parson—as well as the remainder of the statutory language of the exemption.[2] Contrary to respondent's argument, the statute has no requirement that in order for a resi-

[2] Throughout this opinion, we use the terms "church" and "religious society" interchangeably, because although the statutory term is "religious society," the particular society at issue here is a church. Our holding, of course, applies to any religious society of any faith, regardless of the nomenclature it uses to describe itself. The same goes for our use of the terms "minister" or "pastor"; although many religious societies or faiths use different words—and the statute applies equally to each of them—"minister" is the term used by the religious society involved in this case.

dence to constitute a "parsonage," its resident must be a pastor who ministers to a particular congregation. The statute does require, though, that the residence be used as a parsonage. Therefore, so long as the resident is a minister who is not retired or otherwise unconnected to church functions, such a home is used as a parsonage and therefore qualifies for the exemption.

A. LEGISLATIVE ACQUIESCENCE

As an initial matter, petitioner argues that because the Legislature has not overruled or modified *St Joseph's Church v Detroit*, 189 Mich 408; 155 NW 588 (1915), the rule set down in that case is settled and we cannot modify it by virtue of a doctrine known as "legislative acquiescence." That argument is not viable, however, because "it has been the rule in Michigan since at least *Donajkowski v Alpena Power Co*, 460 Mich 243, 261; 596 NW2d 574 (1999), that the doctrine of legislative acquiescence is not recognized in this state." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 209 n 8; 731 NW2d 41 (2007). Indeed, "the legislative acquiescence doctrine is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its words, not from its silence." *Id*. (quotation marks and citation omitted). Thus, the doctrine of legislative acquiescence has no force in this state, and we instead rely on normal principles of statutory interpretation to determine the meaning of "parsonage" as used in MCL 211.7s.[3]

[3] Although petitioner is incorrect about the doctrine of legislative acquiescence, it is correct that we are nevertheless bound by *St Joseph's*. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016), discussed later in this opinion.

B. THE PARSONAGE EXCEPTION

The parties agree that petitioner is a religious society and that it owns the residence. They further agree that Rev. Dr. Crawford is an ordained minister; that she lives in the residence; and that, in her role as District Superintendent, she does not minister to a particular congregation. The purely legal issue before us is whether an ordained pastor must minister to a particular congregation for his or her residence to qualify as a parsonage. As such, this case presents a question of statutory interpretation regarding the definition of a "parsonage" within the meaning of MCL 211.7s, which we review de novo.

1. RULES OF CONSTRUCTION

This Court and the Michigan Supreme Court have described the rules of statutory construction as follows:

> "The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." [*PNC Nat'l Bank Ass'n v Dep't of Treasury*, 285 Mich App 504, 506; 778 NW2d 282 (2009), quoting *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001).]

"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); MCL 8.3a. Nevertheless, "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. As our Supreme Court has noted on numerous occasions in interpreting statutes, "[i]f the language is plain and unambiguous, then judicial construction is neither necessary nor permitted." *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). See also *McCormick v Carrier*, 487 Mich 180, 195; 795 NW2d 517 (2010); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). Finally, "[t]he provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments." MCL 8.3u.

In addition, "[a] property tax exemption is in derogation of the principle that all property shall bear a proportionate share of the tax burden and, consequently, a tax exemption will be strictly construed." *Retirement Homes of Detroit Annual Conference of United Methodist Church, Inc v Sylvan Twp*, 416 Mich 340, 348; 330 NW2d 682 (1982). The rule that tax exemptions are to be strictly construed in favor of the taxing authority is applied "[i]n general." *Mich United Conservation Clubs v Lansing Twp*, 423 Mich 661, 664; 378 NW2d 737 (1985). "However, this rule does not mean that we should give a strained construction which is adverse to the Legislature's intent." *Id*. at 665, cited by *TruGreen Ltd Partnership v Dep't of Treasury*, 332 Mich App 73, 110; 955 NW2d 529 (2020) (SWARTZLE, J., dissenting). Indeed, "because the canon requiring strict construction of tax exemptions does not help reveal the semantic content of a statute, it is a canon of last resort." *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 343; 952 NW2d 384 (2020). Furthermore, as regards both of the cited rules of the

construction of tax law, deference to the MTT and narrow construction of tax exemptions, it is important to bear in mind that they each are just those—rules of construction. As we have noted, when statutory language is clear and unambiguous, judicial construction is neither necessary nor permitted.

2. STATUTORY HISTORY

The tax exemption in MCL 211.7s originally was enacted by 1893 PA 206 and was most recently amended by 1980 PA 142. The language of the statute relevant to this case has remained essentially unchanged since its original enactment in 1893.[4] Today, MCL 211.7s provides:

> Houses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and any parsonage owned by a religious society of this state and occupied as a parsonage are exempt from taxation under this act. Houses of public worship includes buildings or other facilities owned by a religious society and used predominantly for religious services or for teaching the religious truths and beliefs of the society.

Thus, as an initial matter, the relevant statutory language—"any parsonage owned by a religious society of this state and occupied as a parsonage"—is unchanged from the original act, except that the more archaic language of "and occupied as such" has been updated to "occupied as a parsonage," along with some minor punctuation changes and the change from

[4] As originally enacted, the statute exempted the following from all taxation under the act:

> All houses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and also any parsonage owned by any religious society of this State and occupied as such. [1893 PA 206, § 7.]

"owned by *any* religious society of this State" to "owned by *a* religious society." (Emphasis added.)[5]

3. THE CASELAW

a. MICHIGAN SUPREME COURT

Despite Michigan's long history of a statutory parsonage exemption from property taxes, few cases have

[5] To the extent we consider the common understanding of a word or phrase at the time it was adopted by the Legislature, which we discuss later in this opinion, it is the original 1893 enactment which is controlling because, despite more than 30 reenactments, the language of the parsonage exemption has remained substantively unchanged throughout those years. See MCL 8.3u ("The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments."). For purposes of this case, the relevant statutory language from the 1893 act was "any parsonage owned by any religious society of this State and occupied as such." As noted, none of the more than 30 acts addressing the parsonage exception altered that language in any material way.

Indeed, 1901 PA 44 made no changes; 1909 PA 309 merely deleted the comma after "houses of public worship"; 1911 PA 174 and 1919 PA 331 made no changes from the previous versions; and 1925 PA 55 reinserted the comma after "houses of public worship" and ceased capitalizing the word "State." Those changes did not affect the substance of the act.

A whole series of amendments then made no change whatsoever to the previous versions of the exemption. See 1927 PA 118; 1931 PA 42; 1933 PA 243; 1939 PA 232; 1941 PA 125; 1942 (2d Ex Sess) PA 8; 1943 PA 131; 1945 PA 76; 1946 (Ex Sess) PA 24; 1949 PA 24; 1949 PA 55; 1951 PA 169; 1952 PA 54; 1955 PA 46; 1958 PA 190; 1960 PA 155; 1961 PA 238; 1963 PA 148; 1966 PA 320; 1968 PA 342; 1971 PA 109; 1971 PA 189; 1974 PA 358; and 1976 PA 135. The 1931 and 1963 acts changed the catchlines of the exemption but made no other changes. Because "[t]he catch line heading of any section of the statutes that follows the act section number shall in no way be deemed to be a part of the section or the statute, or be used to construe the section more broadly or narrowly than the text of the section would indicate, but shall be deemed to be inserted for purposes of convenience to persons using publications of the statutes," MCL 8.4b, those two changes did not alter the exemption in any substantive way.

actually addressed it or had occasion to define a "parsonage." Indeed, the parties have identified only

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In 1976, the Legislature added a second sentence to the exemption, which defined the term "houses of public worship" as including "buildings or other facilities owned by a religious society and used exclusively for religious services or for teaching the religious truths and beliefs of the society," but left intact the existing relevant statutory language "any parsonage owned by any religious society of this state and occupied as such." 1976 PA 432. In 1978, the Legislature changed the beginning of the statute from "All houses of public worship" to "Houses of public worship," 1978 PA 54, which worked no change in meaning. The Legislature also made a minor change regarding parsonages, changing the phrase "and also any parsonage owned by *any* religious society" to "and any parsonage owned by *a* religious society." *Id*. (emphasis added). "A" and "any" have the same meaning as used in the amendment, so 1978 PA 54 was simply a reenactment of the previous version. See *Allstate Ins Co v Freeman*, 432 Mich 656, 698; 443 NW2d 734 (1989) (stating that " '[a]' or 'an' is an indefinite article often used in the sense of 'any' ") (quotation marks and citation omitted).

Finally, the present version of the exemption was enacted in 1980. The 1980 amendment, 1980 PA 142, made no material amendments to the exemption at issue here, simply using more modern language and word order, including "occupied as a parsonage" in place of a parsonage "occupied as such." MCL 211.7s now provides, "Houses of public worship, with the land on which they stand, the furniture therein and all rights in the pews, and any parsonage owned by a religious society of this state and occupied as a parsonage are exempt from taxation under this act." The 1980 act made a substantive change which does not affect this case: it changed the definition of "houses of public worship" from including "buildings or other facilities owned by a religious society and used *exclusively* for religious services or for teaching the religious truths and beliefs of the society" to "buildings or other facilities owned by a religious society and used *predominantly* for religious services or for teaching the religious truths and beliefs of the society." *Id*. (emphasis added).

Thus, although the parsonage exemption has been "re-enacted, amended or revised" on numerous occasions, MCL 8.3u, its provisions "are the same as those of prior laws" and thus "shall be construed as a continuation of such laws and not as new enactments." In other words, to the extent the Legislature's understanding of a word or phrase is at issue, we look to the original 1893 act to determine that understanding, as all the subsequent amendments have simply been reenactments and thus continuations of the 1893 legislation. See *id*.; *People v Bolling*, 140 Mich App 606, 611-612; 364 NW2d 759 (1985) (construing the word "timber" as

three cases, *St Joseph's Church v Detroit*, 189 Mich 408; 155 NW 588 (1915); *St Mathew Lutheran Church v Delhi Twp*, 76 Mich App 597; 257 NW2d 183 (1977); and *St John's Evangelical Lutheran Church v Bay City*, 114 Mich App 616; 319 NW2d 378 (1982),[6] that they believe address the issue; our review of the relevant caselaw has not discovered any additional cases.[7] *St Mathew* and *St John's* were each decided by this Court before November 1, 1990, and therefore are, at most, persuasive authority. See *In re Stillwell Trust*, 299 Mich App 289, 299 n 1; 829 NW2d 353 (2012) ("Although cases decided before November 1, 1990, are not binding precedent, MCR 7.215(J)(1), they nevertheless can be considered persuasive authority.") (citation omitted). *St Joseph's*, however, was decided by our Supreme Court, and although it was decided more than 100 years ago, it retains its precedential authority. See *Associated Builders & Contractors v Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016) ("The Court of Appeals is bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded and is not authorized to anticipatorily ignore our decisions where it determines

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it was understood by the Legislature in 1867, when the statute at issue was enacted).

[6] Given the similarity of the names of the churches in the three leading cases, we will sometimes include the name of the respondent, which might aid the reader in distinguishing the cases.

[7] *Congregation B'nai Jacob v Oak Park*, 102 Mich App 724; 302 NW2d 296 (1981), addressed a situation in which the religious society had multiple clergy, owned multiple homes, and each of the clergy resided in one of the homes. The legal question thus was whether each of the homes qualified for the tax exemption under the statute, such "that a given congregation may have multiple tax exempt parsonages." *Id*. at 728. We held "that such multiple exemptions are within the scope of the statute." *Id*. That question is not presented in this case, although we discuss *Congregation B'nai Jacob* later in this opinion.

that the foundations of a Supreme Court decision have been undermined.") (emphasis omitted). Consequently, to construe how earlier cases have defined "parsonage," we first address *St Joseph's* before turning to *St Mathew* and *St John's*.

In *St Joseph's*, our Supreme Court addressed whether the parsonage exception applied to a residence while it was under construction, before the minister moved into it. *St Joseph's*, 189 Mich at 410-412. To answer that question, the *St Joseph's* Court examined the 1911 version of the parsonage exception, 1911 PA 174, which provided that the following was exempt from taxation:

> All houses of public worship with the land on which they stand, the furniture therein and all rights in the pews, and also any parsonage owned by any religious society of this State and occupied as such. [1911 PA 174; *St Joseph's*, 189 Mich at 413.][8]

Immediately after quoting the statutory language, the *St Joseph's* Court held:

> A parsonage may be defined as a house in which a minister of the gospel resides. In its ecclesiastical sense the word was 'glebe (or land) and house' belonging to a parish appropriated to the maintenance of the incumbent, or settled pastor of a church; but its modern general signification is in the sense of its being the residence of a parson, and it may be with land or without it. [*St Joseph's*, 189 Mich at 413.]

The reference to the ecclesiastical definition is merely a historical aside; the Court was obligated to apply the

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[8] The 1911 version of the act was the same as the original 1893 version, except for the deletion of a single comma, which did not affect the meaning. See note 5 of this opinion. The 1911 version thus was a reenactment of the 1893 version, and so for all practical purposes it was the original 1893 version which our Supreme Court construed in *St Joseph's*.

same statutorily mandated rule of construction which exists to the present day, encompassing the common understanding of a word.[9] It is the "modern general signification" which constitutes a word's "common and approved understanding," not its ecclesiastical definition. In *St Joseph's*, our Supreme Court ruled that the house was not a parsonage because the minister did not yet live in it. *Id*. at 413-415. The Court held that under the statute, a "parsonage must first be occupied as a parsonage, before it can be held to be exempt from taxation. In other words, it is an essential requirement of the statute that the parsonage must be occupied as such before it can be legally exempted from taxation." *Id*. at 413. Once the property was occupied, the city, "finding that a parsonage had been built, and was at that time occupied, exempted the property from further taxation." *Id*. at 411 (quotation marks and citation omitted).

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[9] See 1893 CL 50(l), which provided:

> 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.

See also current MCL 8.3a. The current versions of MCL 8.3 to MCL 8.3w were unchanged from their enactment in 1846 until 1959. See Green, *The Revised Statutes of the State of Michigan, Passed and Approved May 18, 1846* (Detroit: Bagg & Harmon, 1846), pp 35-36; 1915 CL § 3(1). In 1959, without changing any of the text, the various subsections were changed from numbered paragraphs in MCL 8.3 to the various lettered subsections in the current version "to stand as sections 3a to 3w." See 1959 PA 189. That change was merely of the form of numbering. Thus, we are obliged to apply the same rules of construction as our Supreme Court applied in 1915. See current MCL 8.3u ("The provisions of any law or statute which is re-enacted, amended or revised, so far as they are the same as those of prior laws, shall be construed as a continuation of such laws and not as new enactments.").

Thus, the common understanding or "general signification" of the meaning of "parsonage" was simply "the residence of a parson," whether "with land or without it." *Id*. at 413. For the same reason, that aspect of the definition was not obiter dicta, as petitioner argues, because it was the controlling, common definition when enacted and was relied on by the Legislature.

In applying the commonly understood meaning of "parsonage," *St Joseph's* did not hold or even advert that the resident of a parsonage must minister to a particular congregation, although it was clear in that case that "the rector" did so. *Id*. at 411. We are, of course, bound by *St Joseph's*, but its scope is not clear. One could read *St Joseph's* as foreclosing an argument that a pastor must minister to a particular congregation for a church-supplied residence in which the minister resides to constitute a parsonage, as it defined a parsonage simply as the residence of a pastor; or one could view *St Joseph's* as holding that because the case did not present that issue, the Court simply did not address it and it remains an open question today. In conducting its analysis, *St Joseph's* did not use a dictionary to determine the "common or approved understanding" of "parsonage," nor was it required to do so. See *Hecht v Nat'l Heritage Academies, Inc*, 499 Mich 586, 621 n 62; 886 NW2d 135 (2016) ("A lay dictionary may be consulted to define a common word or phrase that lacks a unique legal meaning.") (quotation marks and citation omitted). Nevertheless, *St Joseph's* did cite a legal encyclopedia. It seems that *St Joseph's* implicitly relied on 1893 as the controlling date, as its statement of the "modern general signification" came directly from the 1891 case it cited, *In re Wells' Estate*, 63 Vt 116; 21 A 270 (1891). See *St Joseph's*, 189 Mich at 413. And in any event, an 1893 dictionary would have given the same definition. See *Sebring v Berkley*, 247 Mich App 666, 678-679; 637

NW2d 552 (2001) (explaining that because the meaning of a word or the primary accepted definition can change over time, courts often look to dictionary definitions in use at the time a statute was enacted); see also *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236, 247; 697 NW2d 130 (2005) (showing that the statute was amended many times over nearly 100 years without changing the word "loss" and stating that "[b]ecause the statute itself does not define 'loss,' " the Court "must ascertain the original meaning the word 'loss' had when the statute was enacted in 1912"). As of 1893, the dictionary definition of "parsonage" was the same as that used by *St Joseph's* for the "modern general signification," viz., "[t]he house and glebe belonging to a parish or ecclesiastical society, and appropriated for the use of the minister of a church." *A Dictionary of the English Language* (1893). The 1915 dictionary definition, the year *St Joseph's* was decided, was no different. See *The Student's Practical Dictionary* (1915) (defining "parsonage" as "[t]he house of the minister of a parish"). Furthermore, in 1893 and 1915, "parson" was defined as "[a] clergyman." *A Dictionary of the English Language* (1893); *The Student's Practical Dictionary* (1915).

Thus, under *St Joseph's*, the resident of a parsonage is not required to minister to a particular parish. See *St Joseph's*, 189 Mich at 413. Rather, a parsonage is merely the residence of a parson. See *id*.[10]

b. MICHIGAN COURT OF APPEALS CASES

We now turn to the more recent cases. In *St Mathew*, this Court considered whether properties lived in by

[10] In addition, an alternative dictionary definition of "parish" in 1893 was "[t]he precinct or territorial jurisdiction of a secular priest or ecclesiastical society, or the precinct, the inhabitants of which belong to the same church" or "[a]ny religious or ecclesiastical society"; "ecclesi-

church employees, who were a school instructor and a youth minister, qualified as parsonages. *St Mathew*, 76 Mich App at 598-599. The *St Mathew* Court quoted the *St Joseph's* Court's definition of parsonage and held that "the [parsonage] exemption applies to any church owned house occupied by a minister ordained in that church." *Id*. at 599. Referring to the school instructor and youth minister, because "[n]either is ordained and they are referred to as lay ministers," *id*. at 598, the Court held that the exemption did not apply; rather, the school instructor and youth minister were simply "church employees," *id*. at 599, with no ministerial function. A dissent would have found that the lay ministers were ministers; the dissenting judge stated that the residences were "occupied by 'ministers of the gospel' " and that "I find no requirement that the ministers be formally ordained." *Id*. at 600 (WALSH, P.J., dissenting). Thus, *St Mathew* is clear that, as a legal matter, ordination is the key to whether or not an individual qualifies as a minister; however, the opinion

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astical" was defined as "[p]ertaining to the church or to its organization or government"; and "church" was defined as "[a] building set apart for Christian worship," "[a] formally organized body of Christian believers worshipping together," "[a] body of Christian believers, observing the same rights and acknowledging the same ecclesiastical authority," "[t]he collective body of Christians," or "[e]cclesiastical influence, authority, &c." *A Dictionary of the English Language* (1893).

Based on these definitions, over the last approximately 130 years, the common understanding of "parsonage" plainly has not required that a pastor minister to one particular congregation. Rather, "parsonage" merely referred to a property belonging to a religious society and housing a minister of a church. That definition has not changed to the present; in 1980, when the present statute was amended, *The Random House College Dictionary* (1980) defined "parsonage" as "the residence of a parson or clergyman, as provided by the parish or church," and defined "church" as "organized religion as a political or social factor" and as "a Christian denomination." We provide the 1915 and 1980 definitions only out of historical interest; the 1893 common understanding of parsonage is controlling. See note 5 of this opinion.

does not shed much light on how the Court determined that fact, and the resolution of that factual question divided the Court.

Finally, in *St John's*, 114 Mich App at 617, the principal case relied on by respondent, this Court addressed the question of whether the church-owned residence of a "teaching minister" who was the superintendent of the church-run school qualified as a parsonage. The Court, relying on the tenets of the Wisconsin Evangelical Lutheran Synod, which was the religious society of which the petitioner was part, drew a distinction between a "teaching minister" and a "preaching minister" who carried out the more traditional pulpit-minister functions. *Id*. at 618-619, 621. In contrasting teaching ministers and preaching ministers, the Court noted that "[t]he church views them equally as ministers of the gospel," *id*. at 619, and that among other qualifications and duties, the teaching ministers received theological training and were theologically equipped to perform marriages, *id*. at 621-622. *St John's* then quoted the definitions of "parsonage" from *St Joseph's* and *St Mathew* before turning to a contemporary dictionary, concluding that "the parsonage exemption applies to a residence of the pastor or his assistants who are ordained teaching ministers for a particular congregation," *id*. at 624-625, then adding that it "agrees with the definition in *St Matthew* [sic]," *id*. at 625. It is that language regarding "for a particular congregation" on which respondent relies for its argument that the residence is not exempt.

The holdings of *St Joseph's*, *St Mathew*, and *St John's* are consistent and straightforward: a parsonage is the home of a minister, and a minster is someone who is "ordained in that church," *St Mathew*, 76 Mich App at 599, or, to use the statutory language, ordained

in a "religious society," MCL 211.7s. Ordination thus is defined by the doctrine or rules of the particular religious society at issue. For example, in regards to teaching ministers, if the religious society "views them equally as ministers of the gospel," *St John's*, 114 Mich App at 619, then they are ministers for purposes of the exemption, see *id*. at 621 (determining ordination by reference to "church canon and rules of theology of the Lutheran Church," which are "mandated from the headquarters of the church and [are] not a matter of local discretion," and stating that "[t]eaching ministers are installed or ordained"). By contrast, when an individual is not ordained, he or she is not a minister and the residence therefore is not a parsonage. *St Mathew*, 76 Mich App at 599.

Respondent argues that in passing on the eligibility of the teaching ministers for the tax exemption, *St John's* imposed a requirement that a purported pastor minister to a particular congregation. The origin of the "for a particular congregation" language is unclear; *St John's* did not expressly tie it to any of the various definitions of "parsonage" it cited, although the Court noted that the word parsonage "has a local connotation, associating the clergyman and a particular church or congregation." *St John's*, 114 Mich App at 623. It is difficult to read that sentence as holding that a residence is a parsonage *only if* the minister who lives in it ministers to a particular congregation; it follows immediately after the sentence which reads, "Different dictionaries define a 'parson' as 'any clergyman' or as 'the clergyman of a parish or congregation,' and a 'parsonage' as a clergyman's dwelling, especially a free official residence provided for a parson or pastor or minister by his congregation." *Id*. The term "any clergyman" is more expansive than the definition for which respondent argues, as is "a clergyman's dwell-

ing," and neither encompasses a limitation regarding a particular congregation. And a more reasonable reading of the "for a particular congregation" language, if it were, in fact, intended as a limitation, refers not to the definition of parsonage but rather to the requirement that the residence be used as a parsonage, MCL 211.7s. In the context of *St John's*, which involved a local minister of a local church, a residence could only be used as a parsonage if it was associated with "a particular congregation," as there is no indication that there was a supervisory church hierarchy, as in the present case. Thus, given the facts of *St John's*, a residence could be a "parsonage" only if it was supplied to a "minister" associated with a particular church or congregation, as there was no other manner, factually, in which a residence could be used as a parsonage. Rev. Dr. Crawford's residence, by contrast, clearly can be used as a parsonage as it is a church-owned property occupied by an ordained minister serving church functions but whose ministerial duties involve administrative functions for numerous congregations.

Moreover, we note that previous decisions of this Court have gone beyond the strict limitation in the definition which respondent suggests. For example, the definition on which respondent relies defines "parson" as "*the* clergyman of a parish or congregation," *St John's*, 114 Mich App at 623 (emphasis added), which, if read strictly, would mean that each congregation could have only one parson and thus only one parsonage. Rather than adopt such a strict meaning, however, this Court has read the statute as permitting multiple ministers (or, more precisely in the context of the pertinent case, multiple rabbis) whose residences all qualified as parsonages. See *Congregation B'nai Jacob v Oak Park*, 102 Mich App 724, 728; 302 NW2d 296 (1981). *St John's* noted the holding in *Congregation*

B'nai Jacob, see *St John's*, 114 Mich App at 624, stating that "the Court put great emphasis on the fact that the rabbis involved therein were each equally responsible for the religious needs of the congregation," *id*. In other words, *St John's* recognized that the "general signification" of definitions depends to some extent on the context. Thus, "the minister" can refer to multiple clergy members when the facts establish that there are multiple clergy members living in multiple residences owned by a religious society. Similarly, any general understanding that the term "parsonage" is limited to the residence used by a pastor to a particular congregation must give way when, as in this case, the pastor is part of a hierarchy and ministers to a number of churches.[11] In fact, *St John's* acknowledged some definitions of "minister" which seem to anticipate just that situation, noting that "[b]oth parson and pastor connote a minister, or rector, having charge of a local church or parish *or body of churches*." *St John's*, 114 Mich App at 624 (emphasis added; quotation marks and citation omitted). Rev. Dr. Crawford undisputedly has charge of a body of churches.

Finally, we note that it is not at all clear what the "for a particular congregation" language adds to the definition of parsonage. The holding of *St John's* would have been the same had the Court said, "Based on the foregoing, the Court holds that the parsonage exemp-

[11] It is important to note that in discussing the definitions of "minister" and "parsonage" and their various meanings depending on the context, we are not construing actual statutory language, which must be strictly applied, but rather the general or common understanding of words which the Legislature left undefined. The common or general understanding of a word can have more than one definition. See Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 418 ("Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense.").

tion applies to a residence of the pastor or his assistants who are ordained teaching ministers for a particular congregation," as it did, *id*. at 624-625, or if it had said, "Based on the foregoing, the Court holds that the parsonage exemption applies to a residence of the pastor or his assistants who are ordained teaching ministers" and not added the words "for a particular congregation." Even without the additional words, the statement would have been factually correct and would not have changed the holding that the exemption applied. Indeed, the issue of whether the school superintendent was associated with "a particular congregation" was not an issue at all in *St John's*; rather, the only question was whether he was ordained as a minister.

4. APPLICATION TO THIS CASE

What we are left with, then, are the consistent holdings of the three cases and the plain language of the statute. The core definition of "parsonage" derives from *St Joseph's*: a residence owned by a religious society, which is occupied by a minister ordained under the rules of that society. *St John's* and *St Mathew* each turned on the definition of ordination and fleshed out its meaning. The "for a particular congregation" language from *St John's* is not part of that case's definition of ordination; *St John's* also noted other definitions, including one which plainly did not encompass the limitation respondent seeks. *St John's* express agreement with *St Mathew*'s definition of parsonage, which contains no limitation regarding a particular congregation, makes it quite apparent that *St John's* did not impose such a limitation. Moreover, the statute refers to a "religious society," which is broader than the minister of a particular local church or parish; its plain

meaning encompasses a minister who is part of the church hierarchy. We find no basis for reading the limitation respondent advocates into the statute. The statute, however, does impose the additional requirement that a residence be used as a parsonage to qualify for the exemption. MCL 211.7s.

Here, of course, there is no question that Dr. Rev. Crawford is a fully ordained minister in the West Michigan Annual Conference of the United Methodist Church, a religious society. The residence undisputedly is owned by petitioner, a religious society; it is the residence of a parson, Dr. Rev. Crawford; and it is used as a parsonage because Dr. Rev. Crawford is an actively practicing minister of the religious society. The residence thus fully satisfies the requirements for exemption under the plain language of the tax statute, and no further construction is permitted. See Part III(B)(1) of this opinion.[12] Respondent's attempt to tease a local limitation out of the terms "minister"—or "parson"—and "parsonage" is simply contrary to the common meaning of those words and the statute. We thus have no occasion to consider two rules of construction regarding tax law: (1) that "[a] property tax exemption is in derogation of the principle that all property shall bear a proportionate share of the tax burden and, consequently, a tax exemption will be strictly construed," *Retirement Homes*, 416 Mich at 348; *Mich United Conservation Clubs*, 423 Mich at 664-665 (same), and (2) that we "generally defer to the Tax Tribunal's interpretation of a statute that it is charged with administering and enforcing," *Twentieth*

[12] The result would be different if, for example, Dr. Rev. Crawford were retired. That is because, if the minister living in a church-owned house is retired, then it is not used as a parsonage because its resident no longer has a connection to any church function.

Century Fox Home Entertainment, Inc v Dep't of Treasury, 270 Mich App 539, 541; 716 NW2d 598 (2006) (quotation marks and citation omitted).

IV. CONCLUSION

The MTT correctly applied the definition of "parsonage" based on that word's common understanding, that is, the home of a parson, as well as the remainder of the statutory language of the tax exemption. The facts of this case are undisputed, and thus our review is limited solely to that legal conclusion; for the reasons stated, the MTT committed no error of law. Contrary to respondent's argument, the statute has no requirement that in order for a residence to constitute a "parsonage," its resident be a pastor who ministers to a particular congregation. The statute does require, though, that the residence be used as a parsonage. In this case, those statutory requirements are met.

The MTT's order granting summary disposition to petitioner is affirmed. Petitioner, as the prevailing party, may tax costs pursuant to MCR 7.219.

MARKEY, J., concurred with TUKEL, J.

SWARTZLE, P.J. (*concurring*). I fully concur in the majority's well-reasoned opinion. I write separately to address an issue that is cited by the majority, though not outcome-determinative in this case—the oft-stated directive that courts must give "respectful consideration" to an agency's statutory interpretation and the related directive that we should not deviate from that interpretation without "cogent reasons" for doing so. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

I will admit to a certain confusion regarding the "respectful consideration" directive aimed specifically at agency interpretations. As our Supreme Court explained in *In re Complaint of Rovas*, this directive is *not* one of deference to the agency's interpretation of statute. *Id*. at 107-108. For sound reasons, our Supreme Court has expressly rejected anything approaching *Chevron* deference in Michigan courts. *Id*. at 111 (discussing *Chevron, USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984)).

Rather, our courts review questions of statutory construction under a de novo standard, whether the particular case before us originated in a circuit court or an agency. Under this standard, courts apply the plain meaning of the statute, or, if there is an actual ambiguity in the statute, we use various semantic, syntactic, and contextual canons of construction to try to resolve the ambiguity. Only when, "after applying all the normal tools of interpretation, an ambiguity cannot be resolved (which is never" . . . or, at least, hardly ever), Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 233, should we resort to judicially created canons of last resort, see, e.g., *TOMRA of North America, Inc v Dep't of Treasury*, 505 Mich 333, 340-344; 952 NW2d 384 (2020).

In this process of interpretation, we do not defer to a circuit court's or agency's interpretation of a statute, though we certainly give that interpretation "respectful consideration," as we should. But crucially, this is no different, in my opinion, than what we are required to do with respect to the interpretation offered by the criminal defendant, the prosecutor, the individual plaintiff, the corporate defendant, the taxpayer, or any other

party before the Court. What is the alternative—disrespectful consideration? No consideration? Something close-to-but-not-quite-respectful consideration? The alternatives are absurdities.

To be clear, my confusion is not with being required to give "respectful consideration" to an agency's interpretation, but rather it is with the fact that our caselaw has singled out the agency's interpretation for such consideration. I believe that our courts are required to give—and, in fact, do give—"respectful consideration" to the interpretation of a statute made by a circuit court, an agency, a party, an amicus curiae, or any other interested party, and there is no good jurisprudential reason for singling out the agency's interpretation in this regard. Similarly, there seems no good jurisprudential reason for singling out an agency's interpretation for approval absent "cogent reasons" favoring an alternative interpretation. *In re Complaint of Rovas*, 482 Mich at 103. Again, what is the alternative, that courts would have non-cogent reasons for disagreeing with an agency's interpretation, or that a more persuasive argument offered by a taxpayer must be rejected because the agency's interpretation has satisfied some vague, undefinable quantum of cogency?

As I read our caselaw, the directives to give "respectful consideration" to an agency's interpretation and not depart from it unless there are "cogent reasons" for doing so are little more than judicial dross. The directives add nothing in substance to what we should do in every case involving statutory interpretation—give "respectful consideration" to the interpretations offered and select an interpretation supported by the most "cogent reasons." If, instead, these directives require courts to do something different when considering an agency interpretation than we do when con-

sidering a circuit court's or party's interpretation, then this is just a legalistic way of loading the dice in favor of the agency.

A court should adopt the best interpretation of a statute, based on a fair reading of the text, using clear, even-handed criteria objectively applied—full stop. If an agency's subject-matter expertise gives that agency some insight into what the Legislature meant when it enacted a particular statute, then that agency should rely on the persuasive force of its arguments, not loaded dice. See *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

Because the majority opinion does precisely what a court should do, I concur in full.

YOUMANS v CHARTER TOWNSHIP OF BLOOMFIELD

Docket No. 348614. Submitted November 5, 2020, at Detroit. Decided January 7, 2021. Approved for publication March 2, 2021 at 9:00 a.m. Leave to appeal denied 507 Mich 1005 (2021).

Jamila Youmans, as plaintiff and representative of all others similarly situated, brought a class action in the Oakland Circuit Court against Bloomfield Charter Township, alleging that defendant's method of setting its water and sewer rates in 2010 through 2015 was arbitrary, capricious, and unreasonable and also violated § 31 of the Headlee Amendment, Const 1963, art 9, § 31. Plaintiff sought to recover, through common-law assumpsit claims, the amount that defendant allegedly overcharged for water and sewer services. The court, Daniel P. O'Brien, J., certified the case as a class action and denied both parties' motions for summary disposition. After a bench trial, the court ruled in defendant's favor with regard to plaintiff's Headlee claims but granted plaintiff injunctive relief with respect to defendant's ratemaking practices and more than $9 million in monetary restitution for certain of plaintiff's claims, including the amount of revenue that defendant received over and above the utility rates it charged and the amount of revenue that defendant anticipated losing to, for example, leaks and broken water mains when setting its rates. Defendant appealed, and plaintiff cross-appealed the trial court's decision not to grant monetary damages with respect to the remaining claims.

The Court of Appeals *held*:

1. The trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm. Plaintiff's claims seeking monetary reimbursement were based in assumpsit, which, at common law, was a proper equitable vehicle for recovering unlawful utility charges that a plaintiff had paid to a municipality under compulsion of local law. Such an action will not lie against one who has not been personally enriched by the transaction because the fundamental basis of the action is not only the loss occasioned to the plaintiff

on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received it. Although assumpsit as a form of action was abolished with the adoption of the General Court Rules in 1963, the substantive remedies traditionally available under assumpsit were preserved. Hence, an "assumpsit" claim is modernly treated as a claim arising under quasi-contractual principles, which represent a subset of the law of unjust enrichment. When considering whether an entity has been unjustly enriched in contemporary municipal utility ratemaking cases, there is a rebuttable presumption that a municipality's utility rates are reasonable, and Michigan courts have historically accorded great deference to legislatively authorized ratemaking authorities when reviewing the validity of municipal water rates. Absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable. Under this rule, even if a specific expense is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a whole. In this case, by asserting her claims for assumpsit, plaintiff was effectively seeking not damages but restitution—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to correct for the unfairness flowing from the benefit defendant received by unjustly retaining the disputed rate charges. Whether defendant received an unjust benefit from retaining the disputed rate charges in this case depended on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were excessive, not on whether some aspect of defendant's ratemaking methodology was improper. In any event, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services, and the record provided no basis to disturb those factual findings. In light of those findings, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class.

2. The trial court abused its discretion by granting plaintiff a permanent injunction requiring defendant to document its ratemaking efforts in a specified fashion. Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. The party seeking injunctive relief has the burden of demonstrating that the requested

injunction is appropriate and necessary. In this case, the trial court found that plaintiff had failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs, and the record showed no basis to disturb this finding. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, it was not apparent that plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let alone an irreparable injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against defendant with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases.

3. The trial court did not clearly err by failing to hold that defendant received free public fire protection (PFP) services in contravention of MCL 141.118(1). That provision of the Revenue Bond Act (RBA), MCL 141.101 *et seq*., prohibits the provision of a free service by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality, and further states that the reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes. Plaintiff argued that defendant received free PFP services in contravention of MCL 141.118(1) because the Township's water and sewer fund, not its general fund, paid for those services by incorporating the PFP expenses into the disputed utility rates. Assuming that the RBA was applicable, that plaintiff was entitled to pursue a private cause of action seeking damages for violation of the RBA, that such a private action would avoid the presumption of reasonableness applicable to municipal utility rates, and that it would violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, the trial court expressly found that defendant did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund, and there was no basis for concluding that this finding was clearly erroneous.

4. The trial court did not err by failing to recognize that the PFP charges were unlawful under MCL 123.141(3), which provides that the retail rate charged to the inhabitants of a city, village, township, or authority that is a contractual customer as

provided by MCL 123.141(2) shall not exceed the actual cost of providing the service. Plaintiff failed to explain how even a proven violation of MCL 123.141(3), standing alone, would exempt her claim from the presumption of reasonableness applicable to rate challenges, and plaintiff did not overcome this presumption.

5. The trial court did not err by holding that the disputed charges related to other postemployment benefits (OPEB), the county drain, and PFP were not unlawful exactions under § 31 of the Headlee Amendment. That section prohibits units of local government from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate. Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not, and the party challenging a given municipal utility charge under § 31 bears the burden of establishing the unconstitutionality of the charge at issue. Under *Bolt v Lansing*, 459 Mich 152 (1998), courts apply three key criteria when distinguishing between a user fee and a tax: (1) a user fee must serve a regulatory purpose rather than a revenue-raising purpose, (2) user fees must be proportionate to the necessary costs of the service, and (3) a user fee is voluntary in that users are able to refuse or limit their use of the commodity or service. In this case, with respect to the first factor, it was undisputed that the contested rates were assessed to fund the operational and capital expenses of defendant's water and sewer system, which serves the primary function of providing water and sewer services to its ratepayers. To the extent that those rates resulted in surpluses during some fiscal years, testimony indicated that this was, at least in part, necessitated by the entry of an abatement order against defendant regarding the level of water infiltration in its sewer system. Defendant's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing PFP services to the community, expenses related to the county storm-drain system, and capital improvements necessitated by the abatement order—primarily served valid regulatory purposes. The fact that some nonratepayers may have benefited from the water and sewer system did not render the disputed rates an improper tax. With respect to the second *Bolt* factor, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and the record provided no basis for disturbing that factual finding. With regard to the final *Bolt* factor, the parties agreed that the disputed water and sewer

rates each comprised both a variable rate, which was based on metered water usage, and a fixed rate. Testimony indicated that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. While it was technically true that defendant's water and sewer customers could have avoided paying the variable portion of the disputed rates by refusing to use any water, the fixed portions of those rates constituted flat-rate charges like those in *Bolt*, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that defendant contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument was unavailing. Thus, the third *Bolt* factor weighed in favor of plaintiff's position. However, on balance, plaintiff failed to carry her burden of demonstrating that the disputed rates were impermissible taxes rather than user fees. The first and second *Bolt* factors clearly favored the conclusion that the disputed charges were proper user fees, and with regard to the third factor, the Court of Appeals has held that the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded for entry of a judgment of no cause of action.

PUBLIC UTILITIES — MUNICIPAL WATER AND SEWER RATES — UNJUST ENRICHMENT — REBUTTABLE PRESUMPTION OF REASONABLENESS.

When considering whether an entity has been unjustly enriched in contemporary municipal utility ratemaking cases, there is a rebuttable presumption that a municipality's utility rates are reasonable; absent clear evidence of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable; even if a specific expense is shown to be either illegal or improper, the party challenging the utility rates nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed as a whole.

Kickham Hanley PLLC (by *Gregory D. Hanley* and *Edward F. Kickham, Jr.*) for plaintiff and all others similarly situated.

Young & Associates, PC (by *Rodger D. Young*, *Henry W. Saad*, and *Joshua D. Apel*), and *Secrest Wardle* (by *Mark S. Roberts*) for defendant.

Amici Curiae:

Miller, Canfield, Paddock & Stone, PLC (by *Sonal Hope Mithani*) for the Michigan Municipal League and the Michigan Townships Association.

Before: STEPHENS, P.J., and MURRAY, C.J., and SERVITTO, JJ.

PER CURIAM. In this certified class action, plaintiff Jamila Youmans, who is the sole class representative, challenged certain municipal utility rates and rate-making practices of defendant, Charter Township of Bloomfield (the Township). Defendant appeals as of right the trial court's amended judgment, entered after a bench trial, that awarded plaintiff and the plaintiff class permanent injunctive relief and more than $9 million in restitution. Plaintiff has filed a cross-appeal, challenging the trial court's refusal to award what she characterized as "damages" for certain components of the Township's water and sewer rates.[1] We affirm the trial court's ruling concerning plaintiff's claims based on a violation of § 31 of the Headlee Amendment, Const 1963, art 9, § 31; reverse its judgment awarding monetary and equitable relief to plaintiff and the plaintiff class; and remand for entry of a judgment of no cause of action in favor of the Township.

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[1] By leave of this Court, the Michigan Municipal League and the Michigan Townships Association have submitted an amicus brief that supports the Township's position. *Youmans v Bloomfield Charter Twp*, unpublished order of the Court of Appeals, entered January 29, 2020 (Docket No. 348614).

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of plaintiff's challenge to various aspects of the Township's water and sewer rates and the underlying ratemaking methodology during the "class period," which commenced on April 21, 2010, for purposes of plaintiff's assumpsit claims (i.e., six years before plaintiff initiated this action) and on April 21, 2015, for purposes of plaintiff's Headlee claims (i.e., one year before plaintiff initiated this action). In October 2016, the trial court entered an order certifying this case as a class action and appointing plaintiff as the sole class representative. Plaintiff's amended complaint included six counts, the first of which asserted several claims for violation of § 31 of the Headlee Amendment and the remainder of which asserted claims under the heading "**ASSUMPSIT/MONEY HAD AND RECEIVED**" with regard to both certain specific components of the Township's water and sewer rates and the "arbitrary, capricious, and unreasonable" nature of those rates and the underlying ratemaking processes. After the trial court denied the parties' competing motions for summary disposition, the matter proceeded to a 10-day bench trial.

A. THE UTILITY SYSTEMS AND BASIC RATEMAKING METHODOLOGY

Wayne Domine, the director of the Township's engineering and environmental services department from 1991 until his retirement in May 2017, testified that the Township consists of approximately 18,000 parcels of realty, approximately 3,000 of which are not serviced by the Township's water utility. The water system provides treated, potable water to its municipal customers and also provides water to the Township's fire hydrants.

According to Domine, much of the Township's water system was privately constructed by real estate developers beginning in the 1920s. The infrastructure was originally a piecemeal collection of "several subdivision well water supply systems throughout the township." However,

> [i]n 1963, the township had decided that the existing well systems would not be adequate to provide the water quality and quantity required to maintain the projected future demands of the community. The connection to the City of Detroit system was found to be most dependable for the health and welfare of the township residents.
>
> Several miles of transmission mains were constructed. . . . Since then over 200 miles of lateral water mains have been extended into areas either by means of special assessments or developer funded projects.

Since 2004, the Township has been subject to an abatement order, which arose out of litigation with the Michigan Department of Environmental Quality (DEQ),[2] to "dry out" the sewer system, i.e., prevent water infiltration into the system. After performing a long-term needs study, the Township approved a 20-year capital improvement program, which is funded by the inclusion of a "water debt charge" in the disputed utility rates.

Domine agreed that the Township's sewer system is a separated system, with "one set of pipes for sanitary sewage" and a separate storm-sewer system that is "intended to collect storm water runoff or . . . water from the land" and discharge such water directly into a waterway. The Township does not own its storm-sewer system, other than the storm drains that are on the property of the Township. Rather, the storm-sewer

[2] The DEQ has since been renamed the Department of Environment, Great Lakes, and Energy. See Executive Order No. 2019-02.

system is owned and maintained, in concert, by several county and state entities. Oakland County bills the Township for the "sewer flow" that exits in the Township, as estimated by approximately 30 meters located in various areas, based on the Township's proportional contribution to the entire system. Conversely, the Township does not measure sewer flow in order to determine the rate that it charges its municipal sewage customers; rather, it bases the overarching sewer rate on water usage, which is the common practice throughout Oakland County.

Domine was involved in the Township's annual budgeting (on a limited basis) and water and sewer ratemaking from before the class periods in this case commenced until his May 2017 retirement.[3] He also coauthored the "annual rate memorandum," which included an outline of recommended water and sewer rates and was presented to the Township board for approval each year. Domine testified that the "first" consideration in ratemaking was "to gather up all the expenses, and then determine a revenue that would cover those expenses." He explained that the rates were intended to allow the Township to "[b]reak even" and that the process is complex, generally taking place "over several months." By nature, the rates are predictive—intended to cover expenses that will be incurred after the rates are set—and thus they merely *estimate* the revenue that will be required. Accordingly, to provide a "margin of error," the rates were generally set to generate "a revenue stream slightly above" the projected expenses, but in some years during Domine's tenure, the "water and sewer fund" was operating at a

[3] Thomas Trice, the director of the Township's Department of Public Works (DPW), testified that he was also involved in the disputed ratemaking process during the pertinent time frame.

deficit. Even so, and in at least one year, a midyear adjustment to the rates was required to prevent an excessive deficit. The ratemaking process employed by the Township did not focus on individual line items; it employed a holistic approach, focusing on generating sufficient overall annual revenue to cover the overall annual costs.

Jason Theis testified that he served as either the Township's finance director or deputy finance director at all times pertinent to this case, during which time he was also involved in the annual budgeting process for the Township's water and sewer fund. Theis is a certified "public finance officer," which is akin to being a certified public accountant but with an exclusive focus on governmental, rather than private, finance and accounting. He indicated that, in setting the disputed utility rates, it was desirable to budget both revenues and expenses "conservatively," in hopes of ensuring sufficient revenue to cover expenses. As a result, with regard to individual line items in the budget, the actual amounts received or expended often varied considerably from the projections used in setting the rates. Theis testified that over the ratemaking period of six months, the disputed rates would go "through many different iterations."

According to Domine and Theis, the water rate included a "variable rate" for consumption—which was intended to recover the Township's operating expenses, depreciation improvements, sewage treatment costs, and the cost of the water purchased from the Southeastern Oakland County Water Authority—and a "fixed" charge to cover extra operational expenses. The fixed portion of the water rate generally represented about 80% of the utility's required revenue stream, and it was intended to help the Township cover what

Domine described as its "steady stream of monthly expenses" despite fluctuating water use and revenue over time. In addition, both the sewer and water rates included debt service charges, which were assessed in amounts intended to pay the debt service on bonds or other obligations issued by the Township related to water and sewer services.

The parties stipulated that some portion of the Township's utility ratepayers were not on the tax rolls that fund the Township's general fund, including tax-exempt entities such as churches. Domine indicated that about 80% of the Township's water customers are also sewer customers, with the remainder using septic-tank systems. A small portion of customers—about 3%—receive sewer services only; they are not water customers. Domine agreed that those "sewer only" customers are billed in one of two ways. The majority pay a fixed annual charge, while the remainder have elected to have a meter installed on their well-water line and are billed for their sewer service on the basis of their actual water usage. Additionally, the water system permits homeowners to install a "secondary" water meter that measures water used outside the home (e.g., for lawn irrigation or swimming pools), and such water usage is not included when calculating the homeowner's sewer charges.

Because the Township has no way of determining the amount of sewer services a sewer-only customer uses, the "fixed annual charge" is determined by averaging the rate of the sewer-only customers who have elected to have a water meter installed. Domine admitted that the sewer ratemaking methodology did not account for the sewer-only customers explicitly. But Domine also indicated that, because the Township had been overestimating volume in an attempt to keep the

sewer rate from excessively increasing, "a lot" of the time the Township did not collect enough "sewer revenue" to cover the associated costs fully.

According to Theis, the budgeting program for the water and sewer fund—which he sometimes referred to as the creation of a "projected income statement"—involved "a lot of back and forth" "looking at five year trends of all the different accounts within the water and sewer fund," establishing projected figures for "operational" overhead (including staffing expenses), and projecting the anticipated water costs. Of the 18 different Township funds for which annual budgets and projections are prepared, the water and sewer fund was the only "enterprise fund" (i.e., a proprietary, non-tax-revenue, self-sustaining fund that charges for services provided, is not supported by a millage, and falls outside the operating township budget), and it was the most difficult to budget for because it involved "more guess work" than the other funds, particularly with regard to commodity charges and tap sales. For instance, Theis explained that the revenue received during a "dry season" would vary by "millions of dollars" from the revenue received in "a wet season[.]" In addition to the Township's 18 budgeted funds, Theis also oversees approximately another 10 that aren't budgeted. Most of the Township's utility customers were billed on a quarterly basis, while most of the "suppliers" billed the Township monthly. As a result, in calculating the necessary revenue flow to meet its utility expenses, the Township needed to plan to keep sufficient cash on hand from quarter to quarter.

Plaintiff called as an expert witness Kerry Heid, who is a "rate consultant specializing in the public utility field," ratemaking in particular, and has approximately 40 years of experience in that field. He

agreed that the "first step" in utility ratemaking "is to determine the revenue requirement," i.e., the revenue that the utility will need to cover its expenses, and he also agreed that this involves cost projections regarding variable expenses that are generally unknown when the rates are set.

According to Heid, "almost industry-wide, the generally recognized standard to use for generally accepted cost of service and rate making practices for water utilities" was, at the time of trial, set forth in the seventh edition of "the American Water Works Association M1 Manual." Heid's opinions in this case concerning the disputed water rates were based on those methodologies and principles. He indicated that there are "two generally accepted methods" by which a utility's revenue requirements are determined: (1) "the cash basis, or the cash method," and (2) "the utility basis." Heid testified that the Township used the cash method in calculating the disputed rates. Under that method, a municipality determines "its cash needs" by considering expenses such as "debt service, which would include principal and interest on bonds or outstanding debt," "operating and maintenance expenses," taxes, "[a]nd any other cash needs that the utility would need in order to operate its utility." The total of such expenses constitutes the utility's "revenue requirement." In determining which expenses are properly considered in ratemaking, a utility should only include an expense if it is "prudently incurred" and "necessary for the utility to operate."

According to Heid, after a utility has determined its anticipated revenue requirement, "[t]here are two different sources of funds that the utility needs to consider, such that the total of those fund sources would generate the needed revenue requirement": rate rev-

enue, and "miscellaneous revenues," which are also known as "nonrate revenues." Nonrate revenue includes any sources of revenue that the utility receives "over and above the actual rates that are developed by the utility." Heid testified that before a utility determines its rates, it should subtract the nonrate revenue from the total revenue requirement. For example, if a utility's initial revenue requirement was estimated to be $100,000, but it expected to generate nonrate revenue of $5,000, it should "design rates that would generate revenues of $95,000."

Heid indicated that, after determining its "net revenue requirement," the utility would determine what portion it "want[ed] to recover through a customer charge," such as the fixed portion of the Township's water rate, and how much the utility wanted to recover by way of "a volumetric charge" for water use. Although there is an element of discretion in deciding the proper ratio of the fixed customer charge and volumetric charge, Heid opined that the proper method was to perform a "cost of service study," which is something that the Township had failed to do, instead relying on what Heid described as "an arbitrary allocation[.]" In any event, Heid indicated that after deducting the fixed charge from the revenue requirement, a utility should divide the remaining portion (i.e., the portion it wished to recover through a volumetric charge) by the expected "total usage," with the result of that equation equaling the appropriate utility rate. In Heid's view, it was "[a]bsolutely not" appropriate for a municipal utility to design its rates to "over-recover," i.e., to recover more than the utility's net revenue requirement.

The Township called Joe Heffernan as an expert witness. Heffernan is a certified public accountant who retired from the accounting firm Plante Moran with at

least 30 years of experience in conducting "public sector" accounting audits and consultations. He indicated that municipalities are required to have such external audits performed under Michigan law. According to Heffernan, before he reviewed the financial statements in this case, the Township's independent auditing firm had "already looked at the underlying general ledger and tested the internal controls and looked for compliance with laws and regulations . . . ." After doing so, the independent auditors issued an audit opinion indicating that the Township's financial statements were "fairly stated" and "free of material misstatement," meaning that "they're reliable." Similarly, Heffernan discerned "nothing" in the financial statements that would have led him to suspect that the Township's water and sewer department was potentially failing to comply with any applicable regulatory law.

Heffernan testified that Plante Moran audits "125 communities in southeast Michigan." He stated that about "[a] third to half of them" do not issue rate memoranda or any other "formal written document" explaining their utility ratemaking methodology, and he was not aware of any requirement for municipalities to do so. According to Heffernan, in setting their utility rates, such municipalities "just look at two things, what do our cash reserves look like, do they seem too high or too low, what's the percentage increase that we're going to get from our supplier, and based on whether their cash is too high or too low they bump . . . up or bump . . . down" the rates. Such "simple" ratemaking was "really common" and it "seem[ed] to work," historically resulting in relatively proportional cash inflows and outflows for the utilities that employed it.

Heffernan agreed that it is "possible to reach a reasonable water and sewer rate using a flawed rate

model" or no model at all, and he also agreed that "mathematical precision" in calculating rates is neither required nor possible because rate models are based on predictions, "every single one of [which] will be wrong" to one degree or another because "the numbers are so big . . . and can change by so much you really have to accept a certain amount of fluctuation and variation . . . ."

The Township also called Bart Foster as an expert "in the area of municipal water and sewer service rate setting[.]" Foster has "30-plus years' experience" in "providing financial, management consulting, and rate consulting services to predominantly municipal water and waste water utilities." He has performed such services for "between 10 and 20" municipalities in Michigan, and he was "regularly engaged for over 30 years with the Detroit Water and Sewage Department until they transitioned into the Great Lakes Water Authority" (GLWA). At the time of trial, he was employed as a consultant at the GLWA, and he indicated that he was familiar with Michigan regulatory law regarding municipal utilities.[4]

B. "LOST" WATER AND "CONSTRUCTION" WATER

According to Domine, one factor that was considered in setting the water rates was "nonmetered water," which was, in essence, "lost" water that the Township purchased but never actually sold. This occurred for "a variety" of reasons, such as broken water mains, leaks, "[c]onstruction water" (i.e., water used in the construction and maintenance of the water system itself), "billing inaccuracies," "meter inaccuracies," and "lag

[4] In substance, Foster's relevant expert opinions were largely identical to those expressed by Heffernan.

time" in meter reading. During the relevant "class period" years, Domine had estimated the anticipated "lost" water, for ratemaking purposes, at between 5% and 7% of the Township's annual projected water purchase. Such "lost water" figures were included in setting the water rates, intended to offset the cost of the water that the Township had purchased but never sold to its metered customers.

According to Heffernan, "water loss" is something that he commonly encountered in auditing municipal utilities because one "key" metric in "every" such audit was a comparison between "the volume of water purchased and sold by the water and sewer fund . . . ." On the other hand, Foster indicated that he disfavored the use of the phrase "lost water"—preferring to use the phrase "unaccounted-for water"—because "lost water" is an "unduly simplified" description. Terminological disputes aside, Foster agreed with Domine and Heffernan about the essential underlying concept, explaining that for a municipality like the Township, which has no water "production facilities" and instead "purchases water wholesale," unaccounted-for water "would simply be how much water is being purchased on a wholesale basis from the provider . . . compared to how much water [the municipality] sells to the customers . . . ." Such unaccounted-for water was generally attributable to "the possibility of inaccurate meter reads, both on the purchase side and on the sales side," "natural leakage out of the pipes," and "uses of water for construction purposes that's unmetered[.]" Foster indicated that "the Township had an unaccounted-for water percentage of between 4 and 5 percent," which was "probably on the low of medium side" for municipalities in southeast Michigan. He opined that, because unaccounted-for water was "a cost of maintaining the system," it was "appropriate" to recover that

cost in the corresponding utility rates, and it would be inappropriate for the water and sewer fund or the Township's general fund to bear that expense.

Domine indicated that "construction water" is used primarily in "the flushing and filling of the water mains that are being built," in "pressurizing the main," and also when "doing bacteria testing." In his opinion, the use of such unmetered construction water is "necessary . . . for the operation of the system itself[.]"

C. WATER USED BY TOWNSHIP FACILITIES

In addition to "lost" water, Domine agreed with the statement of plaintiff's counsel that "the township's own facilities use water, but there isn't a check written from the water and sewer fund to the general fund for the value of that water[.]" Domine further agreed with counsel that, rather than paying for such water with cash, the Township provides in-kind "services and value" to "the water and sewer fund," the value of which "exceeds the value" of the water used by the Township's facilities. Domine and Theis admitted that they were aware of no formal documentation of this in-kind remuneration. As an example of one such in-kind service, Domine indicated that Township firefighters performed inspection, "flushing, and some of the maintenance" on the Township's fire hydrants. As other examples, Theis indicated that his services and those of his staff (i.e., accounting, finance, and human resources services) are provided to the water and sewer fund at no charge, as are the services of the Township's information technology department, which spends approximately 10% of its resources servicing the water and sewer fund. That fund is also provided maintenance and cleaning services by Township employees.

Testimony indicated that although some of the municipal buildings are equipped with water meters, there was no record of precisely how much water was used by the municipal facilities during the pertinent time frame. As part of this litigation, however, Domine prepared an estimate of the water used by the Township's facilities, estimating a total annual use of approximately 3.8 million gallons. On the basis of that figure, he estimated that the combined water and sewer services provided to the Township facilities was worth approximately $35,000 annually,[5] while the water provided to the Township's fire hydrants was valued at $10 per hydrant, for a total of $31,000. Domine and Theis each estimated the value of the Township's in-kind remuneration for such services to be more than $100,000 annually.

Contrastingly, Heid indicated that any in-kind remuneration that the Township provided to the water and sewer fund was inadequate because, given his estimations, the value of the public fire protection services rendered to the Township by the water utility exceeded a million dollars every year. And with regard to fire hydrant water usage, Heid indicated that the $10 estimate per hydrant was "grossly inadequate and without any basis . . . ."

According to Heffernan, most municipalities "typically" have water meters installed on municipal buildings, and their water and sewer departments typically bill the general fund for such water use. Foster agreed, indicating that he does not "normally see . . . the practice employed by [the] Township" of accepting in-kind remuneration for water from the general fund rather than directly billing the general fund for the water

[5] Heid indicated that the $35,000 estimate was facially reasonable.

used by municipal facilities. But according to Heffernan, considering "other communities of a similar size," he estimated that the true value of the in-kind services provided to the water and sewer department by way of "general fund" dollars was "in the neighborhood of" $700,000 or $800,000. On that basis, Heffernan opined that he would not consider the Township's facilities to be receiving "free water."

On the other hand, Foster indicated that the value of the water used by the Township facilities and the in-kind services provided to the water and sewer fund were "close to being a wash . . . ." But he also indicated that the Township's in-kind remuneration strategy was "perfectly reasonable" and opined that the disputed utility rates would most likely go up, not down, if the Township were to undo the in-kind arrangement and, along with beginning to pay for water used by Township facilities, also begin to charge the water and sewer department for all the services that it had previously received from the Township at no charge.

D. "NONRATE" REVENUE

Domine indicated that he never employed the term "nonrate revenue" while working for the Township and had not heard that term before this litigation commenced; rather, he categorized such revenue as "other revenue." His testimony concerning the treatment of nonrate revenue in the ratemaking process was somewhat convoluted. He agreed that the annual rate memoranda likely contained no discussion of nonrate revenue—those memoranda "never" specified all the expenses underlying the recommended rates, according to Domine—but he disagreed that nonrate revenue was not factored into the rate model for the

disputed utilities, explaining that it was considered as part of the "revenue stream" for the Township's annual budget, not as a source of revenue attributable to the disputed rates. Later, however, Domine testified that nonrate revenue "is *not* included in the rate calculation. It's considered as extra revenue to pay towards the expenses." (Emphasis added.) Later still, when Domine was asked, "[Y]ou weren't recovering all of your budgeted expenses through the rate, but instead were leaving some of them off because you anticipated getting non-rate revenue[?]", he replied, "Yeah, that—that would be what I've been saying all along." He also indicated that nonrate revenue was "reflected in the numbers" in the annual rate memoranda, explaining that the total operating expenses listed in those documents were actually "the net expenses, after deducting the non-rate" revenue. Notably, Domine qualified his answers somewhat by stating that his memory of these issues was hazy, given that he had retired, and that questions about nonrate revenue would be better directed to the Township's finance director, Theis. But Domine also indicated that he "kn[e]w for a fact" that he had deducted nonrate revenue from the total operating expenses before calculating the disputed rates. In effect, this benefited the utility customers by lowering rates.

When the trial court asked Domine whether the deduction of nonrate revenue from total operating expenses had "historically" been "manifest" in his "paperwork," he replied, "It—it just came up in the last couple years, because . . . you got to understand, for 20 some years, a lot of it, I just did it[.]" Historically, Domine had performed the calculations informally for his own use, using "notepads and sticky notes," rather

than documenting the process formally.[6] However, during his final two years working for the Township, he had created a detailed spreadsheet to explain to his replacement "how the process works . . . ." The spreadsheet showed the same process by which Domine had deducted nonrate revenue from the total operating expenses "in the past."

Theis agreed that, with the exception of the 2016–2017 rate memo, the rate memos for the other fiscal years at issue here did not include any "calculation that deducts non-rate revenue before setting the rate." Like Domine, however, Theis disagreed with the contention that nonrate revenue had not been accounted for in calculating the disputed rates, indicating that it had been used to offset projected annual expenses in ratemaking. Theis indicated that certain informal spreadsheets, which he had prepared for his own use in prior years, documented the process of incorporating nonrate revenue into the rates. Theis considered a specific item of nonrate revenue to be attributable to the water and sewer department if it was "directly related" to those utility services.

On the other hand, Heid indicated that, other than the Township's rate document for fiscal year 2016–2017, in his review of the documents provided to him in this case, Heid had "absolutely not" seen "any evidence" that nonrate revenue was properly accounted for in calculating the disputed rates. On the contrary, after comparing the "operating expenses that were reflected in the budget" for each fiscal year to the operating expenses that were used in the corresponding ratemaking model for that year, Heid

[6] Theis described the prior methodology as, for "lack of a better term," "back of a napkin" calculations that were not performed consistently during the relevant time frame.

opined that the numbers indicated that the Township had not "netted out" the nonrate revenue in any fiscal year other than the one beginning in 2016. Heid summarized: "My opinion . . . is that the utility's reasoning or explanation for the treatment of non-rate revenues does not hold water, that they did not net out the non-rate revenue from the operating expenses as reflected in the rate memos." Heid further opined that the Township's failure to deduct nonrate revenue "was not a reasonable rate making practice" because it "is commonly accepted that the non-rate revenues should be deducted from the total revenue requirement when establishing rates," and in Heid's reckoning, "if the rate methodology is faulty," then it is not possible to determine whether "the rate is reasonably proportionate" to the underlying utility costs. On cross-examination, Heid indicated that he had derived his opinions concerning whether nonrate revenue was duly incorporated into the disputed rates solely by reviewing the annual rate memorandums and that he had not reviewed any "underlying work papers."

Although Heffernan agreed that nonrate revenues should be accounted for in ratemaking, he indirectly criticized Heid's methodology, indicating that it was not useful to compare the numbers in the rate memoranda and those in the water and sewer fund's annual budget because such documents are prepared "at two different points in time," "for two different purposes," using different accounting principles. Therefore, inconsistencies between the two documents were to be expected. Heffernan explained that "quite often" the budget does not have "a great relationship to what actually happens" after the budget is set, and the same is true with regard to rate memoranda.

Heffernan further explained that his analysis of the issues in this case involved "looking through the financial statements, some of the other documents ancillary to the financial statements, and most importantly, having some open discussion with the finance director, [the Department of Public Works (DPW)] director, and talking through what's behind the numbers in order to come to a conclusion." He focused on the financial statements particularly, because those reflect "what actually happened," whereas the annual utility budget was "merely a plan of what you may expect to happen" so that the Township board would have a basis on which to grant its "permission" for the "the various department heads . . . to conduct business and spend up to certain amounts for certain purposes." Similarly, he explained that although rate memos can offer insight into the thought process employed in ratemaking, they cannot demonstrate the results—"what really happened"—like financial statements do. For that reason, financial statements are vitally important in auditing municipal utilities. They permit an auditor to assess whether the revenues *actually* received by a utility are proportional to the *actually* incurred underlying expenses.

Foster's opinions in this case were also primarily founded on his review of the Township's financial statements, and he agreed with Heffernan that those statements are preferable to the water and sewer fund's budgets and rate memoranda because it was best to evaluate "the effect" of rates and charges "after the fact[.]" Foster added that, having been independently audited, the "financial statements have a degree of review that is arguably more—more rigorous than a budget or a rate memorand[um]."

After reviewing the Township's relevant financial statements, Heffernan and Foster both opined that the

Township had duly accounted for nonrate revenues during the pertinent time frame, although its calculations concerning nonrate revenue were not set forth in the rate memoranda. As Heffernan put it, "The work just wasn't shown." Even so, Heffernan believed that the financial statements and the proportionality of the water and sewer fund's cash flows during the relevant time frame "clearly" demonstrated that the Township had properly accounted for nonrate revenue in the disputed rates. Heffernan noted, "That's the great thing about the financial statements, you can't hide. It's in there or else the auditor would be disclaiming their opinion and saying everything is wrong."

Additionally, Heffernan indicated that even assuming, for the sake of argument, that the Township had *not* duly accounted for nonrate revenue in setting the disputed rates, that failure, standing alone, was insufficient to render the rates unreasonable. Foster agreed, stating that "it wouldn't matter" because if the water and sewer fund had recovered too much in the disputed rates, it would have either adjusted its rates accordingly or taken the opportunity to prudently add to its reserve funds, and if it had recovered too little, "there would need to be rate increases in order to get the reserves at . . . the prudent level."

When asked, on cross-examination, whether failure to account for nonrate revenues would result in an overcharge to the ratepayers, Heffernan replied:

> Potentially. And the reason I say potentially is there's only an overcharge if in fact you have charged them more than their actual cost. And in the rates there are so many other things that could be inaccurate in your rate model and you don't know until you see what—and that's why I look at the financial statements, what were the costs, what was the revenue that came in, that tells you if you've overcharged.

E. THE COUNTY DRAIN CHARGES

Michael McMahon, who is an employee of the Oakland County Water Resources Commissioner's Office, testified that Oakland County assesses fees to its municipalities for maintenance of the county storm-sewer system. He explained that drains can be established under various chapters of the Michigan Drain Code, MCL 280.1 *et seq*. The charges for "chapter 4 drains" are generally "assessed . . . to individual property owners," although an "at large portion" is assessed to the municipality and some municipalities pay the "chapter 4" charges on behalf of their residents, while the charges for "chapter 20 drains" are "assessed to municipalities at large."[7] The county also charges municipalities a combined sewer overflow facility fee.

According to McMahon, in 2015, the Township was in arrears of approximately $346,560 with regard to its county drain charges because, before that time, the county "had sort of lapsed on some of [its] assessments." The same situation had occurred with multiple municipalities, and McMahon was tasked with getting all the drain funds out of deficit. Accordingly, he contacted Domine, seeking to establish a budgetary plan for the Township to satisfy its arrearage. Ultimately, it was agreed that the Township would do that over the course of a couple years so that they could budget for it.

Domine indicated that, as a result, in the fiscal year beginning April 1, 2015, the Township began including a line item in its water and sewer budget for "county storm drain maintenance" (the "drain charges"). Before that time, the Township's "chapter 20" drain fees

[7] Domine indicated that, to his knowledge, the Township does not pass any of its "chapter 4" drain charges onto its tax base or ratepayers.

had always been paid out of the Township's general fund with tax dollars, not included as an aspect of the disputed utility budgets. For example, in 2013, $23,000 was paid from the general fund to satisfy the drain charges. The first year after the switch, the new budgetary line item for drain charges was $200,000, which was included in calculating the disputed utility rates. An additional $200,000 was included in the same fashion the next year (i.e., in the fiscal year beginning April 1, 2016), and $75,000 was included for drain charges the year after that.

Domine was unable to explain specifically why the drain charges were shifted from a general-fund obligation to a component of the disputed utility rates, but he recalled the Township's finance director indicating that he was closing the particular general fund from which the drain charges had previously been assessed and reallocating the line items that had been paid out of that fund "to other accounts . . . that would be more appropriate . . . ." Domine agreed that one of the functions of the storm-sewer system is to prevent flooding by collecting water that runs off the road and that the system also prevents soil erosion. However, Domine testified that the Township does not own any of the roads within it, indicating that they are all owned by the county, the state, or private entities, and the county and state, not the Township, therefore have the responsibility for installing any new drains that are required to ensure proper drainage from roadways. Trice agreed with that statement. According to Domine and Trice, the storm-sewer system also benefits the Township's separate sanitary sewer system by preventing the "infiltration or inflow" that the Township was ordered to remedy in the litigation with the DEQ, by lowering the water-treatment charges incurred by the Township (and thereby lowering the disputed util-

ity rates), and by preventing the backflow of raw sewage into the ground, the sewer system, and sewer customers' homes. Trice explained that the county storm drains run parallel with the Township's sanitary sewers, and therefore anytime the storm-sewer system floods as a result of improper maintenance, storm water would get into the sanitary sewer system and could cause damage (e.g., it could collapse Township pipes).

F. RENT CHARGES

According to Theis, in 2014, the Township began to charge the water and sewer department annual rent of $350,000, which was included as an expense in the disputed ratemaking process in the years that followed. This rent was paid by the water and sewer fund—by way of a quarterly journal entry in the ledger—to the Township's general fund, for the use of the DPW facility. Theis estimated that the DPW facility was constructed sometime between 2007 and 2009, and he stated that it was financed by a new debt millage. The water and sewer fund had occupied the DPW facility since sometime in 2009 or 2010. The Township's motor pool also occupied several automotive repair bays at the DPW facility, which were used to service all of the Township's different departments and funds.

Trice testified that he was the person who established the amount of the disputed $350,000 rent charge. He calculated that figure by estimating that the water and sewer department was occupying about 30,000 square feet of the DPW facility's total 77,000 square feet, then applying an estimated annual rental rate of $12 per square foot. Trice established that estimated rental rate of $12 per square foot on the

basis of storage space that the Township was already renting out in the local district court building, and the figure was also approved of by the Township assessor. In setting the $350,000 annual rent, Trice opined that the Township had used the lowest number available. In his opinion, it would have yielded a much higher rental figure had the Township based the rent on an allocation of all the actual costs associated with the DPW facility, such as insurance, accounting, information technology, human resources, administration, and consultants. Trice also indicated that the disputed rental figure was calculated only by reference to the space in the DPW facility actually occupied by the water and sewer department; it did not include the areas occupied by other departments, such as the motor pool.

In Theis's estimation, the annual rent of $350,000 was reasonable, given the Township's related expenses for depreciation and bond interest with regard to the DPW facility, which were, taken together, over $400,000 a year. In addition, the Township incurred costs for ongoing maintenance, operation, and cleaning of the DPW facility, and it paid a share of the facility's utility bills for gas and electric. In a broader sense, Theis believed that it was appropriate for the water and sewer fund to pay rent for its office space because, "as an enterprise fund, they should be self-sustaining, and all costs and revenues should be coming from and to that base of customers, as opposed to taxpayer[s] in general."

With regard to the disputed rent charges, plaintiff called James Olson as an expert witness. Olson is the director of a company that specializes in preparing federally mandated cost-allocation plans for governmental entities, including municipalities. Olson testified that, in his professional opinion, the $350,000

annual rent charge was not appropriate "because it's not based on cost," i.e., "the cost of the facility, . . . utilities, maintenance, insurance; anything that related to capital improvements on the building once it's built, [and] that kind of thing." To the extent that the rent was instead based on depreciation and the interest associated with debt for that facility, Olson viewed that methodology as improper because those expenses were already "paid for" by the special millage that had financed the DPW facility. Olson explained, "Well, if you're a taxpayer, you're paying for the building and its interest cost in a separate bill, so you're paying for that once. You wouldn't pay for it again in the rate that you pay for your water and sewer." In Olson's estimation, the amount of rent charged by the Township for the DPW facility bore no discernible relationship to the properly considered costs; it was instead improperly based on an estimated market rate. However, because of the limited information that had been provided to him, Olson admitted that he had been unable to determine the Township's annual maintenance expense for the DPW facility, and he acknowledged the possibility that there was some maintenance expense that could properly be charged to the water and sewer fund. Olson also indicated that his opinion concerning the propriety of the Township's methodology in calculating the disputed rental figure involved a philosophical "gray area" of accounting principles.

On cross-examination, Olson admitted that, as an enterprise fund, it was appropriate for the water and sewer fund to be funding its own office space somehow, and he was not of the opinion that it was altogether inappropriate for the Township to charge that fund some amount of rent. Additionally, Olson conceded that it would be appropriate for the Township to consider the central service costs related to the DPW facility—

including accounting, financial, auditing, human resources, insurance, security, legal, and information technology services—in determining the proper rental amount, along with "general administrative expenses[.]" Because plaintiff's counsel had not supplied Olson with the necessary information, Olson had been unable to prepare a full cost-allocation plan for the water and sewer fund, and he was also unable to comment on how, precisely, the Township had calculated the disputed rental amount. Finally, Olson admitted that, although he was not aware of any federal funding related to the DPW facility, his opinions in this case were based exclusively on federal regulations establishing guidelines for development of indirect costs for federal programs.

When asked to critique Olson's opinion concerning the rent charges, Heffernan indicated that Olson's reliance on federal regulations was inappropriate because those regulations "do[] not apply to any spending that's not of federal dollars," and although every township in Michigan receives at least "a little bit" of federal funding in the form of a community development block grant, only those specific federal funds must be spent in accordance with the federal regulations on which Olson based his opinions. Heffernan also disagreed with Olson's ultimate opinion that the disputed rent charges were inappropriate. In Heffernan's view, there were "hundreds of activities" funded by the Township's general fund that affected the water and sewer fund's finances, and the overarching concern was to ensure that the overall allocation of expenses was "fair" when viewed in the context of the "whole system." Indeed, after performing such a review in this case and learning about all the services that the Township's general fund provides to the water and sewer department without compensation, Heffernan

believed that the $350,000 annual rent for the DPW facility represented "undercharging," not an overcharge.

G. CHARGES FOR OTHER POSTEMPLOYMENT BENEFITS

Domine confirmed that "OPEB" charges—i.e., charges for other postemployment benefits—were one budgetary line item that was factored into the disputed utility rates. Theis agreed with plaintiff's counsel's characterization of OPEB benefits as "primarily health insurance expenses that the township is obligated . . . to pay on behalf of retirees," including both those already retired and current employees who will become retirees in the future. In addition to retiree health insurance expenses, all expenses of retirees fall under the broad penumbra of OPEB expenses.

Heffernan testified that, unlike pension funds, which Michigan municipalities are constitutionally required to keep funded at actuarially determined levels, there is no such requirement with regard to OPEB funding, and many municipalities "really kind of ignored" OPEB funding "up until about 15 years ago[.]" Under accounting principles set forth by the Governmental Accounting Standards Board (GASB) sometime between 2006 and 2008, however, municipalities are required to treat their unfunded OPEB obligations as a liability, which Heffernan said tends to encourage them to begin the process of properly funding such obligations.[8] In doing so, there is generally an element of "catch-up"—i.e., setting aside funds for the amortization of the unfunded actual accrued liability—while

[8] On cross-examination, Heffernan admitted that the GASB has no authority to *compel* municipalities to duly fund their OPEB obligations, only to direct them concerning how these obligations should be accounted for in financial documents.

also setting aside funds to pay for the OPEB costs of one's current employees. Heffernan noted that it was "strongly" recommended for municipalities to be proactive about funding their OPEB obligations because it reduces the net present value cost of that benefit. Additionally, Heffernan opined that municipalities have "a moral obligation" to do so, although there are still some communities that have not funded any of their OPEB obligations. He compared failing to fund OPEB requirements to not setting aside money for pension funds, which he viewed as "bonkers." He explained: "[T]o not pay today's cost for that really says I'm going to have employees provide me services and I'm going to tell them, in exchange for the services you provide me I'll give you a salary; I'll also give you this benefit that I'll ask your grandchildren to pay."

In Theis's view, OPEB entitlements were "earned" by employees during their work tenure, and the Township's obligation to fulfill those entitlements accrued at the same time. Heffernan agreed with Theis that employees "earned" their OPEB benefits during their working career with the Township, although such benefits are "paid for," primarily in the form of insurance premiums, after the employees retire. Theis indicated that the inclusion of OPEB charges in the disputed utility rates began in 2009 pursuant to a resolution passed by the Township board, and at some point, the Township also began to include OPEB charges in the fees charged by its cable studio and building inspection fund. The amount of the disputed OPEB charges included in the utility rates—which varied over the relevant years from about $200,000 to approximately $577,000—was based on what Theis described as a "very complicated calculation" that was, in turn, based on "a moving target" in the form of the latest actuarial reports concerning the Township's fu-

ture OPEB obligations. Ultimately, during the fiscal year that began March 31, 2016, the Township transferred the $2.7 million in OPEB charges that had accrued in the water and sewer fund into a return-yielding retiree health care trust, which Theis testified is "dedicated to . . . currently retired water and sewer employees as well as trying to save for the future retirees of the water and sewer fund."[9] Since then, smaller annual contributions of the accrued OPEB charges have been deposited to that trust. Such OPEB funds are partially intended as "catch-up" to cover some of the past service cost, which was necessary, as Theis explained, "because all the prior administrations didn't set aside that money as the employees were earning it, which is what you should do." Theis indicated that the Township's "OPEB costs are jumping up exponentially each year" and are "some of the largest in the state," with current actuarial projections anticipating the future OPEB obligations of the Township at more than $160 million, more than $10 million of which is attributable to retirees or employees of the water and sewer fund.

According to Theis, by paying $2.7 million into the OPEB trust, the Township made an immediate impact on its current OPEB expenses. He explained that "the OPEB line item expense immediately decreased the following year," which resulted in a corresponding decrease in the disputed utility rates, particularly in light of certain recently enacted GASB accounting practices for municipalities. In part, Theis admitted that the OPEB charges in the disputed rates were

[9] The Township's "main operating funds" include its "general fund, road fund, and public safety fund," which Theis estimated paid the salaries of about 80% of the Township's employees. At the close of each fiscal year, any surplus money in these three funds is used to fund a similar OPEB trust for the employees paid from those funds.

necessary because the Township "can only collect so much in a millage and they get rolled back by Headlee and so forth." He indicated that, although he was aware of nothing that would force the Township to proactively set aside funding for its OPEB expenses, the Township's goal is to fully fund its OPEB obligations in trust, thereby relieving the current operating budget and ratepayers from that retiree expense. Theis hoped that it would actually accomplish that goal sometime during his career, but he had doubts, given that, at the time of trial, the Township was "only 3 percent funded." In his view, the disputed OPEB charges were something that was ultimately for the benefit of not just the Township, but the ratepayers, given that new legislation was being contemplated that might force the Township to more aggressively fund its OPEB obligations, which could compel a more dramatic rate increase in the future. In Theis's opinion, it was prudent to be proactive, not reactive, with regard to such budgetary issues.

In Heffernan's view, there was nothing improper about the Township's transfer of $2.7 million to the OPEB trust. And Heffernan agreed that transfer would ultimately result in significant OPEB savings to the water and sewer fund because, once held in such a trust, up to 70% of the funds can be invested in equities with an expected annual return of 7% or more, whereas money held in the water and sewer fund is subject to certain regulations that have historically limited the annual return to under 1%.

H. PUBLIC FIRE PROTECTION (PFP) CHARGES

Domine indicated that, aside from delivering potable water to the Township's customers, the municipal water system is also used for "firefighting capability"

by providing water to the Township's fire hydrants. According to Trice, the Township's water customers receive a special benefit from the Township's fire hydrants because those hydrants are only placed along the course of the public water system.

Heid agreed that the provision of fire protection capabilities is one of the two fundamental functions of a municipal water supply utility, with the other being the provision of potable water to municipal customers. Heid noted that, by nature, those functions fundamentally differ insofar as municipal customers use water on a relatively constant basis, whereas a fire hydrant generally serves in a standby capacity, being used only when there is a fire or "the utility needs to flush their system for periodic maintenance." Nevertheless, Heid explained that the PFP function of a water system carries "a very significant cost" because "[g]enerally, . . . all of the facilities have to be oversized. They have to be two or three times the size that they would be" if the system only had to provide service to "domestic customers." Also, to provide PFP capability, a water system must have a source of supply that provides more water, a greater amount of elevated storage, larger water mains, and either extra higher-powered booster pumping stations. Hence, Heid testified that PFP is "[t]ypically . . . considered a service because public fire protection does require the utility to overbill, if you will, because it needs to be able to meet those particular demands when you do have a fire." He further testified that professional standards generally require that the value of PFP services be paid for out of a municipality's general fund, not borne by the municipal water utility and its ratepayers.

Heid indicated that, in determining the portion of a utility's PFP expenses that is properly allocable to the

municipality, there are two generally employed methods. The first method, which Heid testified was preferred and most commonly used, is to perform "a fully allocated cost of service study where the utility actually calculates the capacity requirements associated with providing public fire protection service and determining the cost of providing that service and what the rate should be for providing that service." Heid described the second as an "antiquated" method that was developed in Maine in 1961 (the "Maine Curve method"). Under the Maine Curve method, the "peak day" requirements of the utility are calculated by multiplying the estimated average daily water usage by an "average peak" factor of 2.5, thereby estimating the peak day (or peak hour) demand on the system's water usage. Subsequently, the utility's *overall* "peak day requirements" are compared to the calculated peak day requirements associated with providing public fire protection, as calculated by a formula that is based upon population that establishes the estimated need of fire flow. The ratio between those two figures is then charted on a graph of "the Maine Curve" to determine what percentage of the water utility's gross revenue should be recovered by PFP charges assessed to the given municipality's general fund.

Heid did not attempt to analyze the Township's PFP expenses under the preferable "fully allocated cost of service study" method because he had inadequate information and because it would have been "virtually impossible" to employ that method in the adversarial setting of litigation given that the process relies on the candid opinions of the given utility's staff members. Rather, for each year at issue in this case, Heid calculated the Township's PFP costs using the Maine Curve methodology. In doing so, he estimated the Township's overall "peak day requirements" using the "average

peak" factor of 2.5, and he admitted that, if the Township's actual peak day requirements varied from that estimated figure, it would alter his analysis. Using the estimated figure, however, the results indicated that, during the relevant years, the Township's water and sewer fund should have recovered between 10% to 15% of its gross revenue by way of PFP charges paid by the Township's general fund. Indeed, under the Maine Curve method, the minimum appropriate charge to a municipality for PFP services is 6% of the water utility's gross revenues. Heid opined that the Township had acted improperly by failing to pay such expenses out of its general fund and instead recovering its PFP expenses in the disputed water rates, which effectively forced the water utility's "end use customers" to pay for PFP services that were provided to the whole Township.

On cross-examination, however, Heid admitted that the M1 Manual indicates that assessing PFP costs to the ratepayers, rather than the municipal taxpayers, is one method for meeting any revenue requirement for the PFP costs. Moreover, it is a method that is, in Heid's experience, used "from time to time under certain circumstances," although he did not specify when or under what circumstances. Heid also reaffirmed that the M1 Manual embodies the generally accepted ratemaking principles for water utilities.

About 96% of Heffernan's auditing experience involved Michigan municipal and governmental entities, and he indicated that he had never before encountered a PFP challenge like the one at issue in this case. Indeed, as far as Heffernan knew, neither his direct clients nor any other client of Plante Moran had ever been subject to any kind of requirement to have a PFP charge like the one described by Heid, although Heffernan had encountered municipalities that did so

voluntarily. Similarly, Foster testified that "many" water distribution systems in Michigan "don't even identify what the [PFP] costs are," and those that do generally recover such costs through their water rates, not by charging the general fund. Foster was aware of only one Michigan municipality that had recovered PFP charges in the fashion suggested by Heid, and it did so only because a local ordinance explicitly mandated the practice. When Foster was asked whether the Maine Curve method is "widely recognized as a method of determining fire protection costs" in Michigan, he replied: "I don't believe so. In the few instances that I'm aware that an entity goes through the practice of allocating . . . public fire protection costs, other methods besides the Maine curve are used."

Heffernan explained that, for municipal utilities, it is difficult to accurately follow generally accepted accounting principles (GAAP) concerning "revenue recognition" and "expense recognition," which is somewhat similar to the non-GAAP concept that is commonly referred to as the "matching principle." Under GAAP, "[e]xpenses should be recognized at the time the transaction occurs that causes you to incur a cost, regardless of when the cash flow goes out," and the same principle generally applies to revenues, although there are exceptions. In the context of municipal utilities, however, following such principles is difficult because water meters are generally read on a quarterly basis, and thus a utility can only estimate how much water was used at any given time. Accordingly, Heffernan testified, the goal is to use such estimates to "get it materially right."

On cross-examination, when Heffernan was asked whether he was "aware of . . . any state or local laws that require" PFP charges "to be incorporated as part

of a general fund obligation as opposed to a water and sewer" fund obligation, he replied that he had seen one attorney-prepared interpretation of the Revenue Bond Act, MCL 141.101 *et seq*., suggesting "that if you have a revenue bond, . . . it's better to have the general fund paying for" PFP charges, but he knew of no other laws of that type.

I. CASH BALANCE OF THE TOWNSHIP'S WATER AND SEWER FUND

According to Theis, the Township's water and sewer fund was one of several Township funds with its "own set of books," separate from the general fund. Because the water and sewer fund was an "enterprise" fund, the state did not require the Township to maintain an annual budget for it, but the Township nevertheless did so in the interest of "transparency" and accurate ratemaking. From 2011 to 2017, the water and sewer fund had total "cash inflows of 156-ish million dollars, and cash outflows" of "151 point something million." Theis opined that this represented "clearly proportionate" cash outflows of 96% of the cash inflows.

Theis agreed that, as of March 31, 2010, the Township's water and sewer fund included about $4 million dollars of cash and cash equivalents. One year later, on March 31, 2011, the fund included approximately $6.6 million in cash and cash equivalents; on March 31, 2012, it contained about $11.5 million; on March 31, 2013, it contained roughly $14.5 million; on March 31, 2014, it contained "in excess of $18 million"; on March 31, 2015, following annual capital-asset purchases of $5.7 million, it contained about $12.5 million; on March 31, 2016, after the $2.7 million OPEB transfer, it contained approximately $7.8 million; and on March 31, 2017, it contained about $8 million.

After reviewing the water and sewer fund's cash flows over that same period and duly considering its nonrate revenues, Heffernan opined that those cash inflows and outflows, which were within 4% of one another over the course of the relevant time frame, were "very proportional." Heffernan believed that, "[i]f anything, the Township should have been "trying to increase their cash investment reserves a little bit." Put succinctly, his opinion was that from 2011 to 2017, the water and sewer fund's "total accumulation of cash, even though it varied from year to year, wasn't unreasonable . . . ."

Foster agreed that the disputed rates and charges were both reasonable and proportional to the underlying utility costs, summarizing his opinion as follows:

> Based on my review of the water and sewer rates in place between 2010 and 2017, . . . the revenues generated by the water and sewer rates have been commensurate with the revenue requirements of the water and sewer enterprise fund to provide service to the customers of the Township. The amount of money recovered through those rates has been proportionate to the cost of providing the service to the residents and businesses in the Township.

On cross-examination, however, Foster conceded that, hypothetically speaking, even if the disputed rates were duly proportional to the underlying utility expenses, the water and sewer fund could nevertheless use the revenue *generated* by those rates for clearly improper purposes, such as purchasing an expensive vacation home for the Township's board members.

Theis confirmed that the Township's water and sewer fund operated at a net loss in four of the fiscal years from 2005 to 2010, which forced the Township to subsidize it with cash from other Township funds. In 2010, for example, the water and sewer fund ended "9 of the 12

months . . . with negative operating cash." Over the years, Theis implemented multiple changes aimed at remedying such shortfalls, and since 2012, the water and sewer fund had no negative balances at any month's end, although there had been "low balances." One month in 2017, for example, the fund was left with only $1,800 in cash on hand. Theis also endeavored to build up a sufficient "emergency reserve" in the water and sewer fund to address emergent breaks and repairs of items such as water mains, which can cost "hundreds of thousands of dollars" or even "millions" to repair, along with operating reserves, debt reserves, and capital improvement reserves. According to Theis, such reserve funding is essential to prudently operating a water and sewer fund, and despite his best efforts, he believed that the water and sewer fund was "still not in a position to have proper reserves[.]" He further opined that having total reserves of about $13 or $14 million was a "pretty conservative, appropriate . . . target to get to."

Theis admitted that, in reviewing financial statements for the disputed years, he found one instance in 2015 where a $600,000 expense was mistakenly counted twice in setting the disputed utility rates, thereby raising the rates. But he highlighted this as proof of how important it is to view the water and sewer fund as a whole, rather than focusing on individual line items, noting that despite including the $600,000 expense twice in setting the rates for 2015, those rates ultimately resulted in an overall loss for the water and sewer fund that year, raising insufficient revenue to cover the fund's annual expenses.

Heffernan indicated that although determining how much a municipal utility should keep in reserves is not an exact science, the water and sewer fund's reserves

of about $4 million in 2010 "felt a little bit low." Heffernan explained that there is a consensus among experts that it is appropriate to maintain reserves for two fundamental areas: operating expenses and capital expenses (including future capital projects). In practice, Heffernan generally recommended that his clients maintain operational reserves of about 25% of their annual operating revenue, while his recommendation concerning capital reserves was dependent on the capital expenses the client anticipated in the next two to three years. Although a municipality could instead fund its capital projects on a pay-as-you-go basis, that was a "somewhat riskier" approach that Heffernan would "probably" advise against. After reviewing the water and sewer fund's 20-year capital plan, Heffernan opined that in the neighborhood of $13.9 million was an appropriate reserve target, and he agreed that the reserve levels at the time of trial were still "well below" what was advisable.

Foster added that his review of the Township's financial records during the relevant time frame demonstrated that "the amounts that were specifically identified on the rate memoranda as capital improvements, and the amounts that were actually, from the audited statements, spent on capital improvements over that time period are remarkably close." This supported his opinion that the rates and charges have generated revenues commensurate with the revenues required to operate and finance capital improvements to the system over the time in question.

In addition, Heffernan opined that a municipality's reserve level is an appropriate consideration in both municipal utility ratemaking and in determining the proportionality of disputed utility rates. In short, he stated that a utility should "be setting [its] rates in a

manner that will get the reserves where they should be." If the reserves are too low, rates should be increased—even if this results in temporarily "disproportional" cash flows—and the converse is equally true. On cross-examination, Heffernan admitted that the Township did not have a written plan with regard to its target reserve figures, but he explained that, considering the other 125 cities and townships that he was familiar with as an auditor, it was "highly unusual" for a municipality to have such a written plan.

J. TRIAL COURT'S OPINION, JUDGMENT, AND AMENDED JUDGMENT

Following the parties' closing arguments, the trial court took the matter under advisement and, on July 12, 2018, it announced its opinion orally from the bench.[10] The court ruled in favor of the Township with regard to plaintiff's claims pursued under § 31 of the Headlee Amendment, entering a judgment of no cause of action with respect to those claims. Generally, the court reasoned that, under the test set forth in *Bolt v Lansing*, 459 Mich 152; 587 NW2d 264 (1998), plaintiff failed to demonstrate that the disputed charges in this case constituted unlawful tax exactions.

Turning to plaintiff's common-law claims for assumpsit for money had and received, the trial court ruled partially in favor of both parties. With regard to nonrate revenue and revenue attributable to the Township's sewer-only customers, the court ruled in plaintiff's favor despite repeatedly finding that in light of the Township's ratemaking methodology—which the court referred to as "abstruse" and "recondite"—the court was unable to determine whether the disputed

[10] It appears that the trial court had prepared some sort of written decision, which it read into the record rather than issuing a written opinion.

rates were proportional to the associated utility costs and, if not, what "damages" figure was warranted. The trial court also chided the Township for failing to "show its work," indicating that, given the record before the court, it was "not evident . . . that the . . . Township water and sewer fund rates are just and reasonable."

This was a common theme in the trial court's decision. The court recognized that both *Novi v Detroit*, 433 Mich 414, 428-429; 446 NW2d 118 (1989), and *Trahey v Inkster*, 311 Mich App 582, 594, 597-598; 876 NW2d 582 (2015), held that municipal utility rates are presumed to be reasonable and that the plaintiff bears the burden of rebutting that presumption when challenging such rates. But the trial court indirectly criticized *Trahey*'s reasoning, and it refused to rely on the presumption of reasonableness in deciding this case. The court described that presumption as a "substitute for reason" and an exercise in "thoughtless thoughtfulness," at least as applied in this case; suggested that *Novi* and *Trahey* are outdated, having relied on caselaw from "1942 and 1943"; and indicated that application of the presumption of reasonableness in this case would "bastardize the presumption" and "absolutely, necessarily, unequivocally transform it into an unrebuttable presumption . . . ." In support, the trial court reasoned that "[i]t is clear from a reading of the law that a presumption exists once the details are on the table for all to see. First comes the details, then comes the presumption." In this instance, the trial court reasoned, the Township's unclear ratemaking methods had

> impeded the Court, and more importantly, [the] customer[s] and taxpayers from passing upon the question of whether the [Township's] rates are proportionate to its costs. This impediment, abstrusity, . . . estops invocation of the presumptive reasonableness, the thoughtless thoughtfulness presumption of the rates. Short of blind deference to [the

> Township], . . . [the Township's] impediment . . . hamstrings the Court . . . from even being able to hear a claim of disproportion. In a word, if the presumption were to prevail here, the presumption is and evermore shall be . . . unrebuttable.

After ruling in plaintiff's favor on that basis regarding the nonrate revenue and sewer-only revenue, the trial court reserved its ruling concerning the proper "damages" figures. The court indicated that, if the parties were unable to settle on the amount of damages, the Township would be permitted to "chime in" with regard to why, in light of the Township's failure to "show its work," the court should not simply accept plaintiff's related damage calculations. After subsequently considering the matter further, the trial court, in a corrected amended judgment, awarded a "refund to Plaintiff and the Class" of approximately $2.935 million with regard to the nonrate revenue claim and about $2.173 million with regard to the sewer-only revenue.

As to plaintiff's claim concerning "lost water," the trial court also ruled in plaintiff's favor. After construing Bloomfield Township Ordinance § 38-225 ("The township shall pay for all water *used* by it in accordance with the foregoing schedule of rates.") (emphasis added) and § 38-226 ("All water service shall be charged on the basis of water *consumed* as determined by a meter installed on the premises of the user by the department.") (emphasis added),[11] the court agreed with plaintiff that, under those provisions, "[i]f water is not consumed, as determined by a meter under [§ 38-226], then by process of elimination, or by default, [it] must be water used by the Township under

[11] The language of these provisions changed somewhat in 2019, and what was then § 38-226 is now § 38-227.

[§ 38-225]." Put differently: "The cost for this truly lost water bucket per ordinance . . . was destined to be borne on the shoulders of the general fund taxpayers." The trial court also rejected any argument that the Township paid for such "truly lost water" by way of the in-kind services it provides to the water and sewer fund. Rather than rule concerning the amount of damages, the trial court instructed the parties "to crunch the numbers."

As to water "used" by the Township's municipal facilities, the trial court held that, although the Township's "rationalization" concerning in-kind remuneration was "obfuscated," plaintiff had failed to "overcome . . . the presumptive reasonableness of the Township's decision to pay" for such water with in-kind services. The trial court also rejected plaintiff's contention that the in-kind arrangement violated Bloomfield Township Ordinance § 38-225, reasoning that the ordinance "does not specify" that in-kind services cannot be used as a form of payment. Nevertheless, the trial court found "liability in Plaintiff's favor" and in favor of the plaintiff class. It awarded no monetary "refund" but ordered defendant to "henceforth" and "permanently" provide "explicit accounting . . . with explicit valuations" of the in-kind services that the Township provides as payment to the water and sewer fund, including payments for "construction water," "lost water," PFP charges, rent, and water used by municipal facilities.

On the other hand, with regard to "construction water," the trial court held that such water is "used" by both the Township and the ratepayers within the meaning of Bloomfield Township Ordinance § 38-225, and it rejected the argument that the Township paid for such water via the in-kind services it provides to

the water and sewer fund. On that basis, the trial court ruled in plaintiff's favor concerning the construction water, again reserving its ruling concerning the amount of damages and instructing the parties "to crunch the numbers." After further considering the matter, the trial court eventually entered an amended judgment ordering the Township to issue "a refund to Plaintiff and the Class in the amount of" approximately $3.69 million related to "the Township's own water use," which seemingly covered both "lost water" and "construction water."

With regard to plaintiff's non-Headlee claim concerning the disputed county drain charges, the trial court stated no reasoning in support of its holding. Rather, it simply stated: "Storm water drain, judgment, no cause of action."

As to the disputed rent charges, without explaining its reasoning, the trial court ruled in plaintiff's favor with regard to liability, but it refused to award any damages. However, as noted earlier, it issued a permanent injunction against the Township, ordering it to explicitly document any in-kind services used to pay such rent charges.

Similarly, with regard to OPEB charges, the trial court ruled in plaintiff's favor with regard to liability, but it refused to award any damages. However, the trial court permanently enjoined the Township to "explicitly document the OPEB dollars in setting its water and sewer rates." The trial court reasoned that the Township's commingling of OPEB-charge revenues that had not yet been funded into the OPEB trust with "surplus" funds in the water and sewer fund was improper given that, until such OPEB funds were transferred to trust, they could be utilized by the water and sewer department "for whatever it deems appropriate."

Finally, as to PFP charges, without explaining its reasoning, the trial court ruled "no cause of action in part" and "liability in Plaintiff's favor in part," initially holding that plaintiff "prevail[ed] in a dollar amount equal to the cost of water in fire hoses over the relevant time frame paid by the general fund." After considering the matter further, however, the trial court entered its amended judgment holding that plaintiff and the plaintiff class were entitled to no "refund" in that regard because the Township "already pays" for such water by way of in-kind services. But the trial court issued a permanent injunction ordering the Township to expressly document such in-kind services and their associated valuations, and it also ordered the Township provide "explicit accounting of water in fire hoses to be paid for by the general fund[.]"

Approximately two months after the trial court announced its decision, it held a hearing concerning the proper remedies in this case. While entertaining argument in that respect, the trial court asked plaintiff's counsel whether, in light of the Township's "abstruse, recondite" ratemaking, there was some "legal vehicle" by which the court might award plaintiff "damages" despite its having found both that it was unable to determine whether the disputed rates were actually disproportionate to the associated costs and that the amount of any disproportionality was impossible to determine on the basis of the record evidence. The trial court indicated that it would keep that issue "on the backburner" and allow plaintiff to argue the issue further at a later date.

Less than two weeks later, however, the trial court entered its initial judgment in this case. That initial judgment explicitly indicated that it was not a final order and that the trial court retained jurisdiction "for

all purposes[.]" But in a subsequently entered order, the trial court ruled: "[T]he inquiry to plaintiff was and remains this: 'Is there a legal or equitable doctrine which would yield a judicial adjudication in favor of one party because the other party obscured proofs needed for that judicial adjudication?' "

Hence, about three months after the initial judgment was entered, plaintiff filed a motion for relief from judgment under MCR 2.612(C)(1)(f), requesting entry of an amended judgment on the basis that there were, in fact, several legal or equitable doctrines that would yield a judicial adjudication in plaintiff's favor because the Township had obscured proofs. At the ensuing motion hearing, the trial court indicated that plaintiff's motion was "inaptly titled" as a motion for relief from judgment and would, instead, be treated as a motion to "supplement" the initial judgment. The court acknowledged that it "remain[ed] unsure if the [Township] committed the singular wrong of passing a rate disproportionate to costs," explaining that, in the court's estimation, the "wrong" committed by the Township "was wont [sic] of clarity" in its "abstruse recondite rates[.]" Having considered the caselaw plaintiff cited, the trial court indicated that it was persuaded that "such wrong of unclarity itself . . . fulfills the element Plaintiff needed to prove that the Defendant's rates were disproportionate to costs in the amount of nonrate revenue and sewer-only receipts . . . ."

Thus, the trial court granted plaintiff most of her requested relief, entering an amended judgment awarding plaintiff and the plaintiff class, in sum, approximately $9.58 million (including prejudgment interest) in "refunds," along with the permanent injunctive relief described earlier. The instant appeals ensued.

II. ANALYSIS

A. STANDARDS OF REVIEW

On appeal, the parties raise several distinct claims of error, which we review under varying standards. "This Court . . . reviews de novo the proper interpretation of statutes and ordinances," *Gmoser's Septic Serv, LLC v East Bay Charter Twp*, 299 Mich App 504, 509; 831 NW2d 881 (2013), and the legal question of whether a municipal utility charge constitutes an unlawful exaction under § 31 of the Headlee Amendment, *Mapleview Estates, Inc v Brown City*, 258 Mich App 412, 413-414; 671 NW2d 572 (2003). As a general rule, this Court also reviews equitable issues de novo, *Sys Soft Technologies, LLC v Artemis Technologies, Inc*, 301 Mich App 642, 650; 837 NW2d 449 (2013), reviewing any related factual findings by the trial court for clear error, *Canjar v Cole*, 283 Mich App 723, 727; 770 NW2d 449 (2009). "A finding is clearly erroneous if, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake was made." *In re AGD*, 327 Mich App 332, 338; 933 NW2d 751 (2019) (quotation marks and citation omitted). In reviewing a trial court's factual findings, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).

However, a trial court's decision to grant equitable relief in the form of an injunction is generally reviewed for an abuse of discretion. *Dep't of Environmental Quality v Gomez*, 318 Mich App 1, 33-34 & n 12; 896 NW2d 39 (2016). "A trial court abuses its discretion when it chooses an outcome falling outside the range of reasonable and principled outcomes, or when it makes an error of law." *Planet Bingo, LLC v VKGS, LLC*, 319

Mich App 308, 320; 900 NW2d 680 (2017) (quotation marks and citation omitted).

B. PLAINTIFF'S ASSUMPSIT CLAIMS

The parties disagree about whether the trial court's use of its equitable powers was proper. As appellant, the Township argues that, having found that plaintiff had failed to demonstrate that the disputed rates were disproportionate to the underlying costs, the trial court erred by disregarding the presumption that those rates were reasonable. The Township also argues that the trial court erred by awarding plaintiff and the plaintiff class both the monetary award and permanent injunctive relief that it did. Contrastingly, by way of plaintiff's cross-appeal, she contends that the trial court should have awarded additional refunds related to the disputed OPEB, PFP, and rent charges. We agree with the Township that the trial court erred by failing to apply the presumption that the disputed rates were reasonable and abused its discretion by granting plaintiff permanent injunctive relief despite her failure to demonstrate that doing so was necessary to prevent irreparable harm.[12]

Aside from the claims that plaintiff asserted under the Headlee Amendment—which we analyze later in this opinion—plaintiff's claims in this action were all captioned "**ASSUMPSIT/MONEY HAD AND RECEIVED**[.]" As our Supreme Court long ago recognized in *Moore v Mandlebaum*, 8 Mich 433, 448 (1860),

[12] Our decision in this regard renders moot the Township's argument that the trial court erred or abused its discretion by amending its initial judgment to award additional "damages." Hence, we decline to decide that issue. See *Garrett v Washington*, 314 Mich App 436, 449; 886 NW2d 762 (2016) ("A matter is moot if this Court's ruling cannot for any reason have a practical legal effect on the existing controversy.") (quotation marks and citations omitted).

> the action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover. And that, as a general rule, where money has been received by a defendant under any state of facts which would, in a court of equity, entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.

Accord *Trevor v Fuhrmann*, 338 Mich 219, 224; 61 NW2d 49 (1953), citing *Moore*, 8 Mich at 448. At common law, assumpsit was a proper vehicle for recovering unlawful fees, charges, or exactions—including unlawful utility charges—that the plaintiff had paid to a municipality under compulsion of local law. See *Bond v Ann Arbor Sch Dist*, 383 Mich 693, 704; 178 NW2d 484 (1970). Notably, such an action "will not lie against one who has not been personally *enriched* by the transaction" because the fundamental "basis" of the action "is not only the loss occasioned to the plaintiff on account of the payment of the money, but the consequent enrichment of the defendant by reason of having received the same." *Trevor*, 338 Mich at 224-225 (quotation marks and citations omitted; emphasis added).

"With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished. But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013). Hence, an "assumpsit" claim is modernly treated as a claim arising under "quasi-contractual" principles, which represent "a subset of the law of unjust enrich-

ment." *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019).

In contemporary municipal utility ratemaking cases, a similar focus on principles of "unjust enrichment" is encapsulated within the rebuttable presumption that a municipality's utility rates are reasonable. See generally *Novi*, 433 Mich at 428-429; *Trahey*, 311 Mich App at 594, 597-598. In *Novi*, 433 Mich at 428, our Supreme Court was charged with deciding whether MCL 123.141 had abrogated "the longstanding principle of presumptive reasonableness of municipal utility rates," affected the applicable burden of proof, or altered the traditionally circumspect scope of judicial review. Ruling in the context of a *municipality's* wholesale-rate challenge under MCL 123.141(2)—not a *ratepayer's* challenge under MCL 123.141(3)—the Supreme Court held that MCL 123.141 had not meaningfully altered the presumption of reasonableness, burden of proof, or scope of judicial review, reasoning, in part, as follows:

> Historically, this Court has accorded great deference to legislatively authorized rate-making authorities when reviewing the validity of municipal water rates. . . .
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> * * *
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> . . . [R]ate-making is a legislative function that is better left to the discretion of the governmental body authorized to set rates.
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> * * *
>
> Michigan courts, as well as those in other jurisdictions, have recognized the longstanding principle of presumptive reasonableness of municipal utility rates. These courts have stressed a policy of judicial noninterference where the Legislature has authorized governmental bodies to set

rates. As this Court noted in [*Plymouth v Detroit*, 423 Mich 106, 128-129; 377 NW2d 689 (1985)], the Court in *Federal Power Comm v Hope Natural Gas Co*, 320 US 591, 602; 64 S Ct 281; 88 L Ed 333 (1943) stated:

> We held in *Federal Power Commission v Natural Gas Pipeline Co* [315 US 575; 62 S Ct 736; 86 L Ed 1037 (1942)], that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences. [Citations omitted.] . . .

The Michigan Legislature's intention that courts refrain from strictly scrutinizing municipal utility rate-making is reflected in several statutory provisions. . . .

Courts of law are ill-equipped to deal with the complex, technical processes required to evaluate the various cost factors and various methods of weighing those factors required in rate-making. The decision of the Court of Appeals, however, superimposes Michigan courts as ultimate rate-making authorities despite the absence of any

> express statutory language or legislative history that would support such a role in the rate-making process.
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> * * *
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> . . . The concept of reasonableness, as recognized by the courts of this state and other states in utility rate-making contexts, must remain operable, in order to provide a meaningful and manageable standard of review.
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> * * *
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> For these reasons, we hold that 1981 PA 89 [i.e., the public act that last amended MCL 123.141] did not render inoperable the concept of reasonableness in the process of judicial review of municipal utility water rates. The burden of proof remains on the plaintiff to show that a given rate or rate-making method does not reasonably reflect the actual cost of service as determined under the utility basis of rate-making pursuant to MCL 123.141(2)[.] [*Novi*, 433 Mich at 425-433 (some alterations added).]

Because *Novi* involved a rate challenge pursued by a municipality under MCL 123.141(2), not a ratepayer challenge pursued under MCL 123.141(3), *Novi*'s statutory analysis focused almost exclusively on MCL 123.141(2). However, in *Trahey*, 311 Mich App at 594, 597-598, this Court expanded the scope of *Novi*'s pertinent holdings, applying them in the context of a resident-ratepayer challenge under MCL 123.141(3). Thus, the presumption of reasonableness was extended to the rates a municipality charges its ratepayers. *Id*. at 594. In these cases, the plaintiff bears the burden of rebutting the presumption of reasonableness "by a proper showing of evidence." *Id*. " 'Absent *clear evidence* of illegal or improper expenses included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable.' " *Shaw v*

Dearborn, 329 Mich App 640, 654; 944 NW2d 153 (2019),[13] quoting *Trahey*, 311 Mich App at 595 (emphasis in *Shaw*).

As authority for its position aside from *Trahey*, *Shaw*, and *Novi*, the Township relies on, among other things, two unpublished decisions of this Court that were decided together in 2019. Plaintiff argues that this Court should disregard those unpublished decisions because they are not binding and "were wrongly decided." Plaintiff is correct that unpublished decisions of this Court are not precedentially binding under MCR 7.215(C)(1), but she fails to recognize that they may nevertheless be considered as "persuasive or instructive" authority.[14] *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

In any event, the heart of the parties' dispute regards the manner in which the rule of law set forth in *Trahey* should be applied. Specifically, citing *Trahey*, 311 Mich App at 595 ("Absent clear evidence of *illegal or improper expenses* included in a municipal utility's rates, a court has no authority to disregard the presumption that the rate is reasonable.") (emphasis added), plaintiff argues that in a ratepayer challenge like the one at bar (i.e., one pursued under MCL 123.141(3)), if a plaintiff *does*

[13] The pending application for leave to appeal in *Shaw* has been held in abeyance pending our Supreme Court's decision in *Detroit Alliance Against the Rain Tax v Detroit*, 505 Mich 962 (2020). *Shaw v Dearborn*, 944 NW2d 720 (2020).

[14] In the context of similar challenges raised under the Headlee Amendment, this Court has recognized that it "presumes the amount of the fee to be reasonable, unless the contrary appears on the face of the law itself or is established by proper evidence[.]" *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665-666; 697 NW2d 180 (2005) (quotation marks and citations omitted). But because the instant rate challenges were not pursued under the Headlee Amendment, that authority is not dispositive here.

present clear evidence of either illegal or improper expenses included in a municipal utility's rates, the presumption of reasonableness is no longer a relevant consideration—that is, the plaintiff need not also demonstrate that the rates, viewed as a whole, are unreasonable. Put differently, plaintiff argues that *Trahey* stands for the proposition that, in the face of illegal or improper expenses included in the disputed rates, she is not required to demonstrate that the rates actually *overcharged* for the related water and sewer services.

In stark contrast, the Township argues that, under *Trahey*, even if a *specific* expense that is included in formulating a challenged municipal utility rate is shown to be either illegal or improper, the plaintiff nevertheless bears the burden of both rebutting the presumption of reasonableness and proving that the disputed rates are unreasonable when viewed *as a whole*. In other words, the Township argues that absent a showing that the disputed rates actually overcharged plaintiff and the plaintiff class for the related water and sewer services, plaintiff's challenge to those rates—and her request for monetary damages in particular—is fatally flawed. We agree with the Township.

In our view, the flaw in plaintiff's argument rests less on a textual dissection of *Trahey* than it does on the fundamental nature of plaintiff's equitable "assumpsit" claims. "[E]quity regards and treats as done what in good conscience ought to be done." *Allard v Allard (On Remand)*, 318 Mich App 583, 597; 899 NW2d 420 (2017) (quotation marks and citation omitted). Had plaintiff sought a declaratory judgment that certain costs included in the disputed water and sewer rates were improper or illegal, perhaps she would be correct that the presumption of reasonableness would be irrelevant. Instead, however, by asserting her claims for assumpsit,

plaintiff sought "restitution"—in the form of a refund to herself and the plaintiff class—of whatever amount was necessary to "correct for the unfairness flowing from" the Township's "benefit received," i.e., its "unjust retention of a benefit owed to another." *Wright*, 504 Mich at 417, 422. Whether the Township would receive an unjust "benefit" from retaining the disputed rate charges in this case depends on whether the water and sewer rates, viewed as a whole, were unreasonable inasmuch as they were "excessive," not on whether some aspect of the Township's ratemaking methodology was improper. See *id*. at 419 ("Unjust enrichment . . . doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded *excessive and unjust benefits* to his or her rightful position.") (emphasis added).

Plaintiff's strained interpretation of *Trahey* would permit an order of restitution in this case without any evidence or finding that the Township was enriched, let alone excessively compensated, by collecting and retaining the disputed utility charges. Moreover, even assuming, arguendo, that plaintiff is correct concerning this Court's holding in *Trahey*, she fails to recognize that, to the extent that *Trahey* might be read as inconsistent with our Supreme Court's decisions concerning the essential nature of unjust enrichment and restitution in *Wright* or with *Novi*'s holding regarding the continued viability of the presumption of reasonableness, *Trahey* must be ignored under the doctrine of vertical stare decisis. See *In re AGD*, 327 Mich App at 339-340 (noting that, under the doctrine of vertical stare decisis, only our Supreme Court has authority to overrule one of its prior decisions, and until that Court

does so, its former decisions remain binding on all lower courts); *Allen v Charlevoix Abstract & Engineering Co*, 326 Mich App 658, 665; 929 NW2d 804 (2019) (noting that this Court is "required to ignore" its former published decisions "in favor of any conflicting Supreme Court precedent").

The application of these principles in this case is straightforward. On several occasions, the trial court explicitly found that plaintiff had failed to rebut the presumption of reasonableness or demonstrate that the disputed rates were excessive in comparison to the associated costs of providing the related water and sewer services. On this record, we perceive no basis to disturb those factual findings. On the contrary, without a comprehensive rate study—or some similar evidence demonstrating that the disputed rates excessively compensated the Township for the related utility services—one can at best speculate about whether the disputed rates were proportional to the underlying costs. And several of the testifying experts at trial specifically indicated, having reviewed the Township's audited financial statements, that its cash inflows and outflows over the disputed period were proportional. Therefore, we are not definitely and firmly convinced that the trial court made a mistake when it found that plaintiff had failed to demonstrate disproportionality in the rates.

In light of that finding, the trial court erred by nevertheless ordering defendants to refund more than $9 million to plaintiff and the plaintiff class. Given that plaintiff failed to demonstrate that the Township would be excessively (and thus unjustly) enriched by the retention of those funds, the trial court should not have ordered the refund that it did. See *Wright*, 504 Mich at 417-418, 422-423; *Trahey*, 311 Mich App at 594, 597-598.

We also conclude that the trial court abused its discretion by granting plaintiff a permanent injunction requiring the Township to document its ratemaking efforts in a specified fashion. "Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, *and there exists a real and imminent danger of irreparable injury*." *Jeffrey v Clinton Twp*, 195 Mich App 260, 263-264; 489 NW2d 211 (1992) (quotation marks and citation omitted; emphasis added). See also *Royal Oak Sch Dist v State Tenure Comm*, 367 Mich 689, 693; 117 NW2d 181 (1962) ("Equity should not be used to obtain injunctive relief where there is no proof that complainant would suffer irreparable injury."). Moreover, the party seeking injunctive relief has the burden of demonstrating that the requested injunction is appropriate and necessary. See *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 3; 753 NW2d 595 (2008); *Dutch Cookie Machine Co v Vande Vrede*, 289 Mich 272, 280; 286 NW 612 (1939).

As noted, we find no basis to disturb the trial court's finding that plaintiff failed to demonstrate that the disputed rates were actually disproportionate to the underlying utility costs. Consequently, plaintiff also failed to demonstrate that the injunctive relief ordered by the trial court was necessary to avert irreparable harm. On this record, one cannot tell whether plaintiff or the plaintiff class suffered any harm at all as a result of the disputed rates or ratemaking practices, let alone an *irreparable* injury or the real and imminent danger of suffering such an injury. By nevertheless granting a permanent injunction against the Township with regard to its ratemaking methodology, the trial court abused its discretion, overstepping the proper bounds of both its injunctive powers and the limited scope of judicial review that is appropriate in ratemaking cases such as this one. See *Dutch Cookie Machine*

Co, 289 Mich at 280 (holding that the party seeking an injunction bears the burden of proving that its issuance is warranted); *Novi*, 433 Mich at 428, 431 (discussing "the difficulties inherent in the rate-making process," "the statutory and practical limitations on the scope of judicial review," and the general "policy of judicial noninterference where the Legislature has authorized governmental bodies to set rates").

C. THE REVENUE BOND ACT

As cross-appellant, plaintiff contends that the trial court erred by failing to recognize that the disputed PFP charges are unlawful under the Revenue Bond Act (RBA), MCL 141.101 *et seq*. In particular, plaintiff argues that those charges are unlawful because they permit the Township to receive "free service" in contravention of MCL 141.118(1), which provides, in pertinent part:

> Except as provided in subsection (2),[15] free service shall not be furnished by a public improvement to a person, firm, or corporation, public or private, or to a public agency or instrumentality. The reasonable cost and value of any service rendered to a public corporation, including the borrower, by a public improvement shall be charged against the public corporation and shall be paid for as the service accrues from the public corporation's current funds or from the proceeds of taxes which the public corporation, within constitutional limitations, is hereby authorized and required to levy in an amount sufficient for that purpose, or both . . . .

Specifically, plaintiff argues that the Township receives "free" PFP services, in contravention of MCL 141.118(1),

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[15] This subsection, MCL 141.118(2), is irrelevant here, given that it applies to "[a] public improvement that is a hospital or other health care facility . . . ."

because the Township's water and sewer fund, not its general fund, pays for those services by incorporating the PFP expenses into the disputed utility rates.

Assuming, without deciding, that the RBA is applicable here, that plaintiff is entitled to pursue a private cause of action seeking damages for violation of the RBA (which is an issue that she failed to brief), that such a private action constitutes a valid end-around of the presumption-of-reasonableness standard discussed in *Trahey* and *Novi*, and that plaintiff is correct that it *would* violate MCL 141.118(1) if the Township were to fail to pay for its PFP services in the manner alleged, plaintiff's argument is nevertheless unavailing. Plaintiff ignores the fact that, in the trial court's amended judgment, it expressly found that the Township did, in fact, pay for the disputed PFP expenses by way of in-kind remuneration provided to the water and sewer fund. In plaintiff's brief as cross-appellant, she fails to explicitly argue that the trial court's finding in that regard was clearly erroneous, and we discern no basis for disturbing it.

There was extensive evidence at trial concerning the in-kind services the Township renders to its water and sewer fund, with Heffernan estimating their annual value at somewhere around $700,000 or $800,000. On the other hand, there was a relative dearth of evidence concerning the proper value for the trial court to ascribe to the PFP services. Plaintiff's own expert, Heid, admitted that the "preferable" method of assessing the value of such services was to perform "a fully allocated cost of service study" and that he had failed to do so, having instead used the "antiquated" Maine Curve methodology. Therefore, we are not persuaded that the trial court clearly erred when it found that the Township's provision of in-kind services constituted

sufficient payment for the disputed PFP services. And in light of the finding that the Township *was* paying for those PFP services, we cannot conclude that the trial court erred by failing to hold that the Township was receiving "free" PFP services in contravention of MCL 141.118(1).

D. MCL 123.141(3)

Plaintiff also argues that the trial court erred by failing to recognize that the PFP charges are unlawful under MCL 123.141(3) ("The retail rate charged to the inhabitants of a city, village, township, or authority which is a contractual customer as provided by subsection (2) shall not exceed *the actual cost of providing the service*.") (emphasis added). But plaintiff fails to explain how even a *proven* violation of MCL 123.141(3), standing alone, exempts her instant claim from the presumption-of-reasonableness standard set forth in *Trahey*, 311 Mich App at 594, 597-598, which addressed a rate challenge pursued under the same statutory provision: MCL 123.141(3). In our estimation, the rule of law set forth in *Trahey* concerning the presumption of reasonableness is binding here and that presumption must be applied. See MCR 7.215(J)(1). And for the reasons explained in Part II(B) of this opinion, we conclude that plaintiff's assumpsit claims under MCL 123.141(3) are not viable in light of the presumption of reasonableness discussed in *Trahey* and *Novi*. Hence, we reject this claim of error.

E. PLAINTIFF'S CLAIMS UNDER HEADLEE § 31

Finally, plaintiff argues that the trial court erred by holding that the disputed OPEB, county drain, and PFP charges were not unlawful exactions under § 31 of the Headlee Amendment. We disagree.

"The Headlee Amendment was adopted by referendum effective December 23, 1978." *Shaw*, 329 Mich App at 652. It was "proposed as part of a nationwide 'taxpayer revolt' in which taxpayers were attempting to limit legislative expansion of requirements placed on local government, to put a freeze on what they perceived was excessive government spending, and to lower their taxes both at the local and the state level." *Durant v State Bd of Ed*, 424 Mich 364, 378; 381 NW2d 662 (1985). These purposes "would be thwarted if a local authority could charge higher utility rates to raise revenue and then use some of the excess funds to finance a public-works project." *Shaw*, 329 Mich App at 643. As adopted, the Headlee Amendment "imposes on state and local government a fairly complex system of revenue and tax limits." *Durant v Michigan*, 456 Mich 175, 182; 566 NW2d 272 (1997).

Plaintiff's claims here are pursued under § 31 of the Headlee Amendment, which provides, in pertinent part:

> Units of Local Government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified, without the approval of a majority of the qualified electors of that unit of Local Government voting thereon. . . .
>
> The limitations of this section shall not apply to taxes imposed for the payment of principal and interest on bonds or other evidence of indebtedness or for the payment of assessments on contract obligations in anticipation of which bonds are issued which were authorized prior to the effective date of this amendment. [Const 1963, art 9, § 31.]

As our Supreme Court observed in *Durant*, 456 Mich at 183, "Section 31 prohibits units of local government

from levying any new tax or increasing any existing tax above authorized rates without the approval of the unit's electorate." "Although the levying of a new tax without voter approval violates the Headlee Amendment, a charge that constitutes a user fee does not," and the party challenging a given municipal utility charge under § 31 "bears the burden of establishing the unconstitutionality of the charge at issue." *Shaw*, 329 Mich App at 653.

To support her position, plaintiff primarily relies on *Bolt*, 459 Mich 152, which set forth a three-prong test for determining whether a municipal charge represents a permissible "user fee" or an impermissible "tax" under Headlee § 31. In *Shaw*, 329 Mich App at 653, this Court observed that in *Bolt*, our Supreme Court explained that

> "[t]here is no bright-line test for distinguishing between a valid user fee and a tax that violates the Headlee Amendment." *Bolt*, 459 Mich at 160. In general, "a fee is exchanged for a service rendered or a benefit conferred, and some reasonable relationship exists between the amount of the fee and the value of the service or benefit. A tax, on the other hand, is designed to raise revenue." *Id*. at 161 (cleaned up). Under *Bolt*, courts apply three key criteria when distinguishing between a user fee and a tax: (1) "a user fee must serve a regulatory purpose rather than a revenue-raising purpose"; (2) "user fees must be proportionate to the necessary costs of the service"; and (3) a user fee is voluntary in that users are "able to refuse or limit their use of the commodity or service." *Id*. at 161-162. "These criteria are not to be considered in isolation, but rather in their totality, such that a weakness in one area would not necessarily mandate a finding that the charge is not a fee." *Wheeler v Shelby Charter Twp*, 265 Mich App 657, 665; 697 NW2d 180 (2005) (cleaned up).

Notably, the presumption of reasonableness regarding municipal utility rates is a "pertinent" consideration

when considering the second *Bolt* factor. *Shaw*, 329 Mich App at 654.

In *Shaw*, this Court recently employed the *Bolt* factors in considering a Headlee challenge somewhat similar to the one now at bar. The *Shaw* Court upheld the challenged water and sewer rates in that case, holding that they were permissible user fees. *Id*. at 669. In part, this Court reasoned:

> [P]laintiff . . . posits that there are embedded taxes within her utility rates, arguing that a charge need not pay for infrastructure to qualify as a disguised tax. . . .
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> * * *
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> Under the analysis suggested by plaintiff, a city could never use funds obtained from city-wide water or sewer ratepayers to install, repair, or replace any particular pipe or facility that is part of the overall water or sewer system. Take, for example, a water main that runs beneath a major thoroughfare on the west side of any average city. The water main does not transport water to the residential homes, commercial businesses, or industrial factories on the east side of that city. Yet, when the water main ruptures and must be repaired, the city can use funds obtained from the general pool of water ratepayers to make the repairs—without transforming its water rates into an unconstitutional tax. The city is not constrained by the Headlee Amendment to determine which specific homes, businesses, or factories in the city use water that flows through the specific water main that burst, and then use revenues derived from only those users to pay the cost of repairing that burst pipe. *When the city uses funds paid by water ratepayers throughout the entire city to pay for the repairs to the burst water main, that repair does not transform the city's water rates into an illegal tax on the ratepayers who use water that flows through pipes other than the one that burst. Rather, the water rates are used to operate and maintain a viable water-supply system for the entire city and the revenues used to make the repairs serve*

> *a regulatory purpose of providing water to all of the city's residents*. [*Id*. at 663-665 (emphasis added).]

Shaw's analysis of the *Bolt* factors strongly supports the propriety of the trial court's Headlee ruling in this case. Addressing the first factor, in *Shaw*, 329 Mich App at 666, this Court held that it was

> beyond dispute that the city's water and sewer rates comprise a valid user fee because the rates serve the regulatory purpose of providing water and sewer service to the city's residents. Although the rates generate funds to pay for the operation and maintenance of the water and sewer systems in their entirety, this by itself does not establish that the rates serve primarily a revenue-generating purpose. "While a fee must serve a primary regulatory purpose, it can also raise money as long as it is in support of the underlying regulatory purpose." *Graham v Kochville Twp*, 236 Mich App 141, 151; 599 NW2d 793 (1999). Further, the [charge at issue], i.e., the cost of operating and maintaining the caissons, is part of the cost of providing sewer service to the city's ratepayers. Dearborn must provide sewer service in conformance with state and federal regulatory requirements, and keeping the caissons functional helps ensure that sewage is properly treated before it is released into the environment.

Similarly, in this case, it is undisputed that the contested rates are assessed to fund the operational and capital expenses of the Township's water and sewer system, which serves the primary function of providing water and sewer services to the Township's ratepayers. Moreover, to the extent that those rates result in surpluses during some fiscal years, Domine indicated that the Township's 20-year capital improvement program was, at least in part, necessitated by the entry of an "abatement order" against the Township, which arose out of litigation with the DEQ and regarded the level of water "infiltration" in the Township's sewer system. Categorically, obligations arising out of administrative-

agency regulations serve a regulatory purpose. On the strength of the entire record, we hold that the Township's act of raising a prudent level of both revenue and capital and operational reserves through the disputed rates—including revenue to fund its OPEB obligations, the costs of providing fire protection services to the community, expenses related to the county storm-drain system, and necessary capital improvements—primarily serves valid regulatory purposes.

Nor are we persuaded by plaintiff's contention that, because some who are not ratepayers may benefit from the water and sewer system, the disputed rates must be an improper tax. By way of example, although county storm-sewer systems certainly benefit the general public when viewed on a macro scale—e.g., by preventing roadways from flooding, limiting soil erosion and the pollution of waterways, and decreasing demand on regional wastewater-treatment facilities—the vast majority of governmental enterprises benefit the general public, rather than just one regional subset of the public, when viewed on this scale. As in *Shaw*, plaintiff's proposed application of the first *Bolt* factor would effectively hamstring municipal utilities, preventing them from raising the funds necessary to comply with mandatory state and federal regulations if doing so will yield any sort of incidental benefit for society at large. In any event, viewing the disputed rates as a whole, we are persuaded that they primarily serve valid regulatory purposes under the first *Bolt* factor, which favors the determination that they are user fees rather than taxes.

In considering the second *Bolt* factor, in *Shaw*, 329 Mich App at 666-668, this Court reasoned, in pertinent part, that the disputed "water and sewer rates" in that case

> constitute[d] a valid user fee because users pa[id] their proportionate share of the expenses associated with the operation and maintenance of the water and sewer systems. Mathematic precision is not required when reviewing the reasonable proportionality of a utility fee. "Where the charge for either storm or sanitary sewers reflects the actual costs of use, metered with relative precision in accordance with available technology, including some capital investment component, sewerage may properly be viewed as a utility service for which usage-based charges are permissible, and not as a disguised tax." *Bolt*, 459 Mich at 164-165 (cleaned up).
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> * * *
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> . . . Plaintiff reasons that the amount of water that a ratepayer withdraws from the tap bears no relation to the amount of stormwater that enters the combined-sewer system, and she argues that funds derived from water ratepayers therefore cannot be used to pay for the construction, operation, or maintenance of anything related to stormwater without transforming the water and sewer rates into an unconstitutional tax. Plaintiff further argues that the city should design a system of charging property owners, rather than ratepayers, for the removal of stormwater that flows across their property before entering the combined-sewer system or the separated-storm system. Yet, under the Headlee Amendment, it is not this Court's role to determine whether a municipal government has chosen the best, wisest, most efficient, or most fair system for funding a municipal improvement or service. This Court's role, rather, is to determine whether a particular charge imposed by a municipal government is a true user fee or a disguised tax. [Quotation marks and citations partially omitted.]

In this case, on several occasions, the trial court expressly found that plaintiff had failed to demonstrate that the disputed utility rates were disproportionate to the underlying utility costs, and as already explained, we see no basis for disturbing that factual

finding. Because plaintiff did not carry her burden of demonstrating disproportionality, it necessarily follows that the second *Bolt* factor militates in favor of the Township's position. See *Shaw*, 329 Mich App at 653 (observing that "the plaintiff bears the burden of establishing the unconstitutionality of the charge at issue").

With regard to the final factor, this Court in *Shaw* ruled as follows:

> The third *Bolt* factor also weighs in favor of finding that Dearborn's water and sewer rates constitute a valid user fee. Each individual user decides the amount and frequency of usage, i.e., each user decides how much water to draw from the tap. See *Ripperger v Grand Rapids*, 338 Mich 682, 686; 62 NW2d 585 (1954) (explaining that "[n]o one can be compelled to take water unless he chooses" and that charges for water and sewer services based on water usage do not comprise taxes); *Mapleview Estates, Inc*[, 258 Mich App at 417] (holding that an increased fee for connecting new homes to water and sewer systems was voluntary because, *inter alia*, "those who occupy plaintiff's homes have the ability to choose how much water and sewer they wish to use"). The purported charges at issue in this case are voluntary because each user of the city's water and sewer system can control how much water they use. [*Shaw*, 329 Mich App at 669.]

The instant case is distinguishable from *Shaw* with respect to the third *Bolt* factor. In this case, the parties agree that the disputed water and sewer rates each comprised both a variable rate, which was based on metered water usage, and a fixed rate. Indeed, Theis testified that the fixed portion of the water rate generally represented about 80% of the utility's required revenue stream. Contrastingly, in *Shaw*, it was "uncontested that Dearborn determine[d] its water and sewer rates based on metered-water usage" alone. *Id*. at 667; see also *id*. at 668 (distinguishing *Bolt* on the

basis that the disputed rates in *Bolt* were "flat rates," not variable rates based on "metered-water usage").

On this record, we conclude that use of the Township's water and sewer services cannot be viewed as "voluntary" for purposes of the *Bolt* inquiry. If a charge is "effectively compulsory," it is not voluntary. *Bolt*, 459 Mich at 167. With the exception of those sewer-only customers who have elected not to have a meter installed to track their actual well-water usage, it is technically true that the Township's water and sewer customers can avoid paying the *variable* portion of the disputed rates by refusing to use any water. But the *fixed* portions of those rates constitute flat-rate charges like those in *Bolt*, 459 Mich at 156 n 6, and such flat rates can only be avoided by not being a utility customer in the first instance. To the extent that the Township contends that the fixed rates are nevertheless voluntary because ratepayers can avoid paying them by moving elsewhere, that argument is unavailing. See *id*. at 168 ("The dissent suggests that property owners can control the amount of the fee they pay by building less on their property. However, we do not find that this is a legitimate method for controlling the amount of the fee because it is tantamount to requiring property owners to relinquish their rights of ownership to their property by declining to build on the property."). In light of *Bolt*, 459 Mich at 167-168, we conclude that at least the fixed portion of the disputed rates here—the most sizable portion—is effectively compulsory. Thus, the third *Bolt* factor weighs in favor of plaintiff's position.

On balance, plaintiff failed to carry her burden of demonstrating that the disputed rates are impermissible taxes, rather than user fees, for purposes of Headlee § 31. The first and second *Bolt* factors clearly

favor the conclusion that the disputed charges are proper user fees, and with regard to the third factor, "the lack of volition does not render a charge a tax, particularly where the other criteria indicate the challenged charge is a user fee and not a tax." *Wheeler*, 265 Mich App at 666. Therefore, the trial court did not err by entering a no-cause judgment against plaintiff with regard to her Headlee claims.

Affirmed in part, reversed in part, and remanded to the trial court for entry of a judgment of no cause of action in the Township's favor. We do not retain jurisdiction.

STEPHENS, P.J., and MURRAY, C.J., and SERVITTO, JJ., concurred.

In re CONSERVATORSHIP OF NINA JEAN MURRAY

Docket No. 349068. Submitted February 3, 2021, at Lansing. Decided March 4, 2021, at 9:00 a.m.

Preston Murray, as personal representative of his mother Nina J. Murray's estate, filed a petition in the Livingston County Probate Court, seeking under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., an accounting of Nina's assets for the period in which his brother, respondent Mark A. Murray, acted as her conservator. In 2014, respondent was appointed conservator of the assets of Nina's estate after the court found that Nina had dementia; respondent was informed of his legal duties to prepare and submit both an inventory of Nina's assets and an annual accounting. In April 2015, petitioner sought to modify the conservatorship, asserting that respondent had failed to accurately inventory Nina's estate assets, engaged in self-dealing, and failed to properly manage Nina's assets. In August 2015, the court, Miriam A. Cavanaugh, J., granted the petition, permitted respondent to resign as conservator, appointed Ella McClatchey as successor conservator of Nina's estate, and ordered respondent to file a final accounting by September 4, 2015. In August 2016, the court suspended respondent's powers as fiduciary, found that respondent had failed to file a final accounting as ordered, and appointed William Mollison as special fiduciary to help respondent with preparing and filing a final accounting so that McClatchey could file an inventory. In December 2016, Nina died. In July 2017, after respondent failed to provide Mollison with the necessary documents and information, the court ordered respondent to provide Mollison with the financial documents. Ultimately, Mollison filed an amended inventory and a first and final accounting of fiduciary for the period during which respondent was conservator of Nina's estate. Petitioner filed objections to the accounting, requested information regarding disbursements of the estate's funds, and sought reimbursements of money to the estate. The court ordered respondent to transfer all estate assets in his possession as former conservator to petitioner, as personal representative of Nina's estate. In December 2017, petitioner sought to surcharge respondent for funds allegedly missing from Nina's estate. Following an eviden-

tiary hearing, the court found that Nina lacked capacity as early as 2012; the court also found that respondent breached his duties as conservator of Nina's estate, failed to file an accurate inventory and accounting, failed to keep records and segregate assets, failed to provide credible accounting or records to support being personally reimbursed from estate assets, and failed to adhere to the standard of care required of a fiduciary. The court surcharged respondent for an itemized list of sums certain, totaling $51,348.86. Respondent moved for reconsideration; the probate court denied the motion. Respondent appealed.

The Court of Appeals *held*:

MCL 700.1104(e) and MCL700.5416 provide, respectively, that a conservator is a fiduciary and that a conservator must act as a fiduciary and observe the standard of care applicable to a trustee. MCL 700.1212(1) requires a fiduciary to observe the standard of care in MCL 700.7803, to discharge all of the duties and obligations of a confidential and fiduciary relationship, and to conform to the Michigan prudent-investor rule with respect to investments. In that regard, MCL 700.7803 provides that a fiduciary shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent-investor rule in MCL 700.1501 *et seq*. MCL 700.5417 and MCL 700.5418 require a conservator to perform certain duties with respect to the inventory, management, record keeping, and accounting of the protected person's estate. Under MCL 700.1308, the probate court has authority to determine and remedy a conservator's breaches of fiduciary duties, including authority to (1) compel the fiduciary to perform the fiduciary's duties; (2) compel the fiduciary to redress a breach of duty by paying money, restoring property, or other means; (3) order a fiduciary to account; (4) remove the fiduciary; and (5) reduce or deny compensation to the fiduciary if the fiduciary was otherwise entitled to compensation. Under MCL 700.5430(2), a conservator is personally liable for an obligation arising from ownership or control of estate property or for torts committed in the course of estate administration only if personally at fault. When a statute fails to state the standard that probate courts are to use to establish a particular fact, the default standard in civil cases—preponderance of the evidence—applies. Given that EPIC, specifically MCL 700.1308, does not specify the applicable standard of proof for determining whether a breach of fiduciary duty occurred for which the probate court may impose a surcharge, the standard of proof for determining breach of duty and the appropriateness of a surcharge is a preponderance of the evidence. Stated differently, whether a conservator breaches his or

her fiduciary duty to the protected individual or whether the probate court may impose a surcharge for that breach must be determined using the preponderance-of-the-evidence standard. In this case, the probate court properly applied the preponderance-of-the-evidence standard to the facts of the case. In light of the record, the court did not abuse its discretion by finding that respondent breached his fiduciary duties to protect Nina in a wide variety of ways and by surcharging respondent for those breaches. The court's findings with regard to the breakdown of the amounts for which respondent was surcharged were not clearly erroneous, and the appellate court deferred to the probate court's assessment of any issues involving a determination of credibility. To the extent respondent sought a setoff or to recoup expenses he allegedly incurred in his care of Nina, respondent failed to provide the probate court with adequate receipts and documentation to support his claim.

Affirmed.

STATUTES — ESTATES AND PROTECTED INDIVIDUALS CODE — CONSERVATORSHIPS — BREACHES OF FIDUCIARY DUTIES — STANDARD OF PROOF.

Under the Estates and Protected Individuals Code, the preponderance-of-the-evidence standard of proof applies when determining whether a conservator breached his or her fiduciary duty to the protected individual and the appropriateness of imposing a surcharge for that breach (MCL 700.1101 *et seq*.).

Bassett Law PLLC (by *Amanda N. Murray*) for petitioner.

John Ceci PLLC (by *John R. Ceci*) for respondent.

Before: M. J. KELLY, P.J., and RONAYNE KRAUSE and REDFORD, JJ.

REDFORD, J. Respondent, Mark A. Murray, appeals by right the probate court's order requiring him to pay $51,348.86 to the estate of Nina Jean Murray after finding that respondent had breached his fiduciary duties as conservator of his mother's estate. Because we conclude the probate court correctly applied the law to the facts of the case, we affirm.

I. BACKGROUND

During January 2014, a doctor diagnosed respondent's mother, Nina Jean Murray, with dementia. She had been in decline since 2012 and became debilitated to the point that respondent petitioned to be appointed her conservator. At a hearing held on September 3, 2014, the probate court found that clear and convincing evidence established that Nina lacked the capacity to manage her property and business affairs because of her dementia and that she had property that would be wasted or dissipated unless properly managed. The probate court granted respondent's petition, created a conservatorship, and appointed respondent as the conservator of all the assets of Nina's estate. The probate court ordered respondent to attend a conservatorship training program provided by the court. With its order, the probate court gave respondent a standard notice that informed respondent of his legal duties to prepare and submit both an inventory of Nina's estate's assets and an annual accounting.

On April 1, 2015, Preston Murray, Nina's son and respondent's brother, petitioned to modify the conservatorship on the grounds that respondent had failed to file an accurate inventory of the estate's assets, failed to disclose assets, engaged in self-dealing, and otherwise failed to properly manage the estate's assets. On August 11, 2015, in accordance with the parties' agreement, the probate court granted the petition, permitted respondent to resign as conservator, and appointed Ella McClatchey as successor conservator of Nina's estate. The probate court ordered respondent to file a final accounting by September 4, 2015.

On August 26, 2016, the probate court suspended respondent's powers as fiduciary and found that respondent failed to file a final accounting as ordered.

The probate court appointed a special fiduciary, attorney William Mollison, and ordered him to assist respondent with preparing and filing a final accounting so that McClatchey could file an inventory. Nina died four months later on December 23, 2016.

Respondent failed to provide Mollison necessary documentation and information respecting Nina's estate, which prompted Mollison to petition the probate court to order respondent to provide the necessary financial documents. The probate court ordered respondent on July 12, 2017, to provide Mollison the requested documents and information within 30 days. Respondent failed to do so, which prompted Mollison to move for respondent to show cause why he failed to comply with the probate court's order. Mollison ultimately filed an amended inventory and a first and final accounting of fiduciary for September 3, 2014 through August 11, 2015, the period of respondent's service as conservator of Nina's estate. Preston, as personal representative of Nina's estate, filed objections to the accounting, requested information regarding disbursements of the estate's funds, and sought reimbursement of money to the estate. At the December 13, 2017 hearing, Mollison advised the probate court that an $1,800 discrepancy existed and that he still did not have all necessary bank account information. Mollison expressed concern that respondent became a joint account owner of Nina's bank accounts on April 10, 2014, before he became conservator, but Mollison could not clarify the ownership of the accounts because of the lack of bank account information. The probate court ordered respondent to transfer all estate assets in his possession as former conservator to Preston, the personal representative of Nina's estate, and discharged Mollison.

On December 21, 2017, Preston petitioned to surcharge respondent for funds allegedly missing from Nina's estate. The probate court held an evidentiary hearing on the objections to the accounting and the petition to surcharge. The probate court found that Nina lacked capacity as early as 2012. The probate court found that respondent breached his duties as conservator of Nina's estate and failed to file an accurate inventory and accounting. The court also found that respondent failed to keep records, failed to segregate assets, failed to provide credible accounting or records to support being personally reimbursed from estate assets, and failed to adhere to the standard of care required of a fiduciary. The probate court determined a total surcharge of $51,348.86 and ordered respondent to pay the following: (1) $6,540.90 for the special fiduciary fee necessitated by respondent's failure to file an inventory and accounting; (2) $1,800 for the discrepancy in the final accounting; (3) $37,099.58 for checks written, some of which he failed to give account and others related to misappropriated funds; (4) $3,400 for a payment made to Dawn Murray, respondent's wife; and (5) $2,508.38 for funds respondent misappropriated from the estate after Nina's death. Respondent moved for reconsideration, but the probate court denied the motion. Respondent now appeals.

II. STANDARD OF REVIEW

We review de novo issues of statutory interpretation, which are questions of law. *In re Baldwin Trust*, 274 Mich App 387, 396; 733 NW2d 419 (2007). We review for clear error a probate court's factual findings in cases in which the court conducted proceedings without a jury. *Id*. "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." *In re Brody Conservatorship*, 321 Mich App 332, 336; 909 NW2d 849 (2017) (quotation marks and citation omitted). We "defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *Id*. (quotation marks and citation omitted). We review for an abuse of discretion a probate court's decision to remove a trustee as well as its decision to surcharge a trustee. *In re Baldwin Trust*, 274 Mich App at 396-397. A probate court abuses its discretion when the court's rulings fall outside the range of reasonable and principled outcomes. *Id*. at 397.

Michigan generally follows the raise-or-waive rule of appellate review. *Walters v Nadell*, 481 Mich 377, 387-388; 751 NW2d 431 (2008).[1] Although our Supreme Court has held that this Court must review unpreserved errors in criminal cases for plain error affecting the defendant's substantial rights, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), it has not established a similar rule for civil cases, see *Walters*, 481 Mich at 387-388.

In *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192-193; 920 NW2d 148 (2018), this Court explained:

> Although this Court need not review issues raised for the first time on appeal, this Court may overlook preser-

[1] Thus, "to be preserved for appellate review, [an issue] must be raised, addressed, and decided by the lower court." *Jawad A Shah, MD, PC v State Farm Mut Auto Ins Co*, 324 Mich App 182, 192; 920 NW2d 148 (2018).

> vation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. However, while an appellate court has the inherent power to review an unpreserved claim of error, our Supreme Court has emphasized the fundamental principles that such power of review is to be exercised quite sparingly and that the inherent power to review unpreserved issues is to be exercised only under what appear to be compelling circumstances to avoid a miscarriage of justice or to accord a criminal defendant a fair trial.
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> . . . [T]he fundamentals of appellate-preservation law . . . require parties to first raise issues in the lower court to be addressed in that forum. Therefore, plaintiffs have waived appellate review of this issue. Plaintiffs may not remain silent in the trial court and then hope to obtain appellate relief on an issue that they did not call to the trial court's attention. (A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute.). [Quotation marks, citations, and brackets omitted.]

This Court has discretion to review unpreserved issues in civil cases if review would prevent manifest injustice, if review is necessary for proper resolution of the case, or if the issue involves a question of law and the facts necessary for determination have been presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). This Court has reviewed forfeited issues when declining to do so would result in a miscarriage of justice. *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). This Court, however, exercises its discretion sparingly and only when exceptional circumstances warrant review.

Booth Newspapers, Inc v Univ of Mich Bd of Regents, 444 Mich 211, 234 n 23; 507 NW2d 422 (1993).

In this case, although we do not conclude that a miscarriage of justice would occur if we declined to consider a waived issue, we exercise our discretion to nevertheless address the issue because the issue involves a question of law and the facts necessary for its determination have been presented. See *Smith*, 269 Mich App at 427.

III. ANALYSIS

A. THE CORRECT BURDEN OF PROOF REQUIRED TO SURCHARGE AN INDIVIDUAL FOR A BREACH OF FIDUCIARY DUTIES

Respondent argues that the probate court erred with respect to every surcharge ordered by the court and contends that petitioner was required, but failed, to establish by clear and convincing evidence each surcharge. We disagree because the probate court properly applied the preponderance-of-the-evidence standard, and the court neither clearly erred in its factual findings nor abused its discretion by deciding to surcharge respondent in the ordered amounts.

1. THE ESTATES AND PROTECTED INDIVIDUALS CODE

This case is governed by the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., enacted by the Legislature in 1998 and made effective April 1, 2000. EPIC provides, "Unless displaced by the particular provisions of this act, general principles of law and equity supplement this act's provisions." MCL 700.1203(1). Under EPIC, a conservator is a fiduciary. MCL 700.1104(e). "Appointment of a conservator vests in the conservator title as trustee to all of the protected individual's property, or to the part of that property

specified in the order, held at the time of or acquired after the order[.]" MCL 700.5419(1). A conservator must "act as a fiduciary and observe the standard of care applicable to a trustee." MCL 700.5416.

MCL 700.1212(1) defines a fiduciary relationship as follows:

> A fiduciary stands in a position of confidence and trust with respect to each heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary. A fiduciary shall observe the standard of care described in [MCL 700.7803] and shall discharge all of the duties and obligations of a confidential and fiduciary relationship, including the duties of undivided loyalty; impartiality between heirs, devisees, and beneficiaries; care and prudence in actions; and segregation of assets held in the fiduciary capacity. With respect to investments, a fiduciary shall conform to the Michigan prudent investor rule.

MCL 700.7803 provides that a fiduciary "shall act as would a prudent person in dealing with the property of another, including following the standards of the Michigan prudent investor rule."[2] Under MCL 700.5417(1) and (2), within 56 days after appointment, a conservator must prepare and file a complete inven-

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[2] MCL 700.1501 *et seq*. prescribes the Michigan prudent-investor rule. MCL 700.1502 provides:

> (1) A fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution.
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> (2) The Michigan prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of the governing instrument. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the governing instrument.

tory of the estate subject to the conservatorship with an oath or affirmation of the inventory's completeness and accuracy as far as information permits, and the conservator must keep suitable records of the administration of the estate and exhibit records at the request of an interested person. Further, under MCL 700.5418, a conservator shall account to the court for the administration of the conservatorship estate and provide a copy of the accounting to the protected individual and to interested persons. The resignation or removal of a conservator triggers the duty to account under MCL 700.5418(1) and does not end the person's liability for actions during service as a conservator.

Under MCL 700.1308, the probate court has authority to determine and remedy a conservator's breaches of fiduciary duties. The statute provides, in relevant part:

> (1) A violation by a fiduciary of a duty the fiduciary owes to an heir, devisee, beneficiary, protected individual, or ward for whom the person is a fiduciary is a breach of duty. To remedy a breach of duty that has occurred or may occur, the court may do any of the following:
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> (a) Compel the fiduciary to perform the fiduciary's duties.
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> (c) Compel the fiduciary to redress a breach of duty by paying money, restoring property, or other means.
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> (d) Order a fiduciary to account.
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> * * *
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> (g) Remove the fiduciary as provided in this act.
>
> (h) For a fiduciary otherwise entitled to compensation, reduce or deny compensation to the fiduciary.

> (2) In response to an interested person's petition or on its own motion, the court may at any time order a fiduciary of an estate under its jurisdiction to file an accounting. After due hearing on the accounting, the court shall enter an order that agrees with the law and the facts of the case.

2. MICHIGAN LAW REQUIRES APPLYING THE PREPONDERANCE-OF-THE-EVIDENCE STANDARD BECAUSE EPIC DOES NOT SPECIFY THE STANDARD OF PROOF

EPIC does not provide the standard of proof required to find a breach of fiduciary duty or personal liability of a conservator. See MCL 700.1308; MCL 700.5430(4). Respondent argues that petitioner was required, but failed, to prove by clear and convincing evidence that respondent breached his fiduciary duties and misused estate funds. Respondent contends that *In re Baldwin's Estate*, 311 Mich 288, 295, 304-305, 306, 310; 18 NW2d 827 (1945), established that lower courts must apply the clear-and-convincing standard of proof when determining whether to surcharge a conservator of an estate. We disagree. In that case, our Supreme Court reviewed, in painstaking detail, a number of individual alleged improprieties for which the executor in that estate matter was surcharged. Our Supreme Court used the word "convincing" three times in its review of more than a dozen discrete surcharges. *Id*. at 305, 310. In context, our Supreme Court was merely commenting on whether it found the record supported a particular conclusion. Even if these ambiguous references could be construed as setting forth any kind of standard, they at most implied a standard of review on appeal, not a quantum of proof to be satisfied in the trial court.[3] Indeed, a

[3] To the extent our Supreme Court explicitly discussed a standard of review, it only explained that trial courts have discretion whether to impose interest upon any particular surcharge. *In re Baldwin's Estate*, 311 Mich at 310-312.

clear-error standard of review would be consistent with the traditional standard of review applied to trial courts' factual determinations. *In re Baldwin Trust*, 274 Mich App at 396. Nothing in *In re Baldwin's Estate*, 311 Mich 288, set forth a standard of proof, and because EPIC was not enacted by the Legislature for another 50 years, *In re Baldwin's Estate* would not necessarily have governed the standard of proof in cases governed by EPIC in any event.

Petitioner counters that, because MCL 700.1308 does not specify a standard of proof applicable for finding a breach of fiduciary duty, the burden of proof is the default standard, i.e., by a preponderance of the evidence. We agree because this Court has held that "[w]hen a statute fails to state the standard that probate courts are to use to establish a particular fact, the default standard in civil cases—preponderance of the evidence—applies." *In re Redd Guardianship*, 321 Mich App 398, 409; 909 NW2d 289 (2017); see also *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 522; 857 NW2d 529 (2014) ("[B]ecause the statute does not state the quantum of proof necessary to obtain confirmation of removal, the default standard in civil cases, the preponderance of the evidence, applies.").

Accordingly, because EPIC, and specifically MCL 700.1308, does not specify the applicable standard of proof for determining breach of fiduciary duty after which the probate court may impose a surcharge, we are bound by precedent that establishes that the preponderance-of-the-evidence standard applies; we therefore hold that the standard of proof for determining breach of duty and the appropriateness of a surcharge is a preponderance of the evidence.

3. THE PROBATE COURT APPLIED THE CORRECT STANDARD OF PROOF AND REACHED THE CORRECT DECISION

Upon a finding that a conservator violated a fiduciary duty, the probate court can "[c]ompel the fiduciary to redress a breach of duty by paying money, restoring property, or other means." MCL 700.1308(1)(c). The probate court may also "reduce or deny compensation to the fiduciary." MCL 700.1308(h). "A conservator is personally liable for an obligation arising from ownership or control of estate property or for torts committed in the course of estate administration only if personally at fault." MCL 700.5430(2). "A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, indemnification, or other appropriate proceeding or action." MCL 700.5430(4).

Under MCL 700.5417(2), respondent had the fiduciary obligation to "keep suitable records of the administration and exhibit those records on the request of an interested person." MCL 700.5418(1) imposed the fiduciary duty on respondent to file a complete and accurate accounting of the estate annually and upon resignation or removal, or as directed by the court. As a conservator, respondent had the fiduciary duty to discharge all of his duties with "care and prudence." MCL 700.1212(1). Further, respondent had the fiduciary obligation to act as a "prudent person in dealing with the property of another" and to "exercise reasonable care, skill, and caution." MCL 700.7803; MCL 700.1502(1).

In this case, a preponderance of the evidence established that respondent breached his fiduciary obligations as a conservator under MCL 700.5417 (inventory of estate and keeping of records) and MCL 700.5418 (accounting to the court). During the period of his service as conservator of Nina's estate, respon-

dent failed to prepare and file a complete and accurate inventory of estate assets. After he resigned his position as conservator, the probate court specifically ordered him to file a final accounting by September 4, 2015. Respondent failed and refused to obey the probate court's order. Because of respondent's disobedience, the probate court appointed Mollison as special fiduciary to render a final accounting for the period of respondent's service as conservator. The record reflects that respondent failed to cooperate with Mollison by never providing the necessary financial documentation and information to Mollison to enable a complete and accurate accounting. Although Mollison prepared an accounting, the record reflects that he did so without the requisite documentation and information because of respondent's misconduct in direct violation of the probate court's order and in further breach of his basic fiduciary duties as a conservator.

Respondent admitted that, despite completing a conservator training class that instructed him to do so, he failed to keep all of the receipts and records respecting Nina' estate. Respondent does not dispute that he failed to file an accounting within the time that the probate court ordered or that the court appointed Mollison as special fiduciary to assist him in filing a final accounting.

We conclude that the probate court correctly concluded by a preponderance of the evidence that respondent breached his fiduciary duties to the protected individual in a wide variety of ways.[4]

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[4] We conclude that the probate court's decision in this regard, based on the preponderance-of-the-evidence standard, was completely correct. We further note, however, even if the standard of proof was clear and convincing evidence as respondent argues, this degree of proof would

B. THE RAMIFICATIONS OF RESPONDENT'S BREACH OF HIS FIDUCIARY DUTIES

1. APPORTIONMENT OF FUNDS EXPENDED BY APPOINTMENT OF MOLLISON $6,540.90

Respondent's breach of his duties during his service as the estate's conservator and his postresignation breach of his duties necessitated the appointment of Mollison, which caused the estate to incur charges totaling $6,540.90. Mollison supported the charges by submitting detailed itemized billing records that set forth the work performed, the time committed to perform that work, and that he charged at the court-approved discounted billing rate. The probate court did not err by finding that respondent breached his fiduciary duties. A preponderance of the evidence supported the probate court's decision. Because of respondent's breaches, the probate court properly surcharged respondent as authorized under MCL 700.1308(1)(c) for the charges incurred by Nina's estate for the services provided by the special fiduciary necessitated by respondent's breaches. We find no merit to respondent's protestations that Mollison should have attempted to fulfill his duties through other methods. The record reflects that Mollison appropriately carried out his duties as the special fiduciary charged with rectifying the mess created by respondent, but respondent failed to cooperate, necessitating court intervention and more work by Mollison. The probate court did not clearly err in making its findings, which were supported by a preponderance of the evidence, and it

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also have easily been satisfied on the record before this Court. We also recognize that respondent contends that the probate court lost some of his exhibits; but because respondent has not provided any evidence or authority that the probate court was made responsible for the safekeeping of those exhibits and because we are not persuaded that respondent is entitled to relief in any event, we decline to address that contention.

did not abuse its discretion by imposing the surcharge of $6,540.90 against respondent.

2. THE $1,800 SHORTFALL IN AN ACCOUNT

Respecting the $1,800 shortfall reported by Mollison, respondent argues for the first time on appeal that Mollison's testimony, inventory, and accounting were unreliable and do not support the surcharge of that amount. Even though respondent failed to preserve this claim of error, we exercise our discretion to review the issue because the issue involves a question of law and the facts necessary for its determination have been presented. See *Smith*, 269 Mich App at 427.

As a fiduciary, respondent had the obligation to comply with MCL 700.1212(1) and to follow the standards of the Michigan prudent-investor rule, MCL 700.1502, which required him to exercise reasonable care, skill, and caution in managing the assets held in his fiduciary capacity. Respondent also had the duty to keep suitable records of his administration of Nina's estate. MCL 700.5417(2). As a result of the final account of Nina's estate for the period respondent served as conservator, Mollison found an $1,800 deficit in Nina's bank account ending in 2589, about which he testified at the evidentiary hearing. Respondent had no reasonable explanation for the bank account deficiency and offered only an excuse for which he lacked supporting documentation. We defer to the probate court's determinations of credibility. *In re Brody Conservatorship*, 321 Mich App at 336. Respondent has failed to establish that the probate court committed error, plain or otherwise. The record reflects that respondent breached his fiduciary duties by failing to properly administer Nina's estate and that he failed to adequately maintain records and account for the assets

of the estate during the time he served as conservator. The probate court did not err by relying on Mollison's testimony, which established the $1,800 shortfall in Nina's bank account. Accordingly, the probate court did not abuse its discretion by ordering respondent to pay $1,800 as authorized under MCL 700.1308(1)(c).

3. $37,099.58 IN CHECKS FROM NINA'S ACCOUNT WITHOUT PROPER EXPLANATION

Respondent also argues that the probate court erred by imposing a surcharge totaling $37,099.58 for checks respondent issued from Nina's bank account without proper explanation or documentary support. We disagree.

The record reflects that the probate court heard testimony from Mollison, McClatchey, and respondent and examined the evidence presented by the parties respecting respondent's use of Nina's bank accounts, in particular, the account ending in 2589. The probate court found that respondent wrote a check in the amount of $3,400 to an unknown recipient and failed to account for the expenditure, lacked any records related to the expenditure, and could not explain his actions. Respondent issued a check in the amount of $6,916.58 in May 2016, another in the amount of $3,283 in July 2016, and another check in the amount of $1,000 in August 2016. Respondent testified that he did not know what he paid for with Check No. 2748, issued July 22, 2016, in the amount of $3,283. The record lacks evidence indicating a reason for respondent's issuance of that check. Similarly, respondent could not account for Check No. 2747, issued August 5, 2016, in the amount of $1,000. The probate court found that respondent failed to account for these checks, lacked suitable records of any transactions requiring those

payments, and could not explain the bases for such expenditures during his sworn testimony at the evidentiary hearing. The probate court also found that respondent issued a check from Nina's account to himself in the amount of $22,500, which he cashed.

The probate court explained in its ruling that during respondent's testimony at the evidentiary hearing, respondent failed to explain why he paid himself the money and vacillated between claiming the bank accounts were jointly owned so that the money belonged to him and claiming that he merely reimbursed himself for expenses he paid for Nina out of his own pocket. The probate court correctly rejected that testimony in its entirety because record evidence established that Nina lacked capacity as early as 2012 and constituted a vulnerable adult, the money in the subject account solely came from deposits from Nina's income sources, and respondent provided the court no accounting or records that supported respondent's right to reimbursement or justified respondent paying himself $22,500.

The record reflects that the probate court considered all of the evidence and analyzed it in great detail. The probate court permitted respondent to provide an explanation and present evidence to support his position. Respondent, however, lacked the ability to account for the $37,099.58 in checks respondent issued from Nina's bank account and submitted no documentary evidence to support the expenditures, which further established his breaches of duties owed to Nina and her estate while she was a vulnerable adult.

Respondent argues that, because he was a joint account owner of Nina's Bank of America accounts, a presumption existed that he owned the accounts upon Nina's death under MCL 487.703. Under MCL

487.703, a presumption exists that title to funds held in a joint account with the right of survivorship is intended to vest in the surviving joint owner, which can be rebutted by a showing of fraud or undue influence.

> To establish undue influence it must be shown that the grantor was subjected to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient. However, in some transactions the law presumes undue influence. The presumption of undue influence is brought to life upon the introduction of evidence which would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary or an interest which he represents benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*Kar v Hogan*, 399 Mich 529, 537; 251 NW2d 77 (1976), holding limited in part on other grounds by *In re Karmey Estate*, 468 Mich 68, 74; 658 NW2d 796 (2003) (citation omitted).]

Once a presumption of undue influence is established, the opposing party must offer sufficient rebuttal evidence. *Kar*, 399 Mich at 542.

This Court has held that a fiduciary relationship exists when a person agrees to act as a principal's agent under a power of attorney. *In re Susser Estate*, 254 Mich App 232, 234-235; 657 NW2d 147 (2002). In *In re Susser Estate*, this Court concluded that a son owed his mother a fiduciary duty after she appointed him a durable power of attorney, which bound him to act in her best interest. *Id*. at 233, 236. This Court affirmed the jury's finding that the son wrongfully converted his mother's assets by using the durable

power of attorney to gift himself a substantial portion of her financial portfolio. *Id*. at 233-234.

In this case, no evidence existed from which the probate court could conclude that respondent jointly held Nina's bank accounts with the right of survivorship. A preponderance of the evidence, however, established that Nina appointed respondent power of attorney respecting her accounts while she suffered from mental disability, but she did not grant him joint ownership. Respondent testified that his name was listed on Nina's Bank of America bank statement for the account ending in 2589 and that "POA" meant "power of attorney."

The record indicates that, a month after a doctor had diagnosed Nina with dementia, respondent's wife, Dawn, sent respondent an e-mail on February 18, 2014, informing him that she was going to add respondent's name to Nina's checking account. Respondent sent an April 8, 2014 e-mail stating that he took Nina to the Bank of America to notarize a new durable power of attorney and that he planned to send the new power of attorney document to all of the accounts of which he was aware. Nina signed the power of attorney appointing respondent as her power of attorney on April 4, 2014. Respondent testified that Nina was able to make an informed decision to put him on her bank accounts in 2014 "[b]ecause that's what she said and that's what she wanted." However, in a March 2015 e-mail, respondent asserted that Nina was not of sound mind when she signed her will on January 30, 2013. Further, respondent never reported that he was joint owner of any of Nina's bank accounts despite the requirement to do so in the conservatorship inventory.

Although respondent asserts that Nina added his name to her bank account in November 2013, respon-

dent's April 8, 2014 e-mail supports a finding that Nina did not do so until after the April 4, 2014 power of attorney documents were executed. From the record evidence, the probate court could reasonably conclude that Nina lacked the mental capacity to do so because she had been diagnosed with dementia in January 2014 and evidence indicated that she lacked capacity long before that. Further, if respondent added his name as joint owner of the accounts while acting under a power of attorney, he owed Nina a fiduciary duty to only act in her best interest respecting her bank accounts and assets. *Id*. at 234-235. Further, a presumption exists that respondent exercised undue influence. *Kar*, 399 Mich at 537, 542. Respondent failed to provide any rebuttal evidence to overcome that presumption, and we conclude that the probate court likewise could conclude that respondent's claim of ownership interest in Nina's accounts lacked merit.

Respondent did not dispute that he wrote himself Check No. 2749 for $22,500 on December 6, 2016. Respondent testified that the $22,500 payment reimbursed him for payments he made on Nina's behalf and that he was entitled to the money because he became owner of the bank account after the death of Nina. Respondent, however, had no receipts to support his claim of entitlement to the reimbursement, and he wrote the check before Nina's death. On appeal, respondent argues that, because he was not on notice that he would have to defend an undue-influence claim, the surcharge of $22,500 should be vacated. Respondent, however, failed to preserve this issue. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Regardless, the argument lacks merit and respondent is not entitled to appellate relief. The probate court found that respondent failed to account for, and could not explain, the $22,500 in expenses he contended he incurred for

the care of Nina. The probate court did not find respondent's testimony credible, and he failed to provide any credible accounting, records, or receipts to support his claim of entitlement to that reimbursement. Further, the record indicates that respondent had already paid himself $10,000 for Nina's care, which the probate court did not surcharge.

It is apparent from review of the entire record that the probate court did not clearly err by finding that respondent had breached his fiduciary duties. A preponderance of the evidence established that he failed to keep and maintain appropriate records or account for the estate assets. Respondent failed to act as a prudent person in managing the estate's assets. Accordingly, because respondent breached his fiduciary duties both as conservator and under the durable power of attorney, the probate court could appropriately order respondent to repay the estate the amounts associated with his breaches. The probate court did not clearly err in making its findings, which were supported by at least a preponderance of the evidence,[5] and it did not abuse its discretion by imposing the surcharge against respondent in the amount of $37,099.58 for checks respondent issued from Nina's bank account without documentary evidence of any sort to support the expenditures.

4. PAYMENT OF THOUSANDS OF DOLLARS TO RESPONDENT'S SPOUSE

Respondent also takes issue with the probate court's ruling respecting his payment of $3,400 from Nina's estate to his wife, Dawn. Respondent testified that he

[5] As indicated previously, it appears from the record that the evidence would also have met the higher clear-and-convincing evidentiary burden posited by respondent.

issued Check No. 2713 for $3,400 from Nina's account to pay Dawn on September 11, 2014, in exchange for conducting an estate sale. Respondent testified that he and Dawn worked for approximately six weeks to clean Nina's condo, hired some of his friends to help, and conducted the sale. Respondent testified that the $3,400 paid to Dawn included "expenses for dumpsters, and cleaning supplies, garbage bags, tables, [and] calculators." The record indicates that respondent submitted an exhibit that indicated that the expenses of the estate sale were $1,332.54. Respondent testified that he issued Check No. 2711 also in the amount of $3,400 on August 18, 2014, for payment to those who worked for the estate sale and for related expenses. Respondent also testified that he paid the individuals in cash from the estate sale and that he did not have a receipt or bill for the $3,400. MCL 700.5417(2) requires a conservator to "keep suitable records of the administration and exhibit those records on the request of an interested person." Respondent, however, kept no receipts for the estate liquidation, did not report any proceeds from the estate sale, and kept no account of the assets purportedly sold or any receipts respecting the expenses. Respondent provided no credible documentation to the probate court of any expenses related to the estate sale. Further, respondent failed during his testimony at the evidentiary hearing to explain how he arrived at the amount he paid his wife or others allegedly related to the estate sale. The probate court observed that respondent offered as justification for his lack of record keeping and failure to properly account for the expenditures that he had saved money by not hiring a professional to handle the estate sale. The probate court appropriately rejected that justification because respondent failed to present any evidence to support his explanation. We

defer to the probate court's determinations of respondent's lack of credibility in this regard. *In re Brody Conservatorship*, 321 Mich App at 336. Respondent has failed to establish that the probate court erred in this regard.

5. EXPENDITURES TO OTHER LAW FIRM

Respondent argues that he issued the May 4, 2016 check for $6,916.58 to the law firm of Green and Green for the collection action against a person who lived with Nina and converted her assets. Petitioner requested $4,145.65 for a surcharge for respondent's pursuit of the lawsuit against that person who proved uncollectible. The record reflects that the probate court did not order respondent to repay the cost for that lawsuit. At the hearing, respondent testified that he did not know why he issued Check No. 2745 for $6,916.58. The April 13, 2016 to May 11, 2016 bank statement for account ending in 2589 does not indicate to whom respondent issued the check. Respondent did provide a February 25, 2016 invoice from Green and Green for $6,916.58 before his closing arguments, although the invoice lacked itemization and was not, strictly speaking, admitted into evidence.[6] It might be proper, under appropriate circumstances, to overlook the untimely submission of the invoice because respondent proceeded *in propria persona* for some portions of this matter. See *Estelle v Gamble*, 429 US 97, 106; 97 S Ct 285; 50 L Ed 2d 251 (1976). Furthermore, parties are generally entitled to the benefit of evidence in their

[6] During the hearing, an April 25, 2015 invoice from Green and Green, totaling $4,057.68, was admitted into evidence, and respondent testified that it was for obtaining Nina's will and responding to the petition to remove him as conservator. Respondent was not surcharged for this amount.

favor, even if that evidence conflicts with an opinion they have expressed. See *Ortega v Lenderink*, 382 Mich 218, 222-224; 169 NW2d 470 (1969). Fatally, however, respondent issued this May 2016 check after he stopped serving as the conservator of Nina's estate; therefore, any expense for the lawsuit owed by Nina's estate should have been directed to and paid by the successor conservator.

6. FUNDS MISAPPROPRIATED AFTER NINA'S DEATH

Respondent also argues that the probate court erred by surcharging him $2,508.38 for funds misappropriated after Nina's death on December 23, 2016. This argument also lacks merit.

The record reflects that the probate court analyzed the evidence and determined that respondent commingled Nina's bank account funds by depositing them into his own bank account. Further, respondent continued to use her funds for his personal expenses after her death. The account ending in 2589 had a balance after her death and deposits from Nina's income sources continued to be directly deposited into that account. Respondent did not contribute any funds to the account ending in 2589, but he testified that he believed he owned the account. Respondent admitted that he used the funds in that account after Nina's death. A preponderance of the evidence establishes that respondent breached his fiduciary duties because he failed to segregate Nina's assets as required under MCL 700.1212(1) and failed to maintain appropriate documentation and account for the expenses under MCL 700.5417(2) and MCL 700.5418(1). Further, he breached his fiduciary duties under the power of attorney by taking Nina's funds for his personal use. The probate court concluded that respondent misappropri-

ated $2,508.38 from the account after Nina's death. A preponderance of the evidence establishes that respondent breached his fiduciary duties by misappropriating the funds, and the probate court did not clearly err by making its findings in this regard. Accordingly, the probate court did not abuse its discretion by surcharging respondent $2,508.38 for funds misappropriated by respondent after Nina's death.

7. DENIAL OF RECOUPMENT BY RESPONDENT BEYOND THE $10,000 RECEIVED BY RESPONDENT FOR NINA'S CARE

Respondent also argues that the probate court erred by denying him either recoupment or a setoff for the expenses he reasonably incurred related to providing Nina housing and caring for her for about one year. Petitioner counters that the probate court did not order a surcharge for the $10,000 respondent paid himself for Nina's housing and care while she lived with him, but that the court correctly rejected respondent's claimed expenses for additional items like adult diapers and replacement of a soiled mattress and couch because respondent failed to provide credible accounting or records to support those charges. As an initial matter, respondent merely asserts, without providing any authority, that he was entitled to a setoff or recoupment. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). A party abandons an issue by failing to address the merits of his or her assertions. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228

(2008). Although we may deem this issue abandoned, we choose to exercise our discretion and consider it.

"Unless specifically authorized by statute in a particular instance, setoff is a matter in equity based on equitable principles." *Mahesh v Mills*, 237 Mich App 359, 361; 602 NW2d 618 (1999). We review de novo a lower court's decision whether to grant equitable relief. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). "Setoff is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other." *Id*.

> Recoupment is, in effect, a counterclaim or cross action for damages. Recoupment is also an affirmative defense that must be properly pleaded. The defense of recoupment is applicable to claims arising out of the same contract or transaction. The defendant bears the burden of proving that the plaintiff breached the contract from which the defendant seeks a setoff or recoupment. [*McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694-695; 818 NW2d 410 (2012) (quotation marks and citations omitted).]

In his answer to the surcharge petition, respondent did not assert entitlement to a setoff or a recoupment. Respondent also did not file objections to the first and final accounting or argue that he was entitled to reimbursement for expenses. Following the evidentiary hearing, in his closing statement filed with the probate court, respondent argued that he was entitled to a setoff or recoupment for expenses he incurred while caring for Nina, totaling $18,395.20.

The record reflects that the probate court did not order a surcharge requiring respondent to reimburse $10,000 to Nina's estate for the amount he paid himself for housing, food, utilities, care, and hired care while Nina lived in his home. Although respondent asserts

he is entitled to recoupment or a setoff for expenses incurred while he cared for Nina, he provided no documentation of those expenses. He testified that he purchased a mattress for $4,100 and a couch for $3,600 from Art Van as a result of Nina's bladder issues; however, he failed to submit Art Van receipts that substantiated the expense, but only a credit card statement. These expenses were not included in the accounting. The expenses for the bed and couch were also not included in respondent's final accounting. Respondent testified that the credit card invoice reflected the amount he paid for the mattress and the couch. Respondent also argues that he is entitled to a setoff amount of approximately $5,000 for adult diapers that he purchased for Nina; however, although respondent testified that he incurred such costs, he failed to provide any receipts or documentation for them. The probate court did not find respondent's testimony credible and found that respondent did not provide any records to support any basis for being reimbursed.

In light of the record before us, we conclude that the probate court did not err when it found that respondent was not entitled to a setoff or recoupment for the alleged expenses because he failed to establish with supporting evidence that he paid for expenses incurred in the amounts he claimed. He failed to provide the probate court adequate receipts and documentation of the expenses to warrant the requested relief. Accordingly, the probate court did not err in this regard.

Affirmed.

M. J. KELLY, P.J., and RONAYNE KRAUSE, J., concurred with REDFORD, J.

CONNELL v LIMA TOWNSHIP

Docket No. 353871. Submitted January 8, 2021, at Lansing. Decided March 4, 2021, at 9:05 a.m.

Karen Connell, Larry Connell, James P. Eyster and others sued Lima Township and the Lima Township Planning Commission in the Washtenaw Circuit Court after the Planning Commission voted to approve a request for conditional rezoning of real property adjacent to real property owned by plaintiffs. James Smith, one of the owners of the subject property, applied to the Township for conditional rezoning of the property under the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., from Rural Residential to Light Industrial. Plaintiffs received written notice of a Planning Commission meeting held on August 27, 2018, when the Planning Commission initially considered the request for conditional rezoning, but the Planning Commission did not take action on the conditional-rezoning request at the August 27, 2018 meeting but postponed action until a site plan was submitted. Plaintiffs did not receive notice of the subsequent meetings at which the conditional rezoning was considered. During a November 2018 meeting, the Planning Commission voted to recommend denial of the conditional-rezoning request to the Township Board. In January 2019, the Township Board returned Smith's application to the Planning Commission so that Smith could modify the request and resubmit it. In March 2019, the Planning Commission considered the application again and returned it to Smith for further modifications. Smith submitted a revised site plan in May 2019, and in June 2019, the Planning Commission voted to recommend approval of the application to the Township Board. The Township Board met to consider the Planning Commission's recommendation on July 8, 2019, at which time they voted to approve the conditional-rezoning request for the subject property. The following day, some of the plaintiffs filed a written request with the Lima Township Clerk to appeal the decision. Plaintiffs filed suit in the circuit court after the Lima Township Supervisor allegedly told them that their appeal would not be accepted because their only remedy was to file an action in the circuit court. Plaintiffs later moved for partial summary disposition, asking the court to

declare that the conditional rezoning was invalid for failure to properly notify adjacent landowners of the Planning Commission's June 2019 meeting at which Smith's application for conditional rezoning was considered and recommended for approval. The circuit court, Timothy P. Connors, J., denied plaintiffs' motion and granted summary disposition for defendants. The court concluded, in part, that plaintiffs had failed to exhaust their administrative remedies before filing their action; that plaintiffs were not "aggrieved" parties under the MZEA and therefore lacked standing to sue; and that even if plaintiffs were aggrieved parties under the statute, defendants had satisfied all of the procedural requirements of the MZEA by issuing notice to plaintiffs before at least one public hearing at which the conditional-rezoning request was considered. Plaintiffs appealed.

The Court of Appeals *held*:

1. Plaintiffs were not required to exhaust administrative remedies before filing their action in the circuit court because the administrative body could not have provided plaintiffs with any relief. When an administrative scheme of relief exists, a party must exhaust those remedies before a circuit court has jurisdiction. In this case, defendants argued that under § 604 of the MZEA, MCL 125.3604(1), plaintiffs were required to appeal the Township Board's decision to the Lima Township Zoning Board of Appeals (ZBA). Under the statute, a person aggrieved may appeal to the zoning board of appeals. However, the statute must be read in light of the distinction between a legislative decision and an administrative decision involving zoning matters. Generally, the zoning and rezoning of property in Michigan are legislative functions, whereas actions such as site-plan review and the approval of special-use permits are administrative in nature. For purposes of the MZEA, the legislative body of a township is its board of trustees, and the function of a township board in enacting a zoning ordinance is legislative. Similarly, the rezoning of real property is an amendment of the zoning ordinance and is likewise a legislative act. The Lima Township Zoning Ordinance provided the ZBA with the authority to hear and decide appeals of *administrative* decisions relating to the Township's Zoning Ordinance, as well as to grant or deny requests for variances and requests related to other nonconforming uses. The Township's Ordinance did not provide the ZBA with any authority over the legislative acts of the Township Board. Moreover, the delegation of legislative power with respect to zoning matters to administrative boards and officers is unconstitutional and void. Additionally, plaintiffs brought claims of procedural and substantive due

process in their circuit court action, and an administrative body, such as the ZBA, may not rule on constitutional claims. Because the exhaustion requirement did not apply to these claims, the trial court erred by ruling that plaintiffs' lawsuit was barred because they had failed to exhaust their administrative remedies.

2. The circuit court concluded that plaintiffs lacked standing to sue defendants because they were not aggrieved parties under § 604 of the MZEA and the Township Ordinance. MCL 125.3604(1) provides that a person aggrieved may appeal to the zoning board of appeals. But this subsection only applies to appeals filed with the zoning board of appeals. Plaintiffs did not have an avenue of appeal to the ZBA. Therefore, MCL 125.3604(1) was not applicable to this case. Further, because plaintiffs could not appeal to the ZBA given the nature of their claims, it was not necessary to determine whether plaintiffs would have qualified as aggrieved under the Township Ordinance. In *Ansell v Delta Co Planning Comm*, 332 Mich App 451 (2020), the Court of Appeals considered whether the "aggrieved party" standard in § 604 applied to appeals of zoning decisions when there was no provision for review by a zoning board of appeals. The *Ansell* Court concluded that appeals from a township board and appeals from a municipal zoning commission planning board were entitled to the same review. However, *Ansell* involved an administrative decision by the township, not a legislative decision. Therefore, although the *Ansell* Court applied the "aggrieved party" provision in the MZEA to other types of appeals, including appeals from the administrative decisions of a township board, that decision did not apply to original actions in the circuit court to challenge a township's legislative actions.

3. Plaintiffs had standing to challenge the conditional rezoning in this case because they owned real property immediately adjacent to the subject property and because they alleged special injuries flowing from the township's rezoning decision that were distinct from those suffered by the general public.

Decision reversed in part, vacated in part, and case remanded for further proceedings.

REAL PROPERTY — ZONING — LEGISLATIVE DECISIONS — APPEALS.

MCL 125.3604(1) of the Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., provides that a person aggrieved by a decision of a township board or other similar local elected governing body concerning the administration of a zoning ordinance may appeal to the zoning board of appeals; this statutory subsection only applies to appeals filed with the zoning board of appeals; the delegation of legislative power with respect to zoning matters to an

> administrative body, such as the zoning board of appeals, is unconstitutional and void; when no avenue of appeal to the zoning board of appeals exists, such as when a party is aggrieved by a legislative decision of a township board, MCL 125.3604(1) is not applicable, and a party aggrieved by a legislative decision of a township board may file an appeal directly with the circuit court.

James P. Eyster, *in propria persona*, and for Karen Connell, Larry Connell, Kim E. Michener, Rita Michener, Diana Newman, Michael B. O'Leary, and Laura Ouellette.

Lucas Law, PC (by *Frederick Lucas*) for Lima Township and the Lima Township Planning Commission.

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

SWARTZLE, P.J. Lima Township rezoned property in its jurisdiction, subject to certain conditions proposed by the property owner. Adjacent property owners sought to challenge the rezoning decision in the circuit court, but the court concluded that they did not exhaust certain administrative remedies and were not aggrieved parties. The critical issue on appeal is whether the rezoning decision was a legislative act or an administrative/quasi-judicial act. As explained, rezoning is a legislative act, in contrast to, for example, the decision to grant a conditional-use permit. Given this, plaintiffs were not required to exhaust administrative remedies or show that they were aggrieved parties, and the circuit court erred by granting summary disposition to defendants on these grounds.

I. BACKGROUND

A. THE 2018 CONDITIONAL-REZONING APPLICATION

The subject property is a 3.41-acre parcel in Lima Township. In 1945, a factory was built on the property.

The facility was used as a factory until 1986, and thereafter the facility was used for other purposes, including as a prior nonconforming use due to a zoning change. The facility was eventually abandoned, and it remained abandoned for approximately 30 years; at some point, the property was rezoned Rural Residential (RR). Several residences were constructed nearby when the facility was no longer being used as an active factory. In 2016, the property owners began to repair the facility.

In the fall of 2018, one of the owners of the subject property, James Smith, requested that the Township conditionally rezone the subject property from Rural Residential (RR) to Light Industrial (LI). A conditional rezoning involves a property owner's offer to impose certain conditions on the use of property in exchange for a rezoning to a new use classification. The Michigan Zoning Enabling Act (MZEA), MCL 125.3101 *et seq*., specifically allows a local unit of government to engage in conditional rezoning:

> (1) An owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.
>
> (2) In approving the conditions under subsection (1), the local unit of government may establish a time period during which the conditions apply to the land. Except for an extension under subsection (4), if the conditions are not satisfied within the time specified under this subsection, the land shall revert to its former zoning classification.
>
> (3) The local government shall not add to or alter the conditions approved under subsection (1) during the time period specified under subsection (2) of this section.
>
> (4) The time period specified under subsection (2) may be extended upon the application of the landowner and approval of the local unit of government.

> (5) A local unit of government shall not require a landowner to offer conditions as a requirement for rezoning. The lack of an offer under subsection (1) shall not otherwise affect a landowner's rights under this act, the ordinances of the local unit of government, or any other laws of this state. [MCL 125.3405.]

Thus, the keystone of a conditional rezoning is that the conditions are voluntarily offered by the property owner in writing, and the local unit of government cannot require the landowner to offer conditions as a requirement for rezoning.

The Township designated Smith's request for conditional rezoning as Application 2018-002, and this designation appears on all of the minutes from the relevant meetings of the Lima Township Planning Commission and the Lima Township Board of Trustees. Plaintiffs have provided a copy of the Township's zoning map to illustrate the location of the subject property and the surrounding land uses. This map shows the crossroads and the zoning districts in the area, as well as the location of surrounding homes; it illustrates that the subject property is entirely surrounded by residential uses located in either the Agriculture-1 (AG-1) or Rural Residential (RR) Districts.

It is uncontested that plaintiffs, as owners of adjoining parcels, received written notice of a Planning Commission meeting held on August 27, 2018, at which the proposal for a conditional rezoning of the subject property from Rural Residential (RR) to Light Industrial (LI) was first considered. Several of the plaintiffs spoke during the public hearing. After the hearing concluded, the Planning Commission considered action on the application, but eventually postponed action until a site plan was submitted. From this point forward, the Planning Commission did not provide plaintiffs with any specific notice regarding meet-

ings on the application for a conditional rezoning; rather, the meetings were simply noticed under the more general requirements of the Open Meetings Act, MCL 15.261 *et seq*., as acknowledged by both parties during oral argument on appeal.

At its next meeting on September 24, 2018, the Planning Commission briefly considered the application. The Planning Commission's meeting minutes report that the chairman "stated that there has not been a site plan filed for Application 2018-002." The Planning Commission again voted to "postpone Application 2018-002 until a Site Plan is filed."

At its meeting on October 22, 2018, the Planning Commission again considered the application. The Planning Commission's meeting minutes for that date report that the chairman "stated [that] a site plan was received on October 3, 2018." (The trial court record does not contain a copy of this site plan.) The Planning Commission had also received a report from the Lima Township Planner; the report stated that all surrounding land uses were residential in nature, and that "the development pattern immediately surrounding the subject site is well established." The report noted that the application was one for conditional rezoning, and the applicant had offered several conditions in exchange for the rezoning. The Township Planner ultimately opined that the site plan submitted by the applicant was inadequate, and recommended that the Planning Commission "postpone action until the applicant has had a chance to revise their application." The Planning Commission voted to direct staff "to draft a resolution recommending denial of the requested conditional rezoning for Application 2018-002."

At its next meeting on November 26, 2018, the Planning Commission considered the application. The

Planning Commission's meeting minutes indicate the following regarding Application 2018-002:

> Chair Consiglio stated that a Public Hearing was held in August with public comments.
>
> Received Resolution of Findings and Recommendation from Township Planner Paul Montagno, dated received November 19, 2018.
>
> At this time Chair Marlene Consiglio read the terms of the standards A through G from the Resolution of Findings and Recommendations. Discussion followed[.]
>
> Motion by Elizabeth Sensoli, seconded by Marlene Consiglio to forward Application 2018-002 to the Lima Township Board and recommend that they deny the application for a conditional rezoning from RR-Rural Residential to LI-Limited Industrial for the parcel located at 1035 North Fletcher Road, Chelsea, MI 48118.

The Planning Commission voted to recommend denial of the requested conditional rezoning, with five members in favor and two members opposed. The meeting minutes do not report that any member of the Planning Commission abstained from voting or was absent.

In their amended complaint, plaintiffs referred to this November 26, 2018 vote of the Planning Commission. Plaintiffs alleged that, following the August 2018 public hearing during which public comment was received, the Planning Commission voted to deny the conditional rezoning request on November 26, 2018. Plaintiffs further alleged that they "all understood that this ended the application process for rezoning." As the subsequent proceedings would reveal, however, plaintiffs' understanding was incorrect.

As explained in more detail in the next section, rezoning is a legislative act that can be accomplished only by the Lima Township Board of Trustees; the Planning Commission can only issue a *recommenda-*

tion to the Township Board. The Lima Township Zoning Ordinance addresses amendments (including the rezoning of parcels) in § 14.3, titled "Amendment Procedures." The Zoning Ordinance provides that an amendment may be initiated by petition of one or more property owners of Lima Township, and all proposed amendments must be referred to the Planning Commission for review and recommendation before action may be taken thereon by the Township Board. Lima Township Zoning Ordinance, § 14.1. The Planning Commission must hold at least one public hearing on a requested rezoning, Lima Township Zoning Ordinance, § 14.3.2, and must forward any recommendation to the Township Board:

> 14.3.7. The Planning Commission shall, following the public hearing and action on the petition, transmit the petition and a summary of comments received at the public hearing and recommendation to the Township Board.
>
> 14.3.8. The Planning Commission shall report its findings, a summary of comments from the public hearing, and its recommendations for disposition of the petition to the Township Board following the public hearing within a reasonable amount of time from the filing date. If the Township Board shall deem advisable any changes, additions, or departures as to the proposed amendment, it shall refer it to the Planning Commission for a report thereon within a time specified by the Board. Thereafter, the Board may act upon the petition. [Lima Township Zoning Ordinance, §§ 14.3.7 to 14.3.8.]

Therefore, the Planning Commission's decision on November 26, 2018, to recommend denial of Smith's application for a conditional rezoning was simply that—a recommendation—and one that was not final until acted upon by the Township Board. Thus, as

noted, plaintiffs were incorrect in believing that the November 26, 2018, recommendation concluded the matter.

Meeting minutes of the Township Board indicate that the Planning Commission did forward its recommendation to the board. (Although the Township Board's meeting minutes are not part of the record on appeal, at oral argument before this Court, counsel for both parties agreed that this Court could take judicial notice of these public records.) The Township Board's minutes of the meeting held on December 10, 2018, state, in relevant part, "1035 N Fletcher Rd—rezoning: Findings Report from Twp. Planner was too intensive for recommending application approval." The next month, the Township Board returned the application to the Planning Commission, as reflected by the January 14, 2019 minutes:

> 1035 N. Fletcher Rd.—Rezoning RR to LI Conditional Application #2018-002
>
> Moved by Bater, supported by Laier referring application #2018-002 back to the Planning Commission so modifications may be made to the application by the applicant and presented again. Motion carried 4 ayes, 1 nay (Havens)

The Planning Commission once again considered the application for a conditional rezoning at its meeting on March 25, 2019. The Planning Commission's meeting minutes for that date indicate, "The list of limited formal uses need[s] to be typed up by the applicant and given to the Planning Commission for conditional rezoning, and also the prior Site Plan needs to be attached to the rezoning request." The meeting minutes also indicate that the Planning Commission voted to direct the Township Planner "to develop a draft for a resolution in favor of conditional rezoning

with conditions for Application 2018-002, and to table this until April 22, 2019." (The record does not indicate that anything of note occurred on April 22, 2019.)

On May 17, 2019, Smith submitted another revised site plan. The record does not contain the site plan or the list of conditions proposed for the subject property.

At its next meeting on June 24, 2019, the Planning Commission again considered the application for conditional rezoning of the subject property. The Planning Commission's meeting minutes report the following regarding Application 2018-002:

> Motion by Howard Sias, seconded by Marlene Consiglio, to recommend to the Township Board approval of application #2018-002 for conditional rezoning for 1035 N. Fletcher Road, with the conditions offered by the applicant on their site plan dated May 14, 2019, and based on the Planning Commissions' [sic] Resolution of Findings and Recommendation dated June 24, 2019.

The Planning Commission's vote was three members in favor, one member opposed, one member abstaining, and two members absent.

On July 8, 2019, the Township Board met to consider the Planning Commission's recommendation that it approve Smith's revised application. According to plaintiffs, none of the owners of adjoining parcels received notice about this meeting, and the Township Board did not receive any correspondence from those neighbors regarding the revised site plan filed in May 2019.

The Township Board's minutes from its July 8, 2019 meeting state:

> **1035 N. Fletcher Rd. — Rezoning RR to LI Conditional Application #2018-002**
>
> **Now therefore be it resolved**, that the Planning Commission recommends to the Township Board, that they

approve the application for a rezoning from RR-Rural Residential to LI—Light Industrial with the conditions offered by the applicant in a the [sic] letter received on May 17, 2019, and the site plan with final revision date of 5-14-19, case # 2018-002, for the parcel located at 1035 North Fletcher, Chelsea, MI 48118, with tax parcel ID # G-07-08-400-012.

Moved by Luick, seconded by Bater to follow the Planning Commission's recommendation and give approval to 1035 N. Fletcher Road for rezoning with conditions from RR-Rural Residential to LI-Light Industrial.

ROLL CALL VOTE: AYE: Bater, Maier, LuickNAY: Havens, Laier ABSENT: None

Motion passed

The very next day, by letter dated July 9, 2019, plaintiffs James Eyster, Michael O'Leary, Karen Connell, Larry Connell, and Diana Newman filed a written request for an appeal to the Lima Township Clerk. The letter was stamped "Received" on July 10, 2019. In that letter, plaintiffs stated: "[W]e are filing this appeal of the decision of the Planning Commission and Township Board to approve a re-zoning of the property located at 1035 N. Fletcher Road, which was approved on July 8, 2019. Please notify Mr. Eyster as to the amount of the fee to be paid." The letter presented detailed arguments regarding why plaintiffs believed that the approval of the request for a conditional rezoning was invalid, including: (1) the Planning Commission failed to provide proper notice to surrounding property owners under Lima Township Zoning Ordinance, § 14.3.8; (2) the conditional rezoning amounted to illegal spot zoning; (3) Lima Township Zoning Ordinance, § 14.7 allowed conditional rezoning only for uses of "land and natural resources" but not for structures; (4) the rezoning did not comply with the Town-

ship's Master Plan; (5) the legislative decision to rezone was arbitrary and capricious; and (6) several Planning Commission members improperly abstained from the vote. Defendants do not dispute that plaintiffs filed this letter with the Township Clerk or that the Township Clerk stamped it "Received."

According to plaintiffs' counsel, the Lima Township Supervisor subsequently contacted plaintiffs by telephone and informed them that the appeal would not be accepted and that their only remedy was to file suit in circuit court. Although plaintiffs did not provide an affidavit regarding the contents of this telephone call, defendants do not dispute that the Township Supervisor rejected plaintiffs' attempt to pursue an administrative appeal of the decision to rezone the subject property.

B. THE CIRCUIT-COURT LAWSUIT

On August 6, 2019, plaintiffs sued defendants in circuit court, challenging the conditional rezoning of the subject property. Plaintiffs made the following claims: (1) taking without just compensation/inverse condemnation/regulatory taking; (2) violation of plaintiffs' substantive-due-process rights; and (3) violation of plaintiffs' procedural-due-process rights. In support of their claims, plaintiffs alleged that the Township's approval of the conditional rezoning had caused plaintiffs to suffer "a special injury or right, or substantial interest which will be detrimentally affected in a manner different from the citizenry at large" and that they would "suffer special damages, distinct and different from those suffered by the public generally" because they were "abutting residential property owners on all four sides" of the subject property. Plaintiffs alleged that their special damages included:

a. Deprivation of the quiet enjoyment of their homes and property;

b. Loss in property values;

c. Unrestricted exposure to paint fumes, metal and wood dust, and industrial noise up to twelve hours a day, seven days a week;

d. Unrestricted visual exposure to a stark, gray, monolithic building with boarded-up windows;

e. Daily subjection to ten or more cars and trucks being driven around the northern side of the factory to an extensive new parking lot;

f. Legal expenses, including, but not limited to, actual attorney fees, consultant fees, overhead, and disbursements.

Plaintiffs subsequently moved for partial summary disposition under MCR 2.116(C)(10). Plaintiffs requested that the circuit court enter a "declaration that the conditional rezoning from Rural Residential to Light Industrial of the property located at 1035 N. Fletcher Road in Lima Township, Washtenaw County, Michigan is invalid for failure to properly notify adjacent landowners of the Planning Commission meeting of June 24, 2019 at which the application for rezoning was considered and approved." The issue that plaintiffs raised in their motion for summary disposition—the alleged inadequacy of notice—was only one claim among the various claims raised in their amended complaint.

Defendants opposed the motion and argued that the circuit court should grant summary disposition in their favor under MCR 2.116(I)(2). Because the circuit court later adopted defendants' arguments by reference as the holding of the court, we will describe defendants' arguments in some detail.

First, defendants argued that plaintiffs had failed to exhaust their administrative remedies before filing the lawsuit. They argued that under § 604 of the MZEA, MCL 125.3604(1), plaintiffs were required, as persons "aggrieved" by a zoning decision of a municipal board, to appeal to the Lima Township Zoning Board of Appeals before suing in circuit court. Defendants argued that plaintiffs skipped this step and, accordingly failed to exhaust available administrative remedies.

Second, defendants argued that plaintiffs failed to qualify as parties "aggrieved" by the Township's rezoning action, citing *Olsen v Chikaming Twp*, 325 Mich App 170; 924 NW2d 889 (2018). Defendants argued that, to qualify as an "aggrieved" party with standing to sue under the MZEA, a party is required to show that the party suffered special damages not common to other property owners who were similarly situated. Defendants further argued that under *Olsen*, " 'mere ownership' " of an adjoining parcel of land is insufficient to show that a party is aggrieved. Therefore, even if plaintiffs had exhausted their administrative remedies, they could not challenge the Township's rezoning decision because they were not "aggrieved" parties.

Third, defendants argued that, even if plaintiffs were "aggrieved" parties under the MZEA, defendants had satisfied all of the procedural requirements of the MZEA before rezoning the subject property. Defendants argued that the Planning Commission held one public hearing on Smith's conditional-rezoning request, and it issued all required notices for that public hearing. Because the Planning Commission held that one public hearing, the Township was required to do nothing more because it had met the procedural requirements of the MZEA and was "free to proceed with its business."

Finally, defendants argued that plaintiffs had improperly relied on "unsworn testimony as statements of fact." Specifically, defendants were referring to plaintiffs' allegations that they "did not receive notice of any regular meeting of the Planning Commission other than the initial public hearing." Defendants objected that plaintiffs' argument on this point was "not supported by affidavits or deposition testimony" and therefore could not be considered by the circuit court.

At the hearing on plaintiffs' motion for summary disposition, plaintiffs addressed defendants' argument regarding exhaustion of administrative remedies. Plaintiffs' counsel stated:

> Defendants have responded that plaintiffs failed to exhaust their administrative remedies. That's not true, Your Honor. Exhibit O is a letter of appeal stamped received by the Lima Township clerk on July 10th, 2019, which is a—a request for an appeal. We did not receive back a letter, but the [township] supervisor called us and told us that we'd have to go to court if we wanted resolution of this issue; that we didn't have standing, because we were not the landowner himself.

Plaintiffs also addressed defendants' argument that plaintiffs had submitted only unsworn arguments to support their allegations about notice. Plaintiffs relied on defendants' answer to ¶ 30 of the amended complaint, stating:

> Defendants have admitted, and their answer to our paragraph 30 states that no new notices were sent to neighbors prior to the June 24th planning commission meeting, at which approval of the request was recommended, and the Township board then approved at their next meeting this recommendation, in part quote, based on the planning commission's resolution of findings and recommendation dated June 24th, 2019.

* * *

> . . . Defense states that no affidavits have been submitted, saying that notice had not been provided, but defense has already admitted that no notices were sent or required. Again, see the answer to our paragraph 30.

We note that plaintiffs are correct on this point. Referring to the June 24, 2019 meeting of the Planning Commission, plaintiffs alleged in ¶ 30 of their amended complaint, "None of the residential property owners received notice from the Township about this meeting of the Planning Commission as required by MCL § 125.3103." In answer to this allegation, defendants stated: "Admit the allegation in paragraph 30 that no new notices were sent out by the Township but for further answer state that no new notices were required by law."

At the conclusion of the hearing, the circuit court adopted defendants' arguments, explaining:

> So gentlemen, first of all, I really appreciate your professionalism, and I did read the briefs and the argument as—your arguments are well set out.
>
> It did cause me to reflect when I read these, I'm in my third decade on the bench, can you believe it, 30 years starting, and I was thinking about this, and the most times I've been reversed by the Court of Appeals is always when I find for the individual against the zoning board. I think there's only one case that I—ever where I found for the—the claimant, and it was reversed by the Court of Appeals, but the Supreme Court actually reinstated, you know, my opinion.
>
> So I am going to rest on the briefs. I'm agreeing, because it just seems this happens over and over, this time with you, [defendants' counsel], so I agree that your analysis is correct, I adopt it, and believe me, I'd love the Court of Appeals to come back and tell me sometimes that maybe the individual is correct, so motion is denied.

Plaintiffs' counsel immediately asked the circuit court to clarify the grounds for its decision, and the following exchange occurred:

> [*Plaintiffs' Counsel*]: Oh my gosh. Your Honor, could you explain to me—I—I don't understand that.
>
> *The Court*: What I'm saying is, is my experience is—I've—I adopt [defendants' counsel's] analysis in his written motion—
>
> [*Plaintiffs' Counsel*]: Mm-hmm.
>
> *The Court*: —and I find that to be correct, and I hope you can convince the Court of Appeals I'm wrong.

After the circuit court denied plaintiffs' motion for partial summary disposition, defendants' counsel asked about the request for summary disposition in their favor under MCR 2.116(I)(2), and the circuit court granted that relief on the basis that plaintiffs were not "aggrieved" parties:

> [*Defendants' Counsel*]: Your Honor, are you—on this matter, I—we'd also asked for summary under 116.(I) [sic] regarding the fact that he is not an aggrieved party as that term is defined.
>
> *The Court*: Yes.
>
> [*Defendants' Counsel*]: Granting on that also?
>
> *The Court*: Yes.
>
> [*Defendants' Counsel*]: Okay.
>
> *The Court*: Take it up, and if the Court of Appeals—
>
> [*Defendants' Counsel*]: Thank you.
>
> *The Court*: —agrees with you—if the Court of Appeals disagrees with you, I'm happy to give you a hearing.
>
> [*Defendants' Counsel*]: Thank you, Your Honor.
>
> *The Court*: All right.

The circuit court entered an order denying plaintiffs' motion for partial summary disposition and granting

summary disposition in favor of defendants "[f]or the reasons set forth in defendants' response to plaintiffs' motion for summary disposition." The order specified that defendants were "granted summary disposition on all claims raised by plaintiffs" under MCR 2.116(I)(2).

This appeal followed.

II. ANALYSIS

A. STANDARD OF REVIEW

This Court reviews de novo a circuit court's decision to grant or deny summary disposition under MCR 2.116(C)(10), *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 166; 667 NW2d 93 (2003), and under MCR 2.116(I)(2), *Brandon Charter Twp v Tippett*, 241 Mich App 417, 418, 421 n 1; 616 NW2d 243 (2000). A circuit court properly grants summary disposition to the opposing party under MCR 2.116(I)(2) if the court determines that the opposing party, rather than the moving party, is entitled to judgment as a matter of law. *Sharper Image Corp v Dep't of Treasury*, 216 Mich App 698, 701; 550 NW2d 596 (1996). "In addition, we review de novo issues involving the construction of statutes and ordinances," and "[w]e also review de novo the legal question whether a party has standing." *Olsen*, 325 Mich App at 180.

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

When it denied plaintiffs' motion for summary disposition and granted summary disposition in favor of defendants, the circuit court adopted as its own analysis the arguments set forth in defendants' brief opposing plaintiffs' motion. In that brief, defendants argued that plaintiffs could not proceed with this lawsuit because plaintiffs failed to exhaust their administra-

tive remedies. To the contrary, the exhaustion requirement does not apply because the relevant administrative appellate body could not have provided plaintiffs with any relief.

"As this Court has repeatedly recognized, when an administrative scheme of relief exists an individual must exhaust those remedies before a circuit court has jurisdiction." *In re Harper*, 302 Mich App 349, 356; 839 NW2d 44 (2013). "The doctrine of exhaustion of administrative remedies requires that where an administrative agency provides a remedy, a party must seek such relief before petitioning the court." *Cummins v Robinson Twp*, 283 Mich App 677, 691; 770 NW2d 421 (2009), citing *Trever v Sterling Hts*, 37 Mich App 594, 596; 195 NW2d 91 (1972). "The converse, however, is that where the administrative appellate body cannot provide the relief sought, the doctrine does not apply." *Id*. Furthermore, when local law makes no provision for an administrative appeal, a party is not barred from filing a lawsuit in circuit court because of failure to exhaust his administrative remedies. *Wenner v Southfield*, 365 Mich 563, 566-567; 113 NW2d 918 (1962).

"The MZEA grants local units of government authority to regulate land development and use through zoning." *Olsen*, 325 Mich at 179. Defendants maintain that, under § 604 of the MZEA, plaintiffs were required to appeal the Township Board's rezoning decision to the Lima Township Zoning Board of Appeals. The statute provides in pertinent part:

> An appeal to the zoning board of appeals may be taken by a person aggrieved or by an officer, department, board, or bureau of this state or the local unit of government. In addition, a variance in the zoning ordinance may be applied for and granted under section 4 of the uniform condemnation procedures act, 1980 PA 87, MCL 213.54,

> and as provided under this act. The zoning board of appeals shall state the grounds of any determination made by the board. [MCL 125.3604(1).]

This statute must be read, however, in light of the distinction between a "legislative" decision versus an "administrative" decision involving zoning matters. Generally speaking, "it is settled law in Michigan that the zoning and rezoning of property are *legislative* functions." *Sun Communities v Leroy Twp*, 241 Mich App 665, 669; 617 NW2d 42 (2000) (emphasis added); see also *Inverness Mobile Home Community v Bedford Twp*, 263 Mich App 241, 247; 687 NW2d 869 (2004); *Essexville v Carrollton Concrete Mix, Inc*, 259 Mich App 257, 265; 673 NW2d 815 (2003); *Arthur Land Co, LLC v Otsego Co*, 249 Mich App 650, 662; 645 NW2d 50 (2002). In contrast, actions "such as site-plan review and the approval of special use permit requests, are essentially administrative in nature." *Sun Communities*, 241 Mich App at 669; see also *Mitchell v Grewal*, 338 Mich 81, 87-88; 61 NW2d 3 (1953).

For purposes of the MZEA, the "legislative body" of a township is defined as its board of trustees. MCL 125.3102(n). "The function of the township board in enacting a zoning ordinance is legislative." *Randall v Meridian Twp Bd*, 342 Mich 605, 607; 70 NW2d 728 (1955). "The adoption of a zoning ordinance is a legislative act . . . [and] the rezoning of a single parcel of land from one district to another is an amendment of the zoning ordinance and is likewise a legislative act." *Sun Communities*, 241 Mich App at 669, quoting Crawford, Michigan Zoning and Planning (3d ed), § 1.11, p 53. "The delegation of legislative power with respect to zoning matters to administrative boards and officers is unconstitutional and void." 8A McQuillin, Municipal Corporations (3d ed revised 2020), § 25:299, p 316.

Consistent with this legislative-versus-administrative distinction, the Lima Township Zoning Ordinance provides the Zoning Board of Appeals with the authority to:

> A. Hear and decide appeals of any *administrative decision* of any official or body on any requirement of this ordinance.
>
> B. Grant or deny requests for variances.
>
> C. Grant or deny requests for the expansion or alteration of non-conforming buildings and structures.
>
> D. Grant or deny requests for substitutions of non-conforming uses. The use being considered as a substitute must be equal to or less intense than the nonconforming use being replaced. [Lima Township Zoning Ordinance, § 13.4.1 (emphasis added).]

Thus, under the Township's Ordinance, the Board of Appeals could hear and decide an appeal from various administrative decisions, such as the Zoning Administrator's interpretation of the Lima Township Zoning Ordinance under § 3.2.1.I., the Planning Commission's decision to grant special-use permits under § 3.3, or the Zoning Administrator's refusal to issue a certificate of zoning compliance under § 3.4. Furthermore, the Board of Appeals could grant or deny requests for variances, grant or deny requests for the expansion or alteration of non-conforming buildings or structures, or grant or deny requests for substitutions of non-conforming uses. Lima Township Zoning Ordinance, § 13.4.1. There is nothing in the Township's Ordinance, however, providing the Board of Appeals with any authority over the legislative acts of the Township Board. An administrative body cannot enlarge its scope of authority beyond that which is granted to it by law.

Another section of the Township's Ordinance makes clear the limits on the Board of Appeals' authority. As

delimited by § 13.4.2, the Board of Appeals "shall not alter or change the zoning district classification of any property." A conditional rezoning approved by the Township Board necessarily entails making a "zoning district classification," and this cannot be altered or changed by the Board of Appeals under § 13.4.2. To be clear, rezoning is a *legislative* decision, and the appointed Board of Appeals is neither a legislative body nor a body to which legislative powers may be delegated. McQuillin, § 25:299, pp 318-319. Thus, the Board of Appeals lacked the authority to hear any appeal from the Township Board's decision to rezone the subject property from Rural Residential (RR) to Light Industrial (LI).

And, even setting aside the legislative nature of the conditional rezoning and the Township Ordinance delimiting the Board of Appeals' authority, an administrative body cannot rule on constitutional claims. *Houdini Props, LLC v Romulus*, 480 Mich 1022, 1022 (2008) ("The zoning board of appeals did not have jurisdiction to decide the plaintiff's substantive due process and takings claims."). A plaintiff who brings a "due process challenge that claims arbitrariness or capriciousness" on the part of the governmental agency "need not exhaust any administrative remedies." *Landon Holdings, Inc v Grattan Twp*, 257 Mich App 154, 177; 667 NW2d 93 (2003). Plaintiffs brought both procedural-due-process and substantive-due-process claims, alleging that the Township acted capriciously when it granted the conditional rezoning. Because the exhaustion requirement does not apply to these claims, the trial court erred in ruling that plaintiffs' lawsuit was barred because they had failed to exhaust their administrative remedies.

Against this, defendants argue that under our Supreme Court's decision in *Paragon Props Co v Novi*,

452 Mich 568; 550 NW2d 772 (1996), plaintiffs were still required to appeal to the Board of Appeals before suing in circuit court. Defendants read too much into *Paragon*.

In that case, our Supreme Court considered a landowner's challenge to a city council's decision to deny a requested rezoning of real property. The city argued that the property owner had failed to seek a use variance from the city's zoning board of appeals and, therefore, had not obtained a final decision as to the potential uses of the property. *Id*. at 572. The Supreme Court noted that, under the city's zoning ordinance, its zoning board of appeals was authorized to grant a land-use variance, and the board had "the authority to allow a use in a zoning district that would not otherwise be allowed." *Id*. at 574-575. The Supreme Court noted the rule of finality, as follows:

> A challenge to the validity of a zoning ordinance "as applied," whether analyzed under 42 USC 1983 as a denial of equal protection, as a deprivation of due process under the Fourteenth Amendment, or as a taking under the Just Compensation Clause of the Fifth Amendment, is subject to the rule of finality.
>
> The finality requirement is concerned with whether the initial decisionmaker has arrived at a definite position on the issue that inflicts an actual, concrete injury . . . . [*Id*. at 576-577 (cleaned up).]

The Supreme Court concluded that the city council's decision to deny the landowner's requested rezoning of real property was "not a final decision because, absent a request for a variance, there is no information regarding the potential uses of the property that might have been permitted." *Id*. at 580.

In contrast to the facts presented in *Paragon*, the Township Board's decision in this case to grant the

conditional rezoning was a final decision subject to review in the circuit court. Defendants point to no procedure in the Township's Ordinance that would allow owners of adjacent property to seek a use variance for the subject property. Further, defendants cite no appellate caselaw standing for the proposition that a legislative body's decision to grant a rezoning request is not a final decision. Unlike in *Paragon*, where there was "no information regarding the potential uses of the property that might have been permitted," *id*., the conditional rezoning request that was approved in this case carried with it very express conditions describing the uses of the property that were permitted by the Township Board. The circuit court erred in ruling that plaintiffs' lawsuit was barred because they had failed to exhaust their administrative remedies.

C. AGGRIEVED PARTIES

The circuit court also concluded that plaintiffs lacked standing to sue because they were not "aggrieved" parties under § 604 of the MZEA and the Township Ordinance. The MZEA provides: "An appeal to the zoning board of appeals may be taken by a person aggrieved . . . ." MCL 125.3604(1). As the text indicates, this statutory subsection applies to appeals filed with the Board of Appeals. But as explained previously, plaintiffs had no avenue of appeal to that board. This case presents a circuit court challenge to the Township's decision to rezone property, not an appeal of the Township Board's decision to the Board of Appeals. Therefore, the text of MCL 125.3604(1) is inapplicable to the present case. Moreover, because plaintiffs could not appeal to the Board of Appeals given the nature of their claims, it is beside the point whether they would qualify as "any person aggrieved" under § 13.8.2 of the Township Ordinance.

This Court's decisions in *Arthur Land Co* and *Sun Communities* further illustrate why plaintiffs' challenge to the Township's decision to rezone the subject property is a matter that falls within the circuit court's original jurisdiction, not within its appellate jurisdiction (as it would be if the circuit court were reviewing on appeal a decision from an administrative appellate body such as the Board of Appeals). "Because rezoning is a legislative act, its validity and the validity of a refusal to rezone are governed by the tests which we ordinarily apply to legislation," and the circuit court is not reviewing as an appellate court whether an administrative decision was supported by competent, material, and substantial evidence. *Arthur Land Co*, 249 Mich App at 664 (cleaned up); see also *Sun Communities*, 241 Mich App at 670. "There is no authority that requires a party to pursue *an appeal* to challenge the constitutionality of a legislative act of rezoning." *Id*. at 672 (emphasis added).

In *Ansell v Delta Co Planning Comm*, 332 Mich App 451, 456; 957 NW2d 47 (2020), this Court recently considered whether the "aggrieved party" standard contained in § 604 of the MZEA applies to "appeals of zoning decisions where there was no provision for review by a zoning board of appeals." Relying on MCR 7.103(A)(3) and MCR 7.122(A)(1), the *Ansell* Court concluded, "Appeals from both a township board and a municipal zoning commission planning board are entitled to the same review." *Ansell*, 332 Mich App at 459. We note, however, that *Ansell* involved the township's decision to grant a conditional-use permit (an administrative decision), not a rezoning (a legislative decision). *Id*. at 454. The *Ansell* Court relied on Const 1963, art 6, § 28, which provides, in part, "All final decisions, findings, rulings and orders of any *administrative officer or agency* existing under the constitution or by

law, which are *judicial or quasi-judicial* and affect private rights or licenses, shall be subject to direct review by the courts as provided by law." *Ansell*, 332 Mich App at 458, quoting Const 1963, art 6, § 28 (emphasis added). The holding in *Ansell* therefore applies to a township's zoning decisions that are administrative in nature, but not to a township's zoning decisions that are legislative in nature, such as a rezoning. Even though the *Ansell* Court applied the "aggrieved party" provision of the MZEA to other types of appeals, including appeals from the administrative decisions of a township board, that decision does not apply to original actions in circuit court to challenge a township's legislative actions.

The provision of the MZEA relied upon by the circuit court to hold that plaintiffs were not "aggrieved" parties who could file an appeal, MCL 125.3604(1), does not apply in this case. The circuit court erroneously granted summary disposition to defendants under MCR 2.116(I)(2) on the grounds that plaintiffs did not qualify as "aggrieved" parties who could have—but failed to—file an appeal to the Zoning Board of Appeals under MCL 125.3604.

D. STANDING

Even setting aside the question of plaintiffs' aggrieved-party status, there remains the question whether plaintiffs have standing to sue. "[T]he term 'standing' generally refers to the right of a plaintiff initially to invoke the power of a trial court to adjudicate a claimed injury." *Olsen*, 325 Mich App at 180. In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010), our Supreme Court explained that the "purpose of the standing doctrine is to assess whether a litigant's interest in the issue is

sufficient to ensure sincere and vigorous advocacy." (Cleaned up.) Thus, "the standing inquiry focuses on whether a litigant is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *Id*. (cleaned up).

In *Olsen*, this Court noted the distinction between a party's attempt to "invoke the power of the trial court regarding a claimed injury" and a party's attempt to trigger "appellate review of a local unit of government's zoning decision when review is sought by a 'party aggrieved' by the decision" of a zoning board of appeals. *Olsen*, 325 Mich App at 193. In contrast to *Olsen*, the present case does not involve a party's attempt to appeal a decision of a zoning board of appeals, but involves a party's attempt to challenge a rezoning decision made by the legislative body of the municipality. Similarly, although this Court in *Olsen* discussed and relied on *Brown v East Lansing Zoning Bd of Appeals*, 109 Mich App 688, 693, 700; 311 NW2d 828 (1981), the *Brown* Court considered a circuit-court appeal from the decision of a local zoning board of appeals to grant a variance, rather than a legislative decision of a local unit of government. See *Olsen*, 325 Mich App at 188-189. Furthermore, the *Brown* Court applied a standing provision contained in a now-repealed statutory section. See *id*. at 189. Thus, neither *Olsen* nor *Brown* undermines plaintiffs' standing here.

Our Supreme Court's decision in *Randall* does shed some light on the standing required of a plaintiff who seeks to challenge the legislative zoning decision of a local unit of government. In *Randall*, the plaintiffs sought to enjoin a township board from amending a zoning ordinance to rezone real property from an agricultural zone to a commercial zone. *Randall*, 342 Mich at 606. The Supreme Court noted, "While it is

within the province of the courts to pass upon the validity of statutes and ordinances, courts may not legislate nor undertake to compel legislative bodies to do so one way or another." *Id*. at 608 (cleaned up). The Supreme Court ruled that, while the courts did not have the authority to order a township board to refrain from engaging in the legislative act of rezoning a parcel of real property, the courts did have the authority to review "the validity of the amendment once it is adopted." *Id*. The plaintiffs in that case owned property adjacent to the property that the township sought to rezone. *Id*. at 606. Despite the township's argument that the plaintiffs had "no vested or contractual right to keep the adjacent property in its present zoning classification," the Supreme Court held:

> It does not follow, however, that plaintiffs have no standing in a court of equity to challenge the validity of an amendment to the zoning ordinance on the grounds of arbitrariness or unreasonableness of the proposed change *or irregularities in the proceedings*. Possible adverse effects of the change on their property create in them such an interest in the subject matter as to entitle them to maintain an action for that purpose. [*Id*. at 607 (emphasis added).]

Because the plaintiffs owned adjacent property, they had "an interest which would entitle them to maintain an action to challenge the validity of the amendment once it is adopted . . . and the courts have jurisdiction to entertain such actions." *Id*. at 608.

Similarly, because plaintiffs in this case own real property immediately adjacent to the real property that the Township Board conditionally rezoned, and because they alleged special injuries flowing from this legislative decision that are distinct from those suffered by the general public, they have standing to challenge the conditional rezoning because they have a

substantial interest "that is detrimentally affected in a manner distinct from that of the general public." *Lansing Sch Ed Ass'n*, 487 Mich at 378; see also *Randall*, 342 Mich at 607-608. And even if *Olsen* applied here (which it does not because this is not an appeal from a zoning board), plaintiffs' statutory entitlement to notice means that they are not merely adjoining property owners.

E. NOTICE

Finally, we briefly address the matter of notice. In moving for partial summary disposition, plaintiffs argued that they had not received notice of the Planning Commission's meetings when it considered the request for a conditional rezoning of the subject property. With regard to notice, the MZEA provides in relevant part that "the zoning commission shall give a notice of a proposed rezoning in the same manner as required under section 103." MCL 125.3202(2). It is undisputed that the Planning Commission is a "zoning commission" under the MZEA. MCL 125.3301(1)(b). Section 103 addresses the notice required when a zoning commission holds a public hearing:

> (1) Except as otherwise provided under this act, if a local unit of government conducts a public hearing required under this act, the local unit of government shall publish notice of the hearing in a newspaper of general circulation in the local unit of government not less than 15 days before the date of the hearing.
>
> (2) Notice required under this act shall be given as provided under subsection (3) to the owners of property that is the subject of the request. Notice shall also be given as provided under subsection (3) to all persons to whom real property is assessed within 300 feet of the property that is the subject of the request and to the occupants of all structures within 300 feet of the subject property regard-

> less of whether the property or structure is located in the zoning jurisdiction. Notification need not be given to more than 1 occupant of a structure, except that if a structure contains more than 1 dwelling unit or spatial area owned or leased by different persons, 1 occupant of each unit or spatial area shall be given notice. If a single structure contains more than 4 dwelling units or other distinct spatial areas owned or leased by different persons, notice may be given to the manager or owner of the structure, who shall be requested to post the notice at the primary entrance to the structure.
>
> (3) The notice under subsection (2) is considered to be given when personally delivered or when deposited during normal business hours for delivery with the United States postal service or other public or private delivery service. *The notice shall be given not less than 15 days before the date the request will be considered*. If the name of the occupant is not known, the term "occupant" may be used for the intended recipient of the notice.
>
> (4) A notice under this section shall do all of the following:
>
> (a) Describe the nature of the request.
>
> (b) Indicate the property that is the subject of the request. The notice shall include a listing of all existing street addresses within the property. Street addresses do not need to be created and listed if no such addresses currently exist within the property. If there are no street addresses, other means of identification may be used.
>
> (c) State when and where the request will be considered.
>
> (d) Indicate when and where written comments will be received concerning the request. [MCL 125.3103 (emphasis added).]

Thus, under the MZEA, the Planning Commission was required to "give a notice of a proposed rezoning," MCL 125.3202(2), to "all persons to whom real property is assessed within 300 feet of the property that is the

subject of the request and to the occupants of all structures within 300 feet of the subject property" (i.e., plaintiffs, as owners of adjoining parcels), MCL 125.3103(2), "not less than 15 days before the date the request will be considered," MCL 125.3103(3).

In addition to the MZEA, the Township Ordinance also contains notice requirements relevant to a request for rezoning. Section 14.3.3 provides, "If an individual property or ten (10) or fewer adjacent properties are proposed for rezoning the Township shall provide written notice in accordance with the requirements of Section 14.3.2." Those notice requirements are as follows:

> The original petition and fourteen (14) copies thereof shall be filed with the Township Clerk. The Clerk shall transmit the petition and ten (10) copies thereof to the Township Planning Commission for review and report to the Township Board. The Planning Commission shall conduct at least one (1) public hearing on the petition. Notice of the public hearing shall be given in the following manner:
>
> A. The notice of the request shall be published in a newspaper of general circulation in the Township not less than fifteen (15) days before the date the application will be considered by the Planning Commission.
>
> B. The notice shall also be sent not less than fifteen (15) days before the date the application will be considered by the Planning Commission to all persons to whom real property is assessed within three hundred (300) feet of the property and to occupants of all structures within three hundred (300) feet of the property regardless of whether the property or occupant is located in the zoning jurisdiction. If the name of the occupant is not known, the term "occupant" may be used in making notification.
>
> C. Each electric, gas, pipeline public utility company, each telecommunication service provider, each railroad operating within the district or zone affected, and the

> airport manager of each airport, that registers its name and mailing address with the Planning Commission shall receive a notice.
>
> D. The notice shall do all of the following:
>
> 1. Describe the nature of the request.
>
> 2. Indicate the property that is the subject of the request.
>
> 3. The notice shall include a listing of all existing street addresses within the property. Street addresses do not need to be created and listed if no such addresses currently exist within the property.
>
> 4. If there are no street addresses, other means of identification may be used.
>
> 5. State when and where the request will be considered.
>
> 6. Indicate when and where written comments will be received concerning the request.
>
> 7. Indicate the place(s) and time at which the request may be examined. [Lima Township Zoning Ordinance, § 14.3.2.]

Thus, under its own Ordinance, the Township was required to provide written notice of a proposal for rezoning to plaintiffs, as owners of adjoining parcels, "not less than fifteen (15) days before the date the application will be considered by the Planning Commission." Lima Township Zoning Ordinance, § 14.3.2.A.

It is uncontested that defendants did provide the required notice for the August 27, 2018 meeting of the Planning Commission, when that body first considered Smith's application for conditional rezoning of the subject property. Plaintiffs argue, however, that the Planning Commission did not resolve the request for a conditional rezoning on that date, and the Planning Commission was required to issue additional written notices when it considered Smith's revised application. Plaintiffs maintain that to allow the Planning Commis-

sion to provide a single notice to adjoining property owners, despite the fact that it considered taking action on the request at several separate public meetings held over the course of 10 months, fails to accord meaning to the MZEA's requirement that the Planning Commission provide notice to owners of adjoining property "not less than 15 days before the date the request will be considered," MCL 125.3103(3), and the similar requirement of § 14.3.2 of the Township Ordinance.

In granting summary disposition to defendants, the circuit court did not take up plaintiffs' notice arguments. Because we are remanding the matter, we decline to take up plaintiffs' notice claim in the first instance. Instead, we vacate the circuit court's denial of summary disposition on this issue, and the parties may take up this matter, as well as other pertinent matters, in the normal course on remand.

III. CONCLUSION

By granting the application for conditional rezoning, the Township Board engaged in a legislative act, not an administrative or quasi-judicial one. From this fact, it follows that plaintiffs did not have to exhaust administrative remedies that were not available to them, nor did they have to establish that they were aggrieved parties to have standing. Accordingly, for the reasons stated, we reverse the circuit court's grant of summary disposition to defendants, we vacate its denial of plaintiffs' motion for partial summary disposition, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction, nor do we impose costs.

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

PEOPLE v SMITH

Docket No. 349900. Submitted January 7, 2021, at Lansing. Decided March 11, 2021, at 9:00 a.m. Leave to appeal denied 508 Mich 997 (2021).

Albert M. Smith IV was convicted by a jury in the Livingston Circuit Court of carjacking, MCL 750.529a(1); third-degree fleeing and eluding, MCL 750.479a(1) and MCL 750.479a(3); assaulting, resisting, and obstructing a police officer, causing injury, MCL 750.81d(2); assaulting, resisting, and obstructing a police officer, MCL 750.81d(1); felonious assault, MCL 750.82(1); attempted disarming of a police officer, MCL 750.479b(2); and attempted unlawful driving away of a motor vehicle, MCL 750.413. After defendant was involved in a hit-and-run accident, the police pursued defendant's vehicle, finding it upside down against a pole. A sheriff's deputy reached into the vehicle and pulled defendant, who was trying to crawl out, from the vehicle. Defendant resisted arrest, and the deputy slipped and fell on the ground. Defendant hit the deputy and attempted to grab the deputy's duty weapon before running toward the deputy's patrol vehicle, which was still running with the driver's door open. The deputy tased defendant, who hit the rear door of the vehicle and then climbed into the driver's seat. According to the deputy, defendant's feet were by the vehicle's gas and brake pedals and he had one hand on the steering wheel and the other on the gear shifter; the deputy reached in and held the gear shift in park while defendant tried to put the gear shift in drive. A Michigan State Police trooper helped the deputy turn off the car and remove defendant, who continued to resist, from the vehicle. Defendant testified that he did not recall fighting with or hitting the deputy; that he ran toward the police vehicle and fell into it after he was tased; that only his upper body was in the driver's seat; and that he had lacked the intent to get into the police vehicle, put it in gear, and drive away. The jury convicted defendant as charged, and defendant appealed his carjacking conviction.

The Court of Appeals *held*:

1. General-intent and specific-intent crimes differ in that a general-intent crime involves the intent to do the physical act,

while a specific-intent crime involves a particular intent beyond the act done. MCL 750.529a(1) currently provides that a person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking. In turn, MCL 750.529a(2) defines the phrase "in the course of committing a larceny of a motor vehicle" as including acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle. Before its amendment in 2004, the carjacking statute was construed as being a general-intent statute. By amending the statute to include "in the course of committing a larceny of a motor vehicle" as an element of the offense, the Legislature signaled that it wanted to add specific intent to the statute. Therefore, MCL 750.529a is a specific-intent offense. The term "larceny" is not statutorily defined, and statutes use the term in its common-law sense. The elements of common-law larceny are: (1) a trespassory taking and (2) the carrying away (3) of the personal property (4) of another (5) with intent to steal that property; it is a specific-intent crime that requires the prosecutor to prove that the defendant had an intent to steal or permanently deprive the owner of their property. MCL 750.529a(2) defines "in the course of committing a larceny of a motor vehicle" as including acts that occur in an *attempt* to commit the larceny; an "attempt to commit the larceny" in turn applies to situations in which a criminal defendant makes an effort or undertakes an overt act with an intent to deprive another person of their property, but does not achieve the deprivation of property. An "attempt" includes (1) an intent to do an act or to bring about certain consequences that would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation. Thus, to convict a defendant of carjacking, the prosecution must establish that the defendant's acts occurred during an attempt to commit, during the commission of, or after the commission of a larceny of a motor vehicle, which requires the prosecutor to prove that the defendant had the intent to steal or permanently deprive a person of the motor vehicle. Because it is difficult to prove an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant has the requisite intent. Questions of intent and the honesty of belief inherently involve weighing the evidence and assessing the credibility of witnesses, which is a task for the fact-finder; a reviewing court must draw all reasonable inferences

and make credibility choices in support of the verdict. In this case, considering the evidence in the light most favorable to the prosecution, there was sufficient evidence for the jury to have found all the elements of carjacking, including the requisite intent, beyond a reasonable doubt. There was sufficient evidence from which the jury could have reasonably inferred and found that defendant had the intent to steal or permanently deprive the deputy of his police vehicle, that defendant used force during the commission of the attempted larceny, and that defendant's actions manifested the requisite intention to drive off in the vehicle.

Affirmed.

RONAYNE KRAUSE, J., dissenting, agreed with the majority's conclusion that carjacking is a specific-intent crime but disagreed with its conclusion that there was sufficient evidence to support defendant's carjacking conviction. While generally only the trier of fact may resolve conflicts in evidence, a jury may not speculate or fabricate nonexistent evidence. Indeed, courts must ensure that any inferences have adequate basis in record evidence. An intent to steal requires more than merely an intent to take without authorization. Instead, the taking of property must be accompanied by a felonious intent to *permanently* deprive the owner of it; in that regard, permanent deprivation requires something affirmative to preclude the rightful possessor from regaining that possession or subjecting the property to a competing claim. There was no evidence that defendant attempted to drive the police vehicle away and permanently deprive the deputy of it. Even if defendant intended to take the vehicle to leave the scene, that evidence merely demonstrated that he intended to use the vehicle without permission. Judge RONAYNE KRAUSE would have reversed defendant's carjacking conviction.

STATUTES — CARJACKING — ELEMENTS OF CARJACKING — SPECIFIC-INTENT.

To convict a defendant of carjacking, the prosecution must establish that the defendant's acts occurred during an attempt to commit, during the commission of, or after the commission of a larceny of a motor vehicle; carjacking is a specific-intent crime, which requires the prosecutor to prove that the defendant had the intent to steal or permanently deprive a person of the motor vehicle (MCL 750.429a).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *William J. Vailliencourt, Jr.*, Prosecuting Attorney, and *William M. Worden*, Assistant Prosecuting Attorney, for the people.

Peter Ellenson for defendant.

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

RICK, J. Defendant appeals as of right his jury-trial convictions of carjacking, MCL 750.529a(1); third-degree fleeing and eluding, MCL 750.479a(1) and MCL 750.479a(3); assaulting, resisting, and obstructing a police officer, causing injury, MCL 750.81d(2); assaulting, resisting, and obstructing a police officer, MCL 750.81d(1); felonious assault, MCL 750.82(1); attempted disarming of a police officer, MCL 750.479b(2); and attempted unlawful driving away of a motor vehicle, MCL 750.413. He was sentenced to serve 12 to 25 years' imprisonment for carjacking, 2 to 5 years' imprisonment for fleeing and eluding, 2 to 4 years' imprisonment for assaulting, resisting, and obstructing a police officer, causing injury, 1 to 2 years' imprisonment for assaulting, resisting, and obstructing a police officer, 2 to 4 years' imprisonment for felonious assault, 3 to 5 years' imprisonment for attempted disarming of a police officer, and 1 year to 30 months' imprisonment for attempted unlawful driving away of a motor vehicle, to be served concurrently, with credit for 156 days served. Defendant challenges only the carjacking conviction, arguing that the evidence was insufficient to establish that he committed carjacking. We affirm.

I. PERTINENT FACTS

This case arises out of events that occurred on November 28, 2018, after defendant was involved in a hit-and-run accident, fled from police, and crashed his vehicle.

Livingston County Deputy Sheriff Michael Mueller responded to a hit-and-run incident, which led to his pursuing defendant's vehicle and finding it upside down, against a pole. Deputy Mueller parked his patrol vehicle, got out of his car, and ran to the driver's side of defendant's vehicle where he saw defendant trying to crawl out of his vehicle. Deputy Mueller reached inside and pulled defendant out of the vehicle. After defendant was outside of the vehicle, Deputy Mueller testified, he tried to get defendant's arms behind his back and take him into custody; however, defendant actively resisted. When Deputy Mueller tried to put defendant on the ground, he slipped on a piece of debris and fell onto his back. After he fell, defendant hit him, attempted to grab his duty weapon, and then ran toward the patrol vehicle; the vehicle was running at the time and the front driver's side door was open.

Deputy Mueller testified that he deployed his Taser at defendant and that defendant hit the driver's side rear door of the patrol vehicle and then climbed into the vehicle. Deputy Mueller testified that defendant sat in the patrol vehicle, with his feet inside the vehicle near the pedals, and had one of his hands on the steering wheel and the other on the gear shifter; defendant attempted to put the vehicle in gear. Deputy Mueller testified that he reached his hand through the steering wheel and grabbed onto the gear shifter so defendant could not put the vehicle into gear and that defendant pulled down on the gear shifter while he held it in park.

Michigan State Police Trooper Ty Peterson also responded to the incident and, upon his arrival, he saw Deputy Mueller attempting to remove defendant from the driver's seat of the patrol vehicle. Trooper Peterson testified that defendant was sitting upright in the front driver's seat of the patrol vehicle with his right hand on

the gear shift and that his feet were by the brake and gas pedals. Eventually, Trooper Peterson turned off the patrol vehicle, removed the keys, and assisted Deputy Mueller in removing defendant from the vehicle; he testified that defendant resisted his efforts to retake the patrol vehicle. At some point, defendant let go of the gear shifter and steering wheel and was pulled out of the vehicle and arrested by the two officers.

A witness observed defendant punching and kicking Deputy Mueller and attempting to take his gun. She testified that defendant attempted to start and take the patrol vehicle and that defendant's hands were on the steering wheel. Another witness testified that Deputy Mueller struggled to remove defendant from the patrol vehicle and that the two officers removed defendant within five to eight seconds.

Defendant did not recall fighting with or hitting Deputy Mueller; however, he testified that he fell on top of him and that he grabbed and pushed down Deputy Mueller's hand and gun. Defendant did not remember being in the driver's seat of the patrol vehicle. He testified that he ran toward the patrol vehicle and fell into it after he was tased. Defendant also did not remember his full body being in the driver's seat; he testified that only his upper body was in the driver's seat side of the vehicle. He testified that he did not have the intent to get into the patrol vehicle, put it in gear, and take it.

On appeal, defendant argues that there was insufficient evidence to prove he had the requisite intent to commit carjacking.

II. STANDARD OF REVIEW

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Bailey*, 310 Mich

App 703, 713; 873 NW2d 855 (2015). "We review the evidence in the light most favorable to the prosecution and determine whether the jury could have found each element of the charged crime proved beyond a reasonable doubt." *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019).

> [A] reviewing court is *required* to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. It is for the trier of fact, *not the appellate court*, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences. [*People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018) (quotation marks and citations omitted).]

"All conflicts in the evidence must be resolved in favor of the prosecution . . . ." *People v Solloway*, 316 Mich App 174, 180-181; 891 NW2d 255 (2016). Questions of statutory interpretation are reviewed de novo. *People v Peltola*, 489 Mich 174, 178; 803 NW2d 140 (2011).

III. ANALYSIS

A. *MENS REA*

As an initial matter, the parties dispute whether carjacking is a specific-intent or general-intent crime. We conclude that carjacking is a specific-intent crime.

Our Supreme Court has held that "the distinction between specific intent and general intent crimes is that the former involves a particular criminal intent beyond the act done, while the latter involves merely the intent to do the physical act." *People v Beaudin*, 417 Mich 570, 573-574; 339 NW2d 461 (1983). Before the amendment of MCL 750.529a, we held that carjacking was a

general-intent crime. See *People v Terry*, 224 Mich App 447, 455; 569 NW2d 641 (1997), and *People v Davenport*, 230 Mich App 577, 581; 583 NW2d 919 (1998). However, MCL 750.529a was amended in 2004, and it provides, in pertinent part:

> (1) A person who in the course of committing a larceny of a motor vehicle uses force or violence or the threat of force or violence, or who puts in fear any operator, passenger, or person in lawful possession of the motor vehicle, or any person lawfully attempting to recover the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years.
>
> (2) As used in this section, "in the course of committing a larceny of a motor vehicle" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle. [MCL 750.529a, as amended by 2004 PA 128.]

The prior version of the statute provided:

> A person who by force or violence, or by threat of force or violence, or by putting in fear robs, steals, or takes a motor vehicle as defined in [MCL 750.412] from another person, in the presence of that person or the presence of a passenger or in the presence of any other person in lawful possession of the motor vehicle, is guilty of carjacking, a felony punishable by imprisonment for life or for any term of years. [MCL 750.529a(1), as enacted by 1994 PA 191.]

Regarding statutory interpretation, our Michigan Supreme Court has held:

> 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. We interpret those words in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the

> statute as a whole. Moreover, every word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory. If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed. [*Peltola*, 489 Mich at 181 (quotation marks and citations omitted).]

Additionally, "a change in the language of a prior statute presumably connotes a change in meaning[.]" *People v Arnold*, 502 Mich 438, 479; 918 NW2d 164 (2018) (quotation marks and citation omitted).

In *People v Langworthy*, 416 Mich 630, 643; 331 NW2d 171 (1982), our Supreme Court considered several factors in determining whether first-degree criminal sexual conduct was a specific-intent or general-intent offense, including whether the language of the statute or the definitions of the corresponding terms contained language regarding intent. Our Supreme Court specifically noted:

> The fact that the Legislature must have been cognizant, in enacting the first-degree criminal sexual conduct provision, of the established rule that rape does not require specific intent, combined with the absence of any provision regarding intent, considerably weakens defendant's argument that his crime is a specific-intent offense. If the Legislature wanted to add specific intent as an element, knowing that the predecessor statute had been consistently construed as a general-intent crime, it would have specifically done so. The fact that it did not leads us to conclude that the Legislature intended to maintain the general rule that "no intent is requisite other than that evidenced by the doing of the acts constituting the offense", *i.e.*, general intent. [*Id*. at 643-644 (citations omitted).]

Applying those same considerations here, the amended statutory language supports our conclusion that carjacking is a specific-intent offense because the

prior statute was construed as a general-intent offense and the Legislature specifically amended MCL 750.529a(1) to include "in the course of committing a larceny of a motor vehicle" as an element of the offense. "There is no statutory definition of larceny in Michigan and all statutes use the term in its common-law sense." *People v March*, 499 Mich 389, 399-400; 886 NW2d 396 (2016) (quotation marks and citation omitted). Our Supreme Court has recognized the following elements of common-law larceny: "(a) a trespassory taking and (b) the carrying away (c) of the personal property (d) of another (e) with intent to steal that property." *Id*. at 401. We have also held that larceny is a specific-intent crime, requiring the prosecutor to prove that the defendant had the intent to steal or permanently deprive the owner of his or her property. *People v Cain*, 238 Mich App 95, 119, 120; 605 NW2d 28 (1999).

People v Williams, 491 Mich 164; 814 NW2d 270 (2012), also provides a helpful analogy. In *Williams*, our Supreme Court interpreted MCL 750.530, which defined robbery as follows:

> (1) A person who, in the course of committing a larceny of any money or other property that may be the subject of larceny, uses force or violence against any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.
>
> (2) As used in this section, "in the course of committing a larceny" includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property. [*Id*. at 171 (quotation marks and emphasis omitted).]

Our Supreme Court held that the plain meaning of the phrase "in an attempt to commit the larceny" applied to "situations in which a criminal defendant makes 'an

effort' or undertakes an 'overt act' *with an intent to deprive another person of his property*, but does not achieve the deprivation of property." *Id*. at 174 (emphasis added). Similarly, the unambiguous language of MCL 750.529a requires that the prosecution prove that defendant was "in the course of committing a larceny of a motor vehicle," which includes "acts that occur in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the motor vehicle." MCL 750.529a(2). Our Supreme Court has held that "[a]n attempt consists of: (1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (quotation marks and citation omitted). Therefore, to convict a defendant of carjacking, the prosecution must establish that the defendant's acts occurred during an attempt to commit, during the commission of, or after the commission of a larceny of a motor vehicle, requiring the prosecutor to prove that the defendant had the intent to steal or permanently deprive a person of the motor vehicle.

In conclusion, we hold that carjacking, under the amended statute, is a specific-intent crime, requiring the prosecutor to prove beyond a reasonable doubt that defendant had the intent to steal or permanently deprive Deputy Mueller of the motor vehicle.

B. SUFFICIENCY OF THE EVIDENCE

Defendant argues that there was insufficient evidence of defendant's intent to permanently deprive Deputy Mueller of his vehicle. We disagree.

"[D]ue process requires the prosecution to prove every element beyond a reasonable doubt." *Oros*, 502 Mich at 239 n 3. As indicated, the prosecutor was required to prove that defendant committed or *attempted to commit* larceny of the vehicle as an element of the offense, and the specific intent necessary to commit larceny is the intent to steal or permanently deprive a person of his or her property. *Cain*, 238 Mich App at 119, 120. "Because of the difficulty in proving an actor's intent, only minimal circumstantial evidence is necessary to show that a defendant had the requisite intent." *People v Stevens*, 306 Mich App 620, 629; 858 NW2d 98 (2014). "[Q]uestions of intent and the honesty of belief inherently involve weighing the evidence and assessing the credibility of witnesses, which is a task for the jury." *Cain*, 238 Mich App at 119.

Considering the evidence in a light most favorable to the prosecution, a rational trier of fact could have found all the elements of carjacking, including the requisite intent, had been proved beyond a reasonable doubt.

Deputy Mueller testified that, after he slipped on debris and fell, defendant hit him and attempted to take his gun and then ran toward the patrol vehicle. Deputy Mueller testified that defendant climbed into the front driver's side of the patrol vehicle after he was tased. Deputy Mueller and Trooper Peterson both testified that defendant was seated in the patrol vehicle, that he had one hand on the steering wheel and the other on the gear shifter, and that defendant's feet were inside the vehicle near the pedals. Deputy Mueller testified that defendant tried to put the vehicle into gear and that defendant pulled down on the gear shifter while Mueller held it in "park." Trooper Peterson testified that he shut off the patrol vehicle, removed the keys from the igni-

tion, and assisted Deputy Mueller in removing defendant from the vehicle. Trooper Peterson testified that defendant physically resisted Peterson's efforts to retake the patrol vehicle.

A female witness observed defendant punching and kicking Deputy Mueller and attempting to take his gun. This witness further testified that defendant attempted to take the patrol vehicle. She testified that defendant's hands were on the steering wheel *and that he tried to start the vehicle*. A different witness testified that Deputy Mueller struggled to remove defendant from the patrol vehicle and that the two officers removed defendant within five to eight seconds.

Although defendant testified that he did not remember being in the driver's seat of the patrol vehicle or reaching for the gear shift and did not intend to put the patrol vehicle into gear and take the vehicle, this Court is "*required* to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Oros*, 502 Mich at 239 (quotation marks and citation omitted). "It is for the trier of fact, *not the appellate court*, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id*. (quotation marks and citation omitted).

In light of the record, a rational trier of fact could have reasonably inferred and found that defendant had the intent to steal or permanently deprive Deputy Mueller of the patrol vehicle. A rational trier of fact could have reasonably concluded that defendant's acts constituted an attempted larceny. The jury could have reasonably determined that defendant used force during the commission of an attempted larceny of the vehicle when he hit Deputy Mueller and then ran toward the patrol vehicle and attempted to engage the

gearshift. A rational trier of fact could have reasonably concluded defendant manifested the requisite specific intention to drive off in the patrol vehicle given that he attempted to put the vehicle in gear. A rational trier of fact could also have reasonably concluded that, but for the actions of Deputy Mueller and Trooper Peterson, defendant would have successfully put the patrol vehicle in drive and used it to flee the scene. Further, although defendant claimed he suffered from post-traumatic stress disorder, a rational jury could have rejected that claim and reasonably concluded that defendant deliberately assaulted the officers and resisted their efforts to remove him from the driver's seat of the patrol vehicle. The evidence is sufficient to support the jury's verdict of guilty on the charge of carjacking.

Affirmed.

SWARTZLE, P.J., concurred with RICK, J.

RONAYNE KRAUSE, J. (*dissenting*). I respectfully dissent. I agree with the majority's recitations of the facts and of the applicable standard of review. I fully concur with the majority's reasoning and conclusion that carjacking is a specific-intent crime. I also agree that an actor's intent may be adequately proved by circumstantial evidence and inferences drawn from that evidence. However, although there is clearly sufficient evidence to support a finding that defendant, Albert M. Smith IV, generally intended to drive away in the police vehicle, I find no evidence on this record to support a finding that defendant specifically intended to retain or permanently deprive the police of that vehicle. I respectfully conclude that the former does not, by itself, establish the latter.

Ordinarily, only the trier of fact may resolve conflicts in evidence. *Nichol v Billot*, 406 Mich 284, 301-302; 279

NW2d 761 (1979). The jury is free to pick and choose which pieces of evidence to believe or disbelieve and how to put those pieces together; however, the jury may not speculate or fabricate nonexistent evidence. *People v Howard*, 50 Mich 239, 242-243; 15 NW 101 (1883); *People v Bailey*, 451 Mich 657, 673-675, 681-682; 549 NW2d 325 (1996). Thus, purely by way of example, our Supreme Court has observed that "doubt about credibility is not a substitute for evidence of guilt[.]" *People v Wolfe*, 440 Mich 508, 519; 489 NW2d 748 (1992). As the majority properly observes, an actor's intent may be proved through circumstantial evidence and inferences drawn from that evidence. *People v Oros*, 502 Mich 229, 239; 917 NW2d 559 (2018). However, there must actually be some evidence. *Howard*, 50 Mich at 242-243. The courts must ensure that any inferences "have adequate basis in record evidence." *People v Hoffmeister*, 394 Mich 155, 159; 229 NW2d 305 (1975). Thus, although our review of the sufficiency of the evidence is deferential, it is not absolutely deferential.

As the majority outlines, there was ample evidence from which the jury could find that defendant attempted to place the police vehicle into driving operation, with the obvious inference that he intended to use the vehicle to depart from the scene. Thus, he could, possibly, be guilty of unlawfully driving away a motor vehicle, MCL 750.413, which explicitly lacks an intent to steal. See *People v Stanley*, 349 Mich 362, 364-365; 84 NW2d 787 (1957).[1] However, as the majority also outlines, carjacking under MCL 750.529a requires a specific intent to steal.

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[1] I do not mean to suggest that defendant actually is guilty of this offense, which imposes other *mens rea* requirements that defendant may have lacked. The evidence seems undisputed that defendant was not behaving in a manner that might be described as calm and collected.

An "intent to steal" has long been understood to require something more than merely an intent to take without authorization. See *People v Quigley*, 217 Mich 213, 220; 185 NW 787 (1921). Rather, the taking of property must be accompanied by a "felonious intent to deprive the owner of it." *People v Johnson*, 81 Mich 573, 576; 45 NW 1119 (1890). This is generally understood to mean, as the model jury instructions state, an intent to permanently deprive. M Crim JI 23.1(5); see also *Rambin v Allstate Ins Co*, 495 Mich 316, 329-331; 852 NW2d 34 (2014). The phrase "permanently deprive" is not strictly literal and may include "the retention of property without the purpose to return it within a reasonable time or the retention of property with the intent to return the property on the condition that the owner pay some compensation for its return." *People v Harverson*, 291 Mich App 171, 178; 804 NW2d 757 (2010), citing *People v Jones*, 98 Mich App 421, 425-426; 296 NW2d 268 (1980). Nevertheless, the examples of what might constitute permanent deprivation entail doing something affirmative to preclude the rightful possessor from regaining that possession or subjecting the property to a competing claim. *Jones*, 98 Mich App at 426; see also M Crim JI 23.1 (use note 2).

Thus, to constitute carjacking, it is simply not enough to intend to *take* the vehicle, or even to take the vehicle without a specific plan to return it. Notably, not even the prosecutor appears to believe defendant intended to *keep* the vehicle; as the prosecutor aptly observes, defendant would inevitably have "ditched" the vehicle at some point. There is simply no evidence tending to suggest, or even hint, that defendant at-

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Indeed, as will be discussed, what little can be gleaned from the police dash-camera video casts doubt on whether defendant had any coherent mental state at the time. I only note that an intent to steal is not among those requirements, in contrast with the carjacking charge at issue here.

tempted to drive the police vehicle away from the scene intending to treat the vehicle as his own. There is likewise no evidence that defendant intended to sell the vehicle, destroy or damage the vehicle, or ransom the vehicle. See *Jones*, 98 Mich App at 426. Furthermore, there is no evidence that defendant intended to "ditch" the vehicle in such a manner that the police would be unlikely to recover it, such as driving it into the woods or a closed garage. It is a matter of common knowledge that police vehicles tend to be somewhat more noticeable than average; "ditching" an ordinary car at the side of the road might present the true owner with some difficulty in recovering it, but it borders on impossible that an abandoned police vehicle would remain "lost" for long unless it were intentionally hidden.

Indeed, the video footage recorded by a police dash camera suggests that defendant may have had little to no state of mind whatsoever. The camera was, unfortunately, directed away from any interaction between defendant and the officer; and during that interaction, it only recorded audio from inside the vehicle. Indistinct shouting[2] from outside the vehicle can be heard, but not loudly or clearly enough to understand. The video does depict defendant (or rather, his legs) making a brief and futile attempt to crawl backward out of the crushed window of his overturned vehicle on the other side from where the officer was shouting. However, whatever else transpired between defendant and the officer is neither depicted nor clearly discernible. It is nevertheless obvious that defendant's vehicle had just suffered a violent rollover, and it is equally obvious that no thought was given by the pursuing officer to

[2] And later, a female's voice, extensively and loudly berating defendant.

the possibility that defendant might have been injured or disoriented as a result. Importantly, there is a brief period captured on the camera's internal audio while defendant was apparently in the driver's seat. Insofar as we can infer from the recording's audio and the shaking of the camera, defendant was inside the vehicle for less than a minute, and any struggle inside the vehicle lasted at most half of that time. At the time of his apparent ingress into the vehicle, the distinctive crackling of a Taser can be heard (and someone can be heard shouting either "Taser" or "tase him"), while defendant makes literal gibberish noises. Thus, the evidence strongly reflects a person with, at a minimum, no rational plan in mind and probably no meaningful self-control over his body.

As this Court observed, deprivation tends to be the result, rather than the true purpose of a theft, and an actor's state of mind must be evaluated accordingly. *Jones*, 98 Mich App at 425. However, as the long history of larceny at common law shows, theft requires more than just a taking. The evidence overwhelmingly shows that, to the limited extent defendant had a state of mind, he intended to flee the scene by whatever means necessary. Thus, even if he nominally intended some kind of taking, the taking was incidental. Furthermore, evidence that defendant intended to take the police vehicle does not show that he intended to cause a deprivation. Rather, under the circumstances, it shows that defendant intended to use it without permission. To establish the requisite intent for carjacking, there must be some affirmative evidence from which a rational trier of fact could infer that defendant intended to take permanent possession of the vehicle or affirmatively interfere with recovery of the vehicle. As noted, merely using it without permission and without a specific plan to return the vehicle is not

sufficient. I do not find in this record any evidence that defendant had the requisite specific intent. I would therefore reverse defendant's carjacking conviction.

PEOPLE v JACK

Docket No. 354524. Submitted February 5, 2021, at Lansing. Decided March 11, 2021, at 9:05 a.m. Leave to appeal denied 507 Mich 948 (2021).

Ricky D. Jack was charged in the Ingham Circuit Court with open murder, MCL 750.316, and first-degree child abuse, MCL 750.136b(2). During discovery, the prosecutor provided defense counsel with a copy of the felony information containing the names of, but not the contact information for, the witnesses who could be called at trial. The prosecutor also provided defense counsel with a redacted police report; in particular, the addresses, phone numbers, and birthdates of several witnesses who were also included on the witness list were redacted from the report. The prosecutor asserted that the witness information had been redacted consistently with MCR 6.201(A)(1). Defendant moved to compel discovery, arguing that under MCR 6.201(B)(2), the information—i.e., the addresses and other contact information for witnesses contained in the original police reports—could not be redacted unless it was related to an ongoing investigation or there was a protective order. The prosecutor asserted that, as required by MCR 6.201(A)(1), she had offered to make the witnesses available to defense counsel to interview and that the relevant information had been redacted from the police reports because of safety concerns for the witnesses. The court, James S. Jamo, J., granted defendant's motion to compel and ordered the prosecutor to produce the unredacted police reports to defense counsel. The court reasoned that MCR 6.201(A)(1), which concerned witness lists, did not allow the prosecutor to redact witness information from police reports that are required to be disclosed under MCR 6.201(B)(2) and that Subrule (B)(2) specifically provided that the relevant information could be redacted from a report if it contained information regarding a continuing investigation or if the prosecutor sought a protective order to shield the information. The prosecution appealed by leave granted.

The Court of Appeals *held*:

MCR 6.201(A)(1), provides that upon request, a party must provide all other parties the names and addresses of all lay and expert witnesses whom the party may call at trial or, in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview. In turn, MCR 6.201(B)(2) provides that, upon request, the prosecuting attorney must provide each defendant any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation. Thus, MCR 6.201(A) pertains to witness lists, while MCR 6.201(B) pertains to the additional discovery a prosecutor must provide to a defendant upon request. Courts cannot supply by judicial construction that which is not included in a court rule; moreover, the express mention of one thing implies the exclusion of other similar things. MCR 6.201(A)(1) and (B)(2) require disclosure of separate and distinct types of information, and a prosecutor must comply with the separate requirement of each one. In this regard, the fact that MCR 6.201 provides specific avenues to restrict the information disclosed in police supports that a prosecutor cannot unilaterally redact information in a police report. Further, MCR 6.201 provides prosecutors with ways to seek judicial permission to withhold otherwise presumptively discoverable contact information. Thus, under MCR 6.201(D), when some parts of materials or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. Under that subrule, the party must inform the other party that nondiscoverable information has been excised and withheld; on motion, the court must conduct a hearing *in camera* to determine whether the reasons for excision are justifiable. MCR 6.201(E) allows the court, on motion and a showing of good cause, to enter an appropriate protective order, and MCR 6.201(I) allows the court, on good cause shown, to order a modification of the requirements and prohibitions of MCR 6.201. Accordingly, absent one of the exceptions provided for in MCR 6.201, a prosecutor must produce unredacted police reports under MCR 6.201(B)(2). In this case, the trial court correctly held that the prosecutor did not have unilateral authority under MCR 6.201(A)(1) to redact information from the police reports that were required to be disclosed under MCR 6.01(B)(2); on remand, the prosecutor could request a protective order under MCR 6.201(E) or pursue a modification under MCR 6.201(I).

Affirmed; case remanded for further proceedings.

BOONSTRA, P.J., dissenting, disagreed with the majority's interpretation of MCR 6.201. MCR 6.201's subrules must be

read within the context of the entire rule. MCR 6.201(A)(1) states the obligations of all parties to disclose witnesses when requested by a party. In contrast, MCR 6.201(B)(2) sets forth the prosecution's mandatory obligations regarding the disclosure of police reports when requested by a defendant. To the extent a police report contains witness information, the information a defendant may request under MCR 6.201(B)(2) necessarily overlaps with the information all parties may request under MCR 6.201(A)(1). However, MCR 6.201(A)(1) allows a prosecutor two options with regard to disclosing witness information: (1) the prosecutor may disclose the witness's contact information or (2) the prosecutor may disclose just the witness's name and make the witness available for interview. When a prosecutor invokes the alternative option under MCR 6.201(A)(1)—that is, providing the names of witnesses, withholding witness addresses, and instead making the witnesses available for interview—the prosecutor may excise witness address information (specifically, for those witnesses whose addresses were withheld under MCR 6.201(A)(1)) from any police reports produced under MCR 6.201(B)(2), all without prejudice to further proceedings under MCR 6.201(D), (E), or (I). To conclude otherwise would render nugatory the alternative option in MCR 6.201(A)(1), essentially reading it out of existence. Judge BOONSTRA would have reversed the trial court's order requiring the prosecution to produce unredacted police reports.

CRIMINAL LAW — DISCOVERY — COURT RULES — POLICE REPORTS — REDACTION OF WITNESS CONTACT INFORMATION.

Under MCR 6.201(A)(1), upon request, a party must provide all other parties the names and addresses of all lay and expert witnesses whom the party may call at trial or, in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; MCR 6.201(B)(2) provides that, upon request, the prosecuting attorney must provide each defendant any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation; MCR 6.201(A)(1) does not authorize a prosecutor to unilaterally redact witness contact information from a police report; absent one of the exceptions provided for in MCR 6.201, a prosecutor must produce unredacted police reports under MCR 6.201(B)(2) when requested by the defendant.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Carol A. Siemon*, Prosecuting

Attorney, and *Kahla D. Crino*, Appellate Division Chief, for the people.

Ingham County Office of the Public Defender (by *Russel Church*, *Keith Watson*, *Edward Hess*, and *Jonathan Forman*) for defendant.

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

RICK, J. In this interlocutory appeal, the prosecution appeals by leave granted[1] the trial court's order granting defendant's motion to compel the production of unredacted police reports. The prosecution argues that MCR 6.201(A)(1) provides their office authority to redact witness contact information from police reports, which are discoverable under MCR 6.201(B)(2). The prosecution maintains that the trial court abused its discretion by granting defendant's motion to compel unredacted police reports.[2] For the reasons stated in this opinion, we affirm the trial court's order and remand the case for proceedings consistent with this opinion.

I. BACKGROUND

This case arises out of the prosecution of defendant, Ricky D. Jack, for first-degree child abuse, MCL 750.136b(2), and open murder, MCL 750.316. The de-

[1] *People v Jack*, unpublished order of the Court of Appeals, entered October 9, 2020 (Docket No. 354524).

[2] For the first time on appeal, the prosecutor also argues that MCL 767.40a does not compel her to disclose unredacted police reports. Accordingly, this issue is unpreserved and we need not consider it. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Nonetheless, we note that MCL 767.40a does not conflict with or inform MCR 6.201, and it is therefore not relevant to our interpretation of the court rule.

tails of the allegations against defendant are not relevant to this appeal.

In November 2018, the prosecutor provided defense counsel with discovery materials that included a copy of the felony information containing the names of witnesses who could be called at trial. The prosecutor did not provide defense counsel with contact information for any witnesses. The prosecutor's office also provided a redacted police report. According to the prosecutor, the information redacted from the police report included the addresses, phone numbers, and birthdates of several witnesses who were also included on the prosecutor's witness list. Defendant's then attorneys demanded discovery, which included requests for the names and addresses of all witnesses and copies of the police reports.[3]

In March 2020, defendant's current counsel filed a supplemental discovery request for unredacted police reports. In April 2020, the prosecutor sent defense counsel an e-mail asserting that the contact information for potential witnesses was redacted in the police report consistently with MCR 6.201(A)(1). In response, defendant moved to compel discovery, arguing that MCR 6.201(B)(2) did not allow the prosecutor to redact a police report unless it was related to an ongoing investigation or there was a protective order.

A hearing on defendant's motion was held on June 18, 2020. The prosecutor argued that she was not required to provide the addresses or other contact information for witnesses under MCR 6.201. The prosecutor asserted that she had offered to make the witnesses available to defense counsel to interview and

[3] Before defendant's current counsel took over his representation, three other attorneys separately represented defendant and each withdrew as his counsel.

that she remained "ready, willing and able to comply with MCR 6.201(A)(1) and make all witnesses available to Defendant's attorneys for interview." The prosecutor also asserted that providing witness contact information to defendant presented a safety issue for the witnesses. For this reason, the prosecutor redacted that information from the police report before providing it to defense counsel. Defendant argued that the disclosure of police reports under MCR 6.201(B)(2) was separate from the disclosure of a witness list under MCR 6.201(A)(1). Defense counsel also asserted that defendant did not pose a risk of harm to anyone because he was in custody at the time of the hearing and would remain so until trial.

The trial court granted defendant's motion to compel and ordered the prosecutor to produce the unredacted police reports to defense counsel. The court concluded that MCR 6.201(A)(1) did not allow the prosecutor to redact police reports required to be disclosed under MCR 6.201(B)(2). The court determined that although the information required to be disclosed in a witness list under MCR 6.201(1)(A) and a police report under MCR 6.201(B)(2) could substantially overlap, the witness list was a separate and distinct disclosure from the production of police reports that contained witness information required by MCR 6.201(B)(2). The trial court noted that the police reports could be redacted if they contained information about a continuing investigation, as provided by MCR 6.201(B)(2), or the prosecutor could seek a protective order. This appeal followed.

II. STANDARD OF REVIEW

"This Court reviews the grant of a discovery motion for an abuse of discretion." *People v Valeck*, 223 Mich

App 48, 51; 566 NW2d 26 (1997). "The trial court abuses its discretion when its decision falls outside the range of principled outcomes or when it erroneously interprets or applies the law." *People v Lane*, 308 Mich App 38, 51; 862 NW2d 446 (2014) (citation omitted). A trial court's interpretation and application of court rules is reviewed de novo. *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018). Our Supreme Court has articulated the following method of interpreting a court rule:

> When called on to construe a court rule, this Court applies the legal principles that govern the construction and application of statutes. Accordingly, we begin with the plain language of the court rule. When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. Similarly, common words must be understood to have their everyday, plain meaning. [*People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003) (quotation marks and citations omitted).]

III. ANALYSIS

Whether or not MCR 6.201(A)(1) allows a prosecuting attorney to redact witness contact information from police reports otherwise discoverable under MCR 6.201(B) is an issue of first impression for this Court and is a matter of statutory interpretation.

MCR 6.201 controls discovery in a criminal case. *Phillips*, 468 Mich at 589. MCR 6.201 provides, in relevant part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alter-

native, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial[.]

* * *

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

* * *

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation[.]

* * *

(D) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.

(E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matters. . . .

* * *

> (I) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

It is the prosecutor's position that MCR 6.201(A)(1) provides her the authority to redact witness contact information from a police report as long as the witnesses are made available to defendant for interviews. We disagree.

The plain language of MCR 6.201 is unambiguous. MCR 6.201(A) governs the mandatory mutual disclosures that parties to a criminal prosecution must provide. MCR 6.201(A)(1) pertains to witness lists, and it permits parties to amend their list without leave of the court no later than 28 days before trial. MCR 6.201(B), on the other hand, sets forth the additional discovery that a prosecuting attorney must provide upon request to each defendant charged. "Upon request, the prosecuting attorney *must* provide each defendant . . . any police report and interrogation records concerning the case, *except so much of a report as concerns a continuing investigation*[.]" MCR 6.201(B) (emphasis added). Thus, redaction of police reports and interrogation records is permitted only when the information relates to an ongoing investigation. *Id*.

In general, provisions that are not included in the court rules should not be supplied by judicial construction. *People v Pinkney*, 501 Mich 259, 286 n 67; 912 NW2d 535 (2018); see also *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008) ("The omission of a provision in one statute that is included in another statute should be construed as intentional, and provisions not included in a statute by the Legislature should not be included by the courts.") (citations omitted). Additionally, *expressio unius est exclusio alterius*, a canon of statutory interpretation, recognizes

that "the express mention of one thing implies the exclusion of other similar things." *People v Garrison*, 495 Mich 362, 372; 852 NW2d 45 (2014). Following these principles, the fact that MCR 6.201 provides specific avenues to restrict the information disclosed in police reports supports the interpretation that a prosecutor does not have the unilateral authority to redact information in a police report.

MCR 6.201(A)(1) and MCR 6.201(B)(2) are two separate subrules that deal with two distinct disclosure requirements. MCR 6.201(A)(1) exclusively concerns a party's obligation to provide a list of the names and addresses of all witnesses whom may be called at trial or, in the alternative, the party can provide the names of the witnesses and make them available for interviews. On the other hand, MCR 6.201(B)(2) concerns the prosecutor's obligation to provide police reports and interrogation records. The information required to be disclosed under Subrules (A)(1) and (B)(2) is separate and distinct, and the prosecution must comply with the separate requirements of each section of the court rule.

The prosecutor asserts there is good cause for excising witness contact information. She submits that this practice protects the privacy rights of the witnesses and that it minimizes the potential risk of witness intimidation or harm. The court rule provides the prosecutor with an avenue to seek judicial permission to withhold otherwise presumptively discoverable contact information. MCR 6.201(E) permits a party upon good cause shown to seek a protective order. The court must consider "the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy

regarding the identity of informants or other law enforcement matters." MCR 6.201(E). Additionally, MCR 6.201(I) permits the court, upon good cause shown, to order a modification of the requirements and prohibitions of the discovery rule.

We hold that, absent an applicable exception provided for in MCR 6.201, a prosecutor is required to produce unredacted police reports under MCR 6.201(B)(2). Accordingly, the trial court did not err when it determined that MCR 6.201(A)(1) did not grant the prosecutor the unilateral authority to redact police reports that were required to be disclosed under MCR 6.201(B)(2). The trial court left open the possibility that the prosecution may file for a protective order.

For these reasons, we affirm the trial court's order compelling disclosure of the unredacted police reports and remand to the trial court for proceedings consistent with this opinion. On remand, the prosecutor may request a protective order under MCR 6.201(E) or pursue a modification under MCR 6.201(I). We do not retain jurisdiction.

Affirmed.

BORRELLO, J., concurred with RICK, J.

BOONSTRA, P.J. (*dissenting*). I respectfully dissent. The majority affirms the trial court's determination that MCR 6.201(A)(1) and MCR 6.201(B)(2) are appropriately read in isolation and that the two subrules impose wholly separate and independent discovery obligations. I disagree and instead would follow a cardinal rule of statutory interpretation that "statutory provisions must be read in the context of the entire statute in order to produce a harmonious whole[.]" *People v Hershey*, 303 Mich App 330, 336; 844

NW2d 127 (2013) (quotation marks and citation omitted).[1]

The issue before us requires that we interpret the language of a single court rule, MCR 6.201, which provides, in pertinent part:

> (A) Mandatory Disclosure. In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
>
> (1) the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview; the witness list may be amended without leave of the court no later than 28 days before trial[.]
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> * * *
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> (B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:
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> (2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation[.]
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> * * *
>
> (D) Excision. When some parts of material or information are discoverable and other parts are not discoverable,

[1] We apply principles of statutory interpretation in construing our court rules, *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). See also *People v Traver*, 502 Mich 23, 31; 917 NW2d 260 (2018) ("The same broad legal principles governing the interpretation of statutes apply to the interpretation of court rules; therefore, when interpreting a court rule, this Court begins with the text of the court rule and reads the individual words and phrases in their context within the Michigan Court Rules.").

> the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.
>
> (E) Protective Orders. On motion and a showing of good cause, the court may enter an appropriate protective order. In considering whether good cause exists, the court shall consider the parties' interests in a fair trial; the risk to any person of harm, undue annoyance, intimidation, embarrassment, or threats; the risk that evidence will be fabricated; and the need for secrecy regarding the identity of informants or other law enforcement matter. . . .
>
> * * *
>
> (I) Modification. On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

Specifically at issue are Subrules (A)(1) and (B)(2). Lurking in the background are Subrules (D), (E) and (I).[2] Because all of these subrules of the single court rule at issue must be harmonized if possible, I will outline how I believe the court rule should be applied in this case.

First, it bears noting at the outset that MCR 6.201(A)(1) speaks of the disclosure of "lay and expert witnesses whom [a] party may call at trial[.]"[3] By

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[2] As noted, the trial court concluded that MCR 6.201(A)(1) and MCR 6.201(B)(2) operate wholly independently. It noted that the prosecution could potentially invoke MCR 6.201(E) (protective order) as the matter proceeds. It did not mention MCR 6.201(D) or MCR 6.201(I).

[3] Because MCR 6.201(A)(1) is part of the "discovery" rules, it cannot be interpreted as referring only to a party's final "trial" witness list, i.e.,

contrast, MCR 6.201(B)(2) speaks of the disclosure of a "police report." MCR 6.201(A)(1) sets forth a mandatory obligation of all parties, upon the request of a party. MCR 6.201(B)(2) sets forth a mandatory obligation of the prosecution, upon the request of a defendant.[4] Because MCR 6.201(A)(1) addresses the disclosure of "witnesses" and MCR 6.201(B)(2) addresses the disclosure of "police reports," they, to some extent, have different focuses. But to the extent a police report contains witness information, the information that a party may request under MCR 6.201(B)(2)—via a request for a police report—necessarily overlaps with the information that a party may request under MCR 6.201(A)(1).[5]

Importantly, MCR 6.201(A)(1) provides two options to a party when, in the course of discovery, it is requested to provide witness information: (1) it may provide the "names and addresses" of the witnesses; or (2) "in the alternative," the party "may provide the name of the witness and make the witness available to the other party for interview[.]" If the party selects the alternative option, it then must still provide the names of witnesses; however, it need not provide the addresses of the witnesses (but must, instead, make the witnesses available for interview). *Id*. Herein lies the rub with the trial court's and the majority's interpretation of MCR 6.201(B)(2): if a defendant requests a

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the list of witnesses that a trial court may require a party to file with the court in advance of trial. Rather, it necessarily refers to witnesses whose identity may be requested *during discovery*.

[4] MCR 6.201(B)(2) contains an exception for "so much of a [police] report as concerns a continuing investigation[.]" That exception is not at issue in this case, and neither its existence nor its inapplicability in this case has any bearing on my statutory analysis.

[5] Indeed, the trial court recognized that "there may and usually will be some or even substantial overlapping information[.]"

police report and the police report contains witness address information, then the application of MCR 6.201(B)(2) in isolation from MCR 6.201(A)(1) effectively divests the prosecution of the alternative option otherwise available to it under MCR 6.201(A)(1).

Before addressing how to harmonize these provisions, I would first bring MCR 6.201(D) into the mix. That subrule provides that when "some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder." MCL 6.201(D). That is effectively the process the prosecution followed in this case (although it was not styled in that fashion): the prosecution produced the police report but did so in redacted fashion, excising witness information that it deemed to be nondiscoverable (and, as is required by MCR 6.201(D), advising defendant that it had done so). Defendant was not without recourse, however, because MCR 6.201(D) further provides that "[o]n motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal." And, indeed, defendant moved to compel disclosure, and the trial court held a hearing on the motion. The sole focus of the hearing, however, was the statutory-interpretation question that lies at the heart of this appeal. That is, the proceedings in the trial court focused solely on the interplay between MCR 6.201(A)(1) and MCR 6.201(B)(2); apart from that statutory-interpretation issue, the prosecution did not offer specific reasons (based on the factual circumstances of this case) for the excisions, defendant did not challenge those reasons (as it could not have under the circumstances), and the trial court not only did not hold

an *in camera* hearing but did not determine whether those reasons were "justifiable" (as it also could not have under the circumstances).

That brings us full circle back to the statutory-interpretation issue. And I conclude, contrary to the trial court and the majority, that the only way to harmonize MCR 6.201(A)(1) and MCR 6.201(B)(2), as applied in this case, is as follows. In response to defendant's request under MCR 6.201(A)(1) for the names and addresses of witnesses, the prosecution had the option—and the right—to invoke the alternative of providing witness names, withholding witnesses addresses, and making the witnesses (whose addresses are withheld) available for interview. When it did so, it effectively rendered the witness address information "not discoverable"—at least for purposes of MCR 6.201(A)(1). That necessarily also meant that the prosecution had the concomitant right to excise witness address information from any police reports that it produced, upon request, under MCR 6.201(B)(2). To conclude otherwise would effectively read the alternative option under MCR 6.201(A)(1) out of existence and would render that part of the court rule nugatory. See *Casa Bella Landscaping, LLC v Lee*, 315 Mich App 506, 510; 890 NW2d 875 (2016) ("Court rules, like statutes, must be read to give every word effect and to avoid an interpretation that would render any part of the [court rule] surplusage or nugatory.") (quotation marks and citation omitted; alteration in original).

The prosecution's choice under MCR 6.201(A) need not be the end of the story, however. The information in question may or may not be discoverable or protectable for other, substantive reasons (apart from the statutory-interpretation issue), and the parties may, in due course, bring those issues before the trial court for

determination. Defendant has the right to seek a "modification of the requirements and prohibitions" of MCR 6.201 by filing a motion and showing good cause under MCR 6.201(I). Defendant also has the right to challenge any substantive reasons for excision by filing a motion under MCR 6.201(D) (in which case the trial court must hold an *in camera* hearing and determine whether the reasons are justifiable). And MCR 6.201(E) is an additional vehicle by which the trial court may afford appropriate protections with respect to any information that it may order be produced during discovery.

For all of these reasons, I would hold that when the prosecution invokes the alternative option under MCR 6.201(A)(1) (thereby providing the names of witnesses, withholding witness addresses, and instead making the witnesses available for interview), it may also excise witness address information (for those witnesses whose addresses are withheld under MCR 6.201(A)(1)) from any police reports produced under MCR 6.201(B)(2), all without prejudice to further proceedings under MCR 6.201(D), MCR 6.201(E), or MCR 6.201(I). I therefore respectfully dissent and would reverse the trial court's order requiring the prosecution to produce unredacted police reports.

PETERSON v OAKWOOD HEALTHCARE, INC

Docket Nos. 353314 and 353353. Submitted March 2, 2021, at Detroit. Decided March 11, 2021, at 9:10 a.m.

Jeanette Peterson and others filed an action in the Wayne Circuit Court against Oakwood Healthcare, Inc., Jonathan Leischner, D.O., and Heather Kathawa, PA-C., asserting claims of medical malpractice in relation to Leischner's and Kathawa's treatment of Peterson at Beaumont Hospital-Dearborn. The Department of Health and Human Services (DHHS) moved to intervene, seeking to recover the $146,285.12 in medical services it had already paid for Jeanette through Medicaid; the court, Sheila Ann Gibson, J., granted the motion to intervene. After plaintiffs entered into a confidential settlement agreement with defendants, which was worth 21.25% of the total value of plaintiffs' case, plaintiffs moved for an evidentiary hearing to determine the lienholders' share of the settlement proceeds. Plaintiffs argued that because the settlement only represented a minor portion of Jeanette's overall damages, the DHHS was entitled to a pro rata share of the settlement; specifically, that the DHHS was only entitled to 1% of the total medical expenses because Jeanette's medical expenses encompassed nearly all of the total medical-expenses portion of the settlement. In contrast, the DHHS asserted that it should recover the full amount of medical expenses up to the amount of the settlement that was allocated (i.e., 65% of the settlement) to medical expenses. The court did not accept the parties' calculations and determined that the DHHS was entitled to 21.25% of its lien ($57,025.93) because the settlement was 21.25% of the total value of plaintiffs' case; the trial court declined to reduce the awarded amount for attorney fees and costs. On December 16, 2019, the trial court signed the order distributing the settlement. On February 11, 2020, the DHHS moved for relief from judgment under MCR 2.612(C)(1)(a) and (f), arguing that (1) the DHHS had never received notice that the final order had been entered in December and that, in fact, the DHHS did not receive notice the order had entered until January 15, 2020, depriving the DHHS of an opportunity to appeal as of right and (2) it was entitled to relief from the judgment because the then recently published Court of Appeals' decision in *Byrnes v Martinez*, 331 Mich App 342 (2020),

vacated in part 506 Mich 948 (2020), supported that the trial court erred when it apportioned the settlement proceeds. The trial court denied the DHHS's motion, reasoning that the DHHS could not rely on *Byrnes* because the opinion was not approved for publication until almost two months after the order was entered and that the order appeared in the e-Filing system and the register of actions, negating the DHHS's lack-of-notice argument. The court found the DHHS's motion for relief from judgment frivolous and awarded plaintiffs $4,000 and defendants $2,000 in sanctions. In Docket No. 353314, the DHHS appealed the order denying its motion for relief from judgment and awarding sanctions to plaintiffs and defendants. In Docket No. 353353, the DHHS appealed by leave granted the trial court's order approving the distribution of proceeds from the settlement agreement.

The Court of Appeals *held*:

1. MCR 2.612(C)(1)(a) provides that on motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding because of mistake, inadvertence, surprise, or excusable neglect or, under MCR 2.612(C)(1)(f), because of any other reason justifying relief from the operation of the judgment. Relief from judgment under MCR 2.612(C)(1)(f) is inappropriate when a party has not sought appellate review of a trial court's final order and the basis for relief from judgment is a subsequent appellate decision in a different case. In this case, the trial court's purported failure to follow *Byrnes* was not a mistake under MCR 2.612(C)(1)(a) because the decision did not exist at the time the court made its decision related to distribution of the settlement. Relief from judgment was also not appropriate under MCR 2.612(C)(1)(f) because at the time the DHHS filed its motion, it had not appealed the final order and the basis for relief was *Byrnes*, which was issued after entry of the final order. Further, even if the DHHS did not receive notice of entry of the final order until January 15, 2020, an appeal of right was not necessarily precluded because the DHHS could have proceeded by right under MCR 7.204(A)(3) by filing the appeal by January 29, 2020. Thus, the DHHS's claim that it could not file an appeal of right in the Court of Appeals was legally without merit. Moreover, the trial court did not clearly err by rejecting the DHHS's assertion that it never received a copy of the final order. Accordingly, the trial court correctly denied the DHHS's motion for relief from judgment. The trial court correctly reasoned that the DHHS could not have obtained relief from the final order based on a subsequently issued Court of Appeals decision. Because that portion of the

DHHS's motion lacked legal merit, the trial court did not abuse its discretion by concluding that the DHHS's motion was frivolous and by assessing sanctions.

2. To address Medicaid requirements, MCL 400.106 addresses Michigan's subrogation and assignment rights related to a third party's liability for a Medicaid recipient's medical care. To that end, MCL 400.106(8) provides, in part, that the DHHS has first priority against the proceeds of the net recovery from the settlement or judgment in an action settled in which notice has been provided under Subsection (3). A contracted health plan has priority immediately after the department in an action settled in which notice has been provided under Subsection (3). The department and a contracted health plan shall recover the full cost of expenses paid under this act unless the department or the contracted health plan agrees to accept an amount less than the full amount. The department or a contracted health plan is not required to pay an attorney fee on the net recovery. As used in this subsection, "net recovery" means the total settlement or judgment less the costs and fees incurred by or on behalf of the individual who obtains the settlement or judgment. The statutory language—"The department and a contracted health plan shall recover the full cost of expenses paid under this act unless the department or the contracted health plan agrees to accept an amount less than the full amount"—does not allow the DHHS to recover from *any* portion of a recipient's settlement because the federal antilien statute, 42 USC 1396p(a)(1), prohibits that broad of recovery; thus, states may not enact statutory provisions designed to recover medical expenditures from the tort proceeds received by Medicaid recipients that are not allocated as payment or reimbursement for medical expenses incurred by the recipient. As a result, a health plan may only recover its lien from the portion of the settlement allocated for medical expenses. As recognized by *Neal v Detroit Receiving Hosp*, 319 Mich App 557 (2017), under *Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268 (2006), a state may recover only from settlement proceeds allocated to medical expenses incurred by the recipient. In other words, the DHHS may not seek reimbursement for anticipated but unpaid Medicaid benefits covering expenses to be incurred in the future because an award for future medical expenses does not correspond with the proposition that the person receiving that award has incurred those expenses. In this case, given the context of the trial court's statements when reducing the total amount of medical expenses to 21.25% of the full amount, the court attributed that amount to past medical expenses only; the trial court did not err by limiting the DHHS's

recovery to the portion of the settlement allocated to past medical expenses. The DHHS's reliance on *Byrnes*, which noted that caselaw and relevant statutory language did not limit the DHHS from recovering only past medical expenses included in a settlement, was misplaced because the Supreme Court vacated any discussion in *Byrnes* related to the inclusion of future medical expenses subject to reimbursement. 506 Mich 948 (2020).

3. The trial court did not err by determining that because plaintiffs settled the case for 21.25% of the value of the case, that percentage amount of the incurred medical expenses was captured in the settlement; the court correctly took into consideration the true value of the case and plaintiffs' claimed losses when it did so. In addition, contrary to the DHHS's argument, the trial court did not reduce the DHHS's award for attorney fees; in fact, attorney fees had no part in the portion of the settlement it was awarded.

Affirmed.

TORTS — MEDICAID LIEN AGAINST TORT SETTLEMENT PROCEEDS — ALLOCATION OF PROCEEDS — MEDICAL EXPENSES — PAST MEDICAL EXPENSES ONLY.

A state Medicaid plan is entitled to reimbursement for expenses it paid for a Medicaid recipient's medical care when the Medicaid recipient receives tort proceeds from a liable third party, but the amount of money the state Medicaid plan can recover is limited to the portion of the tort proceeds allocated to pay for medical expenses; recovery from settlement proceeds is limited to proceeds allocated to medical expenses already incurred (that is, for past medical expenses); a state Medicaid plan cannot recover for future medical expenses included in the settlement.

Meyers Law, PLLC (by *Jeffrey T. Meyers* and *Timothy M. Takala*) and *Mark Granzotto, PC* (by *Mark Granzotto*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *H. Daniel Beaton, Jr.*, Assistant Attorney General, for intervening plaintiff.

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM. These consolidated appeals[1] arise out of plaintiff Jeanette Peterson's medical malpractice claims against defendants. After plaintiffs and defendants[2] settled, the Department of Health and Human Services (DHHS) intervened and sought reimbursement for Medicaid expenses. In Docket No. 353314, the DHHS appeals as of right the trial court's order that denied the DHHS's motion for relief from judgment and granted plaintiffs' motion for sanctions against the DHHS. In Docket No. 353353, the DHHS appeals by delayed leave granted[3] the trial court's order approving the distribution of proceeds from plaintiffs' and defendants' settlement.

On appeal, the DHHS argues that the trial court erred when it (1) imposed sanctions against the DHHS for filing a frivolous motion, (2) did not allow the DHHS to recover from the portion of the settlement attributed to future medical expenses, (3) reduced the DHHS's share of the recovery by a pro rata amount, and (4) reduced the DHHS's share to offset or pay for some of plaintiffs' attorney fees. We affirm.

I. PROCEDURAL HISTORY

On August 18, 2016, Jeanette went to the emergency room at Beaumont Hospital in Dearborn, complaining of a headache since the prior evening. Jeanette informed certified physician's assistant Heather Katahwa that she was also feeling central chest heaviness and shortness of breath. The supervising emergency

[1] *Peterson v Oakwood Healthcare, Inc*, unpublished order of the Court of Appeals, entered July 15, 2020 (Docket No. 353353).

[2] Defendants Oakwood Healthcare, Inc., Dr. Jonathan Leischner, and Heather Kathawa are not involved in this appeal.

[3] *Peterson*, unpub order.

room physician, Jonathan Leischner, obtained Jeanette's electrocardiogram (ECG), which showed an anteroseptal infarct, age-determined abnormal ECG. Laboratory results also showed Jeanette had a potassium level of 3.1 millimoles per liter. Later in the day, Jeanette informed the certified physician's assistant that her symptoms had improved, and she was discharged.

One month later, Jeanette experienced a full cardiac arrest and was unresponsive. She was taken to the emergency room at Henry Ford-Wyandotte Brownstown. At the hospital, she had a potassium level of 2.5 millimoles per liter, and potassium replacement therapy was initiated. As a result of the cardiac arrest, Jeanette suffered severe hypoxic or anoxic, or both, encephalopathy.

Thereafter, plaintiffs filed a complaint in the trial court that alleged the emergency room physician and the certified physician's assistant breached their respective standard of care. The DHHS then moved to intervene, asserting that it had a statutory right to recover the $146,285.12 it had paid thus far for medical services for Jeanette through Medicaid. The DHHS also asserted that it had a statutory right to be first in priority to recover any proceeds in the event of a settlement or judgment in Jeanette's favor. The trial court granted the DHHS's motion to intervene.

At some point, plaintiffs and defendants reached a confidential settlement agreement.[4] Plaintiffs moved for an evidentiary hearing to determine the lienholders' share of the settlement proceeds. Plaintiffs as-

[4] Because the terms of the settlement agreement are confidential and have been sealed by the trial court, apart from the values of the liens asserted by the DHHS and Molina, we will not state the values provided in the settlement agreement.

serted that the settlement only represented a "minor portion" of Jeanette's overall damages, so the DHHS was entitled to a pro rata share of the settlement. The DHHS contended that it was entitled to recover the full amount of medical expenses up to the amount of the settlement that was properly allocated to medical expenses. According to the DHHS, the settlement amount was to be apportioned into two components, the amount attributable to medical expenses and the amount attributable to nonmedical expenses, and the DHHS was entitled to all of the medical expenses up to the amount of its lien.

At the evidentiary hearing, the parties stipulated to the total value of plaintiffs' case and the amount of Jeanette's medical expenses. The DHHS argued that because the amount of the medical expenses was 65% of the total value, then 65% of the settlement amount should be allocated toward the medical expenses. Accordingly, the DHHS asserted that it could recover all of its $268,357.33 lien because 65% of the settlement greatly exceeded its lien. Plaintiffs argued that Jeanette's future medical expenses encompassed nearly all of the total medical expenses, while the DHHS's lien for past medical expenses represented only 1% of the total medical expenses. Accordingly, plaintiffs asserted, the DHHS was only entitled to 1% of the medical portion of the settlement.

The trial court determined that because the settlement was 21.25% of the total value of plaintiffs' case, the DHHS was only entitled to 21.25% of its lien, or $57,025.93.[5] Although plaintiffs suggested that the amount to which the DHHS was entitled might have to be reduced because of costs and attorney fees, the trial

[5] The trial court also determined that the lien of Molina Health Care, a contracted health plan, was similarly reduced to 21.25% of its lien.

court declined to do so and noted that the amount awarded was "more than reasonable[.]" Following a hearing in which plaintiffs approved the settlement distributions, the trial court stated that it would grant the final distribution once the final order was presented to it.

Three days later, on December 16, 2019, the trial court signed the order distributing the settlement. On February 11, 2020, the DHHS moved for relief from the judgment under MCR 2.612(C)(1)(a) and (f). Counsel for the DHHS argued that he had never received notice that the final order had been entered on December 16, 2019. Counsel averred that he had checked the online status at least four times between December 17, 2019 and January 15, 2020, but did not see that the order had been entered. Counsel only learned that the order had been entered when he called the court's clerk to check the status on January 15, 2020. The DHHS argued it was entitled to relief from judgment because (1) a recently published decision of this Court, *Byrnes v Martinez*, 331 Mich App 342; 952 NW2d 607 (2020), vacated in part 506 Mich 948 (2020), showed that the trial court had erred and (2) the DHHS never received notice of the order's entry, which deprived the DHHS of an opportunity to appeal as of right.

Plaintiffs responded that the court's e-filing system clearly showed that counsel for the DHHS was notified of the order and that the copy of the register of actions the DHHS attached to its motion also showed that the order was signed and filed on December 16, 2019. Plaintiffs argued that counsel for the DHHS merely failed to act, which was not a proper ground for relief from judgment. Plaintiffs also asserted that the DHHS's motion was frivolous and requested the imposition of sanctions. Furthermore, plaintiffs argued, the DHHS

could not obtain relief on the basis of *Byrnes* because the case was not available at the time of the order.

The trial court determined that the DHHS could not rely on *Byrnes* because the case was not approved for publication until February 4, 2020, nearly two months after the trial court entered the order approving the distributions. Moreover, the order "appeared in the e-Filing system" and the register of actions. Therefore, the trial court found no reason to grant the DHHS's motion for relief from judgment. Additionally, the trial court found that the motion was frivolous and ordered the DHHS to pay sanctions in the amount of $4,000 to plaintiffs and $2,000 to defendants. These appeals followed.

II. SANCTIONS

In Docket No. 353314, the DHHS argues that the trial court erred when it found that the DHHS's motion for relief from judgment was frivolous and granted sanctions to the opposing parties. We disagree.

This Court reviews for an abuse of discretion a trial court's decision to award sanctions for a frivolous filing. *Sprenger v Bickle*, 307 Mich App 411, 422-423; 861 NW2d 52 (2014). A trial court abuses its discretion when the decision to sanction a party is outside the range of principled outcomes. *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 659-660; 819 NW2d 28 (2011). But any of the trial court's factual findings, including a finding of frivolousness, are reviewed for clear error. *Sprenger*, 307 Mich App at 423. A finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made. *American Alternative Ins Co, Inc v York*, 252 Mich App 76, 80; 650 NW2d 729 (2002), aff'd on other grounds 470 Mich 28 (2004).

The DHHS's motion for relief from judgment relied on MCR 2.612(C)(1), which provides, in relevant part:

> On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.

The DHHS's motion was predicated on two theories: (1) a recently published decision of this Court showed that the trial court had erred and (2) the DHHS never received timely notice of the entry of the December 16, 2019 final order, which deprived it of an opportunity to appeal in this Court as of right.

Regarding the newly published case, because it was not in existence at the time the trial court made its decision,[6] the purported failure to follow it cannot be construed as a "mistake" under MCR 2.612(C)(1)(a). Accordingly, we must consider whether the DHHS's motion should have been granted under MCR 2.612(C)(1)(f). However, this Court has stated that "relief from judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of a trial court's final order and the basis for relief from judgment is a subsequent appellate decision in a different case." *Farley v Carp*, 287 Mich App 1, 8; 782 NW2d 508 (2010). See also *Kidder v Ptacin*, 284 Mich App 166, 171; 771 NW2d 806 (2009) ("The inter-

[6] *Byrnes* was decided on December 19, 2019, but was not approved for publication until February 4, 2020, almost two months after the trial court entered the December 16, 2019 final order.

ests of justice truly militate against allowing a defeated party's action to spring back to life because others have availed themselves of the appellate process."). The situation described by the *Farley* Court is precisely the situation here. At the time the DHHS filed its motion for relief from judgment, it had not appealed the trial court's final order and the basis for relief was *Byrnes*, an appellate decision that was issued after entry of the trial court's final order. Accordingly, the DHHS's argument concerning *Byrnes* was legally deficient on its face.

The DHHS's other reason for moving for relief from judgment under MCR 2.612(C) was that because of the court's mistake, the DHHS had not been notified of the entry of the December 16, 2019 final order. The DHHS asserted that this mistake deprived it of an opportunity to appeal as of right in this Court. Taking the DHHS's factual allegations as true—that it did not receive notice until January 15, 2020, that the December 16, 2019 order had been entered—the delay of service did not necessarily preclude an appeal of right in this Court. As plaintiffs note, MCR 7.204(A)(3) states:

> Where service of the judgment or order on appellant was delayed beyond the time stated in MCR 2.602, the claim of appeal must be accompanied by an affidavit setting forth facts showing that the service was beyond the time stated in MCR 2.602. Appellee may file an opposing affidavit within 14 days after being served with the claim of appeal and affidavit. If the Court of Appeals finds that service of the judgment or order was delayed beyond the time stated in MCR 2.602 and the claim of appeal was filed within 14 days after service of the judgment or order, the claim of appeal will be deemed timely.

Thus, even if the DHHS was not timely served, it could have invoked MCR 7.204(A)(3) to file its claim of appeal. Consequently, the DHHS's position that the

effect of the error resulted in it being barred from filing a claim of appeal of right is not accurate. After receiving notice on January 15, 2020, of the trial court's final order, the DHHS did not attempt to appeal as of right within 14 days, i.e., by January 29. Instead, it waited 27 days to file its motion for relief from judgment in the trial court on February 11. Accordingly, the DHHS's claim that the delay in receiving notice of the entry of the order precluded the DHHS from appealing as of right in this Court is devoid of legal merit.

Moreover, the trial court rejected the DHHS's factual assertion that it never received a copy of the final order, noting that the order appeared in the register of actions and in the e-filing system. Review of the register of actions submitted with the DHHS's motion shows that the December 16, 2019 order had been signed and filed on that date.[7] Additionally, the e-filing system shows that the proof of service for the order was e-mailed to the DHHS's counsel. Thus, we cannot conclude that the trial court clearly erred in its factual finding.

Plaintiffs sought sanctions under MCR 1.109(E), which provides, in pertinent part:

> (5) Effect of Signature. The signature of a person filing a document, whether or not represented by an attorney, constitutes a certification by the signer that:
>
> (a) he or she has read the document;
>
> (b) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and

[7] An entry on December 16, 2019 states, "Final — Miscellaneous Disposition, Signed and Filed."

> (c) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (6) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Although the DHHS's motion for relief from judgment was properly denied, that does not necessarily mean that the DHHS should have been sanctioned for filing a frivolous document. See *Grass Lake Improvement Bd v Dep't of Environmental Quality*, 316 Mich App 356, 365; 891 NW2d 884 (2016) ("A claim is not frivolous merely because the party advancing the claim does not prevail on it.") (quotation marks and citation omitted). Instead, as MCR 1.109(E)(5) and (6) describe, sanctions are appropriate when, among other things, the party had no reasonable basis to believe that the facts underlying the party's legal position were true or the party's legal position was devoid of arguable legal merit. See also *Ford Motor Co v Dep't of Treasury*, 313 Mich App 572, 589; 884 NW2d 587 (2015).

At the hearing on the DHHS's motion for relief from judgment, plaintiffs' counsel requested that the trial court impose sanctions because the motion was frivolous. The trial court provided two alternative reasons for finding that the motion was frivolous:

> [*Plaintiffs' Counsel*]: Your Honor, if I may, this case has been closed. The proper procedure would have been . . . for [the DHHS's counsel] to file a motion to reopen the case

and then ask for his relief. If you deny his motion to reopen the case, I think that's probably the appropriate remedy.

The Court: Right, 'cause this case is closed . . . . This case is closed and I'm not reopening it.

* * *

[*Plaintiffs' Counsel*]: In regards to sanctions, Judge, I don't take this matter lightly. . . . [The DHHS's counsel] is trying to use this case that was decided and published long after your evidentiary hearing.

The Court: Right. Because, like I said, we have finished every—this case was closed, done, finalized in December. There was no Claim of Appeal. Oh, I—that's not my concern but it was closed, finalized. I had had the evidentiary hearing, between the October and the December 6th [sic] date, when I entered my final order. This case came out February 4th, 2020. You can't have retroactivity affect [sic]. It cannot and it does not.

* * *

[*The DHHS's Counsel*]: If I may respond, your Honor. The motion that was brought today is consistent with our rights, under MCR 2.6112 [sic].

The Court: How? The case is closed. This it's a dead—you're beating a dead horse. This case is closed. It's closed. It's closed. It was closed as of my December 6th [sic] order. It's closed. . . .

* * *

The Court: . . . And, like I said, this case was closed. Time has run. There's no basis for the Court to reenter it. As [the DHHS's counsel] tried to articulate, he—say[s] he has a—a year to get the relief from the judgment. This is—this is—it's really mind-boggling because the fact of the matter remains is anybody could open a case if new law comes down. That's not what—that's not what this is intended to do when you get relief from a judgment. So, no

> the Court is denying relief from the judgment and it does not mean that you get another bite of the apple. The case is closed. This is a dead horse. That does not renew the time period for appeal. It does not. The appeal period has run. That ship has sailed.

The basis for the trial court's finding of a frivolous motion is not explicitly clear. The court on the one hand alluded to the fact that counsel could not rely on subsequently issued appellate decisions in moving for relief under MCR 2.612, but it also repeatedly stated that "the case is closed," implying that because it is closed, it cannot be reopened. The court also seemed to accept plaintiffs' assertion that the proper procedure for the DHHS would have been to have moved to reopen the case and then move for relief from judgment.

The trial court's reliance on the fact that the case was closed is highly dubious. Following that premise to its logical end, no party could ever obtain relief from judgment under MCR 2.612(C) once a case was closed. This premise is patently wrong. See MCR 2.612(C)(1) ("[T]he court may relieve a party or the legal representative of a party from a *final* judgment[.]") (emphasis added). Notably, MCR 2.612 does not mention any such extra requirements and instead simply states that a party can seek relief "[o]n motion and on just terms," MCR 2.612(C)(1), and that the motion must be made within a reasonable time, MCR 2.612(C)(2).[8] Additionally, this Court has stated that the vehicle to "reopen" a case is MCR 2.612(C) itself. *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995).

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[8] But if the motion was brought under Subrule (C)(1)(a), (b), or (c), then the motion must have been brought with one year of the challenged judgment or order. MCR 2.612(C)(2).

However, the trial court's rejection of the DHHS's position that it could obtain relief from the final order based on a subsequently issued decision of this Court is correct. As already explained, "relief from judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of a trial court's final order and the basis for relief from judgment is a subsequent appellate decision in a different case." *Farley*, 287 Mich App at 8. On appeal, the DHHS spends a great deal of time arguing that *Byrnes* clearly establishes that the trial court erred. However, the DHHS does not spend any time arguing that a subsequently released case can be a proper basis to obtain relief from judgment under MCR 2.612(C)(1)(f). Therefore, while taking the trial court's statements at the hearing as implicitly finding that the DHHS's motion was frivolous because this portion of the motion was devoid of arguable legal merit, the trial court's finding of frivolousness is not clearly erroneous on this point.

Further, the fact that the trial court may have erroneously relied on the status of the case being "closed" does not invalidate the frivolous nature of the other basis for the motion. Cf. *In re Costs & Attorney Fees*, 250 Mich App 89, 103; 645 NW2d 697 (2002) (holding that the assertion of a frivolous defense is subject to sanctions even if there were additional, valid defenses asserted). Accordingly, the trial court did not abuse its discretion by granting plaintiffs' and defendants' requests for sanctions.

III. SETTLEMENT ALLOCATION

A. PAST MEDICAL EXPENSES

In Docket No. 353353, the DHHS argues that the trial court erred when it, in effect, limited the DHHS's

recovery to the portion of the settlement attributable to Jeanette's past medical expenses. We disagree.

This issue primarily involves matters of statutory interpretation, which this Court reviews de novo. *Riverview v Sibley Limestone*, 270 Mich App 627, 630; 716 NW2d 615 (2006).

> Medicaid is a program that provides medical assistance for the medically indigent under title XIX, 42 USC 1396 *et seq*., of the Social Security Act. MCL 400.105(1); *Workman v* [*DAIIE*], 404 Mich 477, 500; 274 NW2d 373 (1979). The Medicaid program is a cooperative program funded by federal and state funds, and states participating in the program must make reasonable efforts to ascertain the legal liability of third parties to pay for the recipient's medical care. 42 USC 1396a(a)(25)(A). When legal liability is found to exist, the state is to seek reimbursement. 42 USC 1396a(a)(25)(B). To facilitate the state's reimbursement from liable third parties, the state must enact laws under which it is deemed to have acquired the right to such recovery. 42 USC 1396a(a)(25)(H). Accordingly, a state's Medicaid plan must require the recipient to assign to the state any rights to payment for medical care from any third party as a condition of eligibility for Medicaid. 42 USC 1396k(a)(1)(A). [*Neal v Detroit Receiving Hosp*, 319 Mich App 557, 564-565; 903 NW2d 832 (2017).]

"In an effort to comply with federal requirements of the Medicaid program, Michigan enacted MCL 400.106, which includes the state's subrogation and assignment rights related to a third party's liability for a recipient's medical care." *Id*. at 565. MCL 400.106(8) provides:

> The department has first priority against the proceeds of the net recovery from the settlement or judgment in an action settled in which notice has been provided under subsection (3). A contracted health plan has priority immediately after the department in an action settled in which notice has been provided under subsection (3). The

> department and a contracted health plan shall recover the full cost of expenses paid under this act unless the department or the contracted health plan agrees to accept an amount less than the full amount. If the individual would recover less against the proceeds of the net recovery than the expenses paid under this act, the department or the contracted health plan, and the individual shall share equally in the proceeds of the net recovery. The department or a contracted health plan is not required to pay an attorney fee on the net recovery. As used in this subsection, "net recovery" means the total settlement or judgment less the costs and fees incurred by or on behalf of the individual who obtains the settlement or judgment.

However, the provision, "The department and a contracted health plan shall recover the full cost of expenses paid under this act unless the department or the contracted health plan agrees to accept an amount less than the full amount," cannot be read as allowing the DHHS to recover from *any* portion of a person's settlement. That is because the federal antilien statute, 42 USC 1396p(a)(1),[9] preempts that reach. *Neal*, 319 Mich App at 572-573, 578.[10] This Court noted, "As the United States Supreme Court made clear . . . , states may not enact statutory provisions designed to recover medical expenditures from the tort proceeds received by Medicaid recipients that are not designated as payment or reimbursement for medical expenses incurred by the recipient." *Id*. at 572, citing *Arkansas Dep't of Health & Human Servs v Ahlborn*, 547 US 268, 280-282; 126 S Ct 1752; 164 L Ed 2d 459 (2006).

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[9] 42 USC 1396p(a)(1) states, "No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan[.]"

[10] In making its ruling, the *Neal* Court cited and quoted MCL 400.106(5) regarding the "shall recover the full costs of expenses paid" provision, but that provision is now found in MCL 400.106(8). See 2018 PA 511, effective December 28, 2018.

In *Ahlborn*, 547 US at 273, the Medicaid recipient sued the alleged tortfeasors, seeking damages for past medical costs, future medical expenses, permanent physical injury, past and future pain and suffering, past loss of earnings, and permanent impairment of the ability to earn income in the future. The Medicaid recipient and the alleged tortfeasors settled for $550,000, but they did not allocate the settlement to any of the damages' categories. *Id*. at 274. The parties stipulated that the amount for past medical expenses from the settlement was $35,581.47. *Id*. at 274, 280.[11] The Arkansas Department of Health and Human Services (ADHS) thereafter asserted a lien for the full amount of the payments it had made for the recipient's care in the amount of $215,645.30. *Id*. at 274. But to the extent Arkansas's statute allowed it to recover from other portions of the settlement proceeds, i.e., portions not allocated to medical expenses, it was preempted by federal law. *Id*. at 280-282.

In *Wos v E M A*, 568 US 627, 632, 636; 133 S Ct 1391; 185 L Ed 2d 471 (2013), the United States Supreme Court held that a North Carolina statute that created an irrebuttable presumption that one-third of a Medicaid recipient's tort recovery is attributable to medical expenses was preempted by the federal antilien statute. One of the problems with the North Carolina statute was that it did not provide a mechanism for determining whether that one-third amount was a

[11] Although the *Ahlborn* Court stated at one point that this $35,581.47 value represented "compensation for medical expenses," *Ahlborn*, 547 US at 280, it previously noted that the recipient had argued that the ADHS could only recover from portions of the settlement for "*past medical expenses*" and that if her position was correct, then the ADHS would only be entitled to this $35,581.47 amount, *id*. at 274 (emphasis added). Thus, it seems clear that this $35,581.47 from the settlement was for past medical expenses.

reasonable approximation for any particular case. *Id*. at 637. The Court rejected North Carolina's argument that holding " 'mini-trials' " to divide settlement proceeds between medical and nonmedical expenses would be " 'wasteful, time consuming, and costly.' " *Id*. at 641. *Wos* has little application to this case because the sole question was whether North Carolina's irrebuttable presumption was preempted. The Court did not have to address, and in fact did not address, whether the medical-expenses portion of a settlement had to be further divided into past and future medical expenses.

In *Neal*, this Court held that to the extent that MCL 400.106(5), now MCL 400.106(8), allows the state to recover the full cost of Medicaid expenses paid, regardless of the allocation of settlement proceeds, it was preempted by the federal antilien statute, 42 USC 1396p(a)(1). *Neal*, 319 Mich App at 578. The trial court, consistently with Michigan's statute allowing a contracted health plan to " 'recover the full cost of expenses paid,' " permitted the intervening health plan to fully recover from the Medicaid recipient's tort settlement without conducting any proceedings to determine how the settlement proceeds should be allocated among the different classes of damages, including medical expenses. *Id*. at 561, 564, 570, 571. This Court reversed and remanded for the trial court to hold an evidentiary hearing to determine how the settlement should be allocated among the various types of damages because, under *Ahlborn*, the health plan could only recover its lien from the portion of the settlement allocated for medical expenses. *Id*. at 576-577.

The DHHS relies on this Court's decision in *Byrnes*—which was issued after the trial court in this case entered its final order and was the basis for the

DHHS's motion for relief from judgment—for the proposition that it can recover its expenditures from any and all medical expenses. In *Byrnes*, this Court noted that "[n]either *Alhborn* nor *Wos* limit 'medical expenses' to past medical costs as a per se rule, and nothing in the relevant statutory language points toward a Congressional intent to exempt plaintiff's future medical expenses from recovery by the DHHS. See 42 USC 1396a(a)(25) and 42 USC 1396k." *Byrnes*, 331 Mich App at 358. This Court suggested that "the 'medical care' described in these provisions is not limited to past medical care but, instead, includes future medical expenses, which are likewise distinct from a plaintiff's other clamed damages." *Id*. But the Court declined to hold that future medical costs always are included in "medical expenses" because in some instances, a plaintiff may not plead any such damages in the complaint.[12] *Id*. However, our Supreme Court vacated any discussion in *Byrnes* related to

> the inclusion of future medical expenses in the amount of medical expenses subject to reimbursement. The issue of whether any amount of a judgment or settlement that is allocated toward future medical expenses is properly included in the calculation of the amount of medical expenses that are subject to reimbursement under 42 USC §§ 1396a(a)(25)(H) and 1396k(a) should first be addressed by the circuit court on remand. [*Byrnes*, 506 Mich at 948.]

Because our Supreme Court vacated the portion of *Byrnes* discussing the inclusion of future medical ex-

[12] The proclamation in *Byrnes*, 331 Mich App at 358, that the Medicaid recipient in *Ahlborn* did not plead any future medical damages in her complaint is perplexing. In *Ahlborn*, the Medicaid recipient filed suit against the two tortfeasors and "claimed damages not only for past medical costs, but also for permanent physical injury; *future medical expenses*; past and future pain, suffering, and mental anguish; past loss of earnings and working time; and permanent impairment of the ability to earn in the future." *Ahlborn*, 547 US at 273 (emphasis added).

penses, *Byrnes* is not dispositive, contrary to the argument made by the DHHS.

The resolution of this issue relies exclusively on the interpretation of federal law. MCL 400.106(8) on its face allows the state to recover full reimbursement of its Medicaid expenses and does not limit which type of settlement proceeds the state can invade; but that portion of the statute is preempted by the federal antilien statute, 42 USC 1396p(a)(1). *Neal*, 319 Mich App at 570-573. There is no question that the United States Supreme Court in *Ahlborn* limited a state's right to recover Medicaid expenses to portions of a settlement attributed to medical expenses. See *id*. at 572, citing *Ahlborn*, 547 US at 280-282. The question, therefore, is whether the federal provisions limit a state to recovering from funds allocated for *past* medical expenses or for *any* medical expenses, which would include future medical expenses.

Although the *Alhborn* Court did not directly address this question, in describing the procedural posture of the case, the Court stated:

> On September 30, 2002, Ahlborn filed this action in the United States District Court for the Eastern District of Arkansas seeking a declaration that the lien violated the federal Medicaid laws insofar as its satisfaction would require depletion of compensation for injuries *other than past medical expenses*. To facilitate the District Court's resolution of the legal questions presented, the parties stipulated that Ahlborn's entire claim was reasonably valued at $3,040,708.12; that the settlement amounted to approximately one-sixth of that sum; and that, *if Ahlborn's construction of federal law were correct, ADHS would be entitled to only the portion of the settlement ($35,581.47) that constituted reimbursement for medical payments made*. [*Ahlborn*, 547 US at 274 (emphasis added).]

Thus, although the Court held that 42 USC 1396a(25)(H)[13] of the Medicaid Act "does not sanction an assignment of rights to payment for anything other than medical expenses," *id*. at 281, this was in the context of the medical-care proceeds in question being for "medical payments made," *id*. at 274. Additionally, in its final holding, the Court stated, "Federal Medicaid law does not authorize ADHS to assert a lien on Ahlborn's settlement in an amount exceeding $35,581.47." *Id*. at 292. And because that $35,581.47 amount only pertained to past medical expenses, we view the Court's holding as only allowing a state to recover from settlement proceeds allocated to past medical expenses.

The *Neal* Court recognized this view by describing the holding in *Ahlborn* as being "that the Arkansas statutory lien provision was not authorized by federal Medicaid law and actually conflicted with the anti-lien provision that limits a participating state's recovery to tort proceeds designated as payment or reimbursement for medical expenses *incurred by the recipient*." *Neal*, 319 Mich App at 570 (emphasis added). The *Neal* Court later reiterated, "As the United States Supreme Court made clear in *Ahlborn*, states may not enact statutory provisions designed to recover medical expenditures from the tort proceeds received by Medicaid

[13] 42 USC 1396a(a)(25)(H) provides:

> [*T*]*o the extent that payment has been made under the State plan for medical assistance* in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, *to the extent that payment has been made under the State plan for medical assistance* for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party *for such health care items or services*[.] [Emphasis added.]

recipients that are not designated as payment or reimbursement for medical expenses *incurred by the recipient*." *Id*. at 572 (emphasis added). See also *Morrow v Shah*, 181 Mich App 742, 748; 450 NW2d 96 (1989) (holding that the Department of Social Services "may not seek reimbursement for anticipated but unpaid Medicaid benefits covering expenses to be incurred in the future.").

"To 'incur' means 'to become liable or subject to, especially because of one's own actions.' " *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 484; 673 NW2d 739 (2003) (citation and brackets omitted). In *Proudfoot*, the Supreme Court held that the plaintiff did not incur expenses for future home improvements because those costs had not been incurred yet, i.e., because those improvements had not happened yet, the plaintiff was not liable for the costs. *Id*. The same principle applies to this case. An award for future medical expenses does not equate with the proposition that the person receiving that award has *incurred* those expenses. Indeed, as *Proudfoot* shows, it is impossible to have done so because there is no current obligation for those expenses. See also *Bronson Health Care Group, Inc v USAA Cas Ins Co*, 335 Mich App 25, 37; 966 NW2d 393 (2020) (holding that a person does not incur medical expenses until medical services are actually provided).

In this case, the trial court held an evidentiary hearing to allocate the settlement amount in accordance with the above-mentioned caselaw. See *Byrnes*, 331 Mich App at 357 (at the evidentiary hearing, "the trial court must make a determination of the amount of the Medicaid lien and apportion that from the plaintiff's settlement proceeds taking into consideration the true value of the case and the plaintiff's claimed losses"). The parties stipulated the total value

of plaintiffs' claim and the amount of the DHHS's and Molina's liens for past medical expenses, which totaled $383,694.54. The DHHS argued that because the total cost of medical expenses was 65% of the total value of the case, the apportionment of medical expenses should likewise be 65% of the settlement amount, with no further apportionment between past and future medical expenses.

Instead, the trial court, paraphrasing *Wos*, 568 US at 639, stated that "a substantial share of the settlement must be allocated . . . for basically future care . . . ." The court continued to note that it was "looking at this from the perspective that this is only dealing with the past medical," and that Jeanette "has benefits going forward that she needs to be compensated for, in order to sustain her life on a daily basis." Because the settlement amount was 21.25% of the total value of plaintiffs' case, the trial court determined that it would be reasonable to similarly reduce "the total past medical expenses" to 21.25% of the full amount. Thus, the total amount of past medical expenses was reduced to $81,611.73, with the DHHS and Molina being entitled to $57,025.93 and $24,585.80, respectively. Ideally, the trial court would have made an explicit finding that $81,611.73 represented the portion of past medical expenses from the settlement. Regardless, given the context of the trial court's statements, it is clear that the $81,611.73 was attributable to past medical expenses.

As stated in *Ahlborn*, 547 US at 274, 292, and recognized by *Neal*, 319 Mich App at 570, given the federal antilien statute, states are only entitled to recover settlement proceeds that have been allocated to past medical expenses. Accordingly, the DHHS has not shown that the trial court erred by limiting the

DHHS's recovery to the portion of the settlement allocated to past medical expenses.

B. PRO RATA ALLOCATION

The DHHS also argues that the trial court erred by only awarding a portion of the past medical expenses to the DHHS, which was based on a pro rata formula. We disagree.

As an initial matter, this Court disagrees with the premise of the DHHS's argument that the trial court reduced the DHHS's share of the settlement by a pro rata amount. Instead, the trial court determined the portion of the settlement allocated to past medical expenses by using a pro rata approach, i.e., because plaintiffs settled the case for 21.25% of the value of the case, it followed that 21.25% of the incurred medical expenses were captured in the settlement amount. We find no error in the trial court's approach because there is nothing preventing a court from using that formula to determine how a settlement should be apportioned. As this Court stated in *Neal*, "At the hearing, the court must determine that amount of the Medicaid lien that may be recovered from plaintiff's settlement proceeds taking into consideration the true value of the case and plaintiff's claimed losses." *Id*. at 577. That is precisely what the trial court did.[14]

C. ATTORNEY FEES AND COSTS

The DHHS finally argues that the trial court erred by reducing the amount that the DHHS could recover based on plaintiffs' attorney fees and costs. We disagree.

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[14] We note that the DHHS is first in priority to recover from the settlement under MCL 400.106(8). Thus, the DHHS is entitled to the

The American rule for attorney fees provides that each party is responsible for its own attorney fees, unless there is a statute or court rule expressly authorizing the award. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). Assuming that there is no statute or court rule requiring DHHS to pay a portion of a plaintiff's attorney fees,[15] the DHHS avers that the amount it was awarded from the settlement was reduced as a result of plaintiffs' attorney fees. Instead, the record clearly establishes that the settlement amount apportioned to the DHHS was not reduced on account of plaintiffs' attorney fees or costs. While the trial court at one point mentioned how it seemed unfair that all the costs were primarily borne by plaintiffs, thereby implying that the DHHS should have to cover some of those costs, at no point did plaintiffs' costs and attorney fees play a factor in the amount the trial court ultimately awarded the DHHS. As was explained by the trial court, because the settlement amount was 21.25% of the total value of plaintiffs' case, the court awarded DHHS 21.25% of its $268,357.33 lien, or

full amount of the settlement allocated to past medical expenses because the allocation is less than the DHHS's lien. During oral argument, however, the DHHS expressed that it had agreed with Molina regarding the division of the settlement proceeds.

[15] In fact, MCL 400.106(8) states that "[t]he department or a contracted health plan is not required to pay an attorney fee on the net recovery." Further, this Court in *Byrnes*, 331 Mich App at 359, held that a "trial court may not reduce the DHHS's share by a pro rata reduction of attorney fees." Notably, our Supreme Court only vacated the portion of *Byrnes* that discussed the inclusion of future medical expenses in the amount of medical expenses subject to reimbursement. *Byrnes*, 506 Mich at 948. Thus, this portion of this Court's decision in *Byrnes* discussing attorney fees is still valid and binding. However, it is just as important to note that *Byrnes* was addressing the prior version of MCL 400.106. The amended version of the statute contains an express prohibition of the DHHS paying attorney fees. See 2018 PA 511; MCL 400.106(8).

$57,025.93. Importantly, that 21.25% was calculated by using the total settlement amount before any attorney fees or costs were ever considered. Therefore, contrary to the DHHS's assertion on appeal, attorney fees played no role in the amount that it was awarded.

Affirmed.

LETICA, P.J., and CAVANAGH and FORT HOOD, JJ., concurred.

PEOPLE v WHEELER

Docket No. 353419. Submitted March 3, 2021, at Detroit. Decided March 11, 2021, at 9:15 a.m. Leave to appeal denied 508 Mich 947 (2021).

Simon Wheeler, Jr., was charged in the Wayne Circuit Court with felon in possession of a firearm, MCL 750.224f; felon in possession of ammunition, MCL 750.224f(3); carrying a concealed weapon, MCL 750.227; two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*). Defendant was arrested at a gas station in Detroit for carrying a concealed weapon without a concealed pistol license (CPL). Two police officers were in their vehicle on patrol when they saw defendant with a partially concealed handgun in his waistband. Specifically, defendant was leaning over his vehicle checking his oil, and a handgun was situated in the right side of defendant's waistband with its handle sticking out of his coat. One officer asked defendant whether he had a CPL, and defendant said that he did not. The officers then exited their vehicle, approached defendant, recovered the handgun from his waistband, and placed defendant in handcuffs. Defendant moved to suppress the evidence from his arrest, arguing that it was the product of an illegal search and seizure because the handgun was not concealed but rather was being carried consistently with Michigan's open-carry law. Therefore, defendant argued, the police officers' investigatory stop was not justified by a reasonable suspicion that defendant was carrying a concealed handgun and all evidence seized from his arrest should be suppressed. After a hearing, the trial court, Qiana D. Lillard, J., held that the handgun could not have been concealed if it was readily apparent to the arresting officers and thus that the evidence was the product of an illegal search and seizure. Accordingly, the trial court granted defendant's motion to suppress the evidence and dismissed the case. The prosecution appealed.

The Court of Appeals *held*:

In general, a search or seizure conducted without a warrant is presumptively unreasonable and, therefore, unconstitutional. One exception to the warrant requirement is an investigatory

stop. Under this doctrine, if a police officer has a reasonable, articulable suspicion to believe that a person has committed or is committing a crime given the totality of the circumstances, the officer may briefly stop that person for further investigation. In determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed as understood and interpreted by law enforcement officers. Law enforcement officers are permitted, if not required, to consider the modes or patterns of operation of certain kinds of lawbreakers and then make inferences and deductions that might well elude an untrained person. MCL 750.227(2) prohibits a person from carrying a pistol concealed on or about their person. Concealment is an essential element of the crime of carrying a concealed weapon; however, total concealment or invisibility is not required to support a conviction under MCL 750.227(2). Rather, a pistol is concealed if it cannot easily be seen by those who come into ordinary contact with the person carrying it. In this case, defendant was approached by the police officers only after they saw a partially concealed handgun in the waistband of defendant's pants. Defendant had been leaning over his vehicle checking his oil when the handle of his gun became visible from around his coat. Thus, the handgun would not have been even partially visible if defendant had been standing up straight and not leaning over his vehicle so as to cause his coat to fall forward and expose the gun in his waistband. The police officers in this case were entitled to consider the totality of the circumstances, viewed and understood in light of their law enforcement experiences, in deciding whether to approach defendant to investigate the situation. The officers approached defendant and asked whether he had a CPL while they were still in their vehicle. There was no indication from the officers that defendant was not free to leave; accordingly, defendant was not seized for Fourth Amendment purposes at that point. After defendant denied having a CPL, the police officers exited their vehicle and detained defendant; it was at this point that a seizure occurred. Considering the evidence, the police officers had a reasonable, articulable suspicion that defendant was illegally carrying a concealed handgun and thus were justified in conducting an investigatory stop that resulted in the discovery of the handgun as well as other incriminating evidence. The trial court's finding that the handgun could not be considered concealed was clearly erroneous. The fact that the handgun was seen does not necessarily mean that the handgun was not concealed. Accordingly, the trial court's decision that the incriminating evidence produced by the investigatory stop had to be suppressed because defendant's Fourth

Amendment rights were violated was reversed, and the case was remanded to the trial court for reinstatement of the charges against defendant and for further proceedings.

Reversed and remanded.

CRIMINAL LAW — CARRYING A CONCEALED WEAPON — CONCEALMENT.

MCL 750.227(2) prohibits a person from carrying a pistol concealed on or about his or her person; concealment is an essential element of the crime of carrying a concealed weapon; however, total concealment or invisibility is not required; a pistol is concealed if it cannot easily be seen by those who come into ordinary contact with the person carrying it; the fact that a pistol was seen does not necessarily mean that it was not concealed.

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.

Perkins Law Group, PLLC (by *Adam G. Clements*) for defendant.

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

CAVANAGH, J. The prosecution appeals as of right an order granting defendant's motion to suppress and dismissing charges of felon in possession of a firearm, MCL 750.224f; felon in possession of ammunition, MCL 750.224f(3); carrying a concealed weapon, MCL 750.227; two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and possession of less than 25 grams of heroin, MCL 333.7403(2)(a)(*v*). We reverse and remand.

Defendant was arrested at a gas station in Detroit for carrying a concealed weapon without a concealed pistol license (CPL). The arrest was conducted by Detroit Police Officers Diego Fragoso and Steven Anouti. Ac-

cording to Officers Fragoso and Anouti, they saw defendant with a partially concealed handgun in his waistband from their vehicle while on patrol. Specifically, defendant was leaning over his vehicle checking his oil, and a handgun was situated in the right side of defendant's waistband with its handle sticking out of his coat. Subsequently, Officer Anouti asked defendant whether he had a CPL, and defendant said that he did not. The officers then exited their vehicle, approached defendant, recovered the handgun from his waistband, and placed defendant in handcuffs.

Defendant moved to suppress the evidence from his arrest, arguing that it was the product of an illegal search and seizure because the handgun was not concealed but rather was being carried consistently with Michigan's open-carry law. Therefore, defendant argued, the police officers' investigatory stop was not justified by a reasonable suspicion that defendant was carrying a concealed handgun and all evidence seized from his arrest should be suppressed.

The prosecution opposed defendant's motion, arguing that although the handgun's handle might have been visible, "the rest of the weapon was still hidden in [defendant's] waistband and thus concealed within the meaning of MCL 750.227." The prosecution further argued that while concealment under MCL 750.227 occurs when the pistol is not readily discernible by the ordinary observation of persons casually observing the person carrying it, Officers Fragoso and Anouti were not casual observers but police officers trained with respect to firearms.

After a hearing, the trial court held that the handgun could not have been concealed if it was readily apparent to the arresting officers; thus, the evidence was the product of an illegal search and seizure.

Accordingly, defendant's motion to suppress was granted, and the case was dismissed. The prosecution now appeals.

The prosecution argues that the trial court's decision to suppress the evidence and dismiss the case must be reversed because the investigatory stop did not violate defendant's Fourth Amendment rights. We agree.

Findings of fact made regarding a motion to suppress evidence are reviewed for clear error, *People v Hill*, 299 Mich App 402, 405; 829 NW2d 908 (2013), and the findings will be affirmed unless the appellate court is left with a definite and firm conviction that the trial court made a mistake, *People v Dixon*, 333 Mich App 566, 571-572; 963 NW2d 378 (2020). But the trial court's ultimate ruling on the motion is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

In general, a search or seizure conducted without a warrant is presumptively unreasonable and, therefore, unconstitutional. *People v Barbarich*, 291 Mich App 468, 472; 807 NW2d 56 (2011). One exception to the warrant requirement, however, is the *Terry* stop, also known as the investigatory stop. *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). As this Court has explained:

> Under this doctrine, if a police officer has a reasonable, articulable suspicion to believe a person has committed or is committing a crime given the totality of the circumstances, the officer may briefly stop that person for further investigation. Moreover, under *Terry*, a police officer may approach and temporarily detain a person for the purpose of investigating possible criminal behavior even if probable cause does not exist to arrest the person. The scope of any search or seizure must be limited to that which is

> necessary to quickly confirm or dispel the officer's suspicion. [*Barbarich*, 291 Mich App at 473 (citations omitted).]

[I]n determining whether the totality of the circumstances provide reasonable suspicion to support an investigatory stop, those circumstances must be viewed as understood and interpreted by law enforcement officers, not legal scholars. Also, common sense and everyday life experiences predominate over uncompromising standards." *People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001) (quotation marks, alterations, and citations omitted). Law enforcement officers "are permitted, if not required, to consider the modes or patterns of operation of certain kinds of lawbreakers" and then make "inferences and deductions that might well elude an untrained person." *Id*. at 196 (quotation marks and citation omitted).

MCL 750.227(2) prohibits a person from carrying "a pistol concealed on or about his or her person . . . ." "Concealment is an essential element of the crime of carrying a concealed weapon." *People v Jackson*, 43 Mich App 569, 571; 204 NW2d 367 (1972). However, it has long been established by this Court that total concealment or invisibility is not required under the statute to support a conviction. *People v Jones*, 12 Mich App 293, 296; 162 NW2d 847 (1968). Rather, "a weapon is concealed when it is not discernible by the ordinary observation of persons coming in contact with the person carrying it, casually observing him, as people do in the ordinary and usual associations of life." *Id*. Our criminal jury instruction, M Crim JI 11.1(3), states the matter simply: "Complete invisibility is not required. A pistol is concealed if it cannot easily be seen by those who come into ordinary contact with the defendant."

In this case, defendant was approached by the police officers only after they saw a partially concealed hand-

gun in the waistband of defendant's pants. Defendant had been leaning over his vehicle checking his oil when the handle of his gun became visible from around his coat. Thus, it appears that the handgun would not have been even partially visible if defendant had been standing up straight and not leaning over his vehicle so as to cause his coat to fall forward and expose the gun in his waistband. In other words, persons who would come into ordinary contact with defendant would not have easily seen that defendant had a handgun in his waistband. While the handgun came into plain view at the particular point in time when the police officers noticed defendant leaning over his vehicle, this fact "does not negate, as a matter of law, the finding that under any particular set of circumstances there was the necessary concealment." *People v Charron*, 54 Mich App 26, 30; 220 NW2d 216 (1974).

Further, the issue here is not whether there was sufficient evidence to *convict* defendant of the charge of carrying a concealed weapon; rather, the issue here is whether the police officers had a reasonable, articulable suspicion to support their investigatory stop of defendant. The officers were on patrol in an area of the community known for criminal activity, and they were paying special attention to activities occurring at gas stations. The police officers saw defendant at his vehicle with the vehicle's hood up. Defendant was leaning over his vehicle checking his oil, and the officers saw the handle of a gun sticking out from defendant's clothes. While the handgun was partially visible because of the positioning of defendant's body and the vantage point of the police officers, it cannot be said that defendant was "openly" carrying the weapon in full view for the public to see upon casual observation. A portion of the gun was in defendant's waistband, and

the portion that was not in his waistband was, at a minimum, partially covered by his clothing.

The police officers were entitled to consider the totality of the circumstances, viewed and understood in light of their law enforcement experiences, in deciding whether to approach defendant to investigate the situation. Police officers are permitted to approach a person in a public place and ask questions without violating the Fourth Amendment. See *People v Shabaz*, 424 Mich 42, 56-57; 378 NW2d 451 (1985); *People v Taylor*, 214 Mich App 167, 170; 542 NW2d 322 (1995). In this case, the officers approached defendant while still in their vehicle and asked if he had a CPL—which demonstrates that the officers believed that the gun was concealed. "Asking such questions to elicit voluntary information from private citizens is an essential part of police investigations." *People v Jenkins*, 472 Mich 26, 33; 691 NW2d 759 (2005). Defendant denied having a CPL; he also did not deny having a gun, and he did not state that he was legally "openly" carrying his gun. But, at that point, defendant was not obligated to respond in any manner to the police officers; he could have simply ignored them. See *id*. at 33-34. That is so because at the time, both police officers remained in their vehicle and there was no indication from them that defendant was not free to leave; thus, defendant was not seized for Fourth Amendment purposes. See *id*. at 34. However, after defendant denied having a CPL, the police officers exited their vehicle and detained defendant—at which point the handgun was retrieved from his right hip area. At this point, a reasonable person would have believed that he or she was not free to leave, and thus, a seizure of defendant occurred. See *id*. at 32.

Considering the evidence of record, we conclude that the police officers had a reasonable, articulable suspi-

cion that defendant was illegally carrying a concealed handgun and thus were justified in conducting an investigatory stop that resulted in the discovery of the handgun as well as other incriminating evidence. The trial court's finding that the handgun could not be considered "concealed" was clearly erroneous. That the handgun became partially visible by the happenstance of defendant's physical positioning or the incidental movement of his clothing does not mean that the gun was being "openly" carried. In other words, the fact that the handgun was seen does not necessarily mean that the handgun was not "concealed." Accordingly, the trial court's decision that the incriminating evidence produced by the investigatory stop had to be suppressed because defendant's Fourth Amendment rights were violated is reversed. This matter is remanded to the trial court for reinstatement of the charges against defendant and for further proceedings that are consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

LETICA, P.J., and FORT HOOD, J., concurred with CAVANAGH, J.

SWANZY v KRYSHAK

Docket No. 351649. Submitted March 2, 2021, at Lansing. Decided March 11, 2021, at 9:20 a.m. Leave to appeal denied 509 Mich 889 (2022).

Vicki Swanzy, as personal representative of the estate of John Swanzy, filed a complaint in the Kent Circuit Court against Edward J. Kryshak, M.D., and Spectrum Health Primary Care Partners. Plaintiff claimed that Spectrum's employee, Robin Zamarron, an unlicensed medical assistant, gave negligent medical advice that led to John's death. Plaintiff alleged in Count 1 of the complaint that Spectrum was vicariously liable for Zamarron's negligence and that it was directly liable for negligently training and supervising Zamarron. Alternatively, plaintiff alleged medical malpractice against Spectrum, asserting that Zamarron's conduct constituted a breach of the local standard of care for medical professionals. Plaintiff later filed a partial motion for summary disposition, arguing that Count 1 of the complaint sounded in ordinary negligence because Spectrum was not capable of being sued for medical malpractice given that its agent, Zamarron, was not a licensed healthcare professional and that it was not a licensed health facility or agency. Spectrum asserted that the claim sounded in medical malpractice because under MCL 600.5838a(1)(b), it could be held vicariously liable for the negligent administration of professional services by its employees or agents, including Zamarron, who was herself an agent of Kryshak, a licensed medical professional. The trial court, Curt A. Benson, J., granted partial summary disposition in favor of plaintiff. Spectrum applied for leave to appeal, which was granted by the Court of Appeals.

The Court of Appeals *held*:

When determining whether a claim sounds in ordinary negligence or medical malpractice, a reviewing court must determine: (1) whether the claim pertains to an action that occurred within the course of a professional relationship, and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. A professional relationship exists if a person or an entity capable of committing medical

malpractice was subject to a contractual duty to render professional healthcare services to the plaintiff. Under the common law, only physicians and surgeons could be held liable for medical malpractice. However, MCL 600.5838a(1) expands the category of persons and entities that can be held liable for medical malpractice to include a person or entity who is or who holds themselves out to be a licensed healthcare professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency. Only those providers and facilities covered by MCL 600.5838a can meet the professional relationship prong of the test to determine whether a claim sounds in ordinary negligence or in medical malpractice. Spectrum, as a nonprofit corporation, did not qualify as a licensed health facility or agency as defined by MCL 600.5838a(1)(a), nor was it an employee or agent of a licensed health facility or agency. Therefore, Spectrum could only be liable for medical malpractice if it qualified as a licensed healthcare professional. Under *Potter v McLeary*, 484 Mich 397 (2009), in order to determine whether Spectrum was liable for medical malpractice, it had to be determined whether a nonprofit corporation is included in the definitional section of MCL 600.5838a(1). Under the statute, a licensed healthcare professional can engage in the health profession through business entities including a sole proprietorship, partnership, professional corporation, or other business entity. A nonprofit corporation is a business entity, and it is different in nature from sole proprietorships, partnerships, and professional corporations. Therefore, it qualifies as an "other business entity." The next part of the inquiry under *Potter* is whether a nonprofit corporation can render professional services through a licensed healthcare professional. MCL 450.2261(6) provides that a domestic nonprofit corporation may be formed for the purpose of providing services in a learned profession and may employ duly licensed or authorized individuals who shall furnish those services on behalf of the corporation. Under MCL 450.2261(7), any such duly licensed or authorized individual who is employed by a corporation described in MCL 450.2261(6) is personally and fully liable for any negligent or wrongful acts or misconduct they commit, or that is committed by any individual under their direct control, while rendering professional services on behalf of the corporation to the person for whom professional services were being rendered. Therefore, like a professional corporation, a nonprofit corporation can provide professional services through any licensed healthcare providers that it employs. Consequently, under MCL 600.5838a(1)(b), a plaintiff may maintain a claim against a nonprofit corporation based solely on the nonprofit corporation's

vicarious liability for the professional services of its licensed healthcare provider employees. In this case, Spectrum is not capable of being directly sued for professional malpractice under MCL 600.5838a(1)(a) and can only be held vicariously liable under MCL 600.5838a(1)(b). Therefore, Spectrum is incapable of independently committing medical malpractice, so plaintiff's direct-liability claims of negligent training, supervision, selection, and retention of staff necessarily sound in ordinary negligence. Caselaw provides that an institutional defendant is only capable of being held vicariously liable for the professional malpractice of its employees who are licensed healthcare providers under MCL 600.5838a(1)(b). Similarly, the plain language of MCL 600.5838a(1) expressly allows for a medical malpractice claim to accrue against the employees or agents of a licensed health facility or agency but does not provide for the accrual of such a claim against the employees or agents of a licensed healthcare professional under MCL 600.5838a(1)(b). Accordingly, because Spectrum's employee, Zamarron, was not a licensed healthcare professional under the statute, plaintiff's claim that Spectrum was vicariously liable for the actions of Zamarron sounded in ordinary negligence, not medical malpractice. Therefore, because a medical malpractice claim could not accrue against Spectrum for either direct negligence for failing to train Zamarron or for vicarious liability for Zamarron's allegedly negligent conduct, plaintiff's claims raised in Count 1 of the complaint could not sound in medical malpractice.

Affirmed.

NEGLIGENCE — MEDICAL MALPRACTICE — NONPROFIT CORPORATIONS — DIRECT OR VICARIOUS LIABILITY.

A claim that sounds in medical malpractice must pertain to an action that occurred in the context of a professional relationship, and the claim must raise questions of medical judgment beyond the realm of common knowledge or experience; under MCL 600.5838a(1), only a person or entity who is or who holds themselves out to be a licensed healthcare professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency can be held liable for medical malpractice; under MCL 600.5838a(1), a licensed healthcare provider can engage in the health profession through business entities including a sole proprietorship, partnership, professional corporation, or other business entity; a nonprofit corporation qualifies as an "other business entity," and under MCL 450.2261(6) and (7), a nonprofit corporation can provide professional services through any licensed healthcare providers that it employs; therefore, a

plaintiff may maintain a claim against a nonprofit corporation based solely on the nonprofit corporation's vicarious liability for the professional services of its licensed healthcare provider employees.

Hoffer & Sheremet, PLC (by *Stephanie C. Hoffer* and *Aubri N. Sheremet*) for the estate of John Swanzy.

Foster, Swift, Collins & Smith, PC (by *Richard C. Kraus*) and *Smith Haughey Rice & Roegge* (by *Christopher R. Genther* and *Ashley C. Quackenbush*) for Spectrum Health Primary Care Partners, doing business as Spectrum Health Medical Group.

Before: MURRAY, C.J., and M. J. KELLY and RICK, JJ.

M. J. KELLY, J. Defendant Spectrum Health Primary Care Partners, doing business as Spectrum Health Medical Group (Spectrum), appeals by leave granted[1] the trial court's order granting partial summary disposition in favor of plaintiff, Vicki Swanzy, the personal representative of the estate of the decedent, John Swanzy. At issue is whether the claims against Spectrum based on the alleged negligence of its employee Robin Zamarron, an unlicensed medical assistant, sound in ordinary negligence or medical malpractice. For the reasons stated in this opinion, we conclude that both claims sound in ordinary negligence, so we affirm.

I. BASIC FACTS

In June 2016, the decedent was being treated for diabetes by defendant Edward J. Kryshak, M.D. At that time, Dr. Kryshak, an endocrinologist, was employed by Spectrum. According to the amended complaint, before June 2016, the decedent's diabetes had

[1] *Estate of Swanzy v Kryshak*, unpublished order of the Court of Appeals, entered March 31, 2020 (Docket No. 351649).

been treated with Humulin R U-500 vials, but during a March 2016 hospitalization, his medication was changed, and Dr. Kryshak opted to continue with the new medication. Subsequently, on June 23, 2016, the decedent's blood-sugar levels were "in the 400s," so he and his wife called his primary-care physician, who allegedly rerouted the call to Dr. Kryshak's office at Spectrum. Thereafter, on June 24, 2016, a Friday, Dr. Kryshak prescribed the decedent Humulin R U-500 Kwikpen.

Because she believed that the Kwikpen would not be immediately available at the pharmacy, the decedent's wife called Dr. Kryshak's office to ask if she could use an old vial of Humulin R U-500. Plaintiff alleges that the decedent's wife spoke on the phone with Zamarron, who "without caution or instruction" said "yes" to the substitution of insulin medications and directed her to administer "100 units." The decedent's wife then drew 100 units of Humulin R U-500 from the vial and administered it to the decedent. Tragically, 100 units of Humulin R U-500 vial is five times as much as 100 units of Humulin R U-500 Kwikpen, and the decedent fell into a hypoglycemic-induced coma and died.

On September 7, 2018, plaintiff filed a complaint against Spectrum and Dr. Kryshak. The complaint was amended on March 1, 2019, after Zamarron was identified as the medical assistant who allegedly gave incorrect dosage and medication-substitution advice. It is undisputed that (1) Zamarron was employed by Spectrum; (2) in her role as a medical assistant she sometimes assisted Dr. Kryshak, including by answering phone calls; and (3) although she is a certified medical assistant, she is not licensed.

Count 1 of plaintiff's amended complaint includes allegations that Spectrum is vicariously liable for

Zamarron's negligence in independently giving incorrect insulin substitution and dosage information to the decedent's wife. Count 1 also includes allegations that Spectrum is directly liable for negligently training and supervising Zamarron. In Count 3—which did not include a claim of direct negligence based on improper supervision—plaintiff alleged in the alternative a medical malpractice claim against Spectrum, contending that Zamarron's conduct constituted a breach of the local standard of care for medical professionals. In February 2019, plaintiff moved for partial summary disposition under MCR 2.116(C)(9), arguing that Spectrum's defense to Count 1 failed as a matter of law because the claim sounded in ordinary negligence, not medical malpractice. The trial court denied the motion without prejudice but stated that plaintiff could refile the motion under MCR 2.116(C)(7).

Thereafter, plaintiff filed a renewed motion for partial summary disposition under MCR 2.116(C)(7), (9), and (10), arguing that Count 1 of the complaint sounded in ordinary negligence because Spectrum was not capable of being sued for medical malpractice. Plaintiff contended that under *Kuznar v Raksha Corp*, 481 Mich 169; 750 NW2d 121 (2008), the only individuals or entities capable of medical malpractice are (1) licensed healthcare professionals, (2) licensed health facilities or agencies, or (3) the employees or agents of a licensed health facility or agency. Therefore, because Spectrum admitted that its medical assistants (including Zamarron) were not licensed healthcare professionals and that it was not a licensed health facility or agency, plaintiff argued that there was no entity capable of committing medical malpractice, so the claim necessarily sounded in ordinary negligence. In response, Spectrum asserted that under the definition of "licensed health care professional" in MCL 600.5838a(1)(b), it could be held vicari-

ously liable for the negligent administration of professional services by its employees or agents, which included Zamarron, who was an agent of Dr. Kryshak, who was, in turn, licensed under § 15 of the Public Health Code, MCL 333.1101 *et seq*. Spectrum relied on *Potter v McLeary*, 484 Mich 397, 402-403; 774 NW2d 1 (2009), which held that a professional corporation could be held vicariously liable for the medical malpractice of a licensed healthcare professional that it employed. Spectrum also relied heavily on *Estate of Flie v Oakwood Healthcare, Inc*, unpublished per curiam opinion of the Court of Appeals, issued December 12, 2017 (Docket No. 333389). In *Flie*, this Court held that whether a negligent actor was licensed or not was "not necessarily relevant" to determine whether a claim sounded in ordinary negligence or medical malpractice. *Id*. at 7. Rather, "if an employee is one that provides professional services through [a professional corporation] . . . , then the actions of the [professional corporation], and therefore of the employee, are treated as the actions of [a] licensed health care provider, regardless of the employee's licensure." *Id*. The trial court, however, determined that *Potter*'s holding, and *Flie*'s holding by extension, only applied to professional corporations, whereas Spectrum was a domestic nonprofit corporation. The court, therefore, granted partial summary disposition in favor of plaintiff.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Spectrum argues that the trial court erred by granting plaintiff's motion for partial summary disposition. We review de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369;

775 NW2d 618 (2009). Likewise, we review de novo whether the nature of a claim asserted sounds in ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004). Because such claims are appropriately raised under MCR 2.116(C)(7), we must consider "all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict it." *Id*. Our review of a trial court's interpretation of a statute is also de novo. *Kuznar*, 481 Mich at 176. De novo review means that we "review the legal issue independently, without deference to the lower court." *In re Reliability Plans of Electric Utilities for 2017-2021*, 505 Mich 97, 118-119; 949 NW2d 73 (2020).

B. ANALYSIS

When determining whether a claim sounds in ordinary negligence or medical malpractice, a reviewing court must determine: "(1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience." *Bryant*, 471 Mich at 422. "If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions." *Id*. "A professional relationship exists if a person or an entity capable of committing medical malpractice was subject to a contractual duty to render professional health-care services to the plaintiff." *Kuznar*, 481 Mich at 177. Because "[a] malpractice action cannot accrue against someone who, or something that, is incapable of malpractice," *Adkins v*

Annapolis Hosp, 420 Mich 87, 95; 360 NW2d 150 (1984), a determination of whether a person or entity is capable of malpractice "is a necessary condition for bringing a malpractice suit." *Randall v Mich High Sch Athletic Ass'n*, 334 Mich App 697, 722; 965 NW2d 690 (2020); see also *Bryant*, 471 Mich at 420 ("The first issue in any purported medical malpractice case concerns whether it is being brought against someone who, or an entity that, is capable of malpractice."); accord *LaFave v Alliance Healthcare Srvs, Inc*, 331 Mich App 726, 731-732; 954 NW2d 566 (2020).

"MCL 600.5838a(1) is an accrual statute that indicates when a medical malpractice cause of action accrues." *Bryant*, 471 Mich at 420. It provides:

> (1) For purposes of this act, a claim based on the medical malpractice of a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency who is engaging in or otherwise assisting in medical care and treatment, whether or not the licensed health care professional, licensed health facility or agency, or their employee or agent is engaged in the practice of the health profession in a sole proprietorship, partnership, professional corporation, or other business entity, accrues at the time of the act or omission that is the basis for the claim of medical malpractice, regardless of the time the plaintiff discovers or otherwise has knowledge of the claim. As used in this subsection:
>
> (a) "Licensed health facility or agency" means a health facility or agency licensed under article 17 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.20101 to 333.22260 of the Michigan Compiled Laws.
>
> (b) "Licensed health care professional" means an individual licensed or registered under article 15 of the public health code, Act No. 368 of the Public Acts of 1978, being

> sections 333.16101 to 333.18838 of the Michigan Compiled Laws, and engaged in the practice of his or her health profession in a sole proprietorship, partnership, professional corporation, or other business entity. However, licensed health care professional does not include a sanitarian or a veterinarian. [MCL 600.5838a(1).]

MCL 600.5838a(1) "expands the traditional common-law list of those who are subject to medical malpractice actions." *Bryant*, 471 Mich at 420.[2] Accordingly, although "[u]nder the common law, only physicians and surgeons were potentially liable for medical malpractice," the category of persons and entities that can be held liable for medical malpractice now encompasses " 'a person or entity who is or who holds himself or herself out to be a licensed health care professional, licensed health facility or agency, or an employee or agent of a licensed health facility or agency . . . .' " *Kuznar*, 481 Mich at 177, quoting MCL 600.5838a(1). As explained by our Supreme Court in *Potter*, "only those providers and facilities covered by § 5838a can meet the professional relationship prong of the test" to determine whether a claim sounds in ordinary negligence or medical malpractice. *Potter*, 484 Mich at 415.

The issue on appeal is whether Spectrum, a nonprofit corporation, is capable of medical malpractice. At

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[2] The *Bryant* Court cautioned that although MCL 600.5838a(1) expanded the category of persons or entities that may be subject to a medical malpractice action, "it does not define what constitutes a medical malpractice action." *Bryant*, 471 Mich at 420-421. Therefore, if a defendant falls within the category of persons or entities who are capable of medical malpractice, it only means that the plaintiff's claim may possibly sound in medical malpractice. *Id*. at 421. See also *Potter*, 484 Mich at 416 n 25 (recognizing that satisfying the first prong of a medical malpractice action "requires more than mere inclusion within the Public Health Code lists," but also noting that "inclusion within either § 5838a or the Public Health Code lists is a necessary predicate to an action sounding in medical malpractice.").

the outset, it is undisputed that Spectrum does not qualify as a "licensed health facility or agency" as that term is defined in MCL 600.5838a(1)(a). Further, there is nothing on the record to suggest that Spectrum is an employee or agent of a licensed health facility or agency. Consequently, it can only be capable of malpractice if it qualifies as a licensed healthcare professional under MCL 600.5838a(1)(b). To answer that question, we turn to our Supreme Court's decision in *Potter*.

The plaintiff in *Potter* brought a claim against a professional corporation based solely on the professional corporation's vicarious liability for the "professional services of its licensed health care provider-employee," a physician. *Potter*, 484 Mich at 402-403. As part of its analysis, our Supreme Court examined whether a professional corporation was "an entity against which a medical malpractice action could be asserted." *Id*. at 417-418. The Court first concluded that it was unnecessary to determine whether a professional corporation was a licensed healthcare facility or agency under § 5838a(1)(a) "because the plain language of § 600.5838a, as amended effective April 1, 1994, expressly includes professional corporations within its definitional section." *Id*. at 415-417. The Court reasoned that the "specific addition of professional corporations to § 5838a was a clear statement by the Legislature that it intended a [professional corporation] to be an entity against which a medical malpractice action could be asserted." *Id*. at 418 (emphasis omitted).

Second, the Court recognized that "the placement of the reference to *professional corporations* within § 5838a(1)(b) (defining health care professionals), rather than within § 5838a(1)(a) (defining health facili-

ties), stands as a recognition of the nature of services as delineated in the Professional Service Corporation Act, MCL 450.225." *Id*. In that regard, the Court recognized that under MCL 450.225 (now MCL 450.1285(1)[3]), a professional corporation "can only render professional services through its employees or agents who are licensed or legally authorized to render the professional services." *Id*. at 412. The Court explained that the language in MCL 450.225 stood "as a legislative recognition that when a [professional corporation] renders professional services, it is inexorably linked to the licensed health care provider." *Id*. Thus, the professional corporation "and the health care provider are treated as the same entity when professional services are involved." *Id*. Accordingly, the Court held that "[w]here the services provided are professional services rendered by a licensed health care provider, any claim challenging those services as being negligent sound in medical malpractice, and the statutes governing medical malpractice apply." *Id*. at 419 (emphasis omitted). But if the services were not professional services as defined in former MCL 450.225, then "the claim would not be subject to the medical malpractice requirements because those claims sound in ordinary negligence." *Id*. Because the professional services provided by the professional corporation in *Potter* were rendered by a licensed healthcare provider, the *Potter* Court concluded that the professional corporation was an entity capable of being sued in medical malpractice. *Id*. at 402.

Applying *Potter* to this case, we must first determine whether a nonprofit corporation is included in the definitional section of MCL 600.5838a(1). As with all statutory interpretation, we turn to the statutory lan-

[3] See 2012 PA 569.

guage to determine the Legislature's intent. *Potter*, 484 Mich at 410. Section 5838a(1)(b) includes a list of business entities through which a licensed healthcare professional can engage in his or her health profession: "a sole proprietorship, partnership, professional corporation, or other business entity." When interpreting a statute, "words grouped in a list should be given related meaning." *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005) (quotation marks and citation omitted). In that regard, the phrase "other business entity" is broad and encompasses other business entities through which a licensed healthcare professional can engage in his or her health profession. A nonprofit corporation is a business entity. See *Black's Law Dictionary* (11th ed) (defining a corporation as "[a]n entity (usu[ually] a business) having authority under law to act as a single person . . . ."). Further, a nonprofit corporation is different in kind or nature from sole proprietorships, partnerships, and professional corporations. Therefore, it qualifies as an "other business entity."

Having determined that a nonprofit corporation is included in the definitional section, we next must determine whether it can render professional services through a licensed healthcare professional. MCL 450.2261(6) provides that a domestic nonprofit corporation "may be formed . . . for the purpose of providing services in a learned profession and may employ and enter into other arrangements with duly licensed or authorized individuals who shall furnish those services on behalf of the corporation."[4] Subject to a few exceptions that are not relevant in this case, "any duly

[4] In turn, MCL 450.2109(3) defines "[s]ervices in a learned profession" as "services provided by a dentist, an osteopathic physician, a physician, a surgeon, a doctor of divinity or other clergy, or an attorney at law."

licensed or authorized individual who is employed by a corporation described in subsection (6) is personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or her, or by any individual under his or her direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom those professional services were being rendered." MCL 450.2261(7). Therefore, we conclude that, like a professional corporation, a nonprofit corporation can provide professional services through any licensed healthcare providers that it employs. Consequently, under § 5838a(1)(b), as interpreted by our Supreme Court in *Potter*, a plaintiff may maintain a claim against a nonprofit corporation based solely on the nonprofit corporation's vicarious liability for the professional services of its licensed healthcare provider employees. See *Potter*, 484 Mich at 402-403.

This theory of liability is, in fact, the basis for Count 2 of plaintiff's amended complaint, which alleges that Spectrum is vicariously liable for Dr. Kryshak's professional negligence. In that regard, MCL 600.5838a(1)(b) treats Spectrum and Dr. Kryshak (a licensed healthcare professional) as "the same entity when professional services are involved." *Potter*, 484 Mich at 412. Count 1 of plaintiff's amended complaint, however, does not include any allegation that Spectrum is vicariously liable for the professional negligence of any individual who qualifies as a healthcare professional under § 5838a(1)(b). Rather, plaintiff seeks to hold Spectrum vicariously liable for the alleged negligence of Zamarron, an *unlicensed* medical assistant, and directly liable for Spectrum's own negligence in failing to properly train that unlicensed medical assistant. We address each in turn.

An institutional defendant may be held either (1) directly liable through claims of negligent supervision, selection, and retention of staff, or (2) vicariously liable for the alleged negligence of its agents and employees. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002). Here, Spectrum is not capable of being directly sued for professional malpractice under MCL 600.5838a(1)(a), and it can only be held vicariously liable under MCL 600.5838a(1)(b). Consequently, Spectrum is incapable of independently committing medical malpractice, so plaintiff's direct-liability claims of negligent training, supervision, selection, and retention of staff must necessarily sound in ordinary negligence. See *Kuznar*, 481 Mich at 172 (holding that a pharmacy cannot ever be directly liable for medical malpractice because it is not a licensed health facility or agency as that term is defined in MCL 600.5838a(1)(a)).

We must next consider whether Spectrum can be held vicariously liable for the alleged negligence of an employee or agent who is not a licensed healthcare professional. Four cases are on point. First, in *Kuznar*, our Supreme Court held that the plaintiff's claim alleging vicarious liability against a pharmacy for the alleged negligence of its nonpharmacist employee sounded in ordinary negligence, because the employee was neither the employee or agent of a licensed health facility or agency nor a licensed healthcare professional. *Kuznar*, 481 Mich at 172. Second, in *Potter*, the Supreme Court found that the professional corporation was capable of being held vicariously liable for the act of its employee because that employee both rendered professional services and was a licensed healthcare professional. *Potter*, 484 Mich at 402-403. In addition, our Supreme Court expressly stated in *Potter* that "when a claim asserted against a [professional corpo-

ration] involves the actions of an employee or agent *who is unlicensed* or not rendering professional services[,] . . . such a claim would sound in ordinary negligence . . . ." *Id*. at 403 n 4 (emphasis added). Third, in *LaFave*, this Court held that the plaintiff's claim against an MRI provider was one for ordinary negligence, not medical malpractice, because the MRI provider was not a licensed health facility or agency and because its allegedly negligent employee, an MRI technician, was not a licensed healthcare professional. *LaFave*, 331 Mich App at 732-735. Fourth and finally, in *Sabbagh v Hamilton Psychological Srvs, PLC*, 329 Mich App 324, 337; 941 NW2d 685 (2019), this Court held that the plaintiff could not maintain a direct medical malpractice claim against the defendants, a psychological practice and a human resources company, because neither was a licensed health facility. Further, although their employees were licensed healthcare professionals capable of medical malpractice, *id*. at 337-338, because the claims against the licensed employees were time-barred, the psychological practice and the human resources company could not be held vicariously liable for their negligence, *id*. at 344-345. Common in each case is that the institutional defendant—regardless of the form the business entity took—could only be held vicariously liable for the actions of the *licensed* healthcare professionals employed by the institutional defendant.

Kuznar, *Potter*, *LaFave*, and *Sabbagh* stand for the proposition that an institutional defendant is only capable of being held vicariously liable for the professional malpractice of its employees who are licensed healthcare providers under MCL 600.5838a(1)(b). This interpretation is in line with the plain language of MCL 600.5838a(1), which expressly allows for a medical malpractice claim to accrue against the employees

or agents of a licensed health facility or agency, but does not similarly provide that such a claim can accrue against the employees or agents of a licensed healthcare professional under § 5838a(1)(b). See *Danse Corp v Madison Hts*, 466 Mich 175, 182; 644 NW2d 721 (2002) ("Where the statutory language is unambiguous, the plain meaning reflects the Legislature's intent and the statute must be applied as written. No further construction is necessary or allowed to expand what the Legislature clearly intended to cover."). Accordingly, because Spectrum's employee, Zamarron, is not a licensed healthcare professional under MCL 600.5838a(1)(b), plaintiff's claim that Spectrum is vicariously liable for the actions of Zamarron sounds in ordinary negligence, not medical malpractice.

Spectrum argues that we should apply this Court's unpublished decision in *Flie*, which discounted the necessity of the negligent employee being a licensed healthcare professional and stressed that instead, the key inquiry was whether the allegedly negligent employee was or was not providing professional services. *Flie*, unpub op at 5-7. However, "[a]n unpublished opinion is not precedentially binding under the rule of stare decisis." MCR 7.215(C)(1). Nor do we find *Flie* persuasive in light of the above published opinions from both our Supreme Court and this Court recognizing that a business entity is capable of being held vicariously liable for the medical malpractice of its *licensed* healthcare professionals, but not its employees who are unlicensed. Additionally, we note that in *Flie*, although there was a discussion regarding the licensure status of the medical assistant, the plaintiff sought to hold the professional corporation vicariously liable for the actions of a physician it employed, not for the actions of the unlicensed medical assistant. *Flie*, unpub op at 2. Thus, this Court was not tasked with

evaluating whether a professional corporation could be held vicariously liable based solely upon its status as the employer of an employee who was not a licensed healthcare professional under MCL 600.5838a(1)(b). For those reasons, we decline to apply *Flie* here.

In sum, because a claim for medical malpractice cannot accrue against Spectrum either for its direct negligence in failing to train Zamarron or its vicarious liability for her allegedly negligent actions, plaintiff's claims raised in Count 1 of the complaint cannot sound in medical malpractice. The trial court did not err by granting partial summary disposition.

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

MURRAY, C.J., and RICK, J., concurred with M. J. KELLY, J.

PEOPLE v JOLY

Docket No. 354379. Submitted January 7, 2021, at Lansing. Decided March 11, 2021, at 9:25 a.m. Leave to appeal denied 508 Mich 971 (2021).

Nicole C. Joly was charged in the Jackson Circuit Court with one count of first-degree arson, MCL 750.72, and two counts of animal torture, MCL 750.50b. Defendant's home was intentionally set on fire, and his two dogs perished in the blaze. A detective investigated defendant as a suspect and obtained a warrant to search defendant's new home as well as his electronic devices. The detective forwarded the seized electronic devices to a laboratory for forensic analysis, and the analyst found an e-mail in which defendant had shared the names of the individuals to whom he had given his lawnmower and gas can. The detective believed that those items were connected to the fire, interviewed the individuals named in the e-mail, and retrieved the items. Defendant moved to suppress the e-mail and the derivative evidence obtained from it on the ground that the e-mail was protected by attorney-client privilege. The trial court, John G. McBain, J., determined that the e-mail was not privileged and denied the motion. Defendant sought leave to appeal, which the Court of Appeals granted. In an unpublished per curiam opinion issued on January 21, 2020 (Docket No. 348672), the Court of Appeals, BOONSTRA, P.J., and TUKEL and LETICA, JJ., concluded that the attorney-client privilege protected the e-mail and remanded the case to the trial court to address defendant's argument that there was a constitutional violation requiring suppression of the derivative evidence. On remand, the parties submitted a stipulated set of facts, including that the Abood Law Firm advised the Jackson County Prosecutor's office that defendant had retained the firm as legal counsel; that several months later, law enforcement executed a search warrant for a tablet computer; and that from this tablet, law enforcement intentionally pulled an e-mail between defendant and Jeffrey Abood, an employee of the Abood Law Firm. At the preliminary examination, the detective testified that he knew that defendant and defendant's attorney were parties to the e-mail. During the trial court's evidentiary hearing, defense counsel argued that defendant's right to remain silent

and his right to due process were violated by the breach of the attorney-client privilege and that suppression of the derivative evidence was the proper remedy. The prosecution claimed that defendant was asking the trial court to constitutionalize the attorney-client privilege. The trial court issued an opinion suppressing the derivative evidence, drawing guidance from two federal court decisions, *United States v Voigt*, 89 F3d 1050 (CA 3, 1996), and *United States v Kennedy*, 225 F3d 1187 (CA 10, 2000). Using the three-part test set forth in those decisions, the trial court found that the government was aware of the attorney-client relationship between defendant and the Abood Law Firm, that the government deliberately intruded into the attorney-client relationship, and that defendant would suffer actual and substantial prejudice if the evidence derived from the e-mail was not suppressed. Accordingly, the trial court held that the government's actions violated defendant's right to due process and that suppression of the derivative evidence was the proper remedy. The prosecution sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

1. Under Const 1963, art 1, § 17, and US Const, Ams V and XIV, § 1, a person cannot be deprived of life, liberty, or property without due process of law. In Michigan, the attorney-client privilege has both common-law and statutory roots, but it is not a constitutional right. Violation of the common-law privilege is not, by itself, tantamount to a due-process violation and alone does not warrant suppression of derivative evidence. Similarly, violation of a defendant's statutory privilege does not, by itself, warrant suppression of evidence. Federal caselaw, however, has long recognized that outrageous misconduct by the government in detecting and obtaining incriminating evidence can rise to the level of a due-process violation. In *Voigt*, the United States Court of Appeals for the Third Circuit set out the prevailing due-process test involving attorney-client communications. To make a colorable claim of "outrageousness," a defendant must show (1) the government's objective awareness of an ongoing, personal attorney-client relationship between the attorney and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice. Although courts have recognized that exclusion of the evidence might be an appropriate remedy when violation of the privilege rises to the level of fundamental unfairness, the remedy has rarely been used. The three-part test from *Voigt* was adopted here, with the observation that the judiciary is extremely hesitant to find law enforcement conduct so offensive

that it violates the Due Process Clause. In this case, the undisputed facts—as stipulated by both parties—confirmed that the government was objectively aware of the ongoing, personal attorney-client relationship between defendant and the Abood Law Firm. The law firm proactively advised the prosecutor's office of the representation, months before law enforcement executed the warrant and seized defendant's e-mails. The e-mail in question was clearly addressed to a member of the Abood Law Firm, and the detective testified that he knew that defendant and defendant's attorney were parties to the e-mail. Furthermore, the record showed that the government deliberately intruded into the attorney-client relationship; after learning of the privileged e-mail, the detective used the privileged information to further his investigation of defendant, obtaining key information. Finally, there was no question that defendant suffered actual and substantial prejudice because the lawnmower and gas can were critical pieces of evidence in the prosecution's case against defendant, and the prosecution made clear that this evidence would be offered at trial absent suppression. Accordingly, all three factors in the *Voigt* test were satisfied, and the government violated defendant's due-process right. In order to promote respect for constitutional rights, deter violations of the same, and preserve judicial integrity, the trial court's suppression of the evidence was appropriate in this case.

2. The prosecution also moved to remand for an evidentiary hearing. This matter, however, was already extensively litigated, having been the subject of a preliminary examination and a hearing on remand after the first appeal. Furthermore, the parties stipulated a detailed set of facts.

Trial court's suppression of the evidence affirmed; prosecution's motion to remand for an evidentiary hearing denied by separate order.

CONSTITUTIONAL LAW — CRIMINAL LAW — GOVERNMENT USE OF PRIVILEGED ATTORNEY-CLIENT COMMUNICATIONS — DUE-PROCESS VIOLATIONS — THREE-PART TEST.

Outrageous misconduct by the government in detecting and obtaining incriminating evidence can rise to the level of a due-process violation; to establish a due-process violation predicated on intrusion into privileged attorney-client communications, the defendant must show all of the following: (1) the government's objective awareness of an ongoing, personal attorney-client relationship between the attorney and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice; suppression of the evidence obtained by the govern-

> ment in violation of the defendant's right to due process may be an appropriate remedy in some cases in order to promote respect for constitutional rights, deter violations of the same, and preserve judicial integrity, particularly if the evidence to be suppressed is readily identified and isolated.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Jerard M. Jarzynka*, Prosecuting Attorney, and *Jerrold Schrotenboer*, Chief Appellate Attorney, for the people.

The Abood Law Firm (by *Andrew P. Abood*, *Carrie J. Koerber*, and *Austin A. Zima*) for defendant.

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

SWARTZLE, P.J. The government knowingly breached defendant's attorney-client privilege. Rather than try to mitigate the breach, the government deliberately used information obtained from the privileged communication to obtain incriminating physical evidence. The government then charged defendant with several crimes, and it made clear that it intended to use the physical evidence at trial. Thus, the record on appeal confirms that the government knew of the privilege; deliberately intruded into it; and defendant was actually and substantially prejudiced.

This constituted a violation of due process, not just the common-law privilege. Accordingly, for the reasons more fully explained below, we affirm the trial court's suppression of the physical evidence.

I. BACKGROUND

This is the second time that this case has been before our Court. As the prior panel of this Court explained,

> Defendant's home was intentionally set on fire and his two dogs perished in the blaze. Detective Aaron Grove investigated defendant as a suspect. Detective Grove obtained a warrant to search defendant's new home and the electronic devices of defendant and his partner, Christina Moore-Sharon. Detective Grove forwarded the seized electronic devices to a laboratory for forensic analysis. The analyst searched for certain words related to the arson and discovered an email. In that email, defendant shared the names of the individuals to whom he had given his lawnmower and gas can. Detective Grove had been searching for those items because he believed they were connected to the fire. Detective Grove interviewed the individuals named in the email and retrieved the gas can and lawnmower.
>
> Defendant moved to suppress the email on the ground that is [sic] was protected by the attorney-client privilege, as well as the derivative evidence obtained from it. The trial court determined that the email was not privileged and denied his motion. [*People v Joly*, unpublished per curiam opinion of the Court of Appeals, issued January 21, 2020 (Docket No. 348672) (*Joly I*), pp 1-2.]

The panel concluded that the attorney-client privilege protected the e-mail. *Id*. at 3. It remanded the case to the "trial court to address defendant's contention that there was a constitutional violation requiring suppression of the derivative evidence via the fruit-of-the-poisonous-tree doctrine." *Id*. at 4. The derivative evidence is the lawnmower and gas can.

On remand, the parties submitted a set of stipulated facts to the trial court. The stipulation and the undisputed record establish the following additional facts: In August 2017, the Jackson Police Department opened an investigation into the suspected arson. In September 2017, the Abood Law Firm advised the Jackson County Prosecutor's Office that defendant had retained the firm as legal counsel. Several

months later, in February 2018, law enforcement executed a search warrant for a tablet computer. From this tablet, law enforcement intentionally pulled an e-mail between defendant and Jeffrey John Abood, an employee of the Abood Law Firm. Abood's e-mail address was jabood@aboodlaw.com.

In September 2018, the government charged defendant with one count of first-degree arson, MCL 750.72, and two counts of animal torture, MCL 750.50b. At the preliminary examination, Detective Grove testified that the Michigan State Police (MSP) forensic laboratory produced the e-mail to him. Detective Grove testified that he knew that defendant and defendant's attorney were parties to the e-mail. As the parties stipulated, "That based on the foregoing, the Government was objectively aware of an ongoing personal attorney-client relationship" and "Detective Grove had not obtained a waiver of attorney-client privilege from the Defendant." The stipulation continued:

> 10. That because the email was from Defendant and addressed to jabood@aboodlaw.com, on its face, the email appeared to be covered by the attorney-client privilege. The technician intentionally opened and viewed the email and other emails of the Defendant. The substance of the email looked like it was attorney-client privileged subject matter. The technician intentionally turned that email over to law enforcement.
>
> 11. That Detective Grove testified that he knew that one of the parties on the email was Defendant's attorney. Detective Grove intentionally viewed the email, conducted an investigation based on its contents, included its contents in a written incident report, and turned it over to the Prosecutor's Office. Acting on information contained in the email, Detective Grove recovered certain evidence. Said evidence was used against Defendant at his preliminary examination.

> 12. That the People likewise intend to use the aforementioned evidence against Defendant at trial.

During the trial court's evidentiary hearing, defense counsel argued that defendant's rights to remain silent and due process were violated by the breach of the attorney-client privilege. Defense counsel argued that suppression of the derivative evidence was the proper remedy. The prosecutor rejoined that the prosecution did not intend to introduce the e-mail at trial. The prosecutor also claimed that defendant was asking the trial court to constitutionalize the attorney-client privilege.

The trial court issued a written opinion suppressing the derivative evidence. At the outset of its opinion, the trial court drew guidance from two federal appellate court decisions, *United States v Voigt*, 89 F3d 1050 (CA 3, 1996), and *United States v Kennedy*, 225 F3d 1187 (CA 10, 2000). Using the three-part test set forth in those decisions, the trial court first found as a factual matter that the government was aware of the attorney-client relationship between defendant and the Abood Law Firm. It next concluded, in its words, "easily" that "the government deliberately intruded" into the attorney-client relationship. The trial court noted that the detective admitted to knowing about the relationship, "and with that knowledge availed himself to the contents of the email, nonetheless." Finally, the trial court determined that defendant would suffer actual and substantial prejudice if the evidence derived from the email was not suppressed. The trial court recognized that, while the detective was aware of a lawnmower and gas can and that those items might be relevant to the investigation, "there is nothing to indicate that the state, except for information contained in the email, would have acquired the evidence."

(The prosecutor did not argue inevitable discovery.) Accordingly, although the trial court observed that the government's actions did not necessarily "shock it's [sic] conscience," the actions did violate defendant's right to due process under the test found in *Voigt* and *Kennedy*.

This interlocutory appeal followed.

II. ANALYSIS

On appeal, the prosecutor maintains that the trial court erred by "constitutionalizing" the attorney-client privilege. The trial court has done something that no other court in the nation has done—suppress derivative evidence, so-called "fruit of the poisonous tree," based solely on the violation of the common-law privilege. In doing so, the trial court misread and extended *Voigt* and its progeny beyond their intended scope. On these grounds, the prosecutor asks that we reverse the trial court. As we explain, however, the trial court did not do what the prosecutor claims it did, and, as the record makes quite clear, the government's actions here violated defendant's right to due process.

This Court reviews de novo a trial court's decision on a motion to suppress. *People v Hyde*, 285 Mich App 428, 436; 775 NW2d 833 (2009). We also review de novo questions of constitutional law. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). A trial court's findings of fact are reviewed for clear error. *Hyde*, 285 Mich App at 436.

A. THE ATTORNEY-CLIENT PRIVILEGE

Our judicial system is predicated on the adversarial process. Unlike some other legal systems, the American system, brought here by English colonists and

subsequently evolved over the centuries, "is grounded on competing factual and legal arguments presented by adverse parties." *In re Smith*, 335 Mich App 514, 521; 967 NW2d 857 (2021). The truth-seeking function of the judicial process depends on a party subjecting all of the evidence—its own and the opposing party's evidence—to the crucible of critical analysis, cross-examination, and forceful argument.

This adversarial process requires several components to achieve its public end. These include, among other things, a neutral arbiter, even-handed procedures, rational evidentiary rules, and well-prepared advocates. With respect to the latter, for an advocate to be well-prepared, the advocate must have the opportunity to be well-informed by the client.

The attorney-client privilege is one of the means for ensuring well-prepared, well-informed advocates. See *People v Johnson*, 203 Mich App 579, 585; 513 NW2d 824 (1994). "Indeed, the attorney-client privilege is based upon the wise policy that considers that the interests of society are best promoted by inviting the utmost confidence on the part of the client in disclosing secrets to this professional advisor." 81 Am Jur 2d, Witnesses, § 319, p 324. For this and other reasons, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co v United States*, 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981). As the U.S. Supreme Court has observed, "Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id*. The Supreme Court has further recognized that the privilege serves two related purposes: "[T]he privilege exists to protect not only the

giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id*. at 390. In other words, the attorney-client privilege is intended to protect both sides of the two-way street of information exchange between the attorney and client.

In Michigan, the attorney-client privilege has both common-law and statutory roots. The privilege has long been recognized as part of our state's common law. *Passmore v Estate of Passmore*, 50 Mich 626, 627; 16 NW 170 (1883). Additionally, our Legislature codified the privilege in the state's criminal code. MCL 767.5a(2). Our rules of evidence provide for the privilege, MRE 501, and our professional rules of conduct give practical guidance for the implementation of the privilege, MRPC 1.6 and 1.9.

This is all to say that the attorney-client privilege is a cornerstone of our system of jurisprudence.

B. ISSUES NOT ON APPEAL

We begin our analysis by noting what is *not* on the table. The prosecutor conceded before the trial court that the inevitable-discovery rule does not apply. See *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). The prosecutor has not argued that the e-mail between defendant and the Abood Law Firm was subject to the crime-fraud exception, see *People v Paasche*, 207 Mich App 698, 705; 525 NW2d 914 (1994), and our review of the record confirms that nothing in the communication was in furtherance of a crime. The prior panel held that the e-mail was privileged, and under the law-of-the-case doctrine, that conclusion is binding on us. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Relatedly, the canon of construction that the privilege

should be strictly construed does not apply, see *People v Warren*, 462 Mich 415, 427-428; 615 NW2d 691 (2000), contrary to the prosecutor's argument, because the privilege has already been construed by the prior panel, and that panel found that the privilege applied to the e-mail, *Joly I*, unpub op at 3-4. We do, however, agree with the prosecutor that the Sixth Amendment right to counsel is not implicated here, because all of the relevant events occurred before charges were brought against defendant. See *Rothgery v Gillespie Co*, 554 US 191, 198; 128 S Ct 2578; 171 L Ed 2d 366 (2008). And finally, the Fifth Amendment right against self-incrimination is not squarely before us, as the prosecutor has agreed that the e-mail is not admissible and there is no suggestion that either defendant or counsel will somehow be forced to provide testimony in this matter. See *People v Marsack*, 231 Mich App 364, 375; 586 NW2d 234 (1998).

This puts defendant's claim involving the right to due process of law squarely before us, and we turn to this next.

C. THE RIGHT TO DUE PROCESS OF LAW

As noted in the preceding section, the Sixth Amendment right to counsel does not attach until and unless criminal proceedings are initiated against a defendant. This does not, however, give the government license to ignore a defendant's right to due process prior to such proceedings, and this process may include certain aspects involving defense counsel. As explained by the *Kennedy* court, "[A] defendant may claim his or her rights under the Due Process Clause have been violated by [governmental] misconduct occurring prior to indictment." *Kennedy*, 225 F3d at 1194; see also *Coplon v United States*, 89 US App DC 103, 111-112; 191 F2d

749 (1951); *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004) (explaining that, although lower federal court decisions are not binding on state courts, they may be persuasive).

Under our state and federal Constitutions, a person cannot be deprived of life, liberty, or property without due process of law. Const 1963, art 1, § 17; US Const, Ams V and XIV, § 1. In the context of criminal proceedings, the "denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v California*, 314 US 219, 236; 62 S Ct 280; 86 L Ed 166 (1941). This is a relatively high bar—only if "the absence of that fairness fatally infected" the judicial process will there be a violation of due process. *Id*. In analyzing the issue, courts look to the "totality of circumstances." *Withrow v Williams*, 507 US 680, 689; 113 S Ct 1745; 123 L Ed 2d 407 (1993).

The prosecutor is correct to point out that the attorney-client privilege is not a constitutional right. See *Lange v Young*, 869 F2d 1008, 1012 n 2 (CA 7, 1989). Violation of the privilege is not, by itself, tantamount to a due-process violation and alone does not warrant suppression of derivative evidence. See *Marsack*, 231 Mich App at 379. Similarly, violation of a defendant's statutory privilege does not, by itself, warrant suppression of evidence, as the Legislature has not seen fit to provide that remedy for a breach of MCL 767.5a. See *People v Hawkins*, 468 Mich 488, 507; 668 NW2d 602 (2003). These arguments only go so far, however, as violation of the common-law/statutory privilege can be one part of a broader claim that the government has violated a defendant's right to due process. Caselaw has long recognized that outrageous misconduct by the government in detecting and obtaining incriminating

evidence can rise to the level of a due-process violation. See, e.g., *Rochin v California*, 342 US 165, 172-173; 72 S Ct 205; 96 L Ed 183 (1952); *Kennedy*, 225 F3d at 1194.

If a defendant's right to due process has been violated, then the next question is what remedy should be imposed? The remedy depends critically on the violation and context. If, for example, the due-process violation occurred during trial, then an appropriate remedy might be to order a new trial. When the violation occurs in the context of gathering pretrial evidence, courts have developed a remedy referred to as the "exclusionary rule." Applied to the states by the U.S. Supreme Court in *Mapp v Ohio*, 367 US 643, 656; 81 S Ct 1684; 6 L Ed 2d 1081 (1961), the exclusionary rule provides for the exclusion of evidence that was obtained as a result of a fundamentally unfair investigatory process, *United States v Taylor*, 764 F Supp 2d 230, 235 (D Me, 2011) (noting that, in a similar context, "if something was seized improperly, the remedy is suppression of that item and perhaps its fruit"). The purposes of the exclusionary rule are to compel respect for constitutional rights, deter violations of those rights, and preserve judicial integrity. See *Mapp*, 367 US at 656, 659.

Generally speaking, state and federal courts have used the exclusionary rule to remedy violations of due process for decades. With that said, in the more specific context of the attorney-client privilege, although courts have recognized that exclusion of evidence might be an appropriate remedy when violation of the privilege rises to the level of fundamental unfairness, the remedy has rarely needed to be used. We consider next several court decisions that have already considered this issue.

D. VIOLATION OF DUE PROCESS PREDICATED ON INTRUSION INTO ATTORNEY-CLIENT COMMUNICATIONS

In *Voigt*, the U.S. Court of Appeals for the Third Circuit set out the prevailing due-process test involving attorney-client communications. In that case, the court reviewed the existing caselaw and concluded that only a finding of "outrageousness" would warrant the exclusion of evidence for a violation of due process. *Voigt*, 89 F3d at 1067. To make a colorable claim of "outrageousness," a defendant must show all of the following: "(1) the government's objective awareness of an ongoing, personal attorney-client relationship between [the attorney] and the defendant; (2) deliberate intrusion into that relationship; and (3) actual and substantial prejudice." *Id*. (cleaned up).

Applying this three-part test, the court initially faulted the trial court for failing to hold a pretrial evidentiary hearing on defendant's claim that the government intentionally violated the attorney-client privilege and, in doing so, violated his right to due process. *Id*. at 1067-1068. The court went on and concluded, however, that the record at trial conclusively showed that the government was not aware of the relationship for part of the relevant time period, and with respect to the other relevant time period, defendant had not shown that the information was, in fact, privileged or that he was prejudiced in any way. *Id*. at 1068-1069. Given this, the court concluded that defendant had not satisfied the three-part test and affirmed his convictions.

Other courts faced with similar claims have rejected them based on the defendant's failure on one or more of the three parts. For example, the U.S. Court of Appeals for the First Circuit did not require suppression of evidence intercepted as a result of a breach of the

attorney-client privilege. *United States v Charles*, 213 F3d 10, 20 (CA 1, 2000). In *Charles*, law enforcement secured a wiretap of the defendant's telephone. *Id*. at 13. The court that authorized the wiretap prohibited law enforcement from intercepting privileged communications. *Id*. at 14. Nonetheless, a privileged communication was intercepted. *Id*. at 16. The officer who intercepted the call did not know at the time that the communication was privileged, as the officer did not hear the name of the defendant's attorney in the call. *Id*. Subsequent investigation revealed that the call was between the defendant and his attorney, and officers took steps to comply with the court's order involving privileged communication. *Id*. The defendant was subsequently indicted on the basis of information obtained via nonprivileged calls intercepted under the authorized wiretap. *Id*. The defendant moved to suppress all information obtained from the wiretap. *Id*. at 17-18.

On appeal, the First Circuit held that suppression was not proper because the privileged communication was intercepted innocently. *Id*. at 20. The court noted, however, that "in an extreme case of flagrant abuse of the law by state officials, where federal officials seek to capitalize on that abuse, this court might choose to exercise its supervisory powers by excluding ill-gotten evidence." *Id*. (cleaned up). The court highlighted that the officers acted in good faith and in an objectively reasonable manner. *Id*.

In another case, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's decision not to suppress evidence seized as a result of a breach of the attorney-client privilege. *United States ex rel Shiflet v Lane*, 815 F2d 457 (CA 7, 1987). In *Lane*, the defendant, seemingly at the direction of his attorney, told a private investigator (who worked for the attor-

ney) that he killed his wife and where he hid her body. *Id*. at 460. The private investigator then told a deputy sheriff this information. *Id*. at 460-461. But, after obtaining this privileged information, the government took affirmative steps to avoid using it when obtaining subsequent search warrants. *Id*. at 466. The court noted that "the government's efforts to avoid using privileged information in an underhanded way" distinguished that "case from situations in which law enforcement agents deliberately invade the attorney-client relationship." *Id*.

In *United States v Segal*, 313 F Supp 2d 774, 776 (ND Ill, 2004), the government seized the defendants' computers and boxes, which contained communications protected by the attorney-client privilege. When the defendants accused the government of reviewing privileged communications, the government acknowledged that agents might have inadvertently done so. *Id*. at 777-778. The federal district court declined to suppress the evidence because "there [was] no evidence that the Government deliberately read communications that it affirmatively knew were protected by Defendants' attorney-client privilege." *Id*. at 780. The court noted that the government was simply negligent and that the government did not intend to introduce any derivative evidence obtained as a result of a breach of the attorney-client privilege at trial. *Id*. at 780-781.

In a pre-*Voigt* case (cited by the Third Circuit in *Voigt*), a federal district court went beyond suppression and dismissed the indictment against the defendant because it found that the government's conduct "was so outrageous that it shocked the universal sense of justice." *United States v Marshank*, 777 F Supp 1507, 1524 (ND Cal, 1991). In *Marshank*, the defendant's own attorney, among other unethical actions, provided

information to the government and actively worked with the government against the defendant. *Id*. at 1512-1513, 1516-1517. Government attorneys never informed the court about their work with the defendant's attorney and aided the attorney in hiding his dealings with them. *Id*. at 1524. The district court noted that the government showed a "complete lack of respect for the constitutional rights of the defendant . . . and an utter disregard for the government's ethical obligations." *Id*.

Based on our review of this and other caselaw, we believe that the *Voigt* court's three-part test is a reasonable one, and we adopt it here as our own. We likewise agree with *Voigt*'s observation "that the judiciary is extremely hesitant to find law enforcement conduct so offensive that it violates the Due Process Clause." *Voigt*, 89 F3d at 1065. With this test and judicial restraint in mind, we consider the government's conduct in this case.

We recognize that the government's conduct was not as outrageous as that in *Marshank*; this does not mean, however, that the conduct was not "outrageous" in terms of the three-part *Voigt* standard. First, the undisputed facts—as stipulated to by both parties—confirm that the government was objectively aware of the ongoing, personal attorney-client relationship between defendant and the Abood Law Firm. The law firm proactively advised the prosecutor's office of the representation, months before law enforcement executed the warrant and seized defendant's e-mails. The e-mail in question was clearly addressed to a member of the Abood Law Firm, and the detective testified that he knew that defendant and defendant's attorney were parties to the e-mail.

Second, the record shows that the government deliberately intruded into the attorney-client relationship. Admittedly, the deliberate intrusion did not occur through, for example, recruiting defendant's lawyer to cooperate in an investigation of defendant. It appears, instead, that an MSP technician came across the privileged e-mail in the course of searching through other, nonprivileged e-mails. In this day and age of electronic communications, it is not particularly surprising that law enforcement will occasionally come across a privileged communication that is mixed in with other, non-privileged materials. There are systems that can be put in place to screen out privileged materials proactively, see *Taylor*, 764 F Supp 2d at 233-235, though no system is fool-proof. In the case where a potentially privileged communication does get caught up in an otherwise lawful search, there are also steps that can be taken to identify and segregate privileged information from the rest, including filter agents or taint teams. See *id*. at 234-235.

Thus, it was not the apparent *inadvertent* discovery of the privileged e-mail that is particularly troublesome here, but rather what happened *after* the discovery. After learning of the privileged e-mail, the detective did not attempt to segregate the e-mail, turn the case over to another detective or a different law-enforcement office, seek guidance from the court officer who signed the warrant, or work with the prosecutor to develop some other measure to separate the investigation from the privileged information that the detective learned from reading the e-mail (and could not realistically unlearn). Instead, the detective doubled down on the breach and used the privileged information to further his investigation of defendant. And the information in the e-mail was not incidental or only marginally material, but instead provided the key

information—the location—that the detective did not previously have about the lawnmower and gas can. There was, in other words, a direct link between the detective's reading of the e-mail and his retrieval of both pieces of evidence. This can only be characterized as a deliberate intrusion into the substance of the attorney-client relationship.

As to the third element, there is no question that defendant suffered actual and substantial prejudice. No one disputes that the lawnmower and gas can are critical pieces of evidence in the prosecutor's case against defendant, and the prosecutor has made clear that the evidence will be offered at trial absent suppression. There is nothing in the record to suggest that the detective would have discovered the location of the evidence absent the e-mail, and the prosecutor has not argued inevitable discovery. Given this, the third element is easily satisfied here.

This case presents a set of facts that other courts have acknowledged would have changed the outcome of their cases. In *Segal*, 313 F Supp 2d at 780-781, for example, the court noted that the government was simply negligent, not deliberate, in its intrusion into the attorney-client relationship. In *Lane*, 815 F2d at 466, the court noted that the government actively took steps to avoid using privileged information after another party—the investigator—passed on privileged information. In *Charles*, 213 F3d at 20, the court noted that the privileged information was innocently obtained and that the officers involved took steps to comply with court-ordered procedures. The *Charles* court also noted that the government in that case acted "in good faith and in an objectively reasonable manner." *Id*. (cleaned up).

The prosecutor on appeal does not seriously challenge the trial court's findings on any of the three elements of the *Voigt* test. Instead, the prosecutor argues that the trial court "constitutionalized" the attorney-client privilege, but as we have already explained, that is not what the trial court did. The privilege is not a constitutional right, and its breach alone does not warrant suppression of evidence, but this does not mean that the breach is irrelevant to a due-process challenge.

The prosecutor also argues that the trial court was confused because it did not actually conclude that the government acted outrageously here. The trial court did state that the government's actions did not "shock [the court's] conscience," but then the court continued with its analysis and considered the actions under the three-part *Voigt* test, and it ultimately concluded that defendant had met the test. Where the prosecutor misses the mark on appeal is insisting that defendant is required to show something more than the three elements of the *Voigt* test. This is not the case; the *Voigt* test is—itself—the measure of whether government action was outrageous or not. If a defendant satisfies all three elements, then the defendant has shown that the government's actions were "outrageous" for purposes of due process. There is, in short, no additional showing, no "part four" that needs to be proven, for a defendant to show that the government's actions were outrageous in this context.

E. REMEDY FOR THE DUE-PROCESS VIOLATION

As to the remedy for the violation of due process, we conclude that suppression of the physical evidence was appropriate here. The evidence obtained by the government in violation of defendant's right to due process is

readily identified and isolated, so suppression is a straightforward remedy. Moreover, with respect to the violation itself, although presented in a rather matter-of-fact set of stipulated facts, a moment's reflection shows how brazen the government's actions were in this case. The government knew of the attorney-client relationship; it searched defendant's e-mails knowing of this relationship; it found a privileged communication; it took the information gleaned from the e-mail and used the information for its investigation; based on the information, it found two critical pieces of physical evidence; and it informed the trial court that it intended to use the physical evidence at trial notwithstanding the breach. At each step, the government could have paused and made a different decision, one that respected the privilege or at least sought to mitigate the damage from the breach, but this it did not do.

For support against suppression of the evidence, the prosecutor cites *United States v Warshak*, 631 F3d 266, 294 (CA 6, 2010). But *Warshak*'s relevance to this case is limited. In that case, the U.S. Court of Appeals for the Sixth Circuit noted "that it is unwise to extend the fruit-of-the-poisonous-tree doctrine beyond the context of constitutional violations." *Id*. We agree with this statement, but unlike that case, here there was a constitutional violation—defendant's right to due process. Furthermore, the *Warshak* court made this statement within the context of a *Kastigar* challenge; it did not engage in its own due-process analysis. See *id*. at 293-295 (discussing *Kastigar v United States*, 406 US 441; 92 S Ct 1653; 32 L Ed 2d 212 (1972)). And critically, the court observed that there was "no indication that the government made any direct use of the privileged communications, either at trial or before the grand jury." *Id*. at 294-295.

The prosecutor rejoins that suppression of the derivative evidence will thwart the trial court's truth-finding function. Similar arguments have been made by courts and commentators about the attorney-client privilege in general. See, e.g., 81 Am Jur 2d, Witnesses, § 272, p 285 ("Although an evidentiary privilege must be applied so as to effectuate its purpose, it is to be applied cautiously and with circumspection because it impedes the truth-seeking function of the adjudicative process."). We are mindful of this concern, though we are also mindful that, in certain extraordinary circumstances, "excluding relevant evidence has a public good transcending the normally predominate principle of utilizing all rational means for ascertaining truth." *Id*. at 285-286. Furthermore, as the U.S. Supreme Court observed in *Swidler & Berlin v United States*, 524 US 399, 408; 118 S Ct 2081; 141 L Ed 2d 379 (1998), "[T]he loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. . . . [S]o the loss of evidence is more apparent than real." If courts are unwilling to suppress evidence when a breach of the attorney-client privilege results in a violation of due process, then the privilege's role in our adversarial system will be eroded. Accordingly, to promote respect for constitutional rights, deter violations of the same, and preserve judicial integrity, we conclude that the trial court properly suppressed the derivative evidence.

Finally, after oral argument on this second appeal, the prosecutor moved to remand for an evidentiary hearing. This matter has been extensively litigated, and the matter was the subject of a preliminary examination and hearing on remand after the first appeal. The parties stipulated to a detailed set of facts, and we are not inclined to give the prosecutor a third

bite at the evidentiary apple. For these reasons, we deny the prosecutor's motion in a separate order issued with this opinion.

III. CONCLUSION

Defendant and his attorney engaged in a privileged e-mail exchange. The government was aware of the attorney-client relationship, and it discovered the privileged e-mail while searching defendant's electronic tablet pursuant to a warrant. Rather than take steps to mitigate the breach of the privilege, the government exacerbated the breach by deliberately using the information gleaned from the e-mail to discover incriminating physical evidence. When pressed, the government made clear that it intended to use the physical evidence at trial, notwithstanding the breach. By these and the other actions detailed above, the government violated defendant's right to due process, and suppression of the physical evidence was an appropriate remedy.

Accordingly, we affirm the trial court's suppression of the physical evidence and, by separate order today, we deny the prosecutor's motion to remand for an evidentiary hearing. We do not retain jurisdiction.

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

CHRISTENSON v SECRETARY OF STATE

Docket No. 354037. Submitted March 2, 2021, at Grand Rapids. Decided March 11, 2021, at 9:30 a.m.

B. D. Christenson brought an action in the Ingham Circuit Court, seeking a writ of mandamus ordering defendants, the Secretary of State and the Board of State Canvassers (the Board), to accept plaintiff's nominating petitions for judicial office and to place plaintiff on the August 4, 2020 primary ballot. In 2020, plaintiff sought to run as a judicial candidate. He resided in Grand Blanc, Michigan, in Genesee County, and he had a law practice located in Flint, Michigan, also in Genesee County; plaintiff used the address of his law practice in the candidate portion of his nominating petitions. Plaintiff thereafter obtained a sufficient number of elector signatures on his nominating petitions and submitted them to the Secretary of State. Two months later, an opponent seeking the same judicial office filed a challenge to the validity of plaintiff's nominating petitions on the ground that plaintiff listed his business address but not his residential address as required by MCL 168.544c(1) of the Michigan Election Law, MCL 168.1 *et seq*. On May 26, 2020, the Bureau of Elections issued a staff report recommending that the Board conclude that plaintiff's nominating petitions were insufficient because plaintiff incorrectly provided the address of his business instead of his residential address. The Board held a meeting and adopted the staff report's recommendation, concluding that plaintiff's nominating petitions were insufficient and that plaintiff could not be certified as a candidate. Plaintiff brought the instant case, and on June 3, 2020, the circuit court transferred the case to the Court of Claims. The Court of Claims, MICHAEL J. KELLY, J., issued an opinion and order granting plaintiff's request for issuance of a writ of mandamus. The Court of Claims interpreted the plain language of MCL 168.544c(1) and agreed with plaintiff that a candidate's residential address is not required on a nominating petition; therefore, the Court of Claims held that plaintiff met the requirements for appearing on the ballot and ordered that defendants place plaintiff on the ballot. Defendants appealed.

The Court of Appeals *held*:

1. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy. However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review. In this case, while both the August 4, 2020 primary election and the November 2020 general election had already taken place, the proper interpretation of the terms "address" and "street address" in MCL 168.544c(1) was publicly significant because future candidates could be subject to challenges and potential disqualification from running in an election based on defendants' interpretation of the statute. Accordingly, because this appeal presented a publicly significant issue that could arise in the future yet evade judicial review, it was considered.

2. To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. MCL 168.544c(1) outlines the formal requirements for a nominating petition; it requires a candidate, among other things, to circulate for signing by the electors a nominating petition that states their name, address, and the office for which the petitions are signed. MCL 168.544c(1) does not specify that the address identified in the candidate portion of the nominating petition be the candidate's residential address. The certification of the circulator portion of nominating petitions, however, must include the name and signature of the circulator with the circulator's "(Complete Residence Address (Street and Number or Rural Route))." The Legislature plainly differentiated between the information required for identification of the candidate and identification of the circulator of the petition. Elsewhere in the Michigan Election Law, such as in MCL 168.558(2), the Legislature has specifically required candidates to identify their residential address. Accordingly, the plain and ordinary meaning of "address" and "street address" as used in MCL 168.544c(1) respecting candidates differs from the more specific term "residential address" as used in MCL 168.544c(1) respecting circulators. In this case, plaintiff identified himself, identified the office to which he aspired, and listed his business address in the candidate portion of the petition. In the circulator portion of the petition, plaintiff printed and signed his name identifying himself as the circulator and set forth his residential address.

Plaintiff therefore complied with the plain language of MCL 168.544c(1). The Court of Claims correctly interpreted and applied MCL 168.544c(1). The record reflected that plaintiff demonstrated his entitlement to mandamus relief, and defendants were duty-bound to certify his nominating petitions and place his name on the ballot.

Affirmed.

ELECTION LAW — FORMAL REQUIREMENTS FOR NOMINATING PETITIONS — CANDIDATES — WORDS AND PHRASES — "ADDRESS" AND "STREET ADDRESS."

MCL 168.544c(1) of the Michigan Election Law, MCL 168.1 *et seq*., outlines the formal requirements for a nominating petition; it requires a candidate, among other things, to circulate for signing by the electors a nominating petition that states their name, address, and the office for which the petitions are signed; the plain and ordinary meaning of "address" and "street address" as used in MCL 168.544c(1) respecting candidates differs from the more specific term "residential address" as used in MCL 168.544c(1) respecting circulators; MCL 168.544c(1) does not specify that the address identified in the candidate portion of the nominating petition be the candidate's residential address.

Cline, Cline & Griffin (by *Timothy H. Knecht*) for B. D. Christenson.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Heather S. Meingast* and *Erik A. Grill*, Assistant Attorneys General, for the Secretary of State and the Board of State Canvassers.

Before: REDFORD, P.J., and SAWYER and BOONSTRA, JJ.

REDFORD, P.J. Defendants, Michigan's Secretary of State and the Board of State Canvassers (the Board), appeal as of right the Court of Claims order granting plaintiff, B. D. Christenson, a writ of mandamus that ordered defendants to accept plaintiff's nominating petitions for judicial office and to place plaintiff on the August 4, 2020 primary ballot. We affirm.

I. BACKGROUND

In 2020, plaintiff sought to run as a nonincumbent judicial circuit judge candidate. He resided in Grand Blanc, Michigan, in Genesee County, and had a law practice located at 302 E. Court Street, Flint, Michigan, also in Genesee County. Plaintiff formed a candidate committee called "Friends of Bernhardt Chris Christenson" with a registered address of 302 E. Court Street, Flint, Michigan.

MCL 168.413(1) required plaintiff to file nominating petitions "containing the signatures, addresses, and dates of signing of a number of qualified and registered electors residing in the judicial circuit . . . ." Under MCL 168.544c, nominating-petition forms are required to state the nonpartisan judicial candidate's name and address. Plaintiff listed 302 E. Court Street, Flint, Michigan, the address of his law practice and committee headquarters, not his residential address.

On January 27, 2020, before gathering signatures from the electorate, plaintiff sent an e-mail to the Secretary of State requesting confirmation regarding the accuracy of his nominating petitions. He followed up two days later because he had not received a response and asked whether any corrections were required. The Secretary of State responded that his nominating petitions contained accurate information. Plaintiff, therefore, obtained signatures on his petitions, and on March 5, 2020, he submitted to the Secretary of State his nominating petitions with a sufficient number of elector signatures. Two months later, an opponent seeking the same judicial office filed a challenge to the validity of plaintiff's nominating petitions on the ground that plaintiff listed his business and candidate committee's address but not his residential address where he was registered to vote.

Plaintiff opposed the challenge on the ground that MCL 168.544c(1) did not require his residential address. On May 26, 2020, the Bureau of Elections issued a staff report recommending that the Board conclude that plaintiff's nominating petitions were insufficient because plaintiff incorrectly provided the address of his business instead of his residential address.

The Board held a meeting on May 29, 2020, to determine the sufficiency of petitions filed by candidates for the August primary election. Plaintiff argued that his nominating petitions complied with the plain meaning of MCL 168.544c(1) and also contended that the challenge to his nominating petitions had been untimely filed long after the April 28, 2020 deadline. The Board adopted the recommendation in the Bureau of Elections staff report, concluding that plaintiff's nominating petitions were insufficient and that, therefore, plaintiff could not be certified as a candidate for the August 4, 2020 primary election.

The Board's action prompted plaintiff to file under MCR 3.305 a complaint for a writ of mandamus and an ex parte motion for an order for defendants to show cause on the ground that plaintiff had a clear right to be added to the August 4, 2020 primary ballot. Among other reasons, plaintiff alleged that MCL 168.544c(1) did not require plaintiff to list his residential address in the heading of the nominating petitions and made no mention of requiring a candidate's "residence address" or "residential address"; whereas, the Legislature had used those terms in other provisions of the Michigan Election Law, MCL 168.1 *et seq*. On June 3, 2020, the circuit court transferred this case to the Court of Claims. Defendants opposed plaintiff's complaint for a writ of mandamus arguing that although MCL 168.544c(1) does not specify identification of a candi-

date's "residence" or "residential" address, the statute plainly requires the candidate's residential address on the nominating petitions to show signers that the candidate is a qualified and registered elector in the district in which the candidate is seeking office. Defendants further contended that the term is ordinarily understood as the candidate's residential address. Plaintiff filed a reply in which he argued that defendants were duty-bound to accept his nominating petitions because the petitions complied with the plain language of MCL 168.544c(1). Therefore, plaintiff argued that the court was required to issue a writ of mandamus ordering defendants to certify him as a candidate to be placed on the primary ballot.

On June 10, 2020, the Court of Claims issued an opinion and order granting plaintiff's request for issuance of a writ of mandamus. The Court of Claims interpreted the plain language of MCL 168.544c(1) and agreed with plaintiff that a candidate's residential address is not required on a nominating petition. The Court of Claims explained:

> [A] residential address is not required on a nominating petition. The statute uses the term "address" and "street address." There has been no dispute that, at least on some level, that which plaintiff provided, i.e., his office address, was an "address" and/or a "street address" that belonged to or was associated with plaintiff. And that is sufficient to effectively end the inquiry, because the plain language of the statute does not leave any room for concluding that the terms "address" or "street address" are subject to a qualifier such as *residential*, i.e., that the statute requires a "residential address." In this respect, there is no merit to defendants' contention that the purpose of placing a candidate's "address" or "street address" on the petitions is to verify that the candidate is qualified to seek office in the particular district or county. Such verification is already

> achieved by way of the AOI and the AOCQ,[1] which expressly request a "residential" address. These basic eligibility requirements are set forth in MCL 168.411, which is a section of Michigan Election Law that is separate and apart from the section at issue on nominating petitions, i.e., MCL 168.544c. As a result, the Court declines defendants' invitation to read into MCL 168.544c's use of the terms "address" or "street address" any qualifiers not expressly included by the Legislature.

The Court of Claims concluded that if the Legislature had intended for candidates to provide a "residence address" or "residential address" on nominating petitions, the Legislature would have expressly required candidates to do so. The Court of Claims held that plaintiff met the requirements for appearing on the ballot, that plaintiff had a clear right to be included on the August 4, 2020 primary ballot, and that defendants had a commensurate duty to place plaintiff on that ballot. Defendants now appeal.

II. STANDARD OF REVIEW

"We review de novo, as questions of law, whether defendants have a clear legal duty to perform and whether plaintiff has a clear legal right to performance of any such duty." *Berry v Garrett*, 316 Mich App 37, 41; 890 NW2d 882 (2016). "Related issues of statutory interpretation are also reviewed de novo." *Id*. "Contrastingly, because mandamus is a discretionary writ, we review for an abuse of discretion a trial court's decision regarding whether to grant mandamus relief." *Id*. (quotation marks and citations omitted).

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[1] AOI means "affidavit of identity," and AOCQ means "affidavit of constitutional qualification." The Court of Claims noted that "MCL 168.558(2), which outlines the requirements for an affidavit of identity, i.e., the document establishing eligibility for office, expressly uses the term 'residential address.' "

III. ANALYSIS

A. MOOTNESS

Preliminarily, we consider whether the matter has been rendered moot because both the August 4, 2020 primary election and the November 2020 general election have taken place. In *Barrow v Detroit Election Comm*, 305 Mich App 649, 659-660; 854 NW2d 489 (2014), this Court provided the following guidance:

> This Court's duty is to consider and decide actual cases and controversies. We generally do not address moot questions or declare legal principles that have no practical effect in a case. An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy. However, a moot issue will be reviewed if it is publicly significant, likely to recur, and yet likely to evade judicial review. [Quotation marks and citations omitted.]

We conclude that the proper interpretation of the terms "address" and "street address" in MCL 168.544c(1) is publicly significant because future candidates could be subject to challenges and potential disqualification from running in an election based on defendants' interpretation of the statute. Because this appeal presents a publicly significant issue that could arise in the future yet evade judicial review, we consider it.

B. MCL 168.544c

Defendants argue that the Court of Claims erred by granting plaintiff mandamus relief and ordering the Secretary of State to place plaintiff on the August 4, 2020 primary election ballot. We disagree.

In *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, 308 Mich App 498, 518-519; 866 NW2d 817 (2014), this Court explained:

> To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided. [Quotation marks and citations omitted.]

To determine whether plaintiff had a clear legal right to performance of the specific duty he sought, we must interpret MCL 168.544c. In *TCF Nat'l Bank v Dep't of Treasury*, 330 Mich App 596, 606; 950 NW2d 469 (2019), this Court summarized how courts must interpret statutes:

> Proper statutory interpretation requires examination of the specific statutory language to determine the legislative intent. *Universal Underwriters Ins Group v Auto Club Ins Ass'n*, 256 Mich App 541, 544; 666 NW2d 294 (2003). "If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted." *Id*. (quotation marks and citation omitted). In *Detroit Pub Sch v Conn*, 308 Mich App 234, 247-248; 863 NW2d 373 (2014), this Court explained:
>
> > When interpreting a statute, our goal is to give effect to the intent of the Legislature. The language of the statute itself is the primary indication of the Legislature's intent. If the language of the statute is unambiguous, we must enforce the statute as written. This Court reads the provisions of statutes rea-

> sonably and in context, and reads subsections of cohesive statutory provisions together. . . .
>
> [N]othing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself. Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself. [Quotation marks and citations omitted.]

"[W]e must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Nyman v Thomson Reuters Holdings, Inc*, 329 Mich App 539, 544; 942 NW2d 696 (2019) (quotation marks and citation omitted).

This appeal concerns the proper meaning of the words "address" and "street address" as set forth in MCL 168.544c(1). MCL 168.544a provides that, generally, "nonpartisan" nominating petitions shall be the same as "partisan" petitions as provided in MCL 168.544c. MCL 168.544c(1) outlines the formal requirements for a nominating petition and provides, in relevant part, as follows:

> A nominating petition must be 8-½ inches by 14 inches in size. On a nominating petition, the words "nominating petition" must be printed in 24-point boldface type. "We, the undersigned," et cetera must be printed in 8-point type. "Warning" and language in the warning must be printed in 12-point boldface type. The balance of the petition must be printed in 8-point type. The name, address, and party affiliation of the candidate and the office for which petitions are signed must be printed in type not larger than 24-point. The petition must be in the following form:

NOMINATING PETITION
(PARTISAN)

We, the undersigned, registered and qualified voters of the city or township of
(strike 1)
..... , in the county of .....
and state of Michigan, nominate,
..... ,
(Name of Candidate)
..... ,
(Street Address or Rural Route) (City or Township)
as a candidate of the ..... party for the office of ..... ,
..... ,
(District, if any)
to be voted for at the primary election to be held on the ..... day of ..... , 20..... .

* * *

CERTIFICATE OF CIRCULATOR

* * *

_____
(Printed Name and Signature of Circulator) (Date)

_____
(Complete Residence Address (Street and Number or Rural Route))
Do not enter a post office box

_____
(City or Township, State, Zip Code)

_____
(County of Registration, if Registered to Vote, of a Circulator who is not a Resident of Michigan)

We find nothing ambiguous about the statutory language the Legislature used in MCL 168.544c(1). The provision requires candidates, among other things, to circulate for signing by the electors a nominating petition that states their name, address, and the office for which the petitions are signed. MCL 168.544c(1) does not specify that the address identified in that

portion of the nominating petition be the candidate's residential address. The certification of the circulator portion of nominating petitions, however, must include the name and signature of the circulator with the circulator's "(Complete Residence Address (Street and Number or Rural Route))." The Legislature plainly differentiated between the information required for identification of the candidate and identification of the circulator of the petition. The Legislature qualified the address identification of circulators by specifically requiring the residential address, whereas candidates must merely state an address.

Elsewhere in the Michigan Election Law, the Legislature has specifically required candidates to identify their residential address. For example, in MCL 168.558(2), which addresses the requirements for an affidavit of identity, the Legislature stated that

> [a]n affidavit of identity must contain the candidate's name and residential address; a statement that the candidate is a citizen of the United States; the title of the office sought; a statement that the candidate meets the constitutional and statutory qualifications for the office sought[.]

"[W]hen the Legislature uses different words, the words are generally intended to connote different meanings." *Honigman Miller Schwartz & Cohn LLP v Detroit*, 505 Mich 284, 317; 952 NW2d 358 (2020) (quotation marks, citation, and emphasis omitted). "And this Court is well aware that it should avoid, when reasonably possible, the adoption of essentially synonymous definitions of distinctive terms without the most careful consideration of how those terms will come to be understood within a statutory scheme." *Id*. at 317-318. "Simply put, the use of different terms within similar statutes generally implies that different

meanings were intended. If the Legislature had intended the same meaning in both statutory provisions, it would have used the same word." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 14; 795 NW2d 101 (2009) (quotation marks and citation omitted).

Although the place at which a person has his or her mail and other communications sent is often a residence, the use of the word "address" does not necessarily require that it mean a residential address. "Residential address" and "address" can have two distinct meanings. Moreover, to read the terms "address" or "street address" to necessarily mean "residential address" would render the term "residential" mere surplusage. We conclude that the plain and ordinary meaning of "address" and "street address" as used in MCL 168.544c(1) respecting candidates differs from the more specific term "residential address" as used in MCL 168.544c(1) respecting circulators. We are not persuaded by defendants' argument that the phrase "Street Address or Rural Route" is synonymous with "residence address" or "residential address," because had the Legislature "intended the same meaning in both statutory provisions, it would have used the same word." *US Fidelity & Guaranty Co*, 484 Mich at 14.

In this case, plaintiff's nominating petition appeared, in relevant part, as follows:

INSTRUCTIONS ON REVERSE SIDE

NOMINATING PETITION
(COUNTYWIDE NON-PARTISAN)

* The "Countywide" Non-Partisan Petition form may be used by any non-partisan candidate. Exceptions: the form may not be used by a candidate who seeks a school board position, intermediate school board position, community college trustee position, library board position or a district library board position.

We, the undersigned, registered and qualified voters of the County of GENESEE and State of Michigan, nominate BERNHARDT CHRISTENSON (Name of Candidate) 302 E. COURT ST. (Street Address or Rural Route)
FLINT (City or Township), as a candidate for the office of* Judge 7th CIRCUIT COURT, REGULAR TERM - NON-INCUMBENT POS. TOTAL 7 (Title of Office/Term Expiration Date) 000066 (District, if any)
to be voted for at the Primary Election to be held on the 4th day of AUGUST in 20

WARNING–A PERSON WHO KNOWINGLY SIGNS MORE PETITIONS FOR THE SAME OFFICE THAN THERE ARE PERSONS TO BE ELECTED TO THE OFFICE, SIGNS A PETITION MORE THAN ONCE, OR SIGNS A NAME OTHER THAN HIS OR HER OWN IS VIOLATING THE PROVISIONS OF THE MICHIGAN ELECTION LAW.

	SIGNATURE	PRINTED NAME	STREET ADDRESS OR RURAL ROUTE	NAME OF CITY OR TOWNSHIP	ZIP CODE	DATE OF SIGNING MO	DAY	YEAR
1.								
2.								
3.								
4.								
5.								
6.								
7.								
8.								
9.								
10.								

CERTIFICATE OF CIRCULATOR

The undersigned circulator of the above petition asserts that he or she is 18 years of age or older and a United States citizen; that each signature on the petition was signed in his or her presence; that he or she has neither caused nor permitted a person to sign the petition more than once and has no knowledge of a person signing the petition more than once; and that, to his or her best knowledge and belief, each signature is the genuine signature of the person purporting to sign the petition, the person signing the petition was at the time of signing a registered elector of the City or Township indicated preceding the signature, and the elector was qualified to sign the petition.

☐ If the circulator is not a resident of Michigan, the circulator shall make a cross (X) or check mark (✓) in the box provided, otherwise each signature on this petition sheet is invalid and the signatures will not be counted by a filing official. By making a cross or check mark in the box provided, the undersigned circulator asserts that he or she is not a resident of Michigan and agrees to accept the jurisdiction of this state for the purpose of any legal proceeding or hearing that concerns a petition sheet executed by the circulator and agrees that legal process served on the Secretary of State or a designated agent of the Secretary of State has the same effect as if personally served on the circulator.

WARNING–A CIRCULATOR KNOWINGLY MAKING A FALSE STATEMENT IN THE ABOVE CERTIFICATE, A PERSON NOT A CIRCULATOR WHO SIGNS AS A CIRCULATOR, OR A PERSON WHO SIGNS A NAME OTHER

CIRCULATOR – DO NOT SIGN OR DATE CERTIFICATE UNTIL AFTER CIRCULATING PETITION.

(Signature of Circulator) (Date) 02 / 16 / 2020

BERNHARDT CHRISTENSON (Printed Name of Circulator)

[redacted] (Complete Residence Address [Street and Number or Rural Route] - [Do not enter a post office box])

GRAND BLANC MI 48439 10 (City or Township, State, Zip Code)

GENESEE (County of Registration, if Registered to Vote, of a Circulator who is not a Resident of Michigan)

The image shows that in the candidate portion of the petition, plaintiff identified himself, identified the office to which he aspired, and listed his business address. And it shows that in the circulator-certification portion of the petition, plaintiff printed and signed his name identifying himself as the circulator and set forth his residential address. Plaintiff, therefore, complied with the plain language of MCL 168.544c(1).[2]

We hold that the Court of Claims correctly interpreted and applied MCL 168.544c(1). The record re-

[2] Defendants argue that "Street Address or Rural Route" must mean "residence address" because the same statutory terminology is used for electors who sign a candidate's nominating petition, see MCL 168.544c(2), and because defendants interpret the language in that context to mean that the elector must supply his or her "residence address." We are not persuaded. As we have explained, the plain language of the statute is to the contrary. And the accuracy of defendants' interpretation of the statutory requirements for electors who sign nominating petitions is not before us.

flects that plaintiff demonstrated his entitlement to mandamus relief. He complied with the plain language requirements of MCL 168.544c(1), and his nominating petitions were sufficient to place his name on the August 4, 2020 primary ballot. Defendants, therefore, were duty-bound to certify his nominating petitions and place his name on the August 4, 2020 primary ballot. The Court of Claims did not err by ordering defendants to do so.

Affirmed.

SAWYER and BOONSTRA, JJ., concurred with REDFORD, P.J.

HOWARD v MECOSTA COUNTY CLERK

Docket No. 353976. Submitted March 3, 2021, at Grand Rapids. Decided March 11, 2021, at 9:35 a.m.

Jesse J. Howard brought an action in the Mecosta Circuit Court appealing the Mecosta County Clerk's denial of his application for a concealed pistol license. Defendant denied the application under MCL 28.425b(7)(f), which prohibits granting the license to an applicant who has been convicted of a felony. On appeal in the circuit court, plaintiff argued that because the circuit court had earlier reinstated his right to possess firearms, his previous felony convictions no longer precluded him from obtaining a concealed pistol license. The court, Scott P. Hill-Kennedy, J., disagreed and affirmed the clerk's decision. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 28.425b(7)(f), a county clerk is precluded from issuing a concealed pistol license to any person who has been convicted of a felony. A person who has lost certain firearms-related rights may petition the court to have those rights restored under MCL 28.424, but MCL 28.424 does not expressly include the right to obtain a concealed pistol license. Likewise, MCL 28.425b(7)(f) does not make an exception for convicted felons whose other firearms-related rights have been restored.

2. Under MCL 28.426(2), a county clerk "shall not" issue an application to carry a concealed pistol "unless" certain conditions have been met. Plaintiff argued that because he met those conditions, the clerk was required to grant the application, but the language of MCL 28.426(2) is restrictive, not obligatory. Because MCL 28.425b(7)(f) prohibited plaintiff from obtaining a concealed pistol license, it was irrelevant that he met other conditions necessary to obtaining that license.

Affirmed.

1. LICENSES — WEAPONS — CONCEALED PISTOLS.

Under MCL 28.425b(7)(f), a convicted felon is precluded from obtaining a concealed pistol license even when the circuit court

has restored the applicant's other firearms-related rights under MCL 28.424.

2. LICENSES — WEAPONS — CONCEALED PISTOLS.

MCL 28.426 provides additional restrictions on the issuance of a concealed pistol license; a plaintiff who is prohibited from obtaining a concealed pistol license under MCL 28.425b(7)(f) cannot obtain the license even if they meet the conditions set forth in MCL 28.426.

Matthew R. Newburg for plaintiff.

Brian E. Thiede, Prosecuting Attorney, for defendant.

Before: REDFORD, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM. Plaintiff appeals the circuit court decision that affirmed defendant's denial of plaintiff's application for a concealed pistol license. Before applying for a concealed pistol license, plaintiff had been convicted of a felony, but the circuit court had granted plaintiff's petition to restore certain firearms rights under MCL 28.424. Plaintiff argues that the restoration of his rights under that statute included the right to obtain a concealed pistol license. We disagree and affirm.

Plaintiff's argument centers largely on whether, despite the restoration of his firearm rights under Michigan law, he is still prohibited under federal law from possessing a firearm. There was an extensive discussion of this issue in the circuit court, as well as in plaintiff's brief on appeal to this Court, and there seems to be some question regarding whether a restoration of rights under Michigan law is sufficient to restore rights under federal law. But we decline to consider plaintiff's discussion and analysis of his status under federal law because there is a much more

straightforward issue here: defendant is a convicted felon, and the concealed pistol statute precludes any convicted felon from receiving a concealed pistol license.

MCL 28.425b(7)(f) provides in pertinent part:

> (7) The county clerk shall issue . . . a license to an applicant to carry a concealed pistol . . . if the county clerk determines that all of the following circumstances exist:
>
> * * *
>
> (f) . . . the applicant has never been convicted of a felony in this state . . . .

Plaintiff does not dispute that he was, in fact, previously convicted of a felony. Accordingly, plaintiff was disqualified from obtaining a concealed pistol license.

Plaintiff argues that the restoration of his right to possess a firearm also restored his right to obtain a concealed pistol license. We disagree. Plaintiff points to the fact that the application for a concealed pistol license asks whether the applicant has been convicted of a felony as a juvenile, but not as an adult. He argues that the application does not ask about adult felony convictions because unless an applicant's rights have been restored under MCL 28.424, that applicant could not possess a pistol at all. Plaintiff further explains his theory by pointing out that MCL 28.424 does not mention juveniles at all. We fail to see the significance of that distinction. Regardless of whether the application asks about adult felony convictions, MCL 28.425b(7)(f) expressly forbids a convicted felon from obtaining a concealed pistol license.

Plaintiff further argues that interpreting MCL 28.425b(7)(f) as prohibiting any person convicted of a

felony from obtaining a concealed pistol license would render nugatory MCL 28.424 and MCL 28.426. We disagree.

In interpreting a statute, we try to give effect to the legislative intent; to discern that intent, we first look at the plain language of the statute. *People v Miller*, 498 Mich 13, 22-23; 869 NW2d 204 (2015). Where that language is clear and unambiguous, we apply the statute as written. *Id*. at 23. Moreover, we must give effect to the entire statute and not interpret it in a manner that would render part of it nugatory. *Id*. at 25.

With respect to restoring firearms rights, MCL 28.424 provides in relevant part as follows:

> (1) An individual who is prohibited from possessing, using, transporting, selling, purchasing, carrying, shipping, receiving, or distributing a firearm under section 224f(2) of the Michigan penal code, 1931 PA 328, MCL 750.224f, may petition the circuit court in the county in which he or she resides for restoration of those rights.
>
> * * *
>
> (4) The circuit court shall, by written order, restore the rights of an individual to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm or to possess, use, transport, sell, carry, ship, or distribute ammunition if the circuit court determines, by clear and convincing evidence, that all of the following circumstances exist:
>
> (a) The individual properly submitted a petition for restoration of those rights as provided under this section.
>
> (b) The expiration of 5 years after all of the following circumstances:
>
> (i) The individual has paid all fines imposed for the violation resulting in the prohibition.

(ii) The individual has served all terms of imprisonment imposed for the violation resulting in the prohibition.

(iii) The individual has successfully completed all conditions of probation or parole imposed for the violation resulting in the prohibition.

(c) The individual's record and reputation are such that the individual is not likely to act in a manner dangerous to the safety of other individuals.

Plaintiff makes no meaningful argument why denying a convicted felon the right to obtain a concealed pistol license would render that section nugatory. Having had his rights restored under MCL 28.424, plaintiff now enjoys a number of rights that he had previously lost, such as the right to own and possess a firearm. The fact that MCL 28.425b(7)(f) prohibits him from obtaining a concealed pistol license does not mean that MCL 28.424 is meaningless to plaintiff. Moreover, MCL 28.424 does not expressly state that the right to obtain a concealed pistol license is restored, nor does MCL 28.425b(7)(f) make an exception for those applicants that have had their firearm rights restored. The two statutes simply are not in conflict.

Plaintiff also argues that "MCL 28.426 requires the County Clerk to issue Mr. Howard his concealed pistol license." Plaintiff seems to confuse a restriction on the county clerk in issuing a concealed pistol license with an obligation to issue a license. But MCL 28.426 does not *require* the issuance of any concealed pistol license:

(1) An issuing agency shall not issue a license to an applicant under section 2 unless both of the following apply:

(a) The issuing agency has determined through the federal national instant criminal background check sys-

> tem that the applicant is not prohibited under federal law from possessing or transporting a firearm.
>
> (b) If the applicant is not a United States citizen, the issuing agency has verified through the United States Immigration and Customs Enforcement databases that the applicant is not an illegal alien or a nonimmigrant alien.
>
> (2) A county clerk shall not issue a license to an applicant under section 5b unless both of the following apply:
>
> (a) The department of state police, or the county sheriff under section 5a(4), has determined through the federal national instant criminal background check system that the applicant is not prohibited under federal law from possessing or transporting a firearm.
>
> (b) If the applicant is not a United States citizen, the department of state police has verified through the United States Immigration and Customs Enforcement databases that the applicant is not an illegal alien or a nonimmigrant alien.

Subsections (1) and (2) both begin with the phrase "shall not issue a license . . . unless . . . ." Thus, it is restrictive language, rather than obligatory language. Simply put, MCL 28.426 provides additional restrictions on the issuance of a concealed pistol license. And because plaintiff is prohibited from obtaining a concealed pistol license under MCL 28.425b(7)(f), MCL 28.426 is not important to whether plaintiff is entitled to receive a concealed pistol license.[1] Nor is plaintiff's extensive discussion of federal law necessary to our conclusion.

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[1] Plaintiff also discusses whether the clerk erroneously informed him that, under federal law, plaintiff could only possess certain types of firearms, such as muzzleloaders. Whether the clerk should have given plaintiff legal advice and whether that advice was accurate does not affect whether plaintiff is permitted to obtain a concealed pistol license.

In conclusion, the plain language of MCL 28.425b(7)(f) prohibits the issuance of a concealed pistol license to a person who has been convicted of a felony. That provision is not altered by MCL 28.424 or MCL 28.426. Plaintiff admits that he was convicted of two felonies. And he does not argue that those convictions have been set aside, expunged, or otherwise nullified. Accordingly, defendant correctly denied the issuance of a concealed pistol license.

Affirmed. Defendant may tax costs.

REDFORD, P.J., and SAWYER and BOONSTRA, JJ., concurred.

FARISH v DEPARTMENT OF TALENT & ECONOMIC DEVELOPMENT

Docket No. 350866. Submitted July 7, 2020, at Detroit. Decided March 18, 2021, at 9:00 a.m. Leave to appeal denied 508 Mich 1019 (2022).

Dock Farish, Kebeh Gibson, Millie Nichols, and others sued the Department of Talent and Economic Development and others in the Court of Claims to recover unemployment benefits that defendants had deducted to recoup prior overpayments, penalties, and interest. Plaintiffs claimed that the deductions violated MCL 421.30 and MCL 421.62 of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*., as well as federal law governing state unemployment systems that receive federal funds. The Court of Claims, CYNTHIA DIANE STEPHENS, J., granted summary disposition for defendants. Plaintiffs appealed in the Court of Appeals, and the Court of Appeals affirmed the Court of Claims' conclusion that state law had not been violated but reversed the court's dismissal of plaintiffs' claim that the deduction of penalties and interest violated federal law, specifically 42 USC 503 of the Social Security Act (SSA), and therefore constituted conversion. *Farish v Dep't of Talent & Economic Dev*, unpublished per curiam opinion of the Court of Appeals, issued December 11, 2018 (Docket No. 341350). The Court of Appeals remanded for the Court of Claims to consider whether administrative guidance from the United States Department of Labor indicating that deductions from benefits to cover penalties and interest (as opposed to only actual overpayments) were impermissible under federal law. On remand, the Court of Claims concluded that 42 USC 503 was unambiguous and that the Department of Labor's interpretation of the statute was therefore irrelevant and not entitled to deference. The court also ruled that plaintiffs' conversion claims were barred by governmental immunity. Plaintiffs appealed.

The Court of Appeals *held*:

1. Under the SSA, the federal government provides funding for state unemployment compensation programs, subject to the states meeting certain requirements. 42 USC 503(a) provides

that the Secretary of Labor may not extend payment of federal funds unless the state's unemployment compensation law provides administrative methods reasonably calculated to ensure full payment of unemployment compensation when due. In addition, money from the fund must be expended in the payment of unemployment compensation, subject to certain exceptions. One such exception, 42 USC 503(a)(5), provides that amounts may be deducted from unemployment benefits to repay overpayments as provided by 42 USC 503(g). Subsection (g) directs the state to deduct from unemployment benefits otherwise payable to an individual an amount *equal* to any overpayment of benefits previously made and not recovered. In an Unemployment Insurance Program Letter (UIPL) sent to state employment security agencies in 1989, UIPL No. 45-89, the Department of Labor advised that permissible deductions from unemployment compensation payments were limited to the offset of the overpayment and did not include penalties and interest. 42 USC 503(g) is silent as to whether a state is precluded from making deductions for amounts other than overpayments. Yet when viewed as a whole, 42 USC 503 unambiguously precludes states from using unemployment funds to satisfy penalties and interest assessed against benefit recipients. Although 42 USC 503 is silent as to deductions for penalties and interest, such deductions nevertheless violate the general directive in 42 USC 503(a)(5) that unemployment funds must be used to pay benefits. Alternatively, even if the statute was ambiguous, the reasoning expressed in UIPL No. 45-89 is persuasive and is entitled to deference under *Skidmore v Swift & Co*, 323 US 134 (1944).

2. Plaintiffs argued that they had a private cause of action for money damages or remittance of the improper deductions under 42 USC 503. Federal caselaw holding that there is a private cause of action under 42 USC 503 was well settled. However, these cases have only allowed the plaintiffs to seek declaratory and injunctive relief, not money damages. Because there was no reason to infer a cause of action under 42 USC 503 for money damages or a remittance of improperly withheld funds, plaintiffs did not have a money-damages remedy for defendants' violation of the statute. Plaintiffs were permitted, however, to seek declaratory and injunctive relief as to whether defendants may continue to reduce benefits to collect interest and penalties, pursuant to federal caselaw, and MCR 2.605(A)(1) also allowed plaintiffs to pursue declaratory relief.

3. Plaintiffs asserted claims of common-law and statutory conversion against defendants for making deductions from unem-

ployment compensation benefits in violation of federal law. Both common-law and statutory conversion are torts. The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., broadly shields governmental agencies from tort liability, and the Court of Claims properly dismissed plaintiffs' conversion claims pursuant to the GTLA. Defendants were engaged in a governmental function, i.e., the administration of unemployment insurance benefits, when they deducted penalties and interest from plaintiffs' benefits. Although this was a violation of federal law, there was no dispute that defendants' actions were authorized by the MESA. Therefore, the deductions were not ultra vires activity. Plaintiffs also argued that because they sought restitution rather than damages, their suit did not sound in tort and was not barred by immunity. Plaintiffs cited caselaw in support of their argument holding that a claim of unjust enrichment did not shield the governmental defendant from tort liability. But plaintiffs did not argue that the state was not entitled to collect penalties and interest, only that the method used to recoup those sums violated federal law. Receipt of sums to which the state is entitled is not unjust enrichment, and 42 USC 503 does not bar a state from imposing or collecting those sums, except by the means at issue. Additionally, contrary to plaintiffs' assertion that the GTLA does not provide immunity from suits for intentional torts, the Michigan Supreme Court has held that there is no "intentional tort" exception to governmental immunity. Plaintiffs' argument that defendants were not immune from conversion claims also failed. In support of this argument, plaintiffs cited cases decided before July 1, 1965, involving municipalities and counties, which are not included in the GTLA's definition of "state." Further, the pre-1965 cases cited by plaintiffs did not support their argument that conversion claims are excepted from the GTLA.

Decision affirmed in part, reversed in part, and case remanded.

RIORDAN, J., concurring in part and dissenting in part, would have affirmed the Court of Claims' ruling and did not agree that the Department of Labor's guidance in UIPL No. 45-89 regarding the interpretation of 42 USC 503(g) was entitled to deference. He noted that 42 USC 503(g) does not contain a limitation barring states from deducting penalties and interest for unemployment compensation benefits. When read as a whole, the statutory scheme as expressed in 42 USC 503(m) and 26 USC 6402(f)(4) indicated that states may deduct penalties and interest from unemployment benefits, even in cases in which fraud was not alleged. Judge RIORDAN disagreed with the majority's contention

that allowing deductions to recoup penalties and interest due to overpayment was inconsistent with the general rule of 42 USC 503(a)(5) requiring money from a state's unemployment insurance fund to be expended in the payment of unemployment compensation; *reducing* unemployment benefits paid to claimants by deducting penalties and interest would result in money being retained in the fund and thus would not violate the statute's general directive. For this reason, no specific statutory allowance for the deduction of payments for penalties and interest from the unemployment fund was necessary. Because UIPL No. 45-89 did not describe any ambiguity in the statute or provide any persuasive authority for its interpretation, it was not persuasive under *Skidmore* or entitled to deference. Moreover, 42 USC 503 was not ambiguous, and UIPL No. 45-89 conflicted with the plain language of the statute.

SOCIAL SECURITY ACT — UNEMPLOYMENT INSURANCE BENEFITS — DEDUCTIONS TO RECOUP PENALTIES AND INTEREST.

42 USC 503 of the federal Social Security Act does not permit the state to deduct penalties and interest assessed due to overpayment of prior unemployment compensation from current unemployment benefits; federal law provides for a private cause of action to enforce the statute, but only permits declaratory and injunctive relief.

Excolo Law, PLLC (by *Daniel W. Weininger* and *Keith L. Altman*) for plaintiffs.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Kimberly K. Pendrick*, Assistant Attorney General, for defendants.

Amicus Curiae:

Workers' Rights Clinic of the University of Michigan Law School (by *Andrea Van Hoven*) for the Center for Civil Justice.

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

SHAPIRO, J. The question before us in this case is whether the Michigan Unemployment Insurance Agency (UIA) may deduct sums from a recipient's pres-

ent benefits in order to collect penalties and interest assessed because of a prior overpayment. We conclude that it may not. However, we further conclude that plaintiffs' conversion and other damage claims fail and that they may only obtain declaratory and injunctive relief. We remand for entry of orders providing such relief.

I. BACKGROUND

The Michigan Employment Security Act (MESA), MCL 421.1 *et seq*., provides that if an individual is determined to have obtained benefits to which they are not entitled, the agency may recover a sum equal to the overpayment plus interest in one of three ways: "deduction from benefits or wages payable to the individual, payment by the individual in cash, or deduction from a tax refund payable to the individual . . . ." MCL 421.62(a). A deduction from benefits "is limited to not more than 50% of each payment due the claimant," MCL 421.62(a), but that cap does not apply when the restitution sought by the agency results from the claimant's "intentional false statement, misrepresentation, or concealment of material information," MCL 421.62(b). MESA authorizes the assessment of penalties for such conduct. See MCL 421.54(b).

At the time they brought suit, plaintiffs' current unemployment benefits were being deducted in whole or in part to recoup prior overpayments, penalties, and interest. Plaintiffs claimed that the deductions violated state law as set forth in MCL 421.30[1] and MCL 421.62,

[1] MCL 421.30 provides:

> All rights to benefits shall be absolutely inalienable by any assignment, sale, garnishment, execution or otherwise, and, in case of bankruptcy, the benefits shall not pass to or through any

as well as federal law governing state unemployment systems that receive federal funds. Defendants moved for summary disposition, arguing that the deductions from plaintiffs' benefits were authorized by the aforementioned state statutes and not precluded by federal law. The Court of Claims dismissed plaintiffs' suit in its entirety and plaintiffs appealed. *Farish v Dep't of Talent & Economic Dev*, unpublished per curiam opinion of the Court of Appeals, issued December 11, 2018 (Docket No. 341350) (*Farish I*). In that first appeal, we affirmed the trial court's conclusion that state law was not violated and also affirmed dismissal of the procedural due-process claim, a standalone count for equitable relief,[2] and all claims against the individual defendants. *Id*. at 2-7.

However, we reversed the dismissal of plaintiffs' claim that deducting penalties and interest violated federal law, specifically 42 USC 503 of the Social Security Act, and therefore constituted conversion. The Court of Claims had determined that the deduction of penalties and interest from plaintiffs' unemployment benefits did not violate the federal statute. However, we remanded for the court to consider certain administrative guidance promulgated by the United States Department of Labor indicating that such deductions were impermissible under federal law so states that

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trustees or other persons acting on behalf of creditors: Provided, That this section shall not prohibit the use of any remedy provided by law insofar as the collection of obligations incurred for necessaries furnished to the recipient of such benefits or his dependents during the time when such individual was unemployed is concerned.

[2] In *Farish I*, we explained that equitable relief was a remedy, not a cause of action, so summary disposition of plaintiffs' equitable-relief claim was proper. *Farish I*, unpub op at 7. This does not mean, however, that plaintiffs are foreclosed from an equitable remedy if entitled to such relief under a different cause of action.

deduct past interest and penalties from future benefits (as opposed to only the actual overpayments) may not be certified for federal assistance in funding their unemployment programs. See *Farish I*, unpub op at 5-6. On remand, the court again concluded that the statute was unambiguous and that the Department of Labor's interpretation of the statute was therefore irrelevant and entitled to no deference. The court also ruled that governmental immunity barred plaintiffs' conversion claims.[3] Plaintiffs again appealed in this Court.[4]

II. ANALYSIS

A. INTERPRETATION OF 42 USC 503

The federal Social Security Act governs various social welfare programs, including state unemployment com-

[3] We review de novo grants of summary disposition. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006). The Court of Claims granted summary disposition of plaintiffs' 42 USC 503 claim under MCR 2.116(C)(8) (failure to state a claim). Under Subrule (C)(8), we accept all well-pleaded factual allegations as true to determine the legal sufficiency of the complaint. See *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Questions of statutory interpretation are also reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). The goal when interpreting federal statutes is to give effect to Congress's intent. *Johnson v Johnson*, 329 Mich App 110, 119; 940 NW2d 807 (2019). Statutes are reviewed "as a whole, reading individual words and phrases in the context of the entire legislative scheme." *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 552; 886 NW2d 113 (2016). "Statutory language should be construed reasonably, keeping in mind the purpose of the act." *People v Zitka*, 325 Mich App 38, 49; 922 NW2d 696 (2018) (quotation marks and citation omitted). When reviewing a motion under MCR 2.116(C)(7) (governmental immunity), the parties may introduce evidence to support their claims or defenses, and "[t]he contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119.

[4] The Center for Civil Justice filed an amicus brief in support of plaintiffs' brief regarding the interpretation of 42 USC 503.

pensation, 42 USC 501 through 42 USC 506. For all programs, the federal government provides funding for the states on the condition that the states meet and follow certain requirements. The requirements to receive federal funding for unemployment insurance are set forth in 42 USC 503(a). First, the Secretary of Labor may not certify payment unless the state's law provides administrative methods "reasonably calculated to insure full payment of unemployment compensation when due[.]" 42 USC 503(a)(1). In addition, all money withdrawn from a state unemployment fund must, with certain stated exceptions, be expended "in the payment of unemployment compensation." 42 USC 503(a)(5). The exception relevant to this appeal provides "[t]hat amounts may be deducted from unemployment benefits and used to repay overpayments as provided in subsection (g)[.]" 42 USC 503(a)(5). In turn, Subsection (g) provides in pertinent part:

> A State shall deduct from unemployment benefits otherwise payable to an individual *an amount equal to any overpayment* made to such individual under an unemployment benefit program of the United States or of any other State, and not previously recovered. The amount so deducted shall be paid to the jurisdiction under whose program such overpayment was made. Any such deduction shall be made only in accordance with the same procedures relating to notice and opportunity for a hearing as apply to the recovery of overpayments of regular unemployment compensation paid by such State. [42 USC 503(g)(1) (emphasis added).]

Defendants concede that the ordinary meaning of "overpayment" does not include penalties and interest, i.e., the statute does not require or expressly authorize deductions for those amounts. Defendants argue, however, that deductions for penalties and interest are nevertheless permissible because they are not explic-

itly prohibited by 42 USC 503(g). Plaintiffs, on the other hand, maintain that the silence of 42 USC 503(g) on deductions for penalties and interest renders the statute ambiguous and that we should therefore defer to the Department of Labor's stated position on this matter. As discussed in *Farish I*, in an Unemployment Insurance Program Letter sent to all state employment security agencies in 1989 (UIPL No. 45-89),[5] the Department of Labor advised that permissible deductions from payment of unemployment compensation did not include penalties or interest:

> 5. **Specific Situations in which Deductions May or Must be Made from Unemployment Compensation.** A State law may (or must) include provision for deducting and withholding any sum from compensation payable to an individual only if specifically permitted (or required) by Federal law.[6] These exceptions are limited to the following circumstances:
>
> a. If the claimant is legally liable to repay an overpayment of compensation made from the State's unemployment fund, that amount owed may be deducted from compensation currently payable from such fund under State law. This is permissible because the amount previously overpaid is tantamount to a prepayment of compensation currently due the claimant.

* * *

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[5] Although issued in 1989, UIPL No. 45-89 remains active. See United States Department of Labor, *Active Unemployment Compensation Program Letters and Active Unemployment Insurance Program Letters as of July 28, 2016* <https://wdr.doleta.gov/directives/attach/TEN/TEN_07-16_Attachment_E_Acc.pdf> (accessed March 9, 2021) [https://perma.cc/Z2GY-XWV7].

[6] When 42 USC 503(g) was enacted in 1986, states were permitted, but not required, to make deductions to recoup overpayments. PL 99-272, § 12401(a)(2); 100 Stat 297. It became mandatory in 2012 when Congress substituted "shall" for "may" in the original provision. PL 112-96, § 2103(a); 126 Stat 161.

> *Deductions to recover overpayments are limited to the offset of the overpayment itself. Offset may not be used to recover any additional interest or penalties due under State law as these additional amounts do not constitute a prepayment of compensation*. Further, the offsetting of past due contributions, penalty, interest or costs incurred while the claimant was an employer is not permitted. See the Secretary's decision in the Minnesota conformity proceedings, dated December 16, 1988, and transmitted to the States by UIPL 25-89. [Emphasis added.]

Plaintiffs maintain that UIPL No. 45-89 is entitled to deference under *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984), the seminal decision from the United States Supreme Court concerning judicial deference to a federal agency's interpretation of a statute. *Chevron* presents a two-step inquiry. The first step is to determine "whether 'Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' " *Dep't of Labor & Economic Growth, Unemployment Ins Agency v Dykstra*, 283 Mich App 212, 223; 771 NW2d 423 (2009), quoting *Chevron*, 467 US at 842-843. If, however, " 'the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.' " *Dykstra*, 283 Mich App at 224, quoting *Chevron*, 467 US at 843.

Aside from whether the statute is ambiguous, defendants argue that UIPLs are not entitled to *Chevron* deference. Plaintiffs disagree, but alternatively argue that even if *Chevron* does not apply, we should defer to UIPL No. 45-89 under *Skidmore v Swift & Co*, 323 US 134; 65 S Ct 161; 89 L Ed 124 (1944). Per *Skidmore*, an

agency interpretation that does not "carry the force of law" is nonetheless "eligible to claim respect according to its persuasiveness." *United States v Mead Corp*, 533 US 218, 221; 121 S Ct 2164; 150 L Ed 2d 292 (2001), citing *Skidmore*, 323 US 134. See also *Air Brake Sys, Inc v Mineta*, 357 F3d 632, 643 (CA 6, 2004) ("[F]ederal courts give respectful consideration to authoritative interpretations that lack the force of law, but that nonetheless have the 'power to persuade.' "), quoting *Skidmore*, 323 US at 140; accord *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008) (explaining that, while not binding, state agency interpretations are entitled to "respectful consideration" and should only be overruled for "cogent reasons").

To begin, we agree with the parties that 42 USC 503(g) is silent on the issue at hand. 42 USC 503(g) mandates that states recoup overpayments through deductions, but it does not expressly preclude a state from making deductions for other amounts. Viewed by itself, 42 USC 503(g) could be read to mean, as the Court of Claims determined, that although states are required to recover overpayments through deductions, they have discretion whether to also recoup penalties and interest in that manner. However, viewing 42 USC 503 as a whole, as opposed to 42 USC 503(g) alone, we conclude that the statute unambiguously precludes states from using unemployment funds to satisfy penalties and interest assessed against benefit recipients. Although 42 USC 503 is silent as to deductions for penalties and interest, it remains the case that in the absence of an applicable exception or express authorization,[7] deductions for penalties and interest violate

[7] In addition to the exceptions stated in 42 USC 503(a)(5), other subsections in 42 USC 503 allow or require deductions from benefits but

the general directive in 42 USC 503(a)(5) that unemployment funds must be used to pay benefits. See *Grand Rapids Motor Coach Co v Pub Serv Comm*, 323 Mich 624, 634; 36 NW2d 299 (1949) ("[E]xemptions in a statute are carefully scrutinized and not extended beyond their plain meaning."); *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 194; 590 NW2d 747 (1998) ("Statutory exceptions operate to restrict the general applicability of legislative language and are strictly construed.").

Indeed, this is the precise reasoning behind the Secretary of Labor's decision that is cited in the relevant paragraph of UIPL No. 45-89. In 1987, Minnesota enacted a statutory provision allowing the deduction of interest and penalties from unemployment benefits made to individual claimants for the purpose of recouping the value of those claimants' unpaid obligations to the state's unemployment fund that the claimants had failed to pay when they were employers. The United States Department of Labor challenged this provision as violating the Social Security Act's requirement that unemployment benefits be paid in full when due. Minnesota received a hearing before an Administrative Law Judge (ALJ) and maintained that the contested deductions were authorized by 42 USC 503(g). The ALJ determined that the Minnesota statute impermissibly constituted a levy on unemployment compensation that exceeded the narrow statutory exceptions in 42 USC 503(a)(5). The Secretary of Labor adopted the ALJ's recommendation:

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none is relevant here. See 42 USC 503(d)(2)(B) (allowing for deductions to recover uncollected overissuance of supplemental nutrition assistant program benefits); 42 USC 503(e)(2)(A)(iii) (requiring deductions to recover unpaid child support).

[U]nder section 303(a)(5) of [the Social Security Act (SSA)],[8] all money withdrawn from the unemployment fund must be used in payment of unemployment compensation. . . . Section 303(a)(1) of the SSA requires that a state unemployment compensation law provide for such methods of administration as will ensure full payment of unemployment compensation when due. *Certain exceptions to the requirement that funds be used exclusively in the payment of unemployment compensation are statutorily provided for but none of these are applicable here*.

[The Minnesota law at issue] permits the deduction and withholding of up to 50 percent of an individual's unemployment compensation payment for unpaid contributions, *interest*, *penalties* and costs for which the individual has been determined to be liable. Thus, an unemployed claimant would not receive in hand the full amount of his or her cash benefits if the claimant owed contributions to the unemployment fund from a prior period when the claimant had been an employer. The question, therefore, arises whether the reduction in the claimant's cash benefits for the purpose of recouping contributions owed conforms to the Federal statutory prescriptions as to use of unemployment fund monies.

The ALJ's recommendation, that I find Minnesota's recoupment provision in nonconformity with Federal law, is based on the ALJ's analysis of the applicable . . . SSA provisions. Specifically, the ALJ concluded that the statutory language is *clear and unambiguous*, and that the legislative history and historical application of the . . . SSA provisions support the limiting of the use of unemployment fund monies to cash benefits for unemployed claimants or to certain other specifically stated expenditures. *The ALJ then found that Minnesota's recoupment provision involves the constructive withdrawal of funds for a purpose other than permitted by law and resulted in the unemployed claimant failing to receive full benefits when due.*

Upon review of the entire record in this case, I agree with the analysis and conclusions of the administrative

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[8] 42 USC 503 is § 303 of the Social Security Act.

> law judge. . . . [*Minnesota Conformity*, decision of the United States Department of Labor, entered December 16, 1988 (Case No. 88-UIA-9) (emphasis added).]

We agree with the Secretary of Labor's conclusion that 42 USC 503 unambiguously precludes the deduction of penalties and interest from current benefits. Alternatively, even if the statute was ambiguous, we would find that the Secretary's reasoning is persuasive and is at least entitled to *Skidmore* deference. We recognize that UIPL No. 45-89 cites the Minnesota proceedings in support of the statement that deductions cannot be made to recover unpaid contributions, penalties, and interest assessed against former employers currently receiving unemployment benefits. However, the reasoning set forth in the Secretary's decision applies with equal force to the general principle announced in UIPL No. 45-89 that deductions must be limited to recovery of the overpayment itself, and an offset may not be made to recover penalties and interest. It makes no difference that the Minnesota law allowed for recoupment of penalties and interest related to unpaid contributions as an employer rather than past benefits obtained because of an intentionally false statement or concealment of material information. The point is that *any* deduction to recover penalties and interest is impermissible because it is not authorized by 42 USC 503 and therefore violates the statute's starting point that all amounts withdrawn from the unemployment compensation fund must be used for payment of benefits.[9]

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[9] The dissent relies on 42 USC 503(m), which provides:

> In the case of a covered unemployment compensation debt (as defined under section 6402(f)(4) of the Internal Revenue Code of 1986) that remains uncollected as of the date that is 1 year after the debt was finally determined to be due and collected, the State

Finally, our conclusion is bolstered by the fact that 42 USC 503(a)(11) requires states to assess a penalty against an individual when a payment from the unemployment fund is found to have been made because of fraud, but there is no corresponding provision allowing deductions for such penalties.[10] Given the express authorizations in 42 USC 503 allowing for deductions, we presume that Congress was acting intentionally

to which such debt is owed shall take action to recover such debt under section 6402(f) of the Internal Revenue Code of 1986.

In turn, 26 USC 6402(f) requires the Secretary of Treasury to deduct a "covered unemployment compensation debt" from a taxpayer's tax refund and pay that amount to the state, 26 USC 6402(f)(1)(A), and it defines covered unemployment compensation debt to include "any penalties and interest assessed" on "past-due debt for erroneous payment of unemployment compensation due to fraud," 26 USC 6402(f)(4)(A) and (C). Thus, if the state does not collect penalties and interest relating to past benefits erroneously paid because of fraud within a year, it must seek recovery under 26 USC 6402(f), i.e., through interception of the recipient's federal tax refund. From these statutory provisions allowing offset from federal tax refunds, the dissent infers authorization for deduction of penalties and interest from current unemployment benefits. How the dissent reaches this conclusion is mystifying. Put simply, authorization to offset penalties and interest from tax refunds does not equate to authorization to deduct the same amounts from current benefits owed to unemployment compensation recipients. The dissent suggests that allowing recoupment through one method but not the other is unreasonable. Congress apparently disagreed. We also note that we ordered the parties to provide supplemental briefs on 26 USC 6402(f)(4)(C), *Farish v Dep't of Talent & Economic Dev*, unpublished order of the Court of Appeals, entered July 8, 2020 (Docket No. 350866), and they filed a *joint* supplemental brief agreeing that it is not relevant to the interpretation of 42 USC 503. While we are not bound by the parties' stipulation of law, for the reasons stated, we agree that 26 USC 6402(f) is not relevant to the issue before us.

[10] The dissent concludes that the lack of an express authorization for deduction of penalties is irrelevant. We disagree. Given that Congress authorized states to assess penalties, it could have easily provided that states could deduct penalties from current benefits, as it did in 42 USC 503 for numerous other amounts. That there is no express authorization for deduction of penalties is telling.

when it declined to allow or mandate deductions to recover penalties. See *Russello v United States*, 464 US 16, 23; 104 S Ct 296; 78 L Ed 2d 17 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quotation marks and citation omitted; alteration in original). See also *People v Miller*, 498 Mich 13, 24-25; 869 NW2d 204 (2015) ("[I]f the Legislature had intended to allow [the proffered interpretation inferring authorization for multiple punishments], it clearly knew how to do so" given "specific authorization" for multiple punishments elsewhere in the statute.).

To summarize, we conclude that 42 USC 503 precludes the UIA's practice of deducting penalties and interest from unemployment benefits. Where the federal government contributes to a state's unemployment fund, the fund may only be used to pay unemployment compensation unless an exception applies or express authorization for the deduction exists.[11] And no

[11] The dissent acknowledges that 42 USC 503 generally requires that the money withdrawn from an unemployment fund be used in the payment of unemployment compensation and that the statute contains multiple provisions expressly allowing or mandating deductions from benefits. Nonetheless, the dissent concludes that a deduction for penalties and interest does not require express authorization "because such a deduction is inherent within the unemployment statutory scheme itself." In other words, the dissent reads language into an unambiguous statute, contrary to the rules of statutory interpretation. See *Mich Ass'n of Home Builders v City of Troy*, 504 Mich 204, 212; 934 NW2d 713 (2019). The dissent also notes that recovered penalties are deposited into the unemployment fund, so allowing deductions for penalties does not divert funds from the payment of unemployment compensation. This argument overlooks, however, that 42 USC 503 is concerned not only with using funds for proper purposes but also ensuring that recipients receive "full payment of unemployment compensation when due," 42 USC 503(a)(1),

authorization for deducting penalties or interest is contained in the statute. Our reasoning is consistent with UIPL No. 45-89 and the Secretary's decision in the Minnesota conformity proceedings. We conclude that the statute is unambiguous and, to the degree that conclusion may be questioned, that UIPL No. 45-89 is entitled to *Skidmore* deference. Accordingly, we need not address whether UIPLs are entitled to *Chevron* deference.

B. CAUSE OF ACTION TO ENFORCE 42 USC 503

We agree with defendants, however, that plaintiffs do not have a private cause of action under 42 USC 503 for money damages or remittance of the improper deductions, but conclude that plaintiffs may seek declaratory and injunctive relief.

As an initial matter, we disagree with plaintiffs that we are precluded from considering this question under the law-of-the-case doctrine. "The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue." *New Props, Inc v George D Newpower, Jr, Inc*, 282 Mich App 120, 132; 762 NW2d 178 (2009) (quotation marks and citation omitted). "The law of the case doctrine applies only to questions actually decided in the prior decision and to those questions necessary to the court's prior determi-

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which counsels against implying authorization for deductions. Finally, the dissent observes that no federal or state appellate court has relied on UIPL No. 45-89 for the proposition that states may not make deductions for penalties and interest. We presume this is because other states have followed the Department of Labor's unequivocal directive that "[o]ffset may not be used to recover any additional interest or penalties due under State law," UIPL No. 45-89, so the issue has not arisen until now. In any event, we are aware of no authority—administrative or otherwise—consistent with the dissent's view that such deductions are permitted.

nation." *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998).

In its first opinion granting defendants summary disposition, the Court of Claims determined that plaintiffs had an implied cause of action to enforce 42 USC 503, relying on federal caselaw to that effect. As an alternative ground for affirmance in the first appeal, defendants maintained that plaintiffs did not have a cause of action under 42 USC 503. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994) (stating that a party may present a preserved "alternative ground for affirmance"). We did not address the cause-of-action issue and instead remanded for consideration of the Department of Labor's administrative guidance interpreting 42 USC 503. Contrary to plaintiffs' argument, that result did not impliedly determine that they had a cause of action, and resolution of that issue was not necessary to our prior determination.

Turning to the merits, plaintiffs identify federal authority holding that there is an implied private cause of action under 42 USC 503.[12] See *Gann v Richardson*, 43 F Supp 3d 896, 901-904 (SD Ind, 2014); *Shaw v Valdez*, 819 F2d 965, 966 (CA 10, 1987); *Kelly v Lopeman*, 680 F Supp 1101, 1105-1106 (SD Ohio, 1987); *Brewer v Cantrell*, 622 F Supp 1320, 1322-1323 (WD Va, 1985), aff'd without a published opinion 796 F2d 472 (CA 4, 1986). Although the exact basis for allowing private litigants to enforce 42 USC 503 is

[12] Defendants attempt to distinguish these cases by arguing that they imply a cause of action under 42 USC 503(a), not 42 USC 503(g). First, this distinction is insignificant because 42 USC 503(g) operates within the general framework of the administration of a state unemployment fund governed by the rules set forth in 42 USC 503(a). Second, as discussed, although the parties focus on 42 USC 503(g), we conclude that deductions for penalties and interest violates 42 USC 503(a).

unclear, the United States Supreme Court "has consistently assumed that it is a proper remedy." *Jenkins v Bowling*, 691 F2d 1225, 1228 (CA 7, 1982), citing *California Dep't of Human Resources Dev v Java*, 402 US 121; 91 S Ct 1347; 28 L Ed 2d 666 (1971). In *Java*, the United States Supreme Court entertained a private class action lawsuit challenging a state's refusal to pay unemployment benefits while an administrative appeal was pending. *Java*, 402 US at 122. The Court concluded that the state law "must be enjoined because it is inconsistent with § 303(a)(1) of the Social Security Act." *Id*. at 135. See also *Ohio Bureau of Employment Servs v Hodory*, 431 US 471; 97 S Ct 1898; 52 L Ed 2d 513 (1977) (reversing on the merits the lower court's decisions that furloughed employees were entitled to declaratory and injunctive relief and that the state law at issue conflicted with the Social Security Act).

Given the federal caselaw holding that a private cause of action exists under 42 USC 503, we agree with the United States Court of Appeals for the Seventh Circuit that this issue is "too well settled to be questioned by us." *Jenkins*, 691 F2d at 1228. That said, we agree with defendants that these cases have only allowed the plaintiffs to seek declaratory and injunctive relief. And while plaintiffs ask that we follow this caselaw, they do not explain why it should be extended to allow for a cause of action for money damages. Nor do plaintiffs argue that they have an enforceable "right" under 42 USC 503 such that they may proceed under 42 USC 1983.[13] See *Blessing v Freestone*, 520 US 329, 340-341; 117 S Ct 1353; 137 L Ed 2d 569 (1997). For these reasons, we see no basis to infer a cause of

[13] Plaintiffs' 42 USC 1983 claim pertained only to their allegations that defendants' procedures for recouping overpaid benefits did not provide adequate notice or an opportunity for a hearing.

action under 42 USC 503 for money damages or a remittance of improperly withheld funds.

Accordingly, plaintiffs do not have a money-damages remedy for the violation of 42 USC 503, but they can seek declaratory and injunctive relief as to whether defendants may continue to reduce benefits to collect interest and penalties. Indeed, plaintiffs could seek that relief even if they did not have an implied cause of action under 42 USC 503. In *Lash v Traverse City*, 479 Mich 180, 196-197; 735 NW2d 628 (2007), the Supreme Court held that the plaintiff-employee did not have an implied cause of action for damages against the employer for violating a statute prohibiting governmental entities from imposing residency requirements. However, the Court explained that the lack of a cause of action for damages did not preclude the plaintiff from seeking declaratory and injunctive relief:

> [P]laintiff's claim that a private cause of action for monetary damages is the only mechanism by which the statute can be enforced is incorrect. Plaintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310, or declaratory relief pursuant to MCR 2.605(A)(1). . . . [A]n "actual controversy" exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights. In this case, plaintiff's claim is that defendant's residency requirement, made a condition of plaintiff's employment, was in violation of MCL 15.602(2). Such a claim would constitute an "actual controversy" for the purposes of an action for a declaratory judgment. [*Id*. at 196-197 (citations omitted).]

"In a case of actual controversy within its jurisdiction, a Michigan court of record 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." MCR 2.605(A)(1). The

"actual controversy" requirement is easily satisfied in this case because deductions from plaintiffs' benefits were being made in violation of federal law. Further, it is well established that declaratory actions may be brought to determine issues of statutory construction. See *Bd of Ed of Detroit v Superintendent of Pub Instruction*, 319 Mich 436, 455; 29 NW2d 902 (1947) (explaining that cases involving "the validity and interpretation" of statutes were within the purview of the former declaratory judgment statute). See also 26 CJS, Declaratory Judgments, § 53, p 95 ("Questions as to the validity or construction of statutes may be determined in declaratory judgment proceedings, provided there is an actual or justiciable controversy.").

That plaintiffs unsuccessfully pursued a cause of action for damages does not defeat their claim for declaratory relief. The same is true as to plaintiffs' request for an injunction to prevent further unlawful deductions from unemployment benefits. Injunctive relief may be granted in declaratory actions as necessary. See *Barry Co Probate Court v Mich Dep't of Social Servs*, 114 Mich App 312, 319; 319 NW2d 571 (1982) ("After entry of judgment for declaratory relief, further relief, such as an injunction, may be granted, if necessary or proper, against any adverse party whose rights were determined by the declaratory judgment."). See also *Stein v Continental Cas Co*, 110 Mich App 410, 426; 313 NW2d 299 (1981).

In sum, per federal caselaw, plaintiffs have a cause of action for declaratory and injunctive relief under 42 USC 503. They could also seek that relief in an action for a declaratory judgment under MCR 2.605(A)(1). We remand to the Court of Claims for entry of a declaratory judgment that deductions from unemployment benefits to satisfy penalties and interest violates 42 USC 503

and for an injunction enjoining such deductions in the future.

C. CONVERSION

We next address whether plaintiffs can maintain a claim of conversion on the basis of deductions made in violation of federal law. Plaintiffs argue that the Court of Claims erred by determining that their statutory and common-law conversion claims are barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. We disagree.[14]

The GTLA broadly shields government agencies from tort liability:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed. [MCL 691.1407(1).]

Both common-law and statutory conversion are considered torts. See *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 497 Mich 337, 354, 361; 871 NW2d 136 (2015). Plaintiffs nonetheless offer several reasons why their suit is not barred by governmental immunity.

First, they argue that defendants are not immune from tort liability because the deduction of penalties and interest in violation of federal law exceeded the scope of defendants' governmental functions. This is-

[14] As noted, in *Farish I*, we affirmed the dismissal of plaintiffs' conversion claims against the individual defendants who were acting in their official capacity. Therefore, we need only address immunity with respect to plaintiffs' claims against the agency-defendants.

sue is not properly preserved because it was raised for the first time in plaintiffs' reply brief on appeal. See *Henderson v Dep't of Treasury*, 307 Mich App 1, 7-8; 858 NW2d 733 (2014); *Blazer Foods, Inc v Restaurant Props, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003). In any event, plaintiffs' argument lacks merit. The GTLA defines a "governmental function" as "an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law." MCL 691.1401(b). In this case, defendants deducted penalties and interest while exercising the governmental function of administering unemployment insurance benefits. Although we conclude that the agency-defendants violated federal law by deducting penalties and interest from subsequent unemployment benefits, there is no present dispute—given the dismissal of plaintiffs' state-law claims—that their actions were authorized by MESA. Accordingly, the deductions were not ultra vires activity.

Plaintiffs next argue that because they seek restitution rather than damages, their suit does not sound in tort and so is not barred by immunity. In support, they rely on *Genesee Co Drain Comm'r v Genesee Co*, 504 Mich 410; 934 NW2d 805 (2019). In that case, the county drain commissioner sought a proportionate share of group health insurance premiums that were overpaid and refunded to the county and deposited into its general fund. *Id*. at 415. We held that the plaintiff's breach-of-contract claim could proceed, but that his tort claims, including conversion, were barred by the GTLA. *Id*. at 415-416. On remand, the plaintiff amended his complaint to include a claim for unjust enrichment, which the county argued was also barred by the GTLA. *Id*. at 416. The Supreme Court disagreed and held that a claim of unjust enrichment does not subject the defendant to tort liability. The Court rea-

soned that, unlike tort and contract actions in which the party seeks compensatory damages, the remedy for unjust enrichment was restitution. *Id*. at 419. Significantly, the plaintiff did not merely allege the mechanism used by the county to obtain the monies was improper, but that the county had no right to the sums at all.

Thus, plaintiffs' reliance on *Genesee Co* is misplaced. Plaintiffs do not allege unjust enrichment, i.e., they do not claim that the state is not entitled to collect penalties and interest. They argue only that the mechanism used by the state to recoup those sums violates federal law, a proposition with which we agree. But absent a claim that the state has no right to assess penalties and interest, we do not see how our holding that deductions from future unemployment benefits are not permitted by federal law renders the state "unjustly enriched." Receipt of sums to which the state is entitled is not unjust enrichment, and 42 USC 503 does not bar a state from imposing or collecting those sums except by the means at issue. Our conclusion that a particular means of collection may not be used does not change the fact that the state has an underlying and undisputed right to the amounts in question.

Plaintiffs next argue that the GTLA does not provide immunity from suits for intentional torts. In support, they cite several Court of Appeals cases decided prior to 1984.[15] However, after these cases were decided, the Supreme Court issued its decision in *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), in which it unambiguously stated that "[t]here is no

[15] Plaintiffs rely on *Elliott v Dep't of Social Servs*, 124 Mich App 124, 130; 333 NW2d 603 (1983), *Randall v Delta Charter Twp*, 121 Mich App 26, 34; 328 NW2d 562 (1982), and *Lawrence v Dep't of Corrections*, 81 Mich App 234, 240; 265 NW2d 104 (1978).

'intentional tort' exception to governmental immunity." See also *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 328; 869 NW2d 635 (2015); *Harrison v Dir of Dep't of Corrections*, 194 Mich App 446, 450; 487 NW2d 799 (1992).

Lastly, plaintiffs argue that defendants are specifically not immune from conversion claims, asserting that governmental defendants were subject to such claims before July 1, 1965, and that the scope of the state's common-law immunity was continued in accordance with the second sentence of MCL 691.1407(1).[16] However, the pre-1965 cases relied on by plaintiffs all involved municipalities and counties, which are not included in the GTLA's definition of "state." See MCL 691.1401(a), (e), and (g). Further, we have reviewed the cases cited by plaintiffs for the proposition that conversion claims were permitted against other governmental entities prior to July 1, 1965, and find that the cited cases do not support their argument.[17] Accordingly, plaintiffs fail to establish that conversion claims are excepted from the GTLA.

III. CONCLUSION

We reverse the Court of Claims as to the interpretation of 42 USC 503. The statute unambiguously

[16] The sentence reads, "Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed." MCL 691.1407(1).

[17] *Loranger v City of Flint*, 185 Mich 454; 152 NW 251 (1915), and *Stock v City of Hillsdale*, 155 Mich 375; 119 NW 435 (1909), considered whether a city may use river water for public use when doing so allegedly burdens downriver users. These cases involved claims for damages, and there was no assertion that the plaintiffs held title to the water. Other cited cases involved claims for assumpsit, which were essentially breach-of-contract claims involving municipal governments

precludes states from deducting penalties and interest from unemployment compensation. To the extent that conclusion may be questioned, the Department of Labor's interpretation of the statute in UIPL No. 45-89 is entitled to deference. We conclude, therefore, that the state may not reduce future unemployment benefits as a mechanism to collect interest and penalties due because of an overpayment. We further conclude that federal law provides for a private cause of action to enforce the statute, but only as to declaratory and injunctive relief. Finally, we affirm the Court of Claims' dismissal of plaintiffs' conversion claims because they are barred by governmental immunity. Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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

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allegedly failing to pay their contractors for certain materials. See *Ward v Alpine Twp*, 204 Mich 619; 171 NW 446 (1919); *Detroit v Mich Paving Co*, 38 Mich 358 (1878). Plaintiffs also cite *Detroit v Mich Paving Co*, 36 Mich 335 (1877), which, although it makes reference to conversion, was essentially a contract case (discussing whether the city could use sand left in the street by a plaintiff contractor after termination of the contract). *Detroit Muni Employees Ass'n v Detroit*, 344 Mich 670, 672; 74 NW2d 888 (1956), involved an unusual situation in which employees sought to recover wages that had been withheld during the Great Depression pursuant to a city ordinance. The only reference to conversion in that case was the observation that had such a claim been brought, the period of limitations would have barred it. See *id*. at 678. And *McCurdy v Shiawassee Co*, 154 Mich 550; 118 NW 625 (1908), concluded that a city could not be required to repay a loan when the borrowing was not authorized by the voters as was required. The only mention of conversion in that case was its inclusion in a list of several causes of action brought by plaintiff, all of which were rejected on the ground that plaintiff did not have an enforceable right to repayment. *Id*. at 562. In sum, plaintiffs have not cited any pre-1965 cases that support their view regarding the viability of a conversion claim against a governmental entity.

RIORDAN, J. (*concurring in part and dissenting in part*). I would affirm the trial court's ruling that plaintiffs failed to state a claim under 42 USC 503(g).

I. 42 USC 503(g)(1)

The United States Department of Labor's interpretation of 42 USC 503(g)(1), as stated in Unemployment Insurance Program Letter (UIPL) No. 45-89, conflicts with the plain language of the statute, and therefore, it is not entitled to deference under *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837, 843; 104 S Ct 2778; 81 L Ed 2d 694 (1984),[1] or *Skidmore v Swift & Co*, 323 US 134, 139-140; 65 S Ct 161; 89 L Ed 124 (1944) (explaining when an administrative policy is entitled to deference; a court applying *Skidmore* deference determines the best available construction of the statute by considering the agency's own analysis as persuasive and giving that analysis whatever weight it reasonably deserves).

When interpreting a federal statute, our goal is to give effect to the intent of Congress. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). "[T]he most reliable evidence of that intent is the plain language of the statute." *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019) (quotation marks and citation omitted). Statutory language should be construed reasonably, keeping in mind the purpose of the act. *McCahan v Brennan*, 492 Mich 730,

[1] "Under *Chevron*, the federal courts will defer to an administrative agency's interpretation of a statute that it is charged with administering—even if that interpretation differs from what the courts believe to be the best interpretation—so long as the particular statute is ambiguous on the point at issue and the agency's construction is reasonable." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 130 n 10; 807 NW2d 866 (2011).

739; 822 NW2d 747 (2012). When interpreting words and phrases used in a statute, those words and phrases must be assigned meanings that are in harmony with the whole of the statute, construed in the light of history and common sense. *Sweatt v Dep't of Corrections*, 468 Mich 172, 179; 661 NW2d 201 (2003). Thus, we do not construe the meaning of statutory terms in a vacuum; rather, we interpret the words in their context and with a view to their place in the overall statutory scheme. *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008).

The unemployment insurance system is a joint federal-state scheme whereby the federal government subsidizes state unemployment insurance programs. *California Dep't of Human Resources Dev v Java*, 402 US 121, 125; 91 S Ct 1347; 28 L Ed 2d 666 (1971). In order to receive funding, a state unemployment fund must only be used to pay unemployment benefits and certain other items such as cash benefits and refunds for amounts erroneously paid into the fund by employers. 42 USC 503(a)(5). Moreover, states are expressly permitted to deduct certain amounts from unemployment benefits, including payments for health insurance, taxes, and "overpayments as provided in subsection (g)." 42 USC 503(a)(5). Subsection (g) provides that "[a] State shall deduct from unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such individual under an unemployment benefit program of the United States or of any other State, and not previously recovered." 42 USC 503(g)(1). As the trial court correctly concluded, this provision contains no limitation barring states from deducting penalties and interest. Therefore, I would decline to read into the statute a limitation that Congress has not included. See *Haynes v Neshewat*, 477 Mich 29, 38; 729 NW2d 488 (2007)

(holding that courts should "not read into [a] statute a limitation that is not there").

Moreover, 42 USC 503(m) indicates that states must act to recover any uncollected "covered unemployment compensation debt" as defined by 26 USC 6402(f)(4), which includes:

> (A) a past-due debt for erroneous payment of unemployment compensation due to fraud or the person's failure to report earnings which has become final under the law of a State certified by the Secretary of Labor pursuant to section 3304 and which remains uncollected;
>
> (B) contributions due to the unemployment fund of a State for which the State has determined the person to be liable and which remain uncollected; and
>
> (C) any penalties and interest assessed on such debt.

Subsection (C) permits penalties and interest to be assessed on "such debt" as described in Subsection (A) (benefits obtained through fraud or misrepresentation) and Subsection (B) (otherwise liable). Accordingly, Congress expressed its intent for states to seek recovery of any penalties and interest associated with outstanding debts incurred by fraud or otherwise.[2]

Rather than rely on the general directive in 42 USC 503(a)(5) that unemployment funds be used only to pay benefits, as the majority does, I would find that the more reasonable view is that the specific provisions of

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[2] However, the parties have failed to raise this argument, and they agree in their joint supplemental briefs that 42 USC 503(m), and the reference therein to 26 USC 6402(f)(4)(C), does not apply here. But the parties may not dictate by agreement the proper interpretation and application of the law. *Mack v Detroit*, 467 Mich 186, 209; 649 NW2d 47 (2002) (the appellate court must "set forth the law as clearly as it can, irrespective whether the parties assist the Court in fulfilling its constitutional function. The jurisprudence of Michigan cannot be, and is not, dependent upon whether individual parties accurately identify and elucidate controlling legal questions").

42 USC 503(m) and 26 USC 6402(f)(4) indicate that the statutory scheme as a whole allows the states to deduct penalties and interest prior to the disbursement of unemployment payments, even in cases in which fraud is not alleged. See *Manuel*, 481 Mich at 650 (indicating that the courts interpret the words of a statute in their context and with a view to their place in the overall statutory scheme); see also *Donkers v Kovach*, 277 Mich App 366, 370-371; 745 NW2d 154 (2007) (stating that when two statutes relate to the same subject matter and share a common purpose, they are *in pari materia* and must be read together as one law; when two statutes are *in pari materia* but conflict on a particular issue, the more specific statute controls over the more general). This is because 26 USC 6402(f)(4) of the tax code permits recovery of unemployment benefits erroneously paid in cases of fraud or for which a person has been deemed liable irrespective of fraud, and any penalties and interest associated with that debt, by offsetting any tax credit or refund owed to the filer. Further, 42 USC 503(m) of the Social Security Act requires that states utilize that tax-refund-interception method of collection for debts that are outstanding one year after they are assessed, and the Federal Unemployment Tax Act permits those monies to be deposited into the state's funds in the same manner that would have occurred if the individual had made the payment themselves—including penalties and interest. 26 USC 3304(a)(4)(G).

In addition to collecting overpayments via tax-refund garnishment, states are permitted to deduct "overpayments" from unemployment benefits. "Overpayment" is not defined in the statute, but it is more reasonable to conclude that Congress intended for states to have two methods of collecting erroneously paid benefits and associated penalties and interest.

The alternative requires us to conclude that in cases in which a recipient commits fraud to obtain unemployment benefits, for example, Congress intended for states to deduct the amount of erroneously paid benefits from unemployment benefit checks, but also to require states to wait one year and then collect the associated penalties and interest separately by intercepting tax refunds. In other words, a state's ability to collect penalties and interest from a recipient who commits fraud to obtain unemployment benefits largely would be dependent upon whether that individual files a tax return, and if so, the size of the tax refund.[3]

The majority concludes otherwise. Instead, it holds that deducting penalties and interest violates the general provision in 42 USC 503(a)(5) that unemployment funds must be used to pay benefits and that the enumerated exceptions to this general rule should be strictly construed. I struggle to follow such reasoning. Reducing unemployment benefits by the amount of penalties and interest is not, in any respect, inconsistent with the general rule of 42 USC 503(a)(5) that "[e]xpenditure of all money withdrawn from an unemployment fund of [a] State" must be "in the payment of unemployment compensation." Such language means

[3] We must construe statutes reasonably and in a manner that avoids absurd results. *Yang v Everest Nat'l Ins Co*, 329 Mich App 461, 471; 942 NW2d 653 (2019). The majority suggests that there is a legitimate basis for such a peculiar scheme because unemployment compensation benefits provide immediate assistance. However, the majority apparently fails to understand that the value of money depreciates over time. Therefore, when a recipient of unemployment benefits receives excess benefits, they deprive the state of the present use of that money. Additionally, in cases of fraud, Congress specifically requires an immediate assessment of penalties when the recipient is determined to have committed fraud. See 42 USC 503(a)(11). Therefore, as with the issue before us, any delay in collecting such penalties is unwarranted.

that money in an unemployment fund may only be used for payment of unemployment benefits and may not, for instance, be used to pay for road repairs. The majority does not explain why the state's conduct in *reducing* unemployment benefits paid to plaintiffs by the amount of penalties and interest—which logically results in money being *retained in* the unemployment fund—constitutes "money withdrawn from an unemployment fund of [a] State." 42 USC 503(a)(5).

Regardless, we should not overlook "the general rule that exemptions in a statute are carefully scrutinized and not extended beyond their plain meaning." *Grand Rapids Motor Coach Co v Pub Serv Comm*, 323 Mich 624, 634; 36 NW2d 299 (1949). However, this general rule does not apply in this case, in which the relevant provision states that in order to receive federal funding, the state's unemployment compensation law must provide for

> [e]xpenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation, . . . *Provided further*, That amounts may be deducted from unemployment benefits and used to repay overpayments as provided in subsection (g)[.] [42 USC 503(a)(5).]

Our Supreme Court has interpreted the phrase "provided further" to be clarifying language, rather than indicative of an exception to a general directive. See *Magnuson v Kent Co Bd of Canvassers*, 370 Mich 649, 658; 122 NW2d 808 (1963). Moreover, while the general rule requires courts to strictly construe exemptions so that they are not extended beyond their ordinary meaning, it does not require us to constrain the ordinary meaning in a manner that is contrary to Congress's intent. *Ally Fin Inc v State Treasurer*, 502 Mich 484, 491-492; 918 NW2d 662 (2018) (the require-

ment that an exemption be strictly construed does not permit a strained construction that is contrary to legislative intent). Rather, we are "duty-bound to apply the laws as written." *DeWitt Twp Supervisor v State Tax Comm*, 397 Mich 576, 585; 244 NW2d 920 (1976). Thus, even if this general rule applied in this case, the majority has not applied it correctly.

In addition, the majority concludes that penalties and interest may not be deducted because the statutory scheme requires states to assess penalties and interest in cases of fraud, 42 USC 503(a)(11), but does not specifically allow for a deduction in that regard. However, it does not follow that states are prohibited from deducting penalties and interest merely because there is no specific statutory allowance for the deduction. 42 USC 503 requires deductions in two instances[4] and allows deductions in four additional instances.[5] All four of the allowed deductions relate to instances in which money is withdrawn from the unemployment fund for purposes other than the payment of unemployment compensation, contrary to the general rule of 42 USC 503(a)(5). For example, an allowed deduction for the withholding of federal income tax obviously does not result in the unemployment fund retaining a windfall in that amount. Instead, the amount is remitted to the federal government. See 42 USC 503(a)(5). Yet, remitting money from the unemployment fund to the federal

[4] States are required to deduct for "child support obligations," 42 USC 503(e), and for "overpayment" of employment benefits, 42 USC 503(g).

[5] States are allowed to deduct "to pay for health insurance, or the withholding of Federal, State, or local individual income tax," 42 USC 503(a)(5); "for the payment of short-time compensation under a short-time compensation program," *id*.; "for the payment of allowances under a self-employment assistance program," *id*.; or for "an uncollected overissuance . . . of supplemental nutrition assistance program benefits," 42 USC 503(d).

government for the purpose of satisfying a tax obligation is incompatible with the general rule of 42 USC 503(a)(5). Hence, a specific statutory allowance for the deduction for payments from the unemployment fund was necessary.

But a deduction for penalties and interest is unlike all other expressly allowed deductions in that such a deduction does not result in withdrawal of money from the unemployment fund for a generally impermissible purpose under 42 USC 503(a)(5). See, e.g., 42 USC 503(a)(11) (providing that penalties must be immediately deposited into the unemployment fund). In my view, Congress was not required to expressly allow a deduction for penalties and interest because such a deduction is inherent within the unemployment statutory scheme itself. That is, the more reasonable interpretation of the statutory scheme is that Congress left this matter to the discretion of the states—an interpretation which we have determined to be reasonable. *Farish v Dep't of Talent & Economic Dev*, unpublished per curiam opinion of the Court of Appeals, issued December 11, 2018 (Docket No. 341350). Instead, the majority reads into the statute a restriction that is absent from the plain language and violates the principle that we may not "judicially legislate by adding into a statute provisions that . . . [Congress] did not include." *Pike v Northern Mich Univ*, 327 Mich App 683, 697-698; 935 NW2d 86 (2019) (quotation marks and citations omitted).

We remanded this case to the trial court for the sole task of considering whether the UIPL was entitled to any amount of deference. To that point, the UIPL does not describe any ambiguity in the statute and fails to provide any persuasive authority for its interpretation. Therefore, it is not persuasive under *Skidmore*, 323 US 134. See *Dep't of Labor & Economic Growth, Unemploy-*

ment Ins Agency v Dykstra, 283 Mich App 212, 225, 229-230, 231 & n 8; 771 NW2d 423 (2009) (applying the *Chevron* framework to reject a guidance letter that contradicted the statute at issue and concluding that the guidance letter did not warrant a lesser level of deference under *Skidmore*). Moreover, the UIPL conflicts with the plain language of the statute and imposes a restriction on states that Congress did not include. *TRJ & E Props, LLC v City of Lansing*, 323 Mich App 664, 675; 919 NW2d 795 (2018) (agency interpretations of statutes are not entitled to deference when they conflict with the language of a statute). Until today, it does not appear that any federal court or state appellate court has embraced the UIPL in the manner the majority advocates since it was issued in 1989.[6] And the majority does so here in a peculiar manner—simultaneously concluding that 42 USC 503 is unambiguous and also that the UIPL is entitled to *Skidmore* deference which, by the terms of its holding, only applies to ambiguous statutes. See *John Hancock Mut Life Ins Co v Harris Trust & Savings Bank*, 510 US 86, 109; 114 S Ct 517; 126 L Ed 2d 524 (1993).

In sum, the trial court's deference analysis was proper, and I see no reason for reversal.

II. CONCLUSION

The trial court properly concluded that plaintiffs failed to state a claim under 42 USC 503. Accordingly, I would affirm the trial court's ruling.

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[6] The United States Court of Appeals for the Fifth Circuit cited the UIPL in a case involving the Employee Retirement Income Security Act of 1974 for the proposition that state law must prohibit waiver of claims to unemployment compensation if participating in the federal-state unemployment compensation system. See *Mitchell Energy & Dev Corp v Fain*, 311 F3d 685, 688 (CA 5, 2002). I have not identified any other case that has even cited the UIPL.

TURUNEN v DIRECTOR OF THE DEPARTMENT OF NATURAL RESOURCES

Docket No. 350913. Submitted March 2, 2021, at Lansing. Decided March 18, 2021, at 9:05 a.m.

Roger Turunen filed an action in Baraga Circuit Court against the Department of Natural Resources (DNR) and the Director of the DNR, challenging the DNR's determination that eight of plaintiff's pigs were unlawful under the DNR's 2010 Invasive Species Order Amendment 1 (ISO). The ISO added Russian wild boar (Sus scrofa) and their hybrids to the list of invasive species in Michigan, the possession, sale, or introduction of which are prohibited under the Natural Resources and Environmental Protection Act, MCL 324.41301 *et seq*. The DNR offered training on how to distinguish Sus scrofa from Sus domestica (domestic pig), identifying the animals by genotype and phenotype. Plaintiff raised wild boar for sale to hunting ranches. In 2012, plaintiff and others challenged the ISO, arguing that it violated the state and federal Constitutions. In particular, plaintiff sought a declaratory ruling and injunctive relief to determine the applicability of the ISO to his animals. Defendants filed a counterclaim, asserting that plaintiffs were required to abate the public nuisance of owning Russian boar. This case was consolidated in the Marquette Circuit Court with other similar cases, and that court granted plaintiffs' motion for partial summary disposition, concluding that the ISO was unconstitutional on its face. The court also concluded that the boars possessed by plaintiffs were exempt from the DNR's order because the boars qualified as domestic pigs, and the court issued an injunction against dispossessing plaintiffs of their boars. The Court of Appeals, GLEICHER, P.J., and K. F. KELLY and SERVITTO, JJ., affirmed in part, reversed in part, and remanded for further proceedings; in particular, the Court concluded that that the ISO was not facially unconstitutional on equal-protection, due-process, or vagueness grounds and remanded each case to their home circuit court for further proceedings. *Johnson v Dep't of Natural Resources*, 310 Mich App 635 (2015). On remand, defendants moved for an order for voluntary dismissal of their counterclaim after the DNR found no Russian wild boar at plaintiff's facility in December 2015. The Baraga Circuit Court, Charles R. Goodman,

J., denied the motion, concluding that the *Johnson* opinion had rendered plaintiff's 2012 constitutional arguments moot but that defendants' counterclaim allegations were still viable. In 2016, the DNR inspected plaintiff's operation and identified eight pigs as being Russian wild boar or hybrids of same. During the ensuing bench trial concerning defendants' counterclaim, the parties presented testimony regarding whether the identified pigs were the type prohibited by the ISO. Defendants presented testimony regarding the traits the DNR deemed indicative of Sus scrofa. The court found that the determination of whether an animal is invasive when exhibiting more than one trait of Sus scrofa, but less than all the traits associated with Sus scrofa, was dependent on the opinion, subjective judgment, and interpretation of the person who reviewed the animal on behalf of the DNR because there was no explicit, clear standard in that regard. The court entered a judgment of no cause of action on defendants' counterclaim, reasoning that the evidence presented by defendants did not support the DNR's findings regarding plaintiff's eight pigs because the determination was not based on clearly defined standards or the identification of completely reliable morphologies and phenotypes. Defendants appealed. In an unpublished per curiam opinion, issued July 5, 2018 (Docket No. 336075) (*Turunen I*), the Court, STEPHENS, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ., affirmed the trial court's denial of defendants' motion for voluntary dismissal, reasoning that declaratory relief was necessary to guide plaintiff's future conduct related to the pigs he raised. The Court remanded the case for the trial court to address whether the ISO was unconstitutional as applied to plaintiff and to make findings of fact related to each of the eight pigs. On remand, the trial court held that the eight pigs identified by the DNR were not a prohibited species under the ISO and that the ISO was unconstitutionally vague as applied to plaintiff. Defendants appealed.

The Court of Appeals *held*:

1. An issue is not moot, and will be addressed by a court, when the issue is one of public importance that is capable of repetition yet evading review. The issues in this case were not moot because (1) the *Turunen I*'s mootness conclusion was most likely law of the case, (2) the parties continued to actively litigate the constitutionality of the ISO as applied to the pigs and plaintiff's operation, (3) the death of the eight pigs did not obviate the fact that the DNR could act in the future against plaintiff for raising pigs similar to the ones at issue, and (4) a decision on the merits would affect the parties and their right to future enforcement of the ISO.

2. The void-for-vagueness doctrine is a derivative of the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law. A statute may be challenged for vagueness on the grounds that (1) it does not provide fair notice of the conduct proscribed or (2) it is so indefinite that it invites arbitrary or discriminatory enforcement. Fair or proper notice exists if the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. A statute is unconstitutionally vague if it contains inadequate standards to guide those charged with its enforcement or if it impermissibly gives the trier of fact unstructured and unlimited discretion in applying the law. When a void-for-vagueness challenge does not involve the First Amendment, the constitutionality of the statute must be examined in light of the particular facts at hand without concern for the hypothetical rights of others. The correct inquiry is thus not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in the case. In this case, the *Johnson* Court's conclusion—that the ISO's delineation between protected and prohibited pigs was neither facially elusive nor uncertain and provided fair notice to swine owners of ordinary intelligence—was law of the case regarding the order's language and the fair-notice element of the void-for-vagueness doctrine. Moreover, the DNR complied with MCL 324.41313(c), by listing prohibited and restricted species, along with a description, distinguishing features, and photograph of the invasive species. For that reason, the ISO clearly provided standards for determining what constituted an invasive species and was not so indefinite that it invited arbitrary or discriminatory enforcement. The DNR witnesses relied on several of the listed characteristics as to each pig in forming their opinion that the eight pigs were unlawful under the ISO. Although application of the criteria was somewhat subjective and could vary pig by pig, the standards used by the DNR were not unconstitutionally void as applied to the pigs in this case. Therefore, the trial court erred by holding that the ISO was unconstitutionally vague as applied to plaintiff.

3. The trial court's findings regarding the pigs were entitled to great deference given that the court was in a better position to examine the facts and applied the appropriate factors when determining whether plaintiff's pigs fell within the parameters of the ISO. Accordingly, the trial court did not clearly err by concluding that the eight pigs were not prohibited under the ISO.

Affirmed in part and reversed in part.

O'Leary Law Office (by *Joseph P. O'Leary*) and *Bensinger, Cotant & Menkes, PC* (by *Glenn W. Smith*) for plaintiff.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Danielle Allison-Yokom* and *Kelly M. Drake*, Assistant Attorneys General, for defendants.

Before: MURRAY, C.J., and M. J. KELLY and RICK, JJ.

MURRAY, C.J. The legal battle over whether plaintiff's pigs were unlawful under the Department of Natural Resource's Invasive Species Order Amendment 1 (ISO) has been a long and contentious one, and it is now before this Court for a fifth time. On two prior occasions, this Court issued opinions on the merits, see *Johnson v Dep't of Natural Resources*, 310 Mich App 635; 873 NW2d 842 (2015), and *Turunen v Dep't of Natural Resources*, unpublished per curiam opinion of the Court of Appeals, issued July 5, 2018 (Docket No. 336075) (*Turunen I*), while on two other occasions the Court turned down requests for interlocutory review. See *Turunen v Dep't of Natural Resources Dir*, unpublished order of the Court of Appeals, entered December 6, 2013 (Docket No. 317933), and *Turunen v Dep't of Natural Resources Dir*, unpublished order of the Court of Appeals, entered September 12, 2016 (Docket No. 332811). With this appeal, we are provided the opportunity to review the final judgment entered in plaintiff's favor after a bench trial, in which the trial court held that the eight pigs at issue—which were all dead before trial—were not unlawful. We affirm that decision. We do, however, reverse the decision of the trial court holding that the ISO was unconstitutionally vague as applied.

I. BACKGROUND

The background facts are succinctly stated in this Court's opinion in *Turunen I*, unpub op at 2-3:

> In 2010, the Department of Natural Resources (DNR) issued ISO Amendment 1, which "add[ed] Russian wild boar and their hybrids to the list of Michigan's invasive species." *Johnson*, 310 Mich App at 643. The amended ISO provided in pertinent part that:
>
> > Possession of the following live species, including a hybrid or genetic variant of the species, an egg or offspring of the species or of a hybrid or genetically engineered variant, is prohibited:
> >
> > * * *
> >
> > (b) Wild boar, wild hog, wild swine, feral pig, feral hog, feral swine, Old world swine, razorback, [E]urasian wild boar, Russian wild boar (Sus scrofa Linnaeus). This subsection does not and is not intended to affect sus domestica involved in domestic hog production. [§ 40.4(1)(b).]
>
> Under part 413 of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.41301 et seq., a person may not possess, sell, or introduce a prohibited species. MCL 324.41303; MCL 324.41306; MCL 324.41309. Defendants offered training on how to distinguish Sus scrofa from Sus domestica from Dr. John Mayer, an internationally known biologist, to their personnel as well as local animal owners. That training taught them how to identify the animals by genotype ("the unique genetic make-up of a species") and phenotype ("the expression of those genes, which results in specific physical, biochemical, or behavioral characteristics"). Defendants issued a declaratory ruling (DR), which [the department] later rescinded, that listed eight phenotypes for identifying Sus scrofa modeled after Dr. Mayer's training.[3] Despite its rescission of the DR, defendants continued to refer to those phenotypes as a guide for identification.

> On February 21, 2012, plaintiff [Roger Turunen] filed a Complaint for Declaratory Ruling and Injunctive Relief for the court to determine the applicability of the ISO to his animals. On March 26, 2012, defendants filed a counterclaim for declaratory and injunctive relief alleging that plaintiff was required to abate the public nuisance of owning Russian Boar. Plaintiff's case was later consolidated with the cases of other plaintiffs challenging the DR and ISO, and in March 2014, the Marquette circuit court granted them summary disposition as to their claims that the ISO violated the equal protection and due process clauses, and was void for vagueness. This Court, in *Johnson v Dep't of Natural Res*[*ources*, 310 Mich App 635], disagreed and found the ISO constitutional. The plaintiffs' cases were remanded to their home circuit courts. On remand, defendants conducted inspections of plaintiff's hogs on December 18, 2015, and September 28, 2016. Defendants motioned the court to enter an order for voluntary dismissal of their counterclaim after defendants found no Russian wild boar at plaintiff's facility in December 2015. That motion was denied. The circuit court determined that *Johnson v Dep't of Natural Res*[*ources*], 310 Mich App 635, rendered plaintiff's 2012 complaint allegations regarding the ISO's constitutionality moot, but found that the allegations in defendants' March 2012 counterclaim were still viable.
>
> In September 2016, the defendants conducted an inspection, and identified eight pigs they believed were either Russian wild boar or hybrids thereof. The case continued to a bench trial where the issue before the court became whether plaintiff's eight animals were properly classified by defendants as being prohibited under the ISO. [Some alterations in original.]

[3] The sum of those characteristics were: 1) an arched dorsal profile or arched back; 2) front shoulders that were larger than the hind quarters; 3) darker colored fur toward the hooves; 4) "dark brown to blackish in color, sometimes gray" fur with "light tipped bristles;" 5) erect ears and a straight tail that were both darker at the tips; 6) a facial mask that appeared as a light-colored beard; 7) more slender from a frontal profile with eyes that appeared more on the side of their head; and 8) an elongated rostrum or nose.

A trial was conducted on the DNR's[1] counterclaim. Each side presented witnesses and expert witnesses on whether the eight pigs were unlawful under the ISO. The DNR presented the expert testimony of DNR wildlife specialists Duane Etter and Brian Roell (a point person in Michigan for feral swine and Sus scrofa), and Michigan State University associate professor Dr. Juan Steibel, who specializes in genetics and animal breeding. Plaintiff offered his own testimony, as well as that of Shannon Hanna, a DNR wildlife division supervisor involved in implementing the ISO in 2011–2012, as well as several individuals—Chris Helpin, veterinarian Donald Martinson, and Kevin Kirk—who have extensive familiarity with plaintiff's operations and pigs.

On November 22, 2016, the trial court issued an opinion and order containing the following findings of fact:

> 1. In December of 2010, the MDNR issued [the ISO], adding Sus scrofa Linnaeus to Michigan's list of invasive species.
>
> 2. The ISO was issued pursuant to authority conferred upon the MDNR by virtue of the provisions of The Natural Resources and Environmental Protection Act (NREPA), MCL 324.40101, et seq.
>
> 3. Common names that have been given to Sus scrofa include wild boar, wild hog, feral swine, feral pig, feral hog, Old world swine, razorback, [E]urasian wild boar and Russian boar.
>
> 4. In order to assist in identifying animals prohibited by the ISO, the MDNR sought input from Dr. John J. Mayer, a recognized expert in wild hogs.
>
> 5. As a result of its contacts with Dr. Mayer, the MDNR issued a declaratory ruling to assist members of the public

[1] The Director of the DNR is also a named defendant in this action.

in identifying illegal animals (Sus scrofa and hybrids) and to inform the public of the factors which would be utilized by the MDNR to identify Sus scrofa and Sus scrofa hybrids.

6. Because research is not sufficiently advanced, genetic testing is not yet able to differentiate between the two (2) species of pigs and their hybrids. The MDNR, therefore, is required to utilize morphology in an attempt to identify members of the prohibited species and their hybrids.

7. Although rescinded, the MDNR continues to utilize the points set forth in the declaratory ruling to identify pigs which it deems prohibited by the ISO. . . .

8. Included in those traits that the MDNR deems indicative of Sus scrofa are: Body type and shape, arched dorsal profile, larger front shoulders compared to hind quarter, more slender than domestic animals, fully furred, light-tipped bristles, usually dark brown to black or gray in color, facial masks, elongated (not dish faced) rostrums, straight tail and ear, lighter colored underfur, dark point coloration, eyes set to side of head, dorsal mane, grizzled coat and more slender than domestic animals.

9. Pure unhybridized populations of Eurasian/Russian wild boar probably no longer exist in this country. . . .

10. Some characteristics of Russian boar are shared by domestic pigs; nonetheless, if a pig exhibits only one (1) characteristic of a Russian boar it can be classified as a Russian boar.

11. To date, a pig has not been ordered "depopulated" if it exhibited only one (1) trait of a Russian boar.

12. Characteristics of Russian boar are difficult to ascertain. For example, split tips can give the appearance of light-tipped bristles, and split tips exist in domestic swine. Observer designations of pelage can be subject to debate. . . .

13. Environment, nutrition, gender and age can affect a pig's phenotype.

14. There are many morphological similarities amongst domestic breeds, feral pigs, [E]urasian wild boar

and some heritage breeds which make distinguishing them from one another difficult and problematic. . . .

15. A feral pig may be a domestic pig living in the wild.

16. The identification of completely reliable characteristics for feral hogs, [E]urasian wild boar and hybrids between the two has yet to be achieved. . . .

17. An animal can exhibit Sus scrofa characteristics and yet not be classified, by the MDNR, as invasive.

18. On September 28, 2016, the MDNR identified eight (8) animals owned by Roger Turunen as being prohibited Sus scrofa or hybrids, although the eight (8) animals[] differed in the degree and extent of Sus scrofa traits exhibited.

19. None of the eight (8) animals deemed prohibited by the MDNR exhibited all of the traits associated with Sus scrofa Linnaeus.

20. Some of Plaintiff's animals, not deemed invasive by the MDNR, exhibited phenotypes of Sus scrofa.

21. The determination of whether an animal is invasive when exhibiting more than one (1) trait of Sus scrofa, but less than all the traits associated with Sus scrofa, is dependent upon the opinion, subjective judgment and interpretation of the person who reviews the animal on behalf of the MDNR, as there is not an explicit, clear standard in that regard.

22. The individual reviewing an animal on behalf of the MDNR, due to the complexities involved, may be required to seek out the aid of other experts, both internally and externally, in order to reach a decision regarding the legal status of the animal.

The trial court then made the following conclusions of law:

1. The utilization of phenotypes to identify Russian boar and hybrids is problematic and can be difficult.

2. The evidence did not establish a clearly defined, explicit standard to determine when a pig exhibiting some

> traits of Sus scrofa crosses the line and becomes invasive under the ISO.
>
> 3. To determine if an animal is invasive, [it]may require the input of multiple experts, and laypersons would generally lack sufficient ability to know when an animal[] exhibits traits sufficient to be deemed invasive.
>
> 4. The testimony offered by the MDNR that eight (8) of Plaintiff's animals are invasive under the ISO is not based on reliable principles and methods; in that, such determination is not reliant on a clearly defined standard, or upon the identification of completely reliable morphologies or phenotypes; and thus, the testimony offered does not satisfactorily establish the proposition asserted. MRE 702.
>
> 5. Defendant, on its counter[]claim, has not met its burden of proof that eight (8) of Plaintiff's animals, or any of them, are prohibited by the ISO.

The court entered a judgment of no cause of action on defendants' counterclaim and denied defendants' request for injunctive relief and for sanctions.

After a remand from the panel in *Turunen I*, the trial court received briefs on whether the ISO was unconstitutionally vague as applied to plaintiff and whether the eight pigs identified by the DNR were unlawful under the ISO. After incorporating by reference the findings of fact and conclusions of law stated in its November 22, 2016 opinion and order, the court held that the ISO was unconstitutionally vague as applied to plaintiff:

> At oral argument, counsel for the DNR asserted that the depiction of the pig exhibited on the DNR website provided the public, including Mr. Turunen, with fair notice of what would constitute a prohibited animal. It does not.
>
> As admitted by the DNR on page six (6) of its March 28, 2019, brief, the photograph posted on its website is that

[of] a pure Russian boar; however, to be deemed illegal by the DNR, an animal need not be a pure Russian boar. In fact, pure unhybridized populations of Eurasian/Russian wild boar probably no longer exist in this country. . . .

Concerning Mr. Turunen's eight (8) pigs, the evidence offered by the Defendant at trial would support only a finding that each pig was, at best, a Russian boar hybrid, meaning that each animal would be a cross breed between Russian boar stock and domestic pig stock. . . . As such, Mr. Turunen's animals would exhibit less than all of the traits which the DNR associates with Sus scrofa . . . . Mr. Turunen's pigs, therefore, would not mirror the pure Russian boar shown on Defendant's website, and thus, the website's depiction did not provide Mr. Turunen with fair notice as to what would necessarily constitute a prohibited pig in the eyes of the DNR.

The Court finds that the lack of notice provided to Mr. Turunen becomes even more obvious in light of the testimony of Mr. Dwayne Etter who, along with Mr. Brian Roell, was one of the DNR employees who inspected and evaluated Mr. Turunen's animals. Mr. Etter advised that a pig could be categorized as Sus scrofa, even if a pig exhibited only one trait which the DNR associates with Russian boar . . . ; and thus, a pig could be ruled prohibited even if it had minimal resemblance to the animal depicted on the DNR's website. Mr. Turunen was never provided by the DNR with any indication as to the number of traits exceeding one that might distinguish a legal pig from an illegal one.

Because Mr. Turunen was never provided by the DNR with any indication as to the number of traits exceeding one that might distinguish a legal pig from an illegal one, Mr. Turunen could only guess what a DNR examiner might conclude when examining his pigs.

Mr. Turunen was not provided with the required fair notice as to what specifically could cause a pig to be classified as illegal. The ISO, as applied to Mr. Turunen and his animals, was unconstitutionally vague.

> In addition to its failure to provide Mr. Turunen with fair notice that his eight (8) pigs could be held to be violative of the ISO, the ISO and its lack of a clear standard regarding enforcement encouraged the subjective application of its provisions. Again, Mr. Turunen would be required to guess as to the number of traits a specific examiner might deem relevant to justify a determination of illegality. The ISO, as applied in this case, impermissibly encouraged arbitrary and discriminatory enforcement, and again, is unconstitutionally vague. See *Van Buren Charter* [*Twp*] *v Garter Belt, Inc*, 258 Mich App 594 (2003); see also *City of Owosso v Pouillon*, 254 Mich App 210 (2002).

The trial court also made specific factual findings with respect to the characteristics of each of the eight prohibited pigs using the photographs of each pig. The court found that defendants did not meet their burden of proof with respect to the illegality of any of the eight pigs.

II. ANALYSIS

A. MOOTNESS

We first address an issue not raised by either party but mentioned by the trial court in its opinion: does the fact that all eight of the pigs identified as potentially unlawful under the ISO are dead make this appeal moot? Mootness, of course, is an issue that courts are obligated to raise on their own throughout the course of the proceedings in order to avoid issuing opinions when there is no longer a controversy between the parties. See *In re MCI Telecom Complaint*, 460 Mich 396, 434 n 13; 596 NW2d 164 (1999) (obligation of court to raise mootness on its own); *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008) (deciding a moot issue is essentially issuing an advisory opinion). The Court in *League of*

Women Voters of Mich v Secretary of State, 506 Mich 561, 591 n 47; 957 NW2d 731 (2020), recently discussed the mootness doctrine:

> As the United States Supreme Court has explained, "[m]ootness has been described as ' "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." ' " *Arizonans for Official English v Arizona*, 520 US 43, 68 n 22; 117 S Ct 1055; 137 L Ed 2d 170 (1997) (citations omitted). Or, as another court put it, "Mootness . . . 'is akin to saying that, although an actual case or controversy once existed, changed circumstances have intervened to destroy standing.' . . . [S]tanding applies at the sound of the starting gun, and mootness picks up the baton from there." *Sumpter v Wayne Co*, 868 F3d 473, 490 (CA 6, 2017) (citation omitted). [Alterations in original.]

The mootness doctrine is not inflexible given that there are several exceptions to the general rule. *US Parole Comm v Geraghty*, 445 US 388, 404 n 11; 100 S Ct 1202; 63 L Ed 2d 479 (1980). The most frequently cited exception is that a case of public importance, where the remedy requested would be impossible to award because of the passage of time, will still be resolved when the issues are capable of repetition but evading review. *Taylor v Currie*, 277 Mich App 85, 99; 743 NW2d 571 (2007).

We conclude that the matter before us is not moot. First, in all likelihood, the *Turunen I* panel's conclusions on mootness are law of the case because the pigs at issue were dead at the time of that appeal as well. *People v Fisher*, 449 Mich 441, 444-445; 537 NW2d 577 (1995); *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). Second, as to the constitutionality of the ISO as applied to plaintiff and these eight pigs, this is not an issue where there is

"nothing but abstract questions of law which do not rest upon existing facts or rights." *Gildemeister v Lindsay*, 212 Mich 299, 302; 180 NW 633 (1920). Instead, the parties continue to actively dispute and litigate the validity of the ISO as applied to plaintiff, and the ISO can still be enforced against plaintiff and his operations. Thus, a live controversy still exists between the parties with respect to the constitutionality of the ISO as applied to these pigs and plaintiff's operations. Third, the fact that the eight pigs at issue are dead does not cause the matter to become moot. For one thing, it is undisputed that plaintiff continues to raise and sell pigs for the main purpose that plaintiff raised and sold the eight dead ones, so even in the absence of these particular pigs the DNR is just as able to take action against plaintiff under the ISO for raising pigs similar to the ones at issue here. Indeed, the DNR refused to dismiss the case earlier in the proceedings because it would not agree to a dismissal with prejudice because it did not want to foreclose future proceedings. See *Turunen I*, unpub op at 7.

In other words, absent a decision on whether the pigs with these or similar characteristics violate the ISO, the parties will not have any legal clarity to guide their relations. As such, a decision on the legality of the eight pigs would have a practical effect on the parties and their rights to future enforcement of the ISO. *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 489 Mich 884, 884-885 (2011). The issues are not moot.

B. AS-APPLIED CHALLENGE TO THE ISO

In the prior appeal, the panel directed that the trial court "shall make such a ruling on the constitutionality of the ISO as applied," *Turunen I*, unpub op at 5, and

the trial court did so by ruling that the ISO was unconstitutional as applied to plaintiff. We review de novo questions concerning the constitutionality of a statute. *Mich Alliance for Retired Americans v Secretary of State*, 334 Mich App 238, 252; 964 NW2d 816 (2020). Statutes are presumed to be constitutional, and a "party challenging the constitutionality of a statute has the burden of proving the law's invalidity." *In re Forfeiture of 2000 GMC Denali and Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016).

When a vagueness challenge does not involve the First Amendment, "the constitutionality of the statute in question must be examined in light of the particular facts at hand without concern for the hypothetical rights of others." *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998). "The proper inquiry is not whether the statute may be susceptible to impermissible interpretations, but whether the statute is vague as applied to the conduct allegedly proscribed in this case." *Id*. Thus, the law required the trial court to consider whether the ISO was vague as applied to plaintiff and his pigs.

"The 'void for vagueness' doctrine is a derivative of the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *STC, Inc v Dep't of Treasury*, 257 Mich App 528, 538; 669 NW2d 594 (2003). A challenge to the validity of an ordinance predicated on vagueness invokes constitutional principles of due process. See *John's Corvette Care, Inc v Dearborn*, 204 Mich App 616, 617; 516 NW2d 527 (1994); see also US Const, Am XIV, § 1; Const 1963, art 1, § 17. A statute may be challenged for vagueness on the grounds that it does not provide fair notice of the conduct proscribed or that it is so indefinite that it invites arbitrary or discrimi-

natory enforcement. See *Hill v Colorado*, 530 US 703, 732; 120 S Ct 2480; 147 L Ed 2d 597 (2000), and *People v Sands*, 261 Mich App 158, 161; 680 NW2d 500 (2004).

Fair or proper notice exists if the statute gives a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Kenefick v Battle Creek*, 284 Mich App 653, 655; 774 NW2d 925 (2009). A statute is sufficiently definite if its meaning can be "fairly ascertain[ed] by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Sands*, 261 Mich App at 161. In *Johnson*, 310 Mich App at 658-659, this Court held that "[t]he ISO's delineation of the species declared invasive leaves little to the imagination. . . . The lines drawn in the ISO between protected and prohibited pigs are neither elusive nor uncertain, and suffice to provide fair notice to swine owners of ordinary intelligence. No more is required." This holding established the law of the case with respect to the ISO language and the fair-notice element of the void-for-vagueness doctrine.[2] Additionally, plaintiff testified in his deposition that he was breeding his pigs for characteristics that he knew were characteristics of prohibited pigs. Even under these different facts, plaintiff failed to establish that the ISO did not provide fair notice of the type of pigs prohibited by the ISO.

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[2] In *Johnson*, 310 Mich App at 650, this Court considered whether the ISO was unconstitutionally vague as applied to the facts as they existed at that point in time—where plaintiffs conceded that their animals were Sus scrofa prohibited under the ISO. But in *Turunen I*, unpub op at 4, the panel concluded that the facts on remand at the time of the bench trial on defendants' counterclaim were not substantially the same as they were at the time the *Johnson* Court remanded the matter because plaintiff no longer owned the pigs that were at issue. Accordingly, the law-of-the-case doctrine does not preclude plaintiff's as-applied constitutional challenge on vagueness grounds as to these eight pigs, though it certainly has an impact on its success.

With respect to the second way in which a void-for-vagueness challenge can be made, a statute is unconstitutionally vague if it contains inadequate standards to guide those charged with its enforcement, or if it impermissibly gives the trier of fact unstructured and unlimited discretion in applying the law. *People v Douglas*, 295 Mich App 129, 138; 813 NW2d 337 (2011). This Court previously stated in *Johnson*, 310 Mich App at 657:

> "Due process requires that a State provide meaningful standards to guide the application of its laws." *Pacific Mut Life Ins Co v Haslip*, 499 US 1, 44; 111 S Ct 1032; 113 L Ed 2d 1 (1991) (O'Connor, J., dissenting). Void-for-vagueness tenets embrace the principle that a law is unconstitutional "if its prohibitions are not clearly defined." *Grayned v City of Rockford*, 408 US 104, 108; 92 S Ct 2294; 33 L Ed 2d 222 (1972). The Supreme Court explained:
>
> > Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. [*Id*. at 108-109 (citations omitted).]

And, in *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983), the Court said that it had recently recognized, in the context of a penal statute, that "the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legisla-

ture establish minimal guidelines to govern law enforcement.' " (Citation omitted.)

Here, plaintiff argues that he was subject to subjective, arbitrary, and discriminatory enforcement of the ISO because it lacked explicit standards for determining whether an animal was prohibited by the ISO, and therefore, the DNR agents had unfettered discretion to determine whether the pigs were prohibited. The trial court found that "the ISO and its lack of a clear standard regarding enforcement encouraged the subjective application of its provisions. Again, Mr. Turunen would be required to guess as to the number of traits a specific examiner might deem relevant to justify a determination of illegality."

The *Johnson* Court's conclusion that the language of the ISO is "neither elusive nor uncertain" makes a challenge to the ISO on the ground that it encourages arbitrary or discriminatory enforcement difficult. *Johnson*, 310 Mich App at 659. The ISO prohibits possession of Sus scrofa or Sus scrofa hybrids. Part 413 of NREPA requires that the DNR provide "[a] list of prohibited species and restricted species along with a description and a photograph or drawing of each of those species." MCL 324.41313(c). The evidence produced at trial demonstrated that the DNR complied with this requirement. The DNR website provided a color photograph of a prohibited pig, and it also identified the following distinguishing features of the invasive species: white tipped bristles, erect ears, straight facial profile, dark distal portions (legs, ears, snout, tail), light-colored underfur, and hair colored variations of wild/grizzled, solid black, solid red/brown, black and white spotted, and black and red/brown spotted.

The DNR experts, Etter and Roell, testified that Sus scrofa and Sus scrofa hybrids had certain characteris-

tics, which were available on the DNR website as well as in numerous field guides, and that they applied these characteristics when determining whether an animal was prohibited under the ISO. Both experts testified that they would not find an animal to be prohibited on the basis of only one characteristic and that they used all information available, together with the combined characteristics of the animal as a whole, in making the determination whether an animal was an invasive species under the ISO. The use of phenotypic characteristics was an acceptable—and the only—means available at the time of trial to determine whether an animal was an invasive species. The ISO clearly provided standards for determining what constituted an invasive species and was not so indefinite that it invited arbitrary or discriminatory enforcement. Upon de novo review, we hold that plaintiff failed to sustain his burden of proving that the ISO was unconstitutionally vague as applied to him.[3]

The trial court's rationale in reaching the opposite conclusion was based on the high number of characteristics utilized by the DNR to identify Sus scrofa in addition to the subjective application of one or all of the characteristics to the animals in question. But the

[3] Plaintiff also argues that the ISO is unconstitutional as applied because it violates procedural and substantive due process. Although plaintiff raised these arguments in his brief on remand, the *Turunen I* Court remanded the matter to the trial court for a finding of whether the ISO was void for vagueness as applied, and the trial court's opinion after remand addressed only the void-for-vagueness doctrine. Additionally, plaintiff has not filed a cross-appeal with respect to the trial court's opinion after remand. Thus, although an appellee who has taken no cross-appeal may still urge in support of the favorable judgment reasons that were rejected by a lower court, *Burns v Rodman*, 342 Mich 410, 414; 70 NW2d 793 (1955), we will not do so here because plaintiff presents arguments on constitutional issues that were not ruled upon by the trial court and which were outside the scope of this Court's remand.

Johnson Court had already determined that these criteria were not so unclear as to be facially void for vagueness and, instead, provided fair notice of what was prohibited to pig owners (and presumably to DNR employees) of ordinary intelligence. *Johnson*, 310 Mich App at 658-659. Additionally, as applied to *these* eight pigs, the DNR witnesses relied upon several of the listed characteristics as to each pig when opining as to why these eight pigs were unlawful under the ISO. Thus, although the application of the criteria is somewhat subjective and may vary pig by pig, as applied to these pigs, the standards employed by the DNR were not unconstitutionally void.[4]

C. THE LEGALITY OF THE PIGS

Turning now to the trial court's determination that the eight pigs were not prohibited by the ISO, the DNR argues that the trial court's factual findings were in error because defendants presented overwhelming evidence that each of the eight pigs were prohibited under the ISO. In support, the DNR points out that the trial court did not discuss the credibility of the witnesses' testimony or the weight it was giving to their testimony, and did not point to any contrary evidence that was more credible or outweighed the evidence presented by it.

It is true, as argued by the DNR, that the trial court did not specifically address one way or the other the

[4] We note that it was not Etter's testimony that only one trait was sufficient to classify a pig as wild boar or hybrid. Rather, when asked how many characteristics were needed to classify a pig as prohibited, Etter answered, stating the obvious, "at least one[.]" He then almost immediately testified that there was no one controlling characteristic and that he had *never* found an animal to be prohibited based on a single characteristic. Roell also testified that he had *never* identified an animal as prohibited based on one characteristic.

testimony of the three DNR experts (Etter, Roell, and Steibel) explaining which phenotypic characteristics of Sus scrofa or Sus scrofa hybrids were common in Sus scrofa but not in Sus domestica. Etter and Roell also testified that in September 2016, they personally observed the animals and took the photographs of the eight pigs that were admitted as exhibits. Additionally, they testified about each animal, reviewing the photographs of the animals and identifying the Sus scrofa characteristics they had personally observed.

The trial court, in essence, performed the same analysis, as it made factual findings by applying the phenotypic characteristics—including those identified by the DNR on its website and those in the rescinded DR and identified as common characteristics of Sus scrofa by the DNR's experts—to the photographs of each of the eight pigs. On the basis of its examination of the characteristics of each pig, the trial court found that the DNR did not prove by a preponderance of the evidence that the eight pigs were prohibited under the ISO. It was likewise free to utilize the criteria testified to by the DNR experts and independently apply those to the characteristics exhibited in the pictures of the eight pigs. For, as the finder of fact, the trial court was free to accept or reject any part of defendants' witnesses' testimony. MCR 2.613(C). The court was also not required to explain why it did not adhere to the conclusions of a particular witness. Thus, the fact that the trial court did not adhere to or otherwise make findings consistent with the DNR expert witnesses' testimony—even if that testimony was not disputed—is of no moment. *People v Jackson*, 390 Mich 621, 624-625; 212 NW2d 918 (1973) ("The trier of fact was not obliged to believe Lewis's testimony simply because it was not contradicted by another witness."); see also *id*. at 625 n 2. Instead, giving the trial court's factual findings the great defer-

ence they are due, and given that the trial court was in a better position to examine the facts and applied the appropriate factors in determining whether any of the pigs fell within the parameters of the ISO, we cannot conclude that the trial court's findings were clearly erroneous.

The DNR also argues that the trial court's finding that it failed to prove by a preponderance of the evidence that the eight pigs were prohibited under the ISO is contrary to the court's findings that each pig possessed some characteristics of Sus scrofa. However, the DNR's experts acknowledged that a determination whether a pig is prohibited must be made on the basis of the sum of the phenotypic traits of each pig—which is precisely the approach that the trial court took. Those same experts recognized that even though a pig may have characteristics of Sus scrofa, not all pigs exhibiting such traits are prohibited under the ISO. Indeed, the experts testified that they would err in favor of an owner if they could not conclusively determine that an animal was prohibited.

III. CONCLUSION

For these reasons, we reverse the trial court's order holding that the ISO as applied to plaintiff is unconstitutionally vague but affirm the ultimate judgment in favor of plaintiff on the counterclaim. No costs to either side, neither having prevailed in full.

M. J. KELLY and RICK, JJ., concurred with MURRAY, C.J.

SOUTH DEARBORN ENVIRONMENTAL IMPROVEMENT ASSOCIATION, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY

Docket No. 350032. Submitted March 3, 2021, at Detroit. Decided March 18, 2021, at 9:10 a.m. Leave to appeal denied 509 Mich 915 (2022).

South Dearborn Environmental Improvement Association, Inc. (South Dearborn) and several other environmental groups petitioned the Wayne Circuit Court for judicial review of a decision of the Department of Environmental Quality (the DEQ) to issue a permit to install (PTI) for an existing source under the Natural Resources and Environmental Protection Act (the NREPA), MCL 324.101 *et seq*. In 2006, the DEQ issued Severstal Dearborn, LLC (Severstal) a PTI that authorized the rebuilding of a blast furnace and the installation of three air-pollution-control devices at Severstal's steel mill. In the years that followed, the permit was revised twice; each successive permit modified and replaced the preceding permit. Emissions testing performed in 2008 and 2009 revealed that several emission sources at the steel mill exceeded the level permitted. The DEQ sent Severstal a notice of violation, and after extended negotiations, they entered into an agreement, pursuant to which Severstal submitted an application for PTI 182-05C, the PTI at issue in this case. The DEQ issued the permit on May 12, 2014, stating that the purpose of PTI 182-05C was to correct inaccurate assumptions about preexisting and projected emissions and to reallocate emissions among certain pollution sources covered by the PTI. On July 10, 2014, 59 days after PTI 182-05C was issued, South Dearborn and several other environmental groups appealed the DEQ's decision in the circuit court. AK Steel Corporation (AK Steel) purchased the steel mill a short time later, intervened in the appeal, and moved to dismiss the action, arguing that the circuit court lacked jurisdiction over the appeal because South Dearborn's petition was untimely filed. The court, Daniel A. Hathaway, J., denied AK Steel's motion to dismiss, holding that South Dearborn's petition for judicial review was timely filed. AK Steel appealed in the Court of Appeals, and the Court of Appeals, RIORDAN, P.J., and SAAD and M. J. KELLY, JJ., affirmed the result but on different grounds, holding that the petition was timely because

it was filed within the 60-day period provided by MCR 7.119 and MCR 7.104(A). 316 Mich App 265 (2016). AK Steel sought leave to appeal in the Supreme Court, and the DEQ filed a separate application raising nearly identical arguments. Following oral argument, the Supreme Court harmonized the provisions of MCL 324.5505(8) and MCL 324.5506(14) and held that a petition for judicial review of a PTI for an existing source must be filed within 90 days of the permit being issued. 502 Mich 349 (2018). Accordingly, because the petition for judicial review was timely filed 59 days after PTI 182-05C was issued, the Supreme Court held that the circuit court properly denied AK Steel's motion to dismiss, and the matter was remanded to the circuit court for further proceedings. In the circuit court, South Dearborn argued that the DEQ unlawfully processed Severstal's permit in a way that allowed the company to evade a number of current air-pollution standards because the DEQ's 2014 modification of the 2007 permit was not authorized or governed by any rule. South Dearborn therefore argued that the DEQ's issuance of PTI 182-05C was contrary to law, in excess of the agency's authority, based on improper procedure, and arbitrary and capricious. Following a hearing in July 2019, the circuit court, William J. Giovan, J., affirmed the DEQ's decision to issue PTI 182-05C, holding that the DEQ's decision was authorized by law. South Dearborn appealed.

The Court of Appeals *held*:

1. MCL 324.5505(5)(a) of the NREPA provides, in relevant part, that permits shall include terms and conditions necessary to assure compliance with all applicable requirements of Part 55 of the NREPA, the rules promulgated under Part 55, and the Clean Air Act, including those necessary to ensure compliance with all applicable ambient air standards, emission limits, and increment and visibility requirements pursuant to Part C of Title I of the Clean Air Act at each location. No provision of Part 55 of the NREPA requires the DEQ to apply all "current" regulations when it issues a permit. The current air-quality regulations that South Dearborn asserted should have been imposed would have applied only if Severstal had proposed "major modifications" in its PTI 182-05C application. Mich Admin Code, R 336.2801(aa)(i) defines a major modification, in relevant part, as a physical change in or change in the method of operation of a major stationary source that results in a significant emissions increase of a regulated new source review pollutant and a significant net emissions increase of that pollutant from the major stationary source. However,

Severstal indicated in its application that it was not proposing a majormodification. Accordingly, the DEQ was not required to apply the current regulations.

2. South Dearborn's reliance on *Ziffrin, Inc v United States*, 318 US 73 (1943), for the proposition that an agency must apply the law in effect at the time of its permitting decision was not relevant in this case because *Ziffrin* did not involve an amendment to or a modification of an existing permit; the permit at issue in *Ziffrin* was a permit for future acts. Furthermore, South Dearborn's reliance on *Sierra Club v US Environmental Protection Agency*, 762 F3d 971 (CA 9, 2014), for the proposition that "grandfathering" during all permitting decisions is prohibited was misplaced; that case was inapplicable because unlike the permit application in that case, there is no statutory authority that required the DEQ to impose regulations promulgated postconstruction when it modifies emissions standards in a preconstruction permit. South Dearborn provided no compelling authority for the proposition that specific rules governing the modification of permits were required. Moreover, the language of MCL 324.5503(c) evidenced the Legislature's intent that the DEQ possess the power to modify permits for cause. The DEQ's failure to promulgate rules specifically addressing the manner in which a permit may be modified did not nullify the legislative expectation that, when warranted, modification is permissible. Accordingly, there was no merit in South Dearborn's proposition that the issuance of PTI 182-05C was not authorized by law because the DEQ failed to promulgate rules related to the modification of an existing permit.

3. The record in this case did not support South Dearborn's conclusion that the DEQ's actions were arbitrary and capricious. After the DEQ was informed of the results of the emissions testing, a process ensued to determine the proper course of action. At the conclusion of this process, the DEQ exercised its discretion and update the emissions limitations by modifying the permit. Moreover, Mich Admin Code, R 336.1207 defers to the DEQ's judgment regarding whether the operation of the equipment for which the permit was sought would interfere with the attainment or maintenance of the air-quality standard for any air contaminant. The DEQ made this determination when it issued PTI 182-05B; the PTI 182-05C application did not seek to make any physical changes, changes to the method of operation, or increases in production rate/throughput for the equipment in the facility. Accordingly, the DEQ's actions were not arbitrary or capricious.

4. The DEQ was permitted to enter into the extension agreement under Mich Admin Code, R 336.1203. Rule 336.1203 addresses the information that must be included in an application for a PTI, including, among other things, a complete description of each emission unit or process covered by the application, a description of any applicable air-pollution-control regulations, a description of all air contaminants that are reasonably anticipated, and a description of how the applicant intended to control or minimize those contaminants. The extension agreement was the avenue by which the DEQ could exercise its authority under Rule 336.1203 while remaining within the time parameters of Rule 336.1206, which requires that the DEQ act on a PTI application within 120 days of finding it administratively complete. Contrary to South Dearborn's assertions, the codification of a right to enter into an extension does not necessarily mean that the right did not exist before the promulgation of the rule. The October 2013 amendment of Rule 336.1203 specifically allowed for the exercising of rights that previously existed, albeit informally. Accordingly, there was no merit to South Dearborn's assertion that because no written rule allowed the DEQ to extend the time limit provided by Rule 336.1206 in February 2013, the agency's procedures were unlawful and the DEQ exceeded its authority by extending the time limit.

5. The record did not support South Dearborn's contention that the DEQ violated Mich Admin Code, R 336.1207 when it issued the permit because it did not consider multiple violations identified just weeks before the permit was issued. The extension agreement required Severstal to address the violations, which included providing an updated Operation and Maintenance Plan and a Malfunction Abatement Plan. Thus, not only did the DEQ not ignore the violations, it actually addressed the violations in the extension agreement. After considering the violations, the DEQ, in its discretion, still determined that issuing PTI 182-05C was appropriate. Consequently, the DEQ exercised its judgment and was not required to deny the permit under Rule 336.1207. Accordingly, there was no showing that the DEQ's actions were not authorized by law.

Affirmed.

ENVIRONMENT — AIR QUALITY — ADMINISTRATIVE LAW — PERMITS — APPLICATION OF REGULATIONS WHEN ISSUING A PERMIT.

MCL 324.5505(5)(a) of the Natural Resources and Environmental Protection Act (the NREPA), MCL 324.101 *et seq*., provides, in relevant part, that permits shall include terms and conditions

necessary to assure compliance with all applicable requirements of Part 55 of the NREPA, the rules promulgated under Part 55, and the Clean Air Act, including those necessary to ensure compliance with all applicable ambient air standards, emission limits, and increment and visibility requirements pursuant to Part C of Title I of the Clean Air Act at each location; no provision of Part 55 of the NREPA requires the DEQ to apply all "current" regulations when it issues a permit.

Olson, Bzdok & Howard, PC (by *Christopher M. Bzdok* and *Tracy J. Andrews*) for South Dearborn Environmental Improvement Association, Inc.

Great Lakes Environmental Law Center (by *Nicholas Leonard*) for Detroiters Working for Environmental Justice, Original United Citizens of Southwest Detroit, and Sierra Club.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Neil D. Gordon*, Assistant Attorney General, for the Department of Environmental Quality and Dan Wyant.

Driggers, Schultz & Herbst (by *William C. Schaefer*) and *Adam P. Hall* for AK Steel Corporation.

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

CAMERON, J. South Dearborn Environmental Improvement Association, Inc. (South Dearborn), an environmental advocacy group, appeals a circuit court order affirming the decision of the Department of Environmental Quality (the DEQ) to issue a permit for an existing source of air pollution to Severstal Dearborn, LLC (Severstal).[1] We affirm.

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[1] Intervening appellee, AK Steel Corporation, acquired Severstal after the DEQ issued a permit to install titled "PTI 182-05C."

I. BACKGROUND

This appeal arises out of the DEQ's decision to issue Permit to Install (PTI) 182-05C in 2014. Before PTI 182-05C was issued, the DEQ had issued three earlier permits: PTI 182-05, PTI 182-05A, and PTI 182-05B. In a prior appeal concerning the issuance of PTI 182-05C, our Supreme Court summarized the facts surrounding the issuance of the permits as follows:

> AK Steel operates a steel mill within the Ford Rouge Manufacturing complex in Dearborn, Michigan. Before being acquired by AK Steel in 2014, the steel mill was operated by Severstal Dearborn, LLC (Severstal). The steel mill is subject to air pollution control and permitting requirements under the federal Clean Air Act, 42 USC 7401 *et seq*., and the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. In order to comply with the Clean Air Act, Part 55 of the NREPA requires the DEQ to promulgate rules to establish a permit-to-install program, MCL 324.5505(2), and an operating-permit program, MCL 324.5506(4).
>
> In 2006, the DEQ issued Severstal a permit to install titled "PTI 182-05," which authorized the rebuilding of a blast furnace and the installation of three air pollution control devices at Severstal's steel mill. In the years that followed, the permit was revised twice, first in 2006 (PTI 182-05A) and again in 2007 (PTI 182-05B). Each successive permit modified and replaced the preceding permit.
>
> Emissions testing performed in 2008 and 2009 revealed that several emission sources at the steel mill exceeded the level permitted by PTI 182-05B. The DEQ sent Severstal a notice of violation, and after extended negotiations, they entered into an agreement, pursuant to which Severstal submitted an application for PTI 182-05C. The DEQ issued the permit on May 12, 2014, after a period of public comment and a public hearing as prescribed by the NREPA, MCL 324.5511(3). The DEQ stated that the purpose of PTI 182-05C was to correct inaccurate assumptions about pre-existing and projected emissions and to

> reallocate emissions among certain pollution sources covered by the permit to install.
>
> On July 10, 2014, 59 days after PTI 182-05C was issued, appellee [South Dearborn] and a number of other environmental groups appealed the DEQ's decision by filing a petition for judicial review in the Wayne Circuit Court. [*South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 502 Mich 349, 355-357; 917 NW2d 603 (2018).]

After the petition for judicial review was filed in the circuit court, AK Steel purchased the steel mill, intervened in the appeal, and then moved to dismiss under MCR 2.116(C)(1) (lack of jurisdiction). AK Steel argued that South Dearborn's petition for judicial review was untimely filed and, therefore, the circuit court lacked jurisdiction over the case. The circuit court concluded that South Dearborn had 90 days from the date that PTI 182-05C was issued to file a petition for judicial review. The circuit court thereafter found that South Dearborn's petition was timely filed and denied AK Steel's motion to dismiss.

AK Steel applied to this Court for leave to appeal the circuit court's decision on jurisdiction. This Court affirmed, but on different grounds. Specifically, this Court held that the petition was timely because it was filed within the 60-day period provided by MCR 7.119. *South Dearborn Environmental Improvement Ass'n, Inc v Dep't of Environmental Quality*, 316 Mich App 265, 277-278; 891 NW2d 233 (2016), vacated in part 502 Mich 349 (2018).

AK Steel sought leave to appeal in the Michigan Supreme Court. Following oral argument, our Supreme Court harmonized the provisions of MCL 324.5505(8) and MCL 324.5506(14) and held that "a petition for judicial review of a permit to install for an existing source must be filed within 90 days of the permit being

issued." *South Dearborn Environmental Improvement Ass'n, Inc*, 502 Mich at 370-372. Accordingly, because the petition for judicial review was timely filed 59 days after PTI 182-05C was issued, our Supreme Court held that the circuit court properly denied AK Steel's motion to dismiss, and the matter was remanded to the circuit court for further proceedings. *Id*. at 374.

Between September 2018 and December 2018, the parties filed their briefs in the circuit court. South Dearborn argued that the DEQ's issuance of PTI 182-05C was not authorized by law. In essence, South Dearborn argued that the DEQ unlawfully processed Severstal's permit in a way that allowed the company to evade a number of current air-pollution standards. South Dearborn further argued that the 2014 modification of the 2007 permit was not authorized or governed by any rule and that the modification specifically violated rules promulgated by the agency. South Dearborn asserted that as a result of these irregularities, the DEQ's issuance of PTI 182-05C was contrary to law, in excess of the agency's authority, based on improper procedure, and arbitrary and capricious.

In response, the DEQ and AK Steel argued that the case did not involve a typical challenge to an air-pollution permit that authorized changes to a factory or new construction of pollution-emission sources. Instead, the matter involved a simple modification to an existing permit to update certain emission limits in the 2007 permit. The DEQ argued that federal regulations promulgated after 2007 to limit certain emissions did not apply because Severstal was not proposing to make major changes to its mill. The DEQ asserted that, under these circumstances, it had no authority to impose post-2007 air-pollution regulations on Severstal.

Following a hearing in July 2019, the circuit court affirmed the DEQ's decision to issue PTI 182-05C.[2] At the outset, the circuit court explained that it was to determine whether the DEQ's decision was authorized by law. The circuit court noted that a decision was not authorized by law if it violated a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as a result of unlawful procedure, or was arbitrary and capricious. The circuit court then found that the DEQ's decision was authorized by law. Specifically, the court found that the DEQ, when issuing PTI 182-05C, was permitted to consider and apply the circumstances that existed when PTI 182-05B was issued in 2007. This appeal followed.

II. STANDARDS OF REVIEW

"A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 583; 701 NW2d 214 (2005). See also Const 1963, art 6,

[2] Initially, the circuit court noted that the issues deserved—and in other circumstances would have warranted—a written opinion. However, the court indicated that it would not be pursuing that course because a prompt resolution of the petition for judicial review was equally important. The circuit court noted that the appeal had been pending for some time and that a written opinion might take several weeks to prepare. The circuit court then explained that it was sitting as a visiting judge on a temporary assignment and, therefore, the judge might not be assigned to the court in a few weeks. The circuit court also declined to pass on a decision and leave it to the judge's successor, noting that that course would only further postpone resolution of the issues. For these reasons, the circuit court concluded that it would be more prudent to simply issue an oral opinion from the bench.

§ 28. In this case, Part 55 of the NREPA does not require the DEQ to conduct an administrative hearing before it issues a permit. Consequently, no contested-case hearing was held.

> When the agency's governing statute does not require the agency to conduct a contested case hearing, the circuit court may not review the evidentiary support underlying the agency's determination. Judicial review is limited in scope to a determination whether the action of the agency was authorized by law. The agency's action was not authorized by law if it violated a statute or constitution, exceeded the agency's statutory authority or jurisdiction, materially prejudiced a party as the result of unlawful procedures, or was arbitrary and capricious. Courts review de novo questions of law, including whether an agency's action complied with a statute. [*Natural Resources Defense Council v Dep't of Environmental Quality*, 300 Mich App 79, 87-88; 832 NW2d 288 (2013) (quotation marks and citations omitted).]

Further, "[a] ruling is arbitrary and capricious when it lacks an adequate determining principle, when it reflects an absence of consideration or adjustment with reference to principles, circumstances, or significance, or when it is freakish or whimsical." *Henderson v Civil Serv Comm*, 321 Mich App 25, 44; 913 NW2d 665 (2017) (quotation marks and citation omitted). "This Court adopted this particular formulation of the authorized-by-law standard, in part, because it focuses on the agency's power and authority to act rather than on the objective correctness of its decision." *Id*. (quotation marks and citation omitted).

Finally, "[w]hether a circuit court applied the appropriate standard of review is a question of law that this Court reviews de novo." *Natural Resources Defense Council*, 300 Mich App at 87.

III. ANALYSIS

In both the circuit court and this Court, South Dearborn challenges the DEQ's issuance of PTI 182-05C on several fronts. Its primary contention, however, is that through the DEQ's permit-authorization process, Severstal was illegally allowed to evade current air-pollution rules, which are more stringent than when the original PTI was issued. South Dearborn contends that the DEQ's issuance of PTI 182-05C permitted Severstal to benefit from "grandfathering" in the standards that existed in 2007. It asserts that PTI 182-05B should have been revoked and that Severstal should have been required to submit a new application, which would then be subject to the air-quality rules in effect at the time the new permit was issued. Notwithstanding South Dearborn's many and varied arguments, we conclude that the manner in which the DEQ issued PTI 182-05C was authorized by law.

At the outset, it cannot seriously be disputed that the DEQ possesses the authority to modify permits previously issued. MCL 324.5503(c), in general, authorizes the DEQ to "deny, terminate, modify, or revoke and reissue permits for cause." Consistent with this authority, it is also clear that the DEQ's issuance of PTI 182-05C was to effectuate a modification of the 2007 permit. The permit application indicated that Severstal was seeking a "correction to PTI 182-05B for the Severstal Dearborn facility located in Dearborn, MI." Severstal provided that

> [t]his correction is to update emission factors from the previous application based on recent emissions test data. In addition, Severstal will reallocate SO2 emissions from the stove and casthouse stacks located at the blast furnaces.

> This application is not requesting to make any physical changes, changes to the method of operation, or increase in production rate/throughput for the equipment at the facility.

Similarly, the DEQ explained that the proposed permit would

> [u]pdate the emission factors for particulate matter . . . that were used in the 2005 application to establish permit limits, . . . [r]evise the PTI 182-05 series of permits by reallocating SO_2 emissions within the stove and casthouse stacks at the blast furnaces[,] [and] [r]econfirm the Prevention of Significant Deterioration (PSD) applicability analysis and associated emissions netting presented in PTI 182-05B.

The DEQ also noted that there would "not be any physical changes, changes to the method of operation, or increase in annual production rate/throughput for the equipment at the stationary source beyond what was approved in PTI 182-05B."

Notwithstanding the general grant of authority and the limited nature of the modification of the 2007 permit, South Dearborn argues that the DEQ was required to apply air-pollution standards promulgated after 2007 when it issued the permit. Resolution of this issue involves, to some degree, statutory interpretation.

> The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute. When interpreting a statute, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory. [*South Dearborn Environmental Improvement Ass'n, Inc*, 502 Mich at 360-361 (quotation marks and citations omitted).]

Moreover, "[n]ontechnical words and phrases should be construed according to their plain meaning, taking into account the context in which the words are used." *Id*. at 361 (quotation marks and citation omitted; alteration in original). Administrative rules are interpreted in an identical manner. *Brang, Inc v Liquor Control Comm*, 320 Mich App 652, 661; 910 NW2d 309 (2017) ("Just as with statutes, the foremost rule in construing an administrative rule, and our primary task, is to discern and give effect to the administrative agency's intent.").

As the DEQ correctly notes, no provision of Part 55 of the NREPA requires the DEQ to apply all "current" regulations when it issues a permit. Instead, MCL 324.5505(5)(a) provides that permits shall

> [i]nclude terms and conditions necessary to assure compliance *with all applicable requirements* of this part, the rules promulgated under this part, and the clean air act, including those necessary to ensure compliance with *all applicable* ambient air standards, emission limits, and increment and visibility requirements pursuant to part C of title I of the clean air act . . . at each location." [Emphasis added.]

The current air-quality regulations that South Dearborn asserts should have been imposed only apply if Severstal had proposed "major modifications" in its PTI 182-05C application. See Mich Admin Code, R 336.2802(2); Mich Admin Code, R 336.2902(1). A major modification is defined by Rule 336.2801(aa)(i), in relevant part, as a "[p]hysical change in or change in the method of operation of a major stationary source" that results in "[a] significant emissions increase of a regulated new source review pollutant" and "[a] significant net emissions increase of that pollutant from the major stationary source." As indicated in the application, Severstal was not proposing a major modification.

Nonetheless, without any substantive discussion, South Dearborn cites *Ziffrin, Inc v United States*, 318 US 73; 63 S Ct 465; 87 L Ed 621 (1943), for the proposition that "[a]n agency must apply the law in effect at the time of its permitting decision." However, the facts in that case are easily distinguishable from the facts herein. In *Ziffrin*, an Indiana corporation was denied "a permit to continue designated contract carrier operations under the grandfather clause of Section 209(a) of the Interstate Commerce Act . . . ." *Ziffrin*, 318 US at 74. The law changed between the time the application was filed and the order denying the application was entered. *Id*. at 75. In upholding the Interstate Commerce Commission's decision, the Supreme Court held that "the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered." *Id*. at 78. The Court further explained, "A fortiori, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation." *Id*.

Thus, *Ziffrin* did not involve an amendment to or a modification of an existing permit. Instead, at issue in *Ziffrin* was a permit for future acts. *Id*. In this case, the relevant action had already occurred pursuant to the earlier permit, PTI 182-05B. As already stated, the DEQ indicated that there would "not be any physical changes, changes to the method of operation, or increase in annual production rate/throughput for the equipment at the stationary source beyond what was approved in PTI 182-05B." For this reason, the analysis in *Ziffrin* is not relevant.

Additionally, contrary to South Dearborn's arguments, the DEQ specifically stated that it was not

issuing a "grandfathered" permit. In its response to the public comments, the DEQ explained:

> The [Air Quality Division] is not issuing a "grandfathered" permit, there is no such permit. The application is not subject to current [Prevention of Significant Deterioration] requirements for the C Blast Furnace project because the proposed changes did not constitute a modification under those rules, however, the applicant did confirm that the previous CO and SO_2 [Best Available Control Technology] analyses were still valid. The proposed emission increases were not a result of increased production or operation, but the result of limited information at the time of the original application.

Moreover, South Dearborn's reliance on *Sierra Club v US Environmental Protection Agency*, 762 F3d 971 (CA 9, 2014) (*Avenal*), for the proposition that "grandfathering" during all permitting decisions is prohibited is misplaced. In that case, Avenal Power Center LLC (Avenal) applied to the United States Environmental Protection Agency (the EPA) for a PSD permit to build and operate a power plant. *Id*. at 973. Although the EPA was statutorily required to grant or deny the permit application within one year, it failed to do so. *Id*. "After the deadline passed but before taking any final action, EPA tightened the applicable air quality standards." *Id*. Thereafter, Avenal "filed suit and sought to compel EPA to issue the [PSD permit] under the old standards that would have applied had EPA acted within the statutory deadline." *Id*. Initially, the EPA responded that it was not legally allowed to do so and that it was required to impose the air-quality standards in effect at the time the permit was issued. *Id*. "Months later, however, EPA reversed course and granted Avenal Power the [PSD] Permit without regard to the new regulations, which by then had gone into effect." *Id*.

Environmental groups, including the Sierra Club, challenged the EPA's actions. *Id*. On appeal in the United States Court of Appeals for the Ninth Circuit, the EPA asserted that, under narrow circumstances, it had authority to grandfather certain permit applications like Avenal's and that its decision to do so was entitled to deference. *Id*. at 982-983. The Ninth Circuit disagreed, holding that the Clean Air Act unambiguously required Avenal to demonstrate that the energy project complied with the regulations in effect at the time the permit was issued. *Id*. at 982-984. However, it is important to note that the court did not hold that the policy of grandfathering was prohibited in all permit-application decisions. *Id*. at 982 n 7. Instead, the Court reviewed the language of the Clean Air Act applicable to the proposed construction of a new major emitting facility and concluded that, as to those types of permits, the Clean Air Act "clearly requires EPA to apply the regulations in effect at the time of the permitting decision." *Id*. at 979.

As the DEQ correctly notes, the present case is fundamentally different. Unlike the permit application in *Avenal*, there is no statutory authority that required the DEQ to impose regulations promulgated postconstruction when it modifies emissions standards in a preconstruction permit. Furthermore, unlike in *Avenal*, no construction was contemplated in relation to PTI 182-05C. For these reasons, *Avenal* is inapplicable.

In an apparent anticipation of these conclusions, South Dearborn asserts that PTI 182-05C was not written as an amendment to the 2007 permit but was, in fact, a "new permit" authorizing physical modifications and production increases. South Dearborn then reasons that because physical modifications were authorized by PTI 182-05C, "the permit cannot reflect only the testing

data acquired after 2007—it must also reflect the air pollution rules imposed since then." To support this proposition, South Dearborn notes that in the DEQ documents, the agency indicated that the prior permit was "void." It is unclear to us how considering a prior permit void supports the proposition that PTI 182-05C was not an amendment but rather an entirely new permit authorizing physical modifications. Clearly, if an amended permit was issued, the prior permit would be replaced.

South Dearborn also argues that because "[t]he new permit purports to retroactively re-approve the production increases and equipment changes that were approved in the old permit," PTI 182-05C "authorize[s] physical modifications and production increases at the Severstal facility." However, when arguing that PTI 182-05C authorized "physical modifications," South Dearborn readily admitted, "It just happens that in this case, those changes and increases were already completed." Acknowledging that the construction referred to in PTI 182-05C had already been completed pursuant to PTI 182-05B renders disingenuous South Dearborn's claim that PTI 182-05C was not an amendment but rather a new permit authorizing "physical modifications."

South Dearborn next asserts that the issuance of PTI 182-05C was not authorized by law because the DEQ did not promulgate rules to govern the modification of existing permits. However, South Dearborn has provided no compelling authority for the proposition that specific rules governing modification of permits were required. Rather, in support of its argument, South Dearborn cites MCL 324.5503(c), which provides that the DEQ has the authority to "deny, terminate, modify, or revoke and reissue permits for

cause." South Dearborn further relies on MCL 324.5505(2), which provides:

> The department shall promulgate rules to establish a permit to install program to be administered by the department. Except as provided in [MCL 324.5505(4) and (5)], the permit to install program is applicable to each new or modified process or process equipment that emits or may emit an air contaminant.

South Dearborn contends that by reading these two provisions together, the DEQ could not modify a permit "in accordance with" Part 55 of the NREPA and its rules unless it promulgated rules for permit modification.

However, South Dearborn has cited no specific provision within Part 55 of the NREPA that imposes a mandatory duty on the DEQ to promulgate regulations regarding permit modifications. Indeed, MCL 324.5512 identifies several areas in which the DEQ "shall" promulgate rules. See *Wolfenbarger v Wright*, 336 Mich App 1, 30; 969 NW2d 518 (2021) (noting that "[t]he use of the word 'shall' denotes mandatory action"). Noticeably absent from this list is a mandate to promulgate rules related to permit modifications. See MCL 324.5512(1). Instead, MCL 324.5512(1) addresses, in general, the mandatory promulgation of rules related to controlling or prohibiting air pollution. In particular, MCL 324.5512(1)(h) also requires that the DEQ promulgate rules to implement MCL 324.5505, which is related to "source, process, or process equipment," and MCL 324.5506, which relates to operating permits. A review of MCL 324.5512 is relevant because it demonstrates that when the Legislature intends to mandate that the DEQ promulgate rules, it clearly says so. We also find persuasive the DEQ's position that when MCL 324.5503(c) states that the DEQ shall act "[i]n

accordance with" the Part 55 rules, it means that the DEQ must act in agreement or conformity with the applicable rules that already have been promulgated—it does not create a duty on the part of the DEQ to promulgate rules.

Additionally, the language of MCL 324.5503(c) clearly evidences that the Legislature intended that the DEQ possess the power to modify permits for cause. The DEQ's failure to promulgate rules specifically addressing the manner in which a permit may be modified does not nullify the legislative expectation that, when warranted, modification is permissible. See, e.g., *Dep't of Pub Health v Rivergate Manor*, 452 Mich 495, 504; 550 NW2d 515 (1996). Furthermore, this interpretation is consistent with the recognition that "a public agency acting in the public interest" has "both a duty and a right to correct [its own] error[s] . . . ." *Walter Toebe & Co v Dep't of State Hwys*, 144 Mich App 21, 34; 373 NW2d 233 (1985). Consequently, we find no merit in the proposition that the issuance of PTI 182-05C was not authorized by law because the DEQ failed to promulgate rules related to the modification of an existing permit.

Next, South Dearborn asserts that the DEQ failed to comply with rules it promulgated regarding permits to install. Specifically, the DEQ points to Mich Admin Code, R 336.1201(7) and (8). Rule 336.1201(7)(b) requires that "[w]ithin 12 months after completion of the installation" authorized by a permit to install, "the person to whom the permit to install was issued . . . shall notify the department, in writing, of the status of compliance of the process or process equipment with the terms and conditions of the permit to install." Rule 336.1201(8) further provides that "[i]f evidence indicates that the process or process equip-

ment is not performing in accordance with the terms and conditions of the permit to install, the department . . . may revoke the permit to install" after the completion of certain procedures. However, "[r]evocation of a permit to install is without prejudice and a person may file a new application for a permit to install that addresses the reasons for the revocation." Rule 336.1201(8). South Dearborn contends that the DEQ's decision to issue PTI 182-05C was arbitrary, capricious, and an abuse of discretion because it did not revoke PTI 182-05B after learning of emissions-testing discrepancies. We disagree.

It is clear, based on the plain language of the rules, that a decision to revoke an existing permit was within the DEQ's discretion. Indeed, the use of the word "may" demonstrates that revocation was not mandatory. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008). Furthermore, the record does not support South Dearborn's conclusion that the DEQ's actions in this regard were arbitrary and capricious. In documents related to PTI 182-05C, the DEQ explained:

> As required in PTI 182-05B, Severstal performed emissions testing. A majority of the test results indicate compliance with PTI 182-05B limits. However, in some cases the results of the emissions testing identified that emission factors used in the development of emission limits did not accurately reflect the emissions associated with Severstal's operations. Although the emissions factors were based on the best available data at the time, that data was limited, incomplete and, as the current emissions test data have revealed, not as representative of Severstal's operations as anticipated. As a result, Severstal completed a series of technical reviews to determine whether any feasible control technologies or changes in raw materials are available that would enable them to achieve compliance with the emission limits. Based on the results of the technology evaluations, the [DEQ] determined that certain emission limitations

> should be updated. Of note, Severstal also completed additional stack testing during the review of this application, some of those test results have been used to derive emission factors.

After the DEQ was informed of the results of the emissions testing, a process ensued to determine the proper course of action. At the conclusion of this process, the DEQ exercised its discretion and elected not to pursue revocation of PTI 182-05B. Instead, it opted to update the emissions limitations by modifying the permit. It would be a stretch to conclude that the DEQ's decision to consider an application to amend the prior permit rather than to revoke an earlier permit was arbitrary and capricious under the circumstances presented.

South Dearborn further argues that the DEQ was required to deny the permit application under Mich Admin Code, R 336.1207(1). At the time in question, Rule 336.1207 provided, in pertinent part:

> (1) The department shall deny an application for a permit to install if, *in the judgment of the department*, any of the following conditions exist:
>
> (a) The equipment for which the permit is sought will not operate in compliance with the rules of the department or state law.
>
> (b) Operation of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant.
>
> (c) The equipment for which the permit is sought will violate the applicable requirements of the clean air act . . . .
>
> (d) Sufficient information has not been submitted by the applicant to enable the department to make reasonable judgments as required by subdivisions (a) to (c) of this subrule. [Emphasis added.]

Initially, it should be recognized that based on the plain language of the rule, the decision to deny a permit under Rule 336.1207(1) was entirely within the DEQ's discretion. This is evidenced by inclusion of the phrase "in the judgment of the department." In this case, the DEQ assessed the air-quality standards when issuing the permit and, in its judgment, determined that the permit was appropriate. Without totally invading the province and expertise of the DEQ, which would be inappropriate, we cannot conclude that the issuance of PTI 182-05C was unauthorized by law. See *Dep't of Community Health v Anderson*, 299 Mich App 591, 598; 830 NW2d 814 (2013) (noting that "an appellate court must generally defer to an agency's administrative expertise").

Next, South Dearborn addresses the applicability of Rule 336.1207 on two fronts. First, it argues that the permit application should have been denied under Rule 336.1207(1)(b). This rule prohibits the DEQ from issuing a permit when "[o]peration of the equipment for which the permit is sought will interfere with the attainment or maintenance of the air quality standard for any air contaminant." Rule 336.1207(1)(b).

South Dearborn asserts that the DEQ was required to deny the permit if the equipment governed by the permit would interfere with attainment of the 1-hour SO_2 National Ambient Air Quality Standard (NAAQS). South Dearborn contends that the new permit allows the steel mill to emit up to 1,199 tons of SO_2, far in excess of the EPA's "Significant Emissions Rate" for SO_2 of 40 tons per year. South Dearborn asserts that the DEQ never explained how it could make a finding that the emissions from the plant would not interfere with attainment of the 1-hour SO_2 NAAQS when it specifically chose to evaluate the permit as if the area

was already in compliance with that standard. South Dearborn asserts that the DEQ's decision-making was, therefore, arbitrary and capricious. We disagree.

By its plain language, Rule 336.1207(1)(b) applies to permit applications related to the "[o]peration of the equipment for which the permit is sought . . . ." In this case, the PTI 182-05C application did not seek to make any physical changes, changes to the method of operation, or increases in production rate/throughput for the equipment in the facility. That process had already been addressed by PTI 182-05B. Moreover, as already stated, Rule 336.1207 defers to the DEQ's judgment regarding whether the operation of the equipment for which the permit was sought would interfere with the attainment or maintenance of the air-quality standard for any air contaminant. Clearly, the DEQ made this determination when it issued PTI 182-05B. In addition, the DEQ also contemplated the following:

> The 1-hour SO_2 NAAQS standard did not exist at the time of the 182-05B application; therefore, an analysis was conducted to determine if the revised emissions could potentially affect the maximum 1-hour SO_2 concentration near Severstal. The current permitted emissions were modeled, along with the requested changes. Modeling showed that the revised SO_2 emissions from the "C" Blast Furnace Casthouse Baghouse stack and stove stack will not result in an increase of the maximum 1-hour SO_2 impacts.

Considering the foregoing, we are not persuaded that Rule 336.1207(1)(b) rendered the issuance of PTI 182-05C unauthorized by law.

In a related argument, South Dearborn argues that the DEQ's issuance of PTI 182-05C also violated the provisions of Rule 336.1206 in conjunction with Rule 336.1207(1) and that Severstal entered into an imper-

missible agreement with the DEQ to circumvent the rules. As indicated earlier, Rule 336.1207(1) mandates that the DEQ deny a permit to install under certain enumerated circumstances. In addition, at the relevant time, Rule 336.1206 required the DEQ to act on a permit-to-install application within 120 days of finding it administratively complete. According to South Dearborn, a series of events unfolded that resulted in the parties avoiding the implications of Rule 336.1206 and Rule 336.1207.

As represented by South Dearborn, the DEQ determined that Severstal's permit application was complete on April 6, 2012. Thereafter, the DEQ issued a series of violation notices regarding the pollution-control equipment. Because of these violations, the DEQ initially concluded that Rule 336.1207 would have prohibited the agency from granting a new permit to Severstal. The DEQ notified Severstal that the company would have to withdraw its permit application, bring the equipment into compliance, and then submit a new application. According to South Dearborn, however, Severstal was reluctant to withdraw the application because it believed that it would be ineligible for the grandfathering that it sought. Further, Severstal recognized that it would take more than 120 days to bring the steel mill into compliance. According to South Dearborn, Severstal then proposed to enter into an extension agreement with the DEQ that would provide Severstal with additional time to rectify conditions and to comply with the Rule 336.1206 deadline. According to South Dearborn, the DEQ was initially reluctant to enter into such an agreement because the application was technically complete and it was therefore obligated to act upon it and, as mandated by Rule 336.1207, deny the application. South Dearborn represents that Severstal was able to enlist the help of then Governor Snyder and the

then director of the Michigan Economic Development Corporation (MEDC). After a series of meetings between the MEDC, the DEQ, and Severstal, the DEQ agreed to an extension agreement, which it entered into on February 1, 2013. The agreement provided that the DEQ would make a final decision on the permit 150 days after it re-determined Severstal's application to be complete or 120 days after Severstal provided supplemental information that might be requested by the DEQ. The agreement apparently was extended to require a final decision by May 9, 2014.

South Dearborn argues that the DEQ's agreement with Severstal not only circumvented the application of Rule 336.1206 and Rule 336.1207 but that it was also outside the DEQ's authority to enter into the agreement and, indeed, that such an agreement violated the DEQ's own rules. We disagree and conclude that the DEQ was permitted to enter into the extension agreement under Mich Admin Code, R 336.1203. Rule 336.1203 addresses the information that must be included in an application for a permit to install. In relevant part, this includes, among other things, "a complete description . . . of each emission unit or process covered by the application," a description of any applicable air-pollution-control regulations, a description of "all air contaminants that are reasonably anticipated," and a description of how the applicant intended to control or minimize those contaminants. Rule 336.1203(1)(a) through (d). In addition, Rule 336.1203(2) allows the DEQ to request additional information from the applicant: "The department may require additional information necessary to evaluate or take action on the application." The extension agreement was the avenue by which the DEQ could exercise its authority under Rule 336.1203 while remaining within the time parameters of Rule 336.1206.

In an effort to avoid this conclusion, South Dearborn notes that Rule 336.1206 was amended in October 2013 to specifically allow the DEQ to extend the processing period beyond the applicable time limits if requested by the permit applicant. South Dearborn reasons that this rule change further confirms the ultra vires nature of the February 2013 extension agreement. Put another way, South Dearborn contends that the right to enter into extension agreements did not exist until the October 2013 amendment of Rule 336.1206.

Contrary to South Dearborn's assertions, however, the codification of a right to enter into an extension does not necessarily mean that the right did not exist before the promulgation of the rule. Indeed, considering the provisions of Rule 336.1203, it is more reasonable to conclude that the right to enter into extensions existed before October 2013. In *Avenal*, 762 F3d at 981, the court noted the following:

> Although Petitioners suggest that EPA must deny a Permit application if it cannot perform the required review within the one-year limit, that does not appear to have been the agency's only option. Even after the deadline passes, at least absent suit, EPA could presumably work with the applicant to ensure compliance with whatever regulations are in effect, and then issue or deny a Permit accordingly.

Additionally, by analogy, common law is frequently codified in subsequent legislation. See, e.g., *Zaher v Miotke*, 300 Mich App 132, 142; 832 NW2d 266 (2013). We are persuaded that the October 2013 amendment of Rule 336.1203 specifically allowed for the exercising of rights that previously existed, albeit informally. Accordingly, we find no merit to South Dearborn's assertion that, because no written rule allowed the

DEQ to extend the time limit provided by Rule 336.1206 in February 2013, the agency's procedures were unlawful and the DEQ exceeded its authority by extending the time limit.

Finally, South Dearborn asserts that even with the extension agreement, the DEQ violated Rule 336.1207 when it issued the permit because it did not consider multiple violations identified just weeks before the permit was issued. However, the record does not support South Dearborn's contention that the DEQ did not consider the notice of violations. Furthermore, after considering the violations, the DEQ, in its discretion, still determined that issuing PTI 182-05C was appropriate.

Initially, we note that according to the DEQ, the April 2014 notice of violations pertained to violations that allegedly occurred in 2013. Moreover, the DEQ did not ignore them as South Dearborn asserts. The extension agreement required Severstal to address the violations, which included providing an updated Operation and Maintenance Plan and a Malfunction Abatement Plan. Thus, not only did the DEQ not ignore the violations, it actually addressed the violations in the extension agreement. Furthermore, the notice of violations was simply the initiation of the process to confirm an actual violation. See *Luminant Generation Co, LLC v US Environmental Protection Agency*, 757 F3d 439, 441-442 (CA 5, 2014); *WildEarth Guardians v US Environmental Protection Agency*, 728 F3d 1075, 1083 (CA 10, 2013). The DEQ clearly determined that the installed equipment had the ability to achieve compliance. Considering this finding, the notice of violations did not mandate the denial of the PTI 182-05C application. Consequently, the DEQ exercised its judgment and was not required to deny the permit under Rule 336.1207.

Accordingly, there has been no showing that the DEQ's actions were not authorized by law.

South Dearborn also asserts that the manner in which the DEQ considered the emissions from B Blast Furnace rendered the decision to issue PTI 182-05C an action unauthorized by law. It is undisputed that when the DEQ issued PTI 182-05B in 2007, the permit allowed for the installation of a baghouse on B Blast Furnace. However, before Severstal could comply and install the baghouse, B Blast Furnace was damaged and rendered inoperable on January 5, 2008. Nonetheless, the permit application at issue in this appeal proposed changes to the allowed emissions from both B Blast Furnace and C Blast Furnace. South Dearborn takes issue with the manner in which the DEQ treated B Blast Furnace when it issued PTI 182-05C in 2014. Specifically, South Dearborn contends that the permit unlawfully reauthorized the future reconstruction of B Blast Furnace without a new permit. Further, according to South Dearborn, the manner in which the DEQ considered the emissions from B Blast Furnace camouflaged significant emissions increases from C Blast Furnace that would have otherwise required compliance with current standards and rules. Put another way, according to South Dearborn, the fictionally installed baghouse on B Blast Furnace was used to offset emissions increases for C Blast Furnace. South Dearborn asserts that the DEQ lacked the authority to issue a new permit to install six years after the destruction of B Blast Furnace. It contends that if and when AK Steel ever decides to rebuild the blast furnace, the decision must be the subject of a new permit application under the DEQ rules and standards. It further contends that the DEQ's issuance of PTI 182-05C violated

emissions netting rules. Accordingly, South Dearborn contends that the issuance of the permit was not authorized by law.

The resolution of this issue requires a review of the development of the permits in this case and the underlying purpose of PTI 182-05C. As explained in the fact sheet, which is part of the public participation documents, the steel facility's operations included two blast furnaces: C Blast Furnace, which was operational, and B Blast Furnace, which was "currently down for repairs . . . ." The permit in dispute is part of a series of permits related to these blast furnaces and other emitting equipment. The fact sheet explained the evolution of the permits:

> On January 31, 2006, Severstal was issued PTI No. 182-05, which authorized several modifications to enhance C Blast Furnace, including the addition of pulverized coal injection capability and increased hot metal production, as well as the installation of a baghouse for the casthouse and low-NO_x [nitrogen oxide] technology on the furnace stoves. Also included in the PTI, was the contemporaneous installation of a secondary emissions control baghouse at the BOF [basic oxygen furnace] to control charging and tapping emissions and low-NO_x technology on the B Blast Furnace Stoves. *Subsequent revisions to the PTI were approved on July 6, 2006, (182-05A) and April 19, 2007, (182-05B) to incorporate updates and revisions to the original permit application based on detailed design and engineering information and included the addition of an on-site coal pulverization facility, installation of a baghouse on the B Blast Furnace casthouse, and the installation of a hood to route the emissions from the North Reladling to the BOF secondary emissions control baghouse. Note that the coal pulverization facility has not been installed. The coal is pulverized off-site by a vendor and delivered already pulverized to an on-site silo.* [Emphasis added.]

The permit at issue in this case was part of a series, and its intended purpose was to change emissions allowances from the furnaces and other associated equipment:

> The permit application is for the proposed changes to the allowed emissions from the B and C Blast Furnace Operation and other associated equipment. It is also to install low nitrogen oxide (NO_x) technology on the B stoves. There will not be any physical changes, changes to the method of operation, or increase in annual production rate/throughput for the equipment at the stationary source beyond what was approved in current PTI 182-05B.

Considering the scope and the purpose of PTI 182-05C, it would seem appropriate—even required—to evaluate the permit application under the circumstances that existed at the time PTI 182-05B was issued. The purpose of PTI 182-05C was to correct the implications of erroneous emissions assumptions from PTI 182-05B. The proposed changes did not authorize any new construction or changes in the manner of operation. Accordingly, when evaluating PTI 182-05C, it is logical to consider the conditions that existed in 2007 when PTI 182-05B was issued, including the operation of B Blast Furnace. South Dearborn's arguments are premised on issues that were resolved by the issuance of PTI 182-05B, yet there is no indication that South Dearborn challenged the issuance of that permit. South Dearborn cannot be allowed to do so under the guise of challenging PTI 182-05C.

In sum, we agree with the circuit court that the DEQ's decision to issue PTI 182-05C was authorized by law. The DEQ exercised its authority to issue the permit, and there is no indication that the DEQ's decision violated a statute or resulted from procedures that were unlawful. Regarding whether the decision

was arbitrary and capricious, the DEQ issued its decision after detailed study and a period of public comment and hearing. In light of this Court's limited scope of review, we cannot say that this decision was not authorized by law. Accordingly, the circuit court did not err when it affirmed the DEQ's decision.

Affirmed.

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

LONG LAKE TOWNSHIP v MAXON

Docket No. 349230. Submitted November 4, 2020, at Lansing. Decided March 18, 2021, at 9:15 a.m. Vacated and remanded 509 Mich 981 (2022).

Long Lake Township brought an action against Todd Maxon and Heather Maxon in the Grand Traverse Circuit Court, alleging that defendants were keeping "junk" on their property in violation of a zoning ordinance, a nuisance law, and a 2008 settlement agreement. Because most of defendants' property is blocked from view by buildings and trees, plaintiff hired a drone operator to take aerial images of defendants' property, and it did so without defendants' permission or a warrant. Defendants moved to suppress the aerial photographs and all other evidence obtained by plaintiff from what they argued was an illegal search that violated the Fourth Amendment of the United States Constitution. The trial court, Thomas G. Power, J., denied defendants' motion to suppress the images, ruling that defendants did not have a reasonable expectation of privacy. The trial court relied on *Florida v Riley*, 488 US 445 (1989), in which the United States Supreme Court held that the visual observation of a person's premises from a helicopter does not constitute a search under the Fourth Amendment. After the trial court denied their motion for reconsideration, defendants appealed.

The Court of Appeals *held*:

1. The Fourth Amendment of the United States Constitution and Article 1, § 11 of the Michigan Constitution coextensively guarantee the right of persons to be secure against unreasonable searches and seizures. Although the Fourth Amendment does not apply to private parties who are not acting as agents of a governmental entity, it may protect parties from unreasonable searches and seizures committed by a governmental entity in a civil case if the case can be considered "quasi-criminal" and the search or seizure was committed by the governmental entity pursuing the action. In this case, it was undisputed that the drone operator was acting as an agent for Long Lake Township, that Long Lake Township is a governmental entity, and that Long Lake Township sought admission of its own allegedly illegally obtained evidence in

order to obtain a declaratory judgment that defendants' use of their own property was illegal. Under these circumstances, the Fourth Amendment applied.

2. A search for purposes of the Fourth Amendment occurs when the government intrudes on a person's reasonable or justifiable expectation of privacy. Whether an expectation of privacy is reasonable depends on whether the person exhibited an actual, subjective expectation of privacy and whether that expectation was one that society recognizes as reasonable under the totality of the circumstances surrounding the intrusion. Generally, a search or seizure within a home or its surrounding area without a warrant is per se an unreasonable search under the Fourth Amendment. However, under *Katz v United States*, 389 US 347 (1967), what a person knowingly exposes to the public is not a subject of Fourth Amendment protection. Further, under *California v Ciraolo*, 476 US 207 (1986), and *Florida v Riley*, 488 US 445 (1989), viewing a person's property by aerial observation from publicly navigable airspace without a warrant does not violate the Fourth Amendment because doing so does not violate a reasonable expectation of privacy. In separate opinions, *Riley* also held that whether an aerial observation was conducted in compliance with Federal Aviation Administration (FAA) regulations was not dispositive of whether the resulting search violated the Fourth Amendment.

3. Low-altitude, unmanned, targeted drone surveillance of a private individual's property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo* and *Riley*, and it intrudes into reasonable expectations of privacy. Therefore, such surveillance implicates the Fourth Amendment and is illegal without a warrant unless a traditional exception to the warrant requirement applies. Although noncompliance with FAA regulations does not establish a Fourth Amendment violation, such regulations are relevant to what a person might reasonably expect to occur overhead. The FAA regulations pertaining to small unmanned aircraft systems, 14 CFR 107.1 *et seq*. (2021), require drone operators to keep drones within visual observation at all times, fly drones no higher than 400 feet, refrain from flying drones over human beings, and obtain a certification. These rules reflect the fact that drones are more intrusive into a person's private space than an airplane overflight, particularly given that drones fly below what is usually considered public or navigable airspace. Also, the Legislature has stated that drones may not be used to violate a reasonable expectation of privacy, MCL 259.322(3), or to perform an act that would be illegal if performed by the operator in person, MCL 259.320(1). Given their maneuverability, speed, and

stealth, drones are capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind, which renders them similar to the thermal imaging technology at issue in *Kyllo v United States*, 533 US 27 (2001), and the telephone eavesdropping technology at issue in *People v Stone*, 463 Mich 558 (2001). Landowners are entitled to ownership of some airspace above their properties, and intrusions into that airspace will constitute a trespass no different from an intrusion upon the land itself. Consequently, flying drones at legal altitudes over another person's property without permission or a warrant, regardless of whether the flight is just inside or just outside the property line, would reasonably be expected to constitute a trespass.

Reversed and remanded for further proceedings, including entry of a suppression order.

FORT HOOD, J., dissenting, agreed with the majority's analysis of the FAA regulation issue, but she respectfully dissented from the majority's conclusion that this case was distinguishable from *Ciraolo* and *Riley*. While she agreed that drones could be more intrusive than the manned aircraft at issue in those cases, she was not confident that the distinction between manned and unmanned aircraft should carry so much weight. She noted that there was no evidence that the photographs captured in this case were dissimilar to photographs and observations that could have been taken from the vantage point of an airplane or helicopter, that drones also occupy airspace that is navigable by the public, that drones are commonly flown at low altitudes, that drones are readily available to and used by the public, and that there was no evidence that the drone in this case was being operated in a particularly invasive manner. Although she had concerns about the potentially intrusive nature of drones, she would not have categorically concluded that the use of drones without a warrant violates the Fourth Amendment when they are used to view what is otherwise plainly visible to the naked eye from airspace navigable by the public. She would have concluded that no Fourth Amendment violation occurred in this case, and she would have affirmed the trial court's order denying defendants' motion to suppress.

1. SEARCHES AND SEIZURES — CONSTITUTIONAL PROTECTIONS — APPLICABILITY TO CIVIL ACTIONS.

The Fourth Amendment of the United States Constitution and Article 1, § 11 of the Michigan Constitution coextensively guarantee the right of persons to be secure against unreasonable searches and seizures; although the Fourth Amendment does not apply to

private parties who are not acting as agents of a governmental entity, it may protect parties from unreasonable searches and seizures committed by a governmental entity in a civil case if the case can be considered "quasi-criminal" and the search or seizure was committed by the governmental entity pursuing the action.

2. SEARCHES AND SEIZURES — WARRANT REQUIREMENTS — AERIAL SURVEILLANCE — DRONES.

Low-altitude, unmanned, targeted drone surveillance of a private individual's property is illegal without a warrant unless a traditional exception to the warrant requirement applies; whether the drone operator complied with the relevant Federal Aviation Administration regulations is not dispositive of whether a Fourth Amendment violation occurred (US Const, Am IV; Const 1963, art 1, § 11; 14 CFR 107.1 *et seq*.).

Swogger, Bruce & Millar Law Firm, PC (by *Todd W. Millar*) for plaintiff.

The Law Offices of William G. Burdette, PC (by *William G. Burdette*) for defendant.

Amici Curiae:

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

Before: JANSEN, P.J., and FORT HOOD and RONAYNE KRAUSE, JJ.

JANSEN, P.J. In this zoning dispute, defendants, Todd Maxon and Heather Maxon, appeal by leave granted the order of the trial court denying their motion to suppress evidence. At issue is the legality of the use of a drone[1] by plaintiff Long Lake Township to take aerial images of defendants' property without defendants'

[1] Drones are also known as "unmanned aerial vehicles" or "small unmanned aircraft." The particular drone at issue in this matter was operated by nonparty Zero Gravity Aerial.

permission or any other specific legal authorization. Plaintiff relied on those aerial photographs to commence suit against defendants, alleging that defendants were in violation of a zoning ordinance, a nuisance law, and a prior settlement agreement between the parties. We reverse the trial court's May 16, 2019 order denying defendants' motion to suppress evidence, and we remand for entry of an order suppressing all photographs taken of defendants' property from a drone and for further proceedings consistent with this opinion.

I. RELEVANT FACTUAL BACKGROUND

In 2008, plaintiff brought an action against defendant Todd Maxon alleging a violation of the Long Lake Township Ordinance. That proceeding culminated in a settlement agreement (the Agreement), in which plaintiff agreed to dismiss its zoning complaint against Todd with prejudice, plaintiff paid a portion of Todd's legal fees, and plaintiff agreed "not to bring further zoning enforcement action against Defendant [Todd] Maxon based upon the same facts and circumstances which were revealed during the course of discovery and based upon the Long Lake Township Ordinance as it exists on the date of this settlement agreement."

In 2018, plaintiff filed the instant civil action against both Todd and Heather Maxon, alleging that they had "significantly increased the scope of the junk cars and other junk material being kept on their property" since entering into the 2008 Agreement and that such activity "constitute[d] an illegal salvage or junk yard" in violation of the Long Lake Township Zoning Ordinance. In support of these allegations, plaintiff attached aerial photographs taken in 2010, 2016, 2017, and 2018. These photographs showed a

"significant increase in the amount of junk being stored on the [d]efendants' property."

Defendants moved to suppress the aerial photographs and "all evidence obtained by [p]laintiff from its illegal search of their property." Defendants argued that the aerial surveillance of their property, and the photographs taken by the drones of their property and the surrounding area, constituted an unlawful search in violation of the Fourth Amendment of the United States Constitution. Defendants argued that the instant case is distinguishable from precedent involving manned aerial surveillance because, unlike fixed-wing aircraft and helicopters, which "routinely fly over a person's property," drones are equipped with "high powered cameras" and do not operate at the same altitudes as airplanes and helicopters. Additionally, defendants argued that a person can reasonably anticipate being observed from the air by a fixed-wing aircraft, but aerial surveillance from a drone flying over private property and taking photographs is not a reasonable expectation. Moreover, defendants noted that plaintiff's drone surveillance did not comply with Federal Aviation Administration (FAA) regulations. We note that photographs in the record clearly show that very little, if any, of defendants' property is visible from the ground because the view is blocked by buildings and trees.

In response, plaintiff argued that defendants failed to establish how the use of a drone to capture aerial photographs violated their Fourth Amendment rights, because their property was visible from above. Plaintiff also submitted the affidavit of Dennis Wiand, owner of Zero Gravity Aerial and operator of the drone that captured the photographs at issue, in response to defendants' claim that the drone was not compliant

with FAA regulations. Wiand averred that the photographs at issue were taken on April 25, 2017, May 26, 2017, and May 5, 2018. On those dates, Wiand "maintained a constant visual line of sight on the drone and maintained an altitude of less than 400 feet in accordance with the FAA regulations." Plaintiff went on to argue at the hearing on defendants' motion to suppress that defendants did not have a subjectively reasonable expectation of privacy in this case.

The trial court denied defendants' motion to suppress the images, ruling that defendants did not have a reasonable expectation of privacy. The trial court relied on *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989), in which the United States Supreme Court held that the visual observation of a person's premises from a helicopter does not constitute a search under the Fourth Amendment. The trial court further noted that, under *Riley*, FAA regulations are "safety rules and do not define the scope of the Fourth Amendment." Defendants moved for reconsideration, which was also denied. This appeal followed. Defendants generally argue that they had a reasonable expectation of privacy that was violated by plaintiff's use of a drone to photograph their property and that the drone operator's alleged noncompliance with FAA regulations was pertinent to the Fourth Amendment analysis.

II. STANDARD OF REVIEW

We review for clear error the trial court's findings of fact made at a suppression hearing, but we review de novo the trial court's ultimate decision whether to suppress the evidence. *People v Rodriguez*, 327 Mich App 573, 583; 935 NW2d 51 (2019). "A finding is clearly erroneous if it leaves this Court with a definite and

firm conviction that the trial court made a mistake." *Id*. (quotation marks and citation omitted). This Court reviews constitutional issues de novo. *People v Jones*, 260 Mich App 424, 427; 678 NW2d 627 (2004). De novo review means that this Court reviews the issue without any deference to the court below. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018).

III. LEGAL BACKGROUND

"The Fourth Amendment of the United States Constitution and its counterpart in the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). The protections of Article 1, § 11 of the Michigan Constitution "have been construed as coextensive with" the Fourth Amendment. *People v Mead*, 503 Mich 205, 212; 931 NW2d 557 (2019). The basic purpose of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v United States*, 585 US ___, ___; 138 S Ct 2206, 2213; 201 L Ed 2d 507 (2018) (quotation marks and citation omitted).

This is ostensibly a civil proceeding. However, the form of a proceeding may cloak its true nature, depending on the relief sought and what consequences may ensue if a governmental entity prevails. See *People ex rel Strickland v Bartow*, 27 Mich 68, 68-69 (1873); *Boyd v United States*, 116 US 616, 633-635; 6 S Ct 524; 29 L Ed 746 (1886), overruled in part on other grounds in *Md Penitentiary Warden v Hayden*, 387 US 294 (1967). The Fourth Amendment does not apply to private parties who are not acting as agents of a governmental entity. *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). However,

the Fourth Amendment may protect parties from unreasonable searches and seizures committed by a governmental entity in civil cases if the civil case can be considered "quasi-criminal" and the search or seizure was committed by the governmental entity pursuing the action. *Kivela v Dep't of Treasury*, 449 Mich 220, 228-229, 236-239; 536 NW2d 498 (1995) (discussing a test for the admissibility of evidence illegally seized by police for a criminal proceeding in an independent subsequent tax proceeding); *People v Gentner, Inc*, 262 Mich App 363, 369 n 2; 686 NW2d 752 (2004); see also *Camara v Muni Court of City and Co of San Francisco*, 387 US 523, 528-539; 87 S Ct 1727; 18 L Ed 2d 930 (1967) (holding that administrative searches implicate the Fourth Amendment even if the searches are not criminal in nature, albeit subject to less exacting requirements to establish probable cause).

There is no dispute that the drone operator here was acting as an agent for Long Lake Township, that Long Lake Township is a governmental entity, and that Long Lake Township seeks admission of its own allegedly illegally obtained evidence. The purpose of this litigation is to obtain a declaratory judgment that defendants' use of their own property is illegal. Considering the great historical importance placed on the freedom to use one's own property, and in light of the fact that the consequences of this action may entail far more than merely the imposition of money damages, we conclude that this is the kind of proceeding to which the Fourth Amendment may apply. Further supporting this conclusion is MCL 259.322(3), which expressly prohibits the use of a drone to "capture photographs, video, or audio recordings of an individual in a manner that would invade the individual's reasonable expectation of privacy."

The first inquiry in any search and seizure issue is whether a search occurred under the Fourth Amendment. *People v Brooks*, 405 Mich 225, 242; 274 NW2d 430 (1979).

> [A] search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy. Whether an expectation of privacy is reasonable depends on two questions. First, did the individual exhibit "an actual, subjective expectation of privacy"? Second, was the actual expectation "one that society recognizes as reasonable"? Whether the expectation exists, both subjectively and objectively, depends on the totality of the circumstances surrounding the intrusion. [*People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011) (quotation marks and citations omitted).]

The area "immediately surrounding and associated with the home," known as the "curtilage," is "part of the home itself for Fourth Amendment purposes." *Florida v Jardines*, 569 US 1, 6; 133 S Ct 1409; 185 L Ed 2d 495 (2013) (quotation marks and citation omitted). "In general, a search or seizure within a home or its curtilage without a warrant is per se an unreasonable search under the Fourth Amendment." *People v Frederick*, 500 Mich 228, 234; 895 NW2d 541 (2017). However, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967). We note that plaintiff does not, on appeal, seriously dispute whether the area observed by plaintiff's drone was within the curtilage of defendants' home, so we expressly do not decide that issue and focus instead on whether defendants had an actual and reasonable expectation of privacy.

In *Kyllo v United States*, 533 US 27, 31-33; 121 S Ct 2038; 150 L Ed 2d 94 (2001), Justice Scalia set forth a brief history of Fourth Amendment jurisprudence and how it evolved to address the development of surveillance technology capable of overcoming the limitations of human eyesight:

> The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." [*Silverman v United States*, 365 US 505, 511; 81 S Ct 679; L Ed 2d 734] (1961). With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no. See [*Illinois v Rodriguez*, 497 US 177, 181; 110 S Ct 2793; 111 L Ed 2d 148] (1990); [*Payton v New York*, 445 US 573, 586; 100 S Ct 1371; 63 L Ed 2d 639] (1980).
>
> On the other hand, the antecedent question whether or not a Fourth Amendment "search" has occurred is not so simple under our precedent. The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. See, *e.g.*, [*Goldman v United States*, 316 US 129, 134-136; 62 S Ct 993; 86 L Ed 2d 1322] (1942); [*Olmstead v United States*, 277 US 438, 464-466; 48 S Ct 564; 72 L Ed 2d 944] (1928). Cf. *Silverman*, [365 US] at 510-512 (technical trespass not necessary for Fourth Amendment violation; it suffices if there is "actual intrusion into a constitutionally protected area"). Visual surveillance was unquestionably lawful because " 'the eye cannot by the laws of England be guilty of a trespass.' " [*Boyd v United States*, 116 US 616, 628; 6 S Ct 524; 29 L Ed 746] (1886) (quoting [*Entick v Carrington*, 19 How St Tr 1029; 95 Eng Rep 807 (K B 1765)]). We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of

his property, see [*Rakas v Illinois*, 439 US 128, 143; 99 S Ct 421; 58 L Ed 2d 387] (1978), but the lawfulness of warrantless visual surveillance of a home has still been preserved. As we observed in [*California v Ciraolo*, 476 US 207, 213; 106 S Ct 1809; 90 L Ed 2d 210] (1986), "[t]he Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."

One might think that the new validating rationale would be that examining the portion of a house that is in plain public view, while it is a "search"[2] despite the absence of trespass, is not an "unreasonable" one under the Fourth Amendment. See [*Minnesota v Carter*, 525 US 83, 104; 119 S Ct 469; 142 L Ed 2d 373] (1998) (BREYER, J., concurring in judgment). But in fact we have held that visual observation is no "search" at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. See [*Dow Chemical Co v United States*, 476 US 227, 234-235, 239; 106 S Ct 1819; 90 L Ed 2d 226] (1986). In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in [*Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576] (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog ("persons, houses, papers, and effects") that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless protected Katz from the warrantless eavesdropping because he "justifiably relied" upon the privacy of the telephone booth. *Id*., at 353. As Justice Harlan's oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable. See *id*., at 361. We have subsequently applied this principle to hold that a Fourth Amendment search does *not* occur—even when the explicitly protected location of a *house* is concerned—unless "the individual manifested

> a subjective expectation of privacy in the object of the challenged search," and "society [is] willing to recognize that expectation as reasonable." *Ciraolo*, *supra*, at 211. We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, [*Smith v Maryland*, 442 US 735, 743-744; 99 S Ct 2577; 61 L Ed 2d] (1979), and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search, *Ciraolo*, *supra*; [*Riley*, 488 US 445].
>
> The present case involves officers on a public street engaged in more than naked-eye surveillance of a home. We have previously reserved judgment as to how much technological enhancement of ordinary perception from such a vantage point, if any, is too much. While we upheld enhanced aerial photography of an industrial complex in *Dow Chemical*, we noted that we found "it important that this is *not* an area immediately adjacent to a private home, where privacy expectations are most heightened," [*Dow Chem Co*, 476 US at 237 n 4] (emphasis in original).

[2] When the Fourth Amendment was adopted, as now, to "search" meant "[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief." N. Webster, An American Dictionary of the English Language 66 (1828) (reprint 6th ed. 1989).

Although *Kyllo* addressed the use of a thermal imaging device on the defendant's home, it was noteworthy that the device could detect infrared radiation "not visible to the naked eye." *Kyllo*, 533 US at 29. The Court went on to observe that the advance of technology had "exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private." *Id*. at 34. The Court noted that outside the curtilage of a home, it might be "difficult to refine" the principle in

Katz that individuals may have "an expectation of privacy that society is prepared to recognize as reasonable[.]" *Id*. Thus, the reasonable expectation of privacy one might have in property outside the curtilage of one's home is less than the reasonable expectation of privacy one might have within one's home, but it is not nonexistent, nor does plaintiff advance such an argument. Indeed, a person may retain reasonable expectations of privacy even in public, because society historically expected that there were limits to what kind of surveillance could be feasibly performed by law enforcement agents or others. *Carpenter*, 585 US at ___; 138 S Ct at 2117.

Critically for the instant matter, the Court opined that the mere existence and availability of technological advancements should not be per se determinative of what privacy expectations society should continue to recognize as reasonable. *Kyllo*, 533 US at 33-35. Although again discussing only privacy within the home, the Court emphasized that the homeowner should not be "at the mercy of advancing technology" that might eventually be able to see directly through walls outright. *Id*. at 35. The development of historically novel ways to conduct unprecedented levels of surveillance at trivial expense does not itself reduce what society and the law will recognize as a reasonable expectation of privacy. *Carpenter*, 585 US at ___; 138 S Ct at 1217-1219.

In *California v Ciraolo*, 476 US 207, 209, the United States Supreme Court considered "whether the Fourth Amendment is violated by aerial observation without a warrant from an altitude of 1,000 feet of a fenced-in backyard within the curtilage of a home." In that case, a law enforcement officer used an airplane, flown at an altitude of 1,000 feet, to observe the respondent's yard,

which was next to the respondent's home and enclosed by a fence. *Id*. The officer identified marijuana plants in the respondent's yard and used a camera to photograph the area, and the images were used to secure a warrant. *Id*. The respondent moved to suppress the evidence of the search, and that motion was denied. *Id*. at 210. The United States Supreme Court rejected the respondent's argument that no governmental aerial observation of his yard was permissible without a warrant because the yard was in the curtilage of his home; the Court concluded that the respondent's expectation that his yard was protected from the officers' observation was objectively unreasonable. *Id*. at 212-214. The Court determined that the officer's observations took place within publicly navigable airspace, in a physically nonintrusive matter, and that "[a]ny member of the public flying in [that] airspace who glanced down could have seen everything that these officers observed." *Id*. at 213-214. The Court concluded, "In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet." *Id*. at 215.

Only a few years later, in *Riley*, 488 US 445, 447-448, 452, the United States Supreme Court held, in a plurality opinion, that police observation of a greenhouse, located in respondent Riley's curtilage, from a helicopter at an altitude of 400 feet did not violate the Fourth Amendment. Relying on *Ciraolo*, the plurality concluded that Riley "could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft." *Id*. at 450-451 (opinion of White, J.). The plurality specifically noted:

> We would have a different case if flying at that altitude had been contrary to law or regulation. But helicopters are not bound by the lower limits of the navigable airspace allowed to other aircraft. Any member of the public could legally have been flying over Riley's property in a helicopter at the altitude of 400 feet and could have observed Riley's greenhouse. [*Id*. at 451.]

The plurality stated that it was "of obvious importance that the helicopter in this case was *not* violating the law[.]" *Id*. Additionally, the plurality noted that the record did not reveal that there were any "intimate details connected with the use of the home or curtilage" observed and that "there was no undue noise, and no wind, dust, or threat of injury." *Id*. at 452.

Justice O'Connor concurred in the judgment, stating, "I agree that police observation of the greenhouse in Riley's curtilage from a helicopter passing at an altitude of 400 feet did not violate an expectation of privacy 'that society is prepared to recognize as "reasonable." ' " *Id*. at 452 (O'Connor, J., concurring in the judgment) (citation omitted). However, Justice O'Connor opined that the plurality relied "too heavily on compliance with FAA regulations" and stated that compliance with FAA regulations alone does not determine compliance with the Fourth Amendment. *Id*. at 452, 453. Justice O'Connor explained that the relevant inquiry regarding whether Riley had a reasonable expectation of privacy was "whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not 'one that society is prepared to recognize as "reasonable." ' " *Id*. at 454 (citation omitted). Justice O'Connor concluded that "[b]ecause there is reason to believe that there is considerable public use of airspace at altitudes of 400 feet and above, and because Riley

introduced no evidence to the contrary before the Florida courts, . . . Riley's expectation that his curtilage was protected from naked-eye aerial observation from that altitude was not a reasonable one." *Id*. at 455. Although defendant argues that *Riley* is not binding on this Court, Justice O'Connor concurred with the plurality opinion on the limited ground that Riley did not have a reasonable privacy interest in the curtilage of his home that was observable, even from the air, by the naked eye. Thus, a majority of the United States Supreme Court agreed that the respondent's expectation of privacy was unreasonable and the more limited holding is binding law.[2]

Also important to this case, however, are the two dissenting opinions in *Riley*, because the defendant in this case seeks to make violations of FAA regulations tantamount to violations of the Fourth Amendment. Four dissenting justices agreed with Justice O'Connor that compliance with FAA regulations was not dispositive of the Fourth Amendment issue. See *Riley*, 488 US at 464-465 (Brennan, J., dissenting) ("A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet."); *Riley*, 488 US at 467 (Blackmun, J., dissenting) ("Like JUSTICE BRENNAN, JUSTICE MARSHALL, JUSTICE STEVENS, and JUSTICE O'CONNOR, I believe that answering this question . . . does not depend upon the

[2] "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " *Marks v United States*, 430 US 188, 193; 97 S Ct 990; 51 L Ed 2d 260 (1977) (ellipsis in original; citation omitted).

fact that the helicopter was flying at a lawful altitude under FAA regulations. A majority of this Court thus agrees to at least this much."). Therefore, the trial court correctly determined that noncompliance with FAA regulations does not, per se, establish that a Fourth Amendment violation occurred.

IV. ANALYSIS

As defendants tacitly concede, *Ciraolo* and *Riley* establish that defendants could not have reasonably expected the activities and items on their property to be protected from public or official observation made by a human being from the publicly navigable airspace. Conversely, unrefuted photographic exhibits of defendants' property taken from the ground seem to establish a reasonable expectation of privacy against at least casual observation from a nonaerial vantage point. We conclude that, much like the infrared imaging device discussed in *Kyllo*, low-altitude, unmanned, specifically targeted drone surveillance of a private individual's property is qualitatively different from the kinds of human-operated aircraft overflights permitted by *Ciraolo* and *Riley*. We conclude that drone surveillance of this nature intrudes into people's reasonable expectations of privacy, so such surveillance implicates the Fourth Amendment and is illegal without a warrant or a traditional exception to the warrant requirement.[3]

Although noncompliance with FAA regulations does not establish a Fourth Amendment violation, such

[3] We note, for example, that consent is an exception to the warrant requirement. See *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991). Accordingly, the parties could have included some kind of inspection provision in their settlement agreement that would have obviated the issues in this appeal.

regulations are relevant to what a person might reasonably expect to occur overhead. People may, absent extraordinary circumstances, reasonably expect the law to be followed, even if they know the law is readily capable of being violated. See *Camden Fire Ins Co v Kaminski*, 352 Mich 507, 511; 90 NW2d 685 (1958); *People v Stone*, 463 Mich 558, 565-567; 621 NW2d 702 (2001). The FAA regulations pertaining to small unmanned aircraft systems, 14 CFR 107.1 *et seq*. (2021),[4] require drone operators to keep drones within visual observation at all times, fly drones no higher than 400 feet, refrain from flying drones over human beings, and obtain a certification. These rules reflect the fact that drones are qualitatively different from airplanes and helicopters: they are vastly smaller and operate within little more than a football field's distance from the ground. A drone is therefore necessarily more intrusive into a person's private space than would be an airplane overflight. Furthermore, unlike airplanes, which routinely fly overhead for purposes unrelated to intentionally targeted surveillance, drone overflights are not as commonplace, as inadvertent, or as costly. In other words, drones are intrinsically more targeted in nature than airplanes and intrinsically much easier to deploy. Also, given their maneuverability, speed, and stealth, drones are—like thermal imaging devices—capable of drastically exceeding the kind of human limitations that would have been expected by the Framers not just in degree, but in kind.

Although the United States Supreme Court has rejected the ancient understanding that land ownership extended upwards forever, landowners are still

[4] See FAA, *Fact Sheet—Small Unmanned Aircraft Systems (UAS) Regulations (Part 107)* (October 6, 2020) <https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615> [https://perma.cc/C4LK-DKCE].

entitled to ownership of some airspace above their properties, and intrusions into that airspace will constitute a trespass no different from an intrusion upon the land itself. *United States v Causby*, 328 US 256, 260-265; 66 S Ct 1062; 90 L Ed 1206 (1946). Drones fly below what is usually considered public or navigable airspace. Consequently, flying them at legal altitudes over another person's property without permission or a warrant would reasonably be expected to constitute a trespass. We do not decide whether nonpermissive drone overflights necessarily *are* trespassory, because we need not decide that issue. Although a physical trespass by a governmental entity may constitute a violation of the Fourth Amendment, a trespass into an open field[5] might not implicate the Fourth Amendment. See *United States v Jones*, 565 US 400, 404-411; 132 S Ct 945; 181 L Ed 2d 911 (2012). Furthermore, we think there is little meaningful distinction for present purposes between "just inside the property line" and "just outside the property line." We decide this matter on the basis of defendants' reasonable expectation of privacy—critical to which is that any reasonable person would have *expected* a low-altitude drone overflight to be trespassory and exceptional, whether the drone flew as high as a football-field length or flew directly up to an open bathroom window. The Legislature has already stated that drones may not be used to violate a reasonable expectation of privacy, MCL 259.322(3), or to perform an act that would be illegal if performed by the operator in person, MCL 259.320(1).

To establish a violation of the Fourth Amendment, a person is required to establish that they had a legiti-

[5] We observe, however, that defendants' property can hardly be described as an "open field" by any lay understanding of the term and, as noted, most of it is not visible from the ground.

mate expectation of privacy and to establish that society is prepared to recognize that expectation as reasonable. *People v Mead*, 503 Mich at 212-213. As noted, the fact that it is well known that a particular intrusion into privacy is technologically feasible does not cause a person's reasonable expectation of privacy to evaporate. *Stone*, 463 Mich at 562-567.[6] The United States Supreme Court has, likewise, held that just because technology develops new and innovative ways in which a person's privacy *can* be violated must not dictate whether that person retains a legitimate expectation of privacy and whether society should continue to recognize that expectation as reasonable. *Kyllo*, 533 US at 33-36. Implicit in both *Stone* and *Kyllo* is that there would have historically been an expectation of privacy that becomes called into question solely by a change in the available technology—which is clearly the situation here. See also *Carpenter*, 585 US at ___; 138 S Ct at 2213-2217. We believe it would be unworkable and futile to try to craft a precise altitude test. Rather, we conclude that persons have a reasonable expectation of privacy in their property against drone surveillance, and therefore a governmental entity seeking to conduct drone surveillance must obtain a warrant or satisfy a traditional exception to the warrant requirement.

We also observe that plaintiff's warrantless surveillance was totally unnecessary. The parties could easily have—and likely should have—included a monitoring or inspection provision in their settlement agreement. Aside from that, as the United States Supreme Court observed, the quantum of evidence necessary to estab-

[6] Although our Supreme Court's analysis in *Stone* was based on Michigan's eavesdropping statutes, we think its reasoning is equally applicable here.

lish probable cause to conduct an administrative inspection is more than "none," but is less than what might be required to execute a criminal search warrant. *Camara*, 387 US 528-539. By plaintiff's own account, it had concrete evidence, in the form of unrelated site inspection photographs and complaints from defendants' neighbors, that defendants were violating the settlement agreement, violating the zoning ordinance, and creating a nuisance. Our holding today is highly unlikely to preclude any legitimate governmental inspection or enforcement action short of outright "fishing expeditions." If a governmental entity has any kind of nontrivial and objective reason to believe there would be value in flying a drone over a person's property, as did plaintiff here, then we trust the entity will probably be able to persuade a court to grant a warrant or equivalent permission to conduct a search.

V. CONCLUSION

We reverse the trial court's May 16, 2019 order denying defendants' motion to suppress evidence, and we remand for entry of an order suppressing all photographs taken of defendants' property from a drone and for further proceedings consistent with this opinion. We do not retain jurisdiction.

RONAYNE KRAUSE, J., concurred with JANSEN, P.J.

FORT HOOD, J. (*dissenting*). I agree with the majority's analysis of the Federal Aviation Administration (FAA) regulation issue. I respectfully dissent, however, from the majority's conclusion that this case is distinguishable from the otherwise binding precedent of the United States Supreme Court. I too am deeply concerned about the particularly intrusive nature of drones

as compared to other aircraft with respect to the Fourth Amendment and the right to be free from unreasonable searches, but I do not believe that concern provides us a basis to sidestep the precedent by which we are bound.

As the majority notes, "a search for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011) (quotation marks and citation omitted). Determining whether such an intrusion has occurred requires that we first analyze whether there was "an actual, subjective expectation of privacy" and next analyze whether that expectation was "one that society recognizes as reasonable[.]" *Id*. (quotation marks and citations omitted). Fundamental to the case at bar, however, is that "[w]hat a person knowingly exposes to the public, even in his own home or office, is *not* a subject of Fourth Amendment protection." *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967) (emphasis added). "[M]ere observation from a vantage point that does not infringe upon a privacy interest, *of something open to public view*, normally implicates no Fourth Amendment constraints because observation of items readily visible to the public is not a 'search.' " *People v Barbee*, 325 Mich App 1, 7; 923 NW2d 601 (2018) (quotation marks and citation omitted; emphasis added).

As the majority further notes, and with specific regard to aerial observations, the Supreme Court of the United States has held that property plainly visible from a "public navigable airspace" tends not to be subject to Fourth Amendment protection. *California v Ciraolo*, 476 US 207, 213; 106 S Ct 1809; 90 L Ed 2d 210 (1986). In *Ciraolo*, the defendant did not have a reasonable expectation of privacy in marijuana plants

that, despite being intentionally concealed from street-level view by a 10-foot privacy fence, were observable from the naked eye at an altitude of 1,000 feet. *Id*. at 211, 215. Even noting that there was reasonable concern with respect to "future 'electronic' developments that could stealthily intrude upon an individual's privacy," the Court concluded that, on the basis that "private and commercial flight in the public airways is routine," "[t]he Fourth Amendment simply does not require the police traveling in the public airways . . . to obtain a warrant in order to observe what is visible to the naked eye." *Id*. at 215.

In *Florida v Riley*, 488 US 445; 109 S Ct 693; 102 L Ed 2d 835 (1989), the Supreme Court reaffirmed this principle when it again noted that, "[a]s a general proposition, the police may see what may be seen 'from a public vantage point where [they have] a right to be[.]' " *Riley*, 488 US at 449 (opinion of White, J.), quoting *Ciraolo*, 476 US at 214 (alteration in *Riley*). In *Riley*, the Supreme Court concluded that a helicopter that surveilled the defendant's property from a height of 400 feet did not impede upon the defendant's privacy rights because the state was "free to inspect the [defendant's] yard from the vantage point of an aircraft flying in the navigable airspace . . . ." *Riley*, 488 US at 450 (opinion of White, J.). The Supreme Court noted that the defendant in that case "no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation." *Id*. However, "[b]ecause the sides and roof of his greenhouse were left partially open, . . . what was growing in the greenhouse was subject to viewing from the air."[1] *Id*.

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[1] And, as the majority notes, a majority of the *Riley* Court concluded that compliance with FAA regulations was not the relevant inquiry for

The majority distinguishes *Ciraolo* and *Riley* from this case by noting that unmanned drones are smaller, quieter, and more discreet than manned airplanes or helicopters. That is, the majority essentially concludes that *Ciraolo* and *Riley* categorically do not apply to cases involving drones. Again, I agree that drones *can* be inherently more intrusive than the manned aircraft at issue in those cases, but I do not believe *Ciraolo* and *Riley* can be so sweepingly distinguished.

First, I am not confident the distinction between manned and unmanned aircraft should carry so much weight. In *Ciraolo*, for example, the evidence at issue was a photograph taken from a plane, viewing what was visible to the naked eye. See *Ciraolo*, 476 US at 209. To that end, and second, although a drone is smaller than an airplane or helicopter, there is no evidence that the photographs captured in this case were dissimilar in kind to that of photographs and observations that may be taken from the vantage point of an airplane or helicopter.[2] Third, although drones may not occupy the same publicly navigable airspace as other aircraft, they do occupy airspace that is navigable by the public.[3] Lastly, for the purposes of our review, I would think, on the basis of the caselaw, that of equal

Fourth Amendment purposes, "but rather whether [the defendant's] expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet." *Riley*, 488 US at 464-465 (Brennan, J., dissenting).

[2] I note defendants' argument that the digital photography at issue went beyond "typical videos" and that plaintiff utilized enhanced technology that was capable of "zooming in and out to obtain more details than [a person] could get from just a naked eye observation or a vantage point of more than 400 feet to 12,000 feet in the air . . . ." There is no evidence, however, that the drone "videotaped" defendants' property at all, or that the drone utilized "advanced technology" not otherwise accessible to the public.

[3] The FAA regulations cited by majority demonstrate this fact.

importance to the distinctiveness of drones as compared to other aircraft is the extent to which drones are readily available to and utilized by the public.

Related to this point is the majority's reliance on *Kyllo v United States*, 533 US 27; 121 S Ct 2038; 150 L Ed 2d 94 (2001), over *Ciraolo* and *Riley*. The majority contends that drone observation is, by nature, similar to the intrusive surveillance that occurred in *Kyllo*. However, *Kyllo* involved infrared thermal imaging of the defendant's home. Our Supreme Court concluded with respect to that surveillance:

> Where, as here, the Government uses a device that *is not in general public use*, to explore details of the home that *would previously have been unknowable without physical intrusion*, the surveillance is a 'search' and is presumptively unreasonable without a warrant. [*Kyllo*, 533 US at 40 (emphasis added).]

In my opinion, the fundamental import of *Ciraolo*, *Riley*, and *Kyllo* is that if the drone that was used to view defendants' property in this case was a technology commonly used by the public that observed only what was visible to the naked eye and that was flown in an area in which any member of the public would have a right to fly their drone—and the record suggests that all of these things are true—then precedent provides that a Fourth Amendment violation has not occurred. See *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450; *Kyllo*, 533 US at 40.

Defendants have not provided any evidence that the type of drone used in this case was a technology unavailable to the general public. Contrarily, drones are generally widely available to the public,[4] there is

[4] There were 873,144 drones registered with the FAA as of February 2021, and the FAA stated that drones—also known as "un-

reason to believe that the public commonly flies them at altitudes of 400 feet and below,[5] and there is no evidence in this case that the drone in question was flying at a particularly invasive altitude or in a particularly invasive manner, or that the drone contained or used any particularly invasive technology. Similar to the situations in *Ciraolo* and *Riley,* there is reason to believe that any member of the public could have used their own drone and plainly viewed the property at issue in this case.[6] See *Ciraolo*, 476 US at 213-214; *Riley*, 488 US at 449-451. With the above in mind, I would emphasize the common availability and use of drones by the public in determining whether defendants had a reasonable expectation of privacy in this case. That, in conjunction with whether the drone in this case was lawfully deployed in the public airspace, should control over our policy concerns with respect to how drones may be operated in future cases.

The majority addresses this idea by noting that a person's reasonable expectation of privacy does not evaporate simply because an invasion into privacy

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manned aerial systems (UAS)—"are rapidly becoming a part of our everyday lives." FAA, *UAS by the Numbers* <https://www.faa.gov/uas/resources/by_the_numbers/> (accessed February 2, 2021) [https://perma.cc/M888-5X2Q]. And, notably, not every drone used for recreational purposes is required to be registered with the FAA. See FAA, *Register Your Drone* <https://www.faa.gov/uas/getting_started/register_drone/> (accessed February 2, 2021) [https://perma.cc/A4YP-S8FY].

[5] The FAA specifically instructs recreational drone users to fly their drones "at or below 400 feet" when in "uncontrolled airspace. FAA, *Recreational Flyers & Modeler Community-Based Organizations* <https://www.faa.gov/uas/recreational_fliers/> (accessed February 1, 2021) [https://perma.cc/VE7W-EFMH]. See *Small Unmanned Aircraft Systems*, 14 CFR 107.51 (2021).

[6] Again, the existence of a privacy fence in this case did not imbue in defendants a reasonable expectation of privacy in what was readily and legally viewable from above. See *Ciraolo*, 476 US at 211, 215; *Riley*, 488 US at 450.

becomes technologically feasible. I agree, but I find the majority's extension of that logic to create a Fourth Amendment violation in this case problematic, particularly in light of the cases the majority relies upon: *People v Stone*, 463 Mich 558; 621 NW2d 702 (2001), and *Kyllo*. In *Stone*, our Supreme Court held, on the basis of Michigan eavesdropping statutes, that a person has a reasonable expectation of privacy in certain telephone conversations despite the fact that technology makes it possible for others to eavesdrop on those conversations. *Stone*, 463 Mich at 568. Outside of the idea that advances in technology do not automatically diminish a person's reasonable expectation of privacy, *Stone* has little import to the case at hand.[7] Similarly, and as noted above, *Kyllo* involved infrared thermal imaging of the defendant's home, and it was fundamental to the result in that case that the technology employed by the police was both invasive and not ordinarily available to or used by the general public. *Kyllo*, 533 US at 34, 40.

Ultimately, I do not believe *Kyllo* and *Stone* provide us a basis to sidestep *Ciraolo* and *Riley*. And, while I too have concerns about the potentially intrusive nature of drones, I would not categorically conclude that the use of drones without a warrant violates the Fourth Amendment where one is used to view what is otherwise plainly visible to the naked eye from air-

[7] And notably, technological advances have not diminished a privacy interest that defendants otherwise would have had. There appears to be little in the way of argument to say that, had plaintiff flown a helicopter at a relatively low altitude and captured substantially similar images to those captured by the drone, the majority might feel inclined to reach a different conclusion. See *Riley*, 488 US at 451 (noting that the helicopter in that case was flown at an altitude of 400 feet). I do not see the purpose in distinguishing the two aircrafts under the facts of this case when either could be used to view property plainly visible in a substantially similar manner from publicly navigable airspace.

space navigable by the public. That type of rule may be crafted by the Legislature, but for the purposes of our review, I would think that whether an unreasonable search has occurred for Fourth Amendment purposes should continue to be a question we address on the basis of the totality of the circumstances in each case. See *People v Woodard*, 321 Mich App 377, 383; 909 NW2d 299 (2017) (noting that the "touchstone" of Fourth Amendment protections is reasonableness, which is measured by examining the totality of the circumstances).

With all of the above in mind, again, there is no evidence that the drone in this case was flown in violation of the law or applicable regulations, nor that it contained equipment or was itself technology not readily available or generally used by the public. The fundamental principle from both *Ciraolo* and *Riley* is that the property observed in those cases was observable by commercial and public aircraft in the publicly navigable airspace, see *Ciraolo*, 476 US at 215; *Riley*, 488 US at 450, and the fundamental difference between those two cases and *Kyllo* was that the technology in *Kyllo* was not something that could be reasonably expected to be employed by members of the public, *Kyllo*, 533 US at 34, 40. On that basis, I would conclude that no Fourth Amendment violation occurred in this case, and I would affirm the trial court's order denying defendants' motion to suppress.

PEOPLE v SWENOR

Docket No. 352786. Submitted December 3, 2020, at Grand Rapids. Decided March 18, 2021, at 9:20 a.m.

Dennis L. Swenor was charged in 96th District Court with misdemeanor trespass and felony possession of methamphetamine. Defendant was arrested in the parking area of a Walmart store after a loss-prevention associate contacted the sheriff's department and stated that he wanted defendant and another man removed from the premises. The store manager informed the deputy who responded to the call that the manager had previously served defendant with a no-trespass order. Defendant did not give consent to the police to search his personal property, which was contained in two shopping carts and included backpacks and a safe. The deputy arrested defendant on the basis of the no-trespass order, put defendant's property in the backseat of a patrol car, and transported the property to the police station, where the deputy inventoried it. While inventorying the property, the deputy opened a zippered bag that was inside a backpack; a digital scale in that bag had a residue on it that later tested positive for methamphetamine. Additional drug paraphernalia was found after a search warrant was authorized to search the safe. With certain exceptions, the department's written policies for inventory searches required that a warrant be obtained before performing a search. The impound-and-inventory exception related to vehicles provided that an inventory search was allowed to protect the owner's property, to protect officers from false claims, and to protect officers from the danger of vehicle contents; the policies did not mention an inventory search of personal property. After he was bound over on the charges to the Marquette Circuit Court, defendant moved to suppress the evidence, i.e., the methamphetamine, discovered as a result of the inventory search. Defendant argued that suppression was appropriate because the inventory search was not conducted pursuant to standardized departmental procedures, that there were people at the scene who could have taken possession of his belongings, and that there was no indication that his personal property contained evidence related to his trespass. The prosecution argued that the police did not act impermissibly when they placed defendant's property in the patrol car and that the im-

poundment of the property was not unconstitutional simply because the police could have made alternative arrangements. When questioned at the motion hearing about whether a written policy was required before police officers could conduct an inventory search of personal property, the prosecutor stated that while the department's policies appeared to apply to vehicle searches, those policies were sufficient as applied to searches of personal property. The court, Jennifer A. Mazzuchi, J., requested that the parties file briefs addressing whether the court could apply the existing policies to a search of personal property, whether a separate policy applied to personal property, or whether there was a separate legal justification for the search. The prosecution argued that (1) the reasoning in *People v Toohey*, 438 Mich 265 (1991)—which reviewed and focused on a police department's written policy regarding vehicle inventory searches, holding that it was sufficient for courts to determine the constitutionality of police conduct by determining whether the police officer acted in accordance with standardized departmental procedures when conducting an inventory search—applied to personal-property searches as well as to vehicle searches, (2) that police have a duty to conduct an inventory search of an arrested person's possessions, and (3) that the department's separate policy requiring prisoners arriving at the booking facility to be patted down and their personal effects taken away and inventoried supported the legality of the inventory and search of defendant's property. The court granted defendant's motion to suppress, reasoning that inventory searches by the police were only permitted when conducted pursuant to their caretaking functions and that inventory searches must be conducted in accordance with a departmental policy or established departmental procedures; in this case, the department's written search and seizure policies did not address the impoundment or search of personal property, and thus the search did not satisfy the inventory exception discussed in *Toohey*. The prosecution moved for reconsideration, arguing that the department's existing written policies covered defendant's circumstances. In a footnote, the prosecution asserted that while the existing policies applied, there was no requirement that a written policy authorize a search for it to be constitutionally sound. The court denied the motion, concluding that *Toohey* required a written procedure to justify both the impoundment and the search and there was no written procedure on point in this case. The prosecution appealed by leave granted.

In separate opinions by Judges FORT HOOD, SAWYER, and SERVITTO, the Court of Appeals *held*:

A police department's policies regarding inventory searches need not be in writing for an inventory search to be reasonable under the Fourth Amendment. However, the prosecution failed to adequately preserve its argument that the department was not required to conduct its inventory search pursuant to a written policy.

Affirmed.

FORT HOOD, P.J., in the lead opinion, noted that Michigan has long recognized the importance of preserving issues for appellate review. In this case, the prosecution failed to adequately preserve its argument that the department was not required to conduct its inventory search pursuant to a written policy; an issue is not preserved if it is raised for the first time in a motion for reconsideration. The prosecution's argument that suppression was an inappropriate remedy was also not preserved because the prosecution did not raise the issue in the trial court. Accordingly, the issues raised by the prosecution on appeal were subject to plain-error review. The right of persons to be secure against unreasonable searches and seizures is guaranteed by both the United States and Michigan Constitutions. To establish that an inventory search is reasonable, the prosecution must establish that an inventory-search policy existed, all police officers were required to follow the policy, the officers actually complied with the policy, and the search was not conducted in bad faith; whether the policy is in writing is not, by itself, dispositive of the constitutional question. However, given the *Toohey* Court's focus on the written policy at issue in that case, a reasonable court interpreting that holding could have concluded that a written policy was a requirement for a search to be constitutionally valid. Therefore, regardless of the correctness of the trial court's holding that the search was invalid because police officers searched defendant's property without guidance from a written policy, the court's decision was not plainly or obviously wrong because no binding caselaw had directly addressed whether a written policy was required.

SERVITTO, J., concurring in the result only, declined to address the prosecution's argument on appeal—that a policy concerning an inventory search of a defendant's property does not have to be in writing to be constitutionally sound—because the prosecution failed to raise that issue in the trial court until its motion for reconsideration.

SAWYER, J., dissenting, agreed with the lead opinion that an inventory-search policy does not have to be in writing but disagreed that the search in this case violated the Fourth Amendment. The trial court plainly erred by concluding that a written

policy justifying the impoundment of defendant's personal property while he was transported to jail was required. *Toohey* did not stand for the proposition that a department's impoundment-and-inventory procedure must be in writing. The proper focus should be whether the police acted reasonably, and the police in this case acted reasonably within the bounds of the Fourth Amendment. Judge SAWYER would have reversed the trial court's order suppressing the evidence of methamphetamine.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Mark J. Wiese*, Prosecuting Attorney, and *Jenna M. Nelson*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Steven Helton*) for defendant.

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

FORT HOOD, P.J. The prosecution appeals by leave granted[1] the order of the trial court granting defendant's motion to suppress evidence discovered as the result of an inventory search of defendant's personal property. On appeal, the prosecution argues that the trial court should not have granted defendant's motion because it was not required to have a written policy addressing the specific kind of inventory search conducted in this case. The prosecution further contends that suppression was an inappropriate remedy in this case. We agree that a written policy is not necessarily required for an inventory search of personal property to be constitutional, but because the prosecution did not properly preserve this issue,[2] we affirm. The trial

[1] *People v Swenor*, unpublished order of the Court of Appeals, entered April 10, 2020 (Docket No. 352786).

[2] We note that the prosecution first addressed this issue in a motion for reconsideration after having been asked twice by the trial court to address it.

court's decision was not plainly or obviously erroneous given the precedent available to it. Moreover, whether suppression was an appropriate remedy is an issue we generally decline to review when unpreserved.

I. FACTUAL BACKGROUND

At the preliminary examination, Marquette County Sheriff's Office Deputy Jesse Fergin-Kuehnl testified that, on August 3, 2019, he was dispatched to a Walmart regarding "some suspicious subjects in the Walmart area." A loss-prevention associate had called about two men sitting on a bench outside of the store. The associate had stated that, several days before, one of the subjects had attempted to conceal items in the store. The associate identified defendant by name.

When Deputy Fergin-Kuehnl arrived at the store, the store's loss-prevention manager stated that the two men were on a bench by the vending machines. The manager directed Deputy Fergin-Kuehnl to defendant and another man, Keith Gronseth, and stated that he wanted the men removed from the premises. The manager also told Deputy Fergin-Kuehnl that he had previously served a no-trespass order on defendant. Deputy Fergin-Kuehnl found the two men on a bench outside the store's west entrance, where he asked defendant and Gronseth why they were there. Both stated that they planned to return items to the store. Deputy Fergin-Kuehnl testified that "there were two full carts, Walmart carts, filled with what appeared to be personal property," and that Gronseth had a small shopping bag. When Deputy Fergin-Kuehnl asked whose property was in the carts, defendant stated that it was his property. Deputy Fergin-Kuehnl noted that the items did not appear to be stolen or purchased from the Walmart. He described the property as backpacks

that were worn and did not have tags on them, a safe that appeared to have been previously pried open, a damaged subwoofer, and "multiple other property items that, uh, were definitely not new."

Deputy Fergin-Kuehnl questioned the men for approximately 10 minutes. Gronseth consented to a search of his shopping bag, but defendant did not consent to a search of his property. Thereafter, Deputy Fergin-Kuehnl made contact with the loss-prevention manager and confirmed the existence of a no-trespass order issued on defendant. On the basis of the no-trespass order, Deputy Fergin-Kuehnl placed defendant under arrest. Deputy Fergin-Kuehnl testified that he then took defendant's property "into safekeeping while he was lodged in Marquette . . . [.]" When asked whether defendant stated whether he wanted anything done with his property, Deputy Fergin-Kuehnl responded, "No, I don't believe he did." He then stated that defendant may have mentioned his girlfriend, Jacqueline Swanson. However, when Swanson arrived about 10 minutes later, she too was arrested for trespassing.[3]

Defendant's property was placed in the backseat of a patrol car and later transported to the "sally port," which was a secure location where large amounts of property were kept by police. Deputy Fergin-Kuehnl performed an inventory search of defendant's property. During the search, he found a black backpack. Inside the backpack was a small, red-and-black zipper bag,

[3] At the later hearing on the motion to suppress, the parties stipulated that another deputy told defendant that he could have someone else pick up his belongings as long as he allowed the police to search it first. The exact words from that deputy's body camera were, "Deputy Fergin is willing to turn your property over to someone else if you let us look through it."

which Deputy Fergin-Kuehnl opened "to insure that there was no valuable property" inside. The bag had a small, black digital scale with a white powdery residue on the weighing area. In his experience, white powdery substances found on scales were most commonly methamphetamine or cocaine. When Deputy Fergin-Kuehnl performed a methamphetamine field test kit, the scale tested positive for methamphetamine. He drafted a search warrant for entry into the safe, in which he found "a syringe or two" and a clear glass smoking pipe with a gray and brown residue. He sent the pipe to the Michigan State Police crime lab for analysis.

Deputy Fergin-Kuehnl stated at defendant's preliminary examination that there was a written departmental policy for inventory searches, but he "could not recite it word-for-word." At the subsequent hearing on the motion to suppress the evidence, Deputy Fergin-Kuehnl testified that large amounts of property were generally inventoried in a secure location:

> *Q*. Why didn't you inventory it there at Walmart?
>
> *A*. Generally, with large amounts of property, we will take that back to our office in a secured location. We don't have property forms in our patrol vehicles, so it's a lot better to do it in a controlled environment, secure environment, and take inventory of everything.

The Marquette County Sheriff's Office search and seizure guidelines provide that "[a]ll searches require a warrant, unless they fall into one of the following exceptions to the warrant requirement[.]" The listed exceptions include "[s]earch based on impounding a vehicle and its inventory." The guidelines provide that an inventory search is only permitted to protect the owner's property, to protect officers from false claims, and to protect officers "from the danger of vehicle contents." The guidelines provide that officers "may not

just routinely impound and inventory any vehicle." A vehicle only may be impounded if it creates a traffic hazard, if the vehicle is abandoned, or to protect the vehicle from vandalism or theft.[4] Notably, the guidelines do not mention an inventory search of personal property.[5]

Defendant was ultimately charged with felony possession of methamphetamine and misdemeanor trespass. On October 31, 2019, defendant moved to suppress the evidence—the methamphetamine—found in his personal property. According to defendant, an inventory search was required to be conducted pursuant to standardized departmental procedures that ensured that specific property was not singled out for search on the basis of improper motives. Defendant argued that he was arrested for trespass, and there was no indication that his personal property contained evidence of the same. Defendant further noted that there were people on the scene who could have taken possession of defendant's property. The prosecution did not file a written response to defendant's motion. At the motion hearing, however, the prosecution argued that the police officers had not acted impermissibly when they placed defendant's property in the patrol car, and that an impoundment was not unconstitutional solely because the police could have made alternative arrangements.

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[4] Deputy Fergin-Kuehnl agreed that the shopping carts were not obstructing the roadway.

[5] The guidelines also discuss a search incident to arrest "for a Bondable Misdemeanor." This section provides that, when a defendant is arrested for a bondable misdemeanor, officers may search the defendant, the passenger compartment of defendant's vehicle, and the passenger when the defendant is arrested, and "[t]he search should be completed on the street at the scene." The arrested person should be informed of his or her right to post bond, and "[i]f the person is not informed of his/her right to post bond, any subsequent search at the station may be illegal."

The trial court asked the prosecution whether it was necessary for police officers to have a written policy to conduct an inventory search:

> *The Court*: . . . Most of the law about inventory searches talks about there—it being, you know, pursuant to a policy. Is it the People's position that a specific personal property inventory search policy isn't required, that it's constitutional irrespective of written policy?
>
> [*The Prosecutor*]: As in to—to the manner of how they do the search?
>
> *The Court*: The ability to do the search at all. I mean, I think most of the case law in the area, and I—you know, just from looking at the briefs, too, makes statements like, if it's done pursuant to departmental regulations, and so forth.
>
> [*The Prosecutor*]: Correct.
>
> *The Court*: And it's not clear to me whether there are any departmental regulations on personal property versus vehicles. Because this is kind of written in a vehicle context, I don't know whether there is or not. But the one that's offered—
>
> [*The Prosecutor*]: Right.
>
> *The Court*:—seems like it might be vehicle specific.
>
> [*The Prosecutor*]: Well, and—though the idea behind it might be vehicle specific, I think this is a sufficient policy to comply with that because it talks about the reasons you're doing it . . . .

The prosecutor later argued, "I think the best practice is that you're doing it pursuant to policy because I think the history behind the need for an inventory search is for the reasons that the Marquette Sheriff's Office has cited, but it's also to avoid just using it as a shield to go looking for evidence." The prosecutor stated that, without a written policy, practices over time might focus on specific individuals or types of

arrests, which would violate the Fourth Amendment. The prosecutor then stated, "I think the idea that you have this policy is a supplement to the actual authority to it [sic], but it's not the basis from which the authority flows."

Following arguments on the motion, the trial court noted that it had reviewed *People v Toohey*, 438 Mich 265, 272; 475 NW2d 16 (1991). The court stated, "The defense appeared to argue that the inventory search policy regarding vehicles is equally applicable to the impoundment and inventory of personal property." It directed counsel to further brief the issue and to specifically answer whether the trial court could apply the existing inventory-search policy to a search of personal property. It asked, in the alternative, whether a separate policy applied to personal property, or whether there was a separate legal justification for the search.

In defendant's supplemental brief, defendant argued that the trial court could not apply the sheriff's office policy to defendant's case because the policy only applied to vehicles. Defendant also stated that there did not appear to be a separate policy that applied to searches of personal property. Defendant further argued that police officers did not search his property in good faith because he had refused to consent to a search, defendant's personal property did not pose a threat to public safety, and defendant had made reasonable efforts to secure his property when he was arrested.

In the prosecution's supplemental brief, the prosecution argued that the reasoning in *Toohey* applied to searches of personal property as well as vehicles. The prosecution asserted that *Toohey* relied on an unarticulated but established principle that police have a duty

to conduct an inventory search of an arrested person's possessions. The prosecution further argued that the police officers in this case searched defendant's property "in accordance with their policies." The prosecution noted, "The Marquette County Sheriff's Office does have a separate policy that applies to personal property," and it attached copies of the policy to its brief. The policies the prosecution attached stated that an inmate arriving at a booking facility would be patted down and that the inmate would then remove all personal belongings and place them in a bin. The arresting officer would inventory the inmate's possessions and record the results in the computer. An inmate arriving at the jail would be searched to prevent contraband from entering the facility. All personal property would be removed and placed in a property bag. The policy stated that inmates would not be allowed to access their personal belongings during the custodial inventory search.

Upon reviewing the briefs, the trial court issued an opinion and order noting that inventory searches without a warrant are permitted only when they are conducted pursuant to police caretaking functions. The court held that inventory searches were required to be conducted in accordance with a departmental policy or established departmental procedures. It determined that an officer's use of discretion in the ability of the officer to dispose of the property by alternative means did not render a search invalid. On that basis, the court rejected defendant's argument that the officers' ability to deliver his possessions to his friend or girlfriend affected the analysis.

However, the trial court determined that the written office policy on search and seizure did not address impoundment or search of personal property; it only

addressed procedures concerning stop and frisk or the impoundment and inventory search of a vehicle. The court agreed that, had the officers left defendant's property outside the Walmart, it could have been damaged or taken. However, the written policies still did not address impounding personal property. With that in mind, the trial court held that the seizure did not satisfy "the inventory exception discussed in *Toohey*, [438 Mich 265]," and stated that it could not find authority to extrapolate the sheriff office's existing policies to the present circumstance. It concluded that the search did not satisfy the requirements of the inventory exception, and it granted defendant's motion to suppress the evidence.

In a motion for reconsideration, the prosecution reiterated that its written property management guidelines covered the circumstances of this case. In a footnote, the prosecution also argued that, while its written guidelines addressed defendant's circumstances, it was not required to provide a written policy. The trial court denied the prosecution's motion. It found that, although the police officers had acted in good faith to protect defendant's personal items, the "lack of a policy justifying the impoundment or seizure of property fails to satisfy the standard set forth in *Toohey*." The court reasoned that "the case law requires a written procedure to justify both the impoundment and the search." This appeal followed.

II. PRESERVATION AND STANDARD OF REVIEW

Highly relevant to the outcome of this case, we conclude that the prosecution's arguments on appeal are not preserved. "Michigan has long recognized the importance of preserving issues for appellate review." *People v Carines*, 460 Mich 750, 762; 597 NW2d 130

(1999). Preservation requirements apply to both constitutional and nonconstitutional issues. *Id*. at 762-763. To preserve an issue, a party must raise it before the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A challenge on one ground before the trial court is not sufficient to preserve a challenge on another ground on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). When a party raises a separate argument on appeal than the party raised before the trial court, the party must satisfy the standard for plain-error review. *Id*. at 312.

The prosecution did not adequately raise below its argument that the department was not required to conduct its inventory search pursuant to a written policy. An issue is not preserved if it is raised for the first time in a motion for reconsideration. *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). When directly asked whether a written policy was required for police officers to conduct a search, the prosecution sidestepped the issue. It then argued that the written policy in this case was sufficient even though it was specific to vehicles. The prosecution argued that it was "best practice" to conduct an inventory search pursuant to a policy because conducting searches without a written policy might result in unconstitutional searches, and it stated that, without a written policy, practices over time might focus on specific individuals or types of arrests, which would violate the Fourth Amendment. It then argued that the policy was "a supplement to the actual authority to it [sic], but it's not the basis from which the authority flows."[6] In response to the trial

[6] While we note that this statement suggested the prosecution's position that a written policy was not required, it was not adequate, particularly in light of the context in which it was made, to fully raise

court's request for supplemental briefing, the prosecution argued that *Toohey* applied to this case and that its written policies actually covered defendant's circumstances. Ultimately, the prosecution argued in its motion for reconsideration that, even if the department's policies did not address defendant's specific search, a written policy was not required. Because the prosecution did not address this issue in a timely fashion, we conclude that the issue is unpreserved.[7] Additionally, the prosecution's argument that suppression was an inappropriate remedy is not preserved because the prosecution did not raise this issue during its arguments before the trial court.

This Court reviews de novo the application of constitutional standards regarding search and seizure and reviews for clear error the trial court's findings of fact supporting a motion to suppress. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). A finding is clearly erroneous if, after reviewing the entire record,

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the issue. The statement was made in support of the idea that the department's written policy applied to the circumstances of the case despite explicitly targeting vehicle searches.

[7] This Court applied similar reasoning in *People v Wilson*, unpublished per curiam opinion of the Court of Appeals, issued December 18, 2018 (Docket No. 340376), p 4. Unpublished authorities are not binding on this Court but may be considered as persuasive authority. *People v Daniels*, 311 Mich App 257, 268 n 4; 874 NW2d 732 (2015). In *Wilson*, unpub op at 4, the prosecution was given several opportunities to raise an issue, but it did not take advantage of those opportunities and only raised the issue in its motion for reconsideration. This Court held that the issue was unpreserved. *Id*. In this case, the trial court specifically asked the prosecution questions about this issue at the motion hearing and requested supplemental briefing on the issue, but the prosecution consistently argued that its written policies actually covered defendant's circumstance. It first argued that a written policy was not required in a footnote in its motion for reconsideration. Similar to *Wilson*, the prosecution was given several opportunities to raise the issue but did not do so in a timely fashion.

this Court is definitely and firmly convinced that the trial court made a mistake. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). This Court reviews de novo the application of the exclusionary rule to a constitutional violation. *People v Frazier*, 478 Mich 231, 240; 733 NW2d 713 (2007). This Court reviews unpreserved constitutional issues for plain error affecting a party's substantial rights. *Carines*, 460 Mich at 763. An error is plain if it is clear or obvious, and it affects substantial rights if it affected the outcome of the lower court proceedings. *Id*. An error is also plain when it is contrary to well-settled law. See *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

III. ANALYSIS

The prosecution first argues that it was not required to have a written policy addressing inventory searches of personal property. We conclude that the trial court's ruling regarding this inventory search was not plainly erroneous. The prosecution further contends that suppression was not an appropriate remedy in this case because the police officers were acting in good faith. However, we generally decline to overturn a suppression decision on the basis that suppression was not the appropriate remedy where the prosecution did not raise the issue before the trial court. Accordingly, we affirm.

A. WHETHER A WRITTEN POLICY WAS REQUIRED

Both the United States and Michigan Constitutions "guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). See US Const, Am IV; Const 1963, art 1, § 11. To comply with this requirement, police officers generally must

have a warrant to conduct a search. *Kazmierczak*, 461 Mich at 417. "In order to show that a search was legal, the police must show either that they had a warrant or that their conduct fell under one of the narrow, specific exceptions to the warrant requirement." *People v Eaton*, 241 Mich App 459, 461; 617 NW2d 363 (2000). An inventory search is an exception to the warrant requirement. *Toohey*, 438 Mich at 271.

When police officers conduct a search without a warrant, the standard for determining constitutionality is whether the search was reasonable. *Id*. at 272. In *Illinois v Lafayette*, 462 US 640, 641; 103 S Ct 2605; 77 L Ed 2d 65 (1983), the United States Supreme Court considered a case in which the defendant was arrested for disturbing the peace. At the time, the defendant possessed a shoulder bag. *Id*. at 641-642. When a police officer inventoried the contents of the bag, he found amphetamine pills. *Id*. at 642. The police officer testified that it was standard procedure to inventory everything in the possession of an arrested person. *Id*. The trial court ruled, however, that the search was invalid because it was not a search incident to arrest, and the Illinois Appellate Court affirmed on that same basis. *Id*. The appellate court also held that the search was not a valid inventory search because it was not a search of an automobile and the defendant had a greater privacy interest in his shoulder bag than he would have had in an automobile. *Id*. at 642-643.

The United States Supreme Court reversed, holding that the search was a reasonable inventory search of the property that the arrested person had in his possession at the time of arrest. *Id*. at 648. The Court reasoned, "it is entirely proper for police to remove and list or inventory property found on the person or in the possession of an arrested person who is to be jailed." *Id*.

at 646. Inventory searches prevent police from stealing the arrested person's property, deter false claims that the police have done so, and protect arrested persons and the police from dangerous items such as bombs or weapons. *Id*. The United States Supreme Court stated that "standardized inventory procedures are appropriate to serve legitimate governmental interests . . . ." *Id*. at 647.[8]

We have also held before that it is appropriate for police officers to open closed containers during inventory searches. This Court is not bound to follow a rule of law announced by this Court before November 1, 1990, but it gives such decisions greater precedential effect than unpublished decisions. *People v Bensch*, 328 Mich App 1, 7 n 6; 935 NW2d 382 (2019). In *People v Guy*, 118 Mich App 99, 101; 324 NW2d 547 (1982), the defendant was arrested on a misdemeanor charge. At the police station, a police officer removed his briefcase, opened it, and found a cassette recorder inside. *Id*. at 101-102. The police officer was later informed that a cassette recorder was missing from a house that the defendant had entered. *Id*. at 102. The officer testified that the briefcase was opened and inspected pursuant to routine procedures to prevent claims of theft or damage to property. *Id*. The defendant argued that the officer should not have opened his briefcase and inspected its contents. *Id*. This Court held that "the briefcase was opened and its contents inspected pursuant to a valid inventory search procedure." *Id*. This Court distinguished a case holding that the search of a briefcase was improper when it was not

[8] The Court also rejected an argument that the police could have met these interests by less intrusive means, such as by securing the bag in a sealed plastic bag or box before placing it in a locker. *Lafayette*, 462 US at 647.

conducted pursuant to a standard procedure. *Id*. at 103. See *People v Miller*, 110 Mich App 270; 312 NW2d 225 (1981), vacated by *Michigan v Miller*, 459 US 1167 (1983), after *Guy* was decided. This Court reasoned in *Guy* that opening the defendant's briefcase was consistent with the basic purposes of an inventory search, which were to protect the property while it was held in police custody, to protect the police against claims over lost and stolen property, and to protect the police from potential danger. *Guy*, 118 Mich App at 103.

In this case, defendant possessed two shopping carts filled with personal property at the time of his arrest. Deputy Fergin-Kuehnl testified that the personal property was taken into police possession for "safekeeping" following defendant's arrest. The property included backpacks, a safe, and other used property. The property was ultimately taken to a secure location, where Deputy Fergin-Kuehnl performed an inventory search. He opened the backpack, which contained a black and red zipper bag that he also opened. The zipper bag contained a scale that tested positive for methamphetamine. While no binding Michigan caselaw explicitly holds that it is acceptable for police officers to conduct an inventory search of personal property in the possession of a person who is arrested, federal caselaw and nonbinding Michigan caselaw support that police officers may inventory the personal property of a person who is arrested and may open containers when doing so because such searches serve legitimate government interests.

Standardized inventory searches, specifically, serve the legitimate governmental interests of preventing police from stealing the arrested person's property, deterring false claims of theft, and protecting people from possibly dangerous contents. *Lafayette*, 462 US at

646-647; *Guy*, 118 Mich App at 102-103. We hold that, in order to establish that an inventory search is reasonable, the prosecution must establish that an inventory-search policy existed, all police officers were required to follow the policy, the officers actually complied with the policy, and the search was not conducted in bad faith. Whether the policy is or is not in writing should not itself be dispositive of the constitutional question.

That having been said, we cannot conclude that the trial court's decision was clearly or obviously wrong. In *Toohey*, 438 Mich at 272, the defendant asserted that police officers did not follow their own departmental regulations when deciding whether to impound his vehicle. The Court stated that "the critical factors which the court must evaluate are whether the police acted in accordance with departmental regulations when conducting the inventory search and that it was not done for criminal investigation." *Id*. at 277. The *Toohey* Court stated that it was sufficient for courts to determine the constitutionality of police conduct by determining whether the police officer "acted in accordance with standardized departmental procedures when conducting an inventory search . . . ." *Id*. at 279. The Court later reiterated, "To be constitutional, an inventory search *must* be conducted in accordance with established departmental procedures, which all police officers are required to follow, and *must not* be used as a pretext for criminal investigation." *Id*. at 284.

The *Toohey* Court considered the language of an Ann Arbor ordinance to determine whether the police officers' search was constitutionally valid. *Id*. at 285-286. Addressing the defendant's argument that the policy left the police officers with too much discretion, the Court disagreed, stating, "The critical factor in deter-

mining whether too much discretion has been granted to police officers regarding impoundment of an arrested person's automobile is the ability for arbitrary searches and seizures to be conducted by the police officers." *Id*. at 287. Under the facts and circumstances of the case, the impoundment of the vehicle was reasonable to protect the unattended vehicle from possible theft or vandalism. *Id*. at 290-291.

In this case, the trial court held that the search did not satisfy the requirements of the inventory exception because the sheriff's office policies did not address the impoundment of personal property. It held that the seizure did not satisfy *Toohey*'s inventory exception, and it reasoned that "the case law requires a written procedure to justify both the impoundment and the search." The *Toohey* Court's focus on the written policy in that case and its analysis of that policy's language could lead a reasonable court to conclude that a written policy was, in fact, a requirement.

An error is plain when it is clear or obvious, *Carines*, 460 Mich at 763, such as when it is contrary to well-settled law, see *Vaughn*, 491 Mich at 665. Regardless of the correctness of the trial court's holding that the search was invalid because police officers did not conduct it pursuant to a written policy, its decision was not plainly or obviously wrong because no binding caselaw has directly addressed whether a written policy was required.[9]

B. WHETHER SUPPRESSION WAS AN APPROPRIATE REMEDY

The prosecution also argues for the first time on appeal that the trial court should not have granted defendant's motion to suppress the evidence because

[9] As an aside, we note the prosecution's argument that the testimony of Deputy Fergin-Kuehnl established that an unwritten policy governed the

suppression was an inappropriate remedy. The prosecution notes that there was no evidence that Deputy Fergin-Kuehnl engaged in deliberate misconduct. Again, this issue is unpreserved, and on that basis, we decline to grant the relief the prosecution seeks.

The exclusionary rule is a prudential doctrine whose purpose is to deter future Fourth Amendment violations. *Davis v United States*, 564 US 229, 236; 131 S Ct 2419; 180 L Ed 2d 285 (2011); *People v Hill*, 299 Mich App 402, 412; 829 NW2d 908 (2013). "[A]pplication of the exclusionary rule is inappropriate in the absence of governmental misconduct." *Frazier*, 478 Mich at 250. However, this Court will decline to review this issue when the prosecution has forfeited the argument. *Id*. at 240-241.

In this case, the prosecution did not argue before the trial court that the exclusionary rule should not apply. To the extent that the prosecution argued that the police officers had not behaved inappropriately, it was part of the prosecution's argument that the officers were protecting defendant's property and protecting themselves from false claims of loss. Because the prosecution did not preserve this claim of error, we decline to review it. See *id*.

Affirmed.

SERVITTO, J. (*concurring in the result*). I concur in the result only. The arguments in the prosecution's appeal brief address whether a policy concerning an inventory search of a defendant's personal property must be in writing, whereas the arguments the prosecution pur-

police officers' conduct in this case. The trial court did not resolve this factual issue, and given our conclusion that the trial court did not plainly err for the purpose of our review, we decline to address it on appeal.

sued in the trial court were based on an assertion that a written policy applicable to those searches did exist. Because the prosecution did not first raise in the trial court (until its motion for reconsideration) the specific issues now before this Court, I would deem the issues before this Court unpreserved and would therefore decline to address them.

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

I agree with the lead opinion that the law on inventory searches is clear that while there must be a policy, it does not have to be in writing. But I disagree that the trial court's decision should be affirmed. For the reasons discussed in this opinion, I believe that the actions taken by the sheriff's department were reasonable under the Fourth Amendment, and I would reverse the trial court.

First, I conclude that the trial court plainly erred by determining that there had to be a written policy to justify the impoundment of defendant's personal belongings and taking them to the jail along with defendant.[1] This Court, in *People v Green*,[2] held that the "testimony of police officers may be sufficient to establish the existence of a standard procedure or routine." In this case, the deputy testified that defendant's belongings were taken with him to the jail because "there wasn't really a good option to give the property to. So in those cases we try to take them in for

[1] The trial court's opinion states that the facts would have justified the inventory search of the items had the impoundment itself been lawful. Therefore, the central question is whether the sheriff's deputies acted properly in transporting defendant's belongings from the point of arrest to the jail, where the items were subject to an inventory search.

[2] 260 Mich App 392, 411; 677 NW2d 363 (2004), overruled on other grounds *People v Anstey*, 476 Mich 436 (2006).

safekeeping while the person is lodged, and we have to do an inventory search per our guidelines." The trial court relied on the Supreme Court's decision in *People v Toohey*[3] for the proposition that an impoundment or inventory policy must be in writing. But as the lead opinion acknowledges, while *Toohey* involved a written policy, that does not mean that it stands for the proposition that a policy must be written.

Analysis of this matter is complicated by the fact that impoundment cases typically involve the impoundment of automobiles. I find some assistance in the United States Supreme Court's decision in *Illinois v Lafayette*,[4] where the defendant was arrested for disturbing the peace and was taken to the police station along with his shoulder bag. A subsequent search of the bag revealed the possession of controlled substances. The Court's opinion focuses more on the search of the bag than on its impoundment. But it is nevertheless instructive.

The Court[5] discussed the role of courts relative to these procedures:

> The Illinois court held that the search of respondent's shoulder bag was unreasonable because "preservation of the defendant's property and protection of police from claims of lost or stolen property, 'could have been achieved in a less intrusive manner.' For example, . . . the defendant's shoulder bag could easily have been secured by sealing it within a plastic bag or box and placing it in a secured locker." [*People v Lafayette*, 99 Ill App 3d 830, 835; 425 NE2d 1383 (1981)] (citation omitted). Perhaps so, but the real question is not what "could have been achieved," but whether the Fourth Amendment *requires* such steps;

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[3] 438 Mich 265; 475 NW2d 16 (1991).

[4] 462 US 640; 103 S Ct 2605; 77 L Ed 2d 65 (1983).

[5] *Id*. at 647-648.

it is not our function to write a manual on administering routine, neutral procedures of the stationhouse. Our role is to assure against violations of the Constitution.

The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means. In *Cady* v. *Dombrowski*, 413 U.S. 433 [93 S Ct 2523; 37 L Ed 2d 706] (1973), for example, we upheld the search of the trunk of a car to find a revolver suspected of being there. We rejected the contention that the public could equally well have been protected by the posting of a guard over the automobile. In language equally applicable to this case, we held, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." *Id*., at 447. See also *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 557 n. 12 [96 S Ct 3074; 49 L Ed 2d 1116] (1976). We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the stationhouse. It is evident that a station-house search of every item carried on or by a person who has lawfully been taken into custody by the police will amply serve the important and legitimate governmental interests involved.

Even if less intrusive means existed of protecting some particular types of property, it would be unreasonable to expect police officers in the everyday course of business to make fine and subtle distinctions in deciding which containers or items may be searched and which must be sealed as a unit. Only recently in *New York* v. *Belton*, 453 U.S. 454 [101 S Ct 2860; 69 L Ed 2d 768] (1981), we stated: " '[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.' " *Id*., at 458, quoting *Dunaway* v. *New York*, 442 U.S. 200, 213–214 [99 S Ct 2248; 60 L Ed 2d 824] (1979). See also *United States* v. *Ross*, 456 US 798, 821 [102 S Ct 2157; 72 L Ed 2d 572] (1982). [Some alterations in original.]

> Applying these principles, we hold that it is not "unreasonable" for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.

The Court's focus in *Lafayette* on whether the police acted reasonably is the key inasmuch as the Fourth Amendment protects against unreasonable searches and seizures. And the deputy's testimony reflects just that: what was the reasonable alternative available to those on the scene. It would seem to me that they had two alternatives: take defendant's belongings with him to the jail or abandon them in the Walmart parking lot. I am tempted to conclude that it would have been unreasonable for the police to leave behind those belongings to potentially be scavenged by others, including the possibility that those belongings might have contained items that could be dangerous in the possession of those scavengers. But I will resist that temptation because I take to heart the admonition of the Supreme Court in *Lafayette* not to second-guess the police in how to carry out their community-caretaking function. See also *Colorado v Bertine*.[6]

For these reasons, I conclude that the trial court plainly erred by holding that the procedures employed had to be part of a written departmental policy. I further conclude that the actions taken by the sheriff's department in this case were reasonable and within the bounds of the Fourth Amendment.

Accordingly, I would reverse the trial court.

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[6] 479 US 367, 374; 107 S Ct 738; 93 L Ed 2d 739 (1987) ("[R]easonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.").

STIRLING v COUNTY OF LEELANAU

Docket No. 353117. Submitted March 3, 2021, at Lansing. Decided March 25, 2021, at 9:00 a.m. Leave to appeal sought. Oral argument ordered on the application 509 Mich 857 (2022).

Mack C. Stirling filed a petition in the Tax Tribunal challenging Leelanau County's decision denying his application for a principal-residence exemption (PRE) for tax years 2016–2019. The county denied the application because Stirling's wife had claimed a property-tax exemption for a residence in Utah for the same tax years. Stirling moved for summary disposition in the Tax Tribunal. The tribunal granted Stirling's motion, concluding that the Utah exemption was not substantially similar to the Michigan PRE because the Michigan PRE requires a person to be both an owner and occupier of the residence, while the Utah law allows owners who either live in the property or who have tenants using the property as a primary residence to claim the exemption. The tribunal denied the county's motion for reconsideration, and the county appealed.

The Court of Appeals *held*:

Michigan's PRE is governed by MCL 211.7cc of the General Property Tax Act, MCL 211.1 *et seq*., and allows taxpayers to exempt their domicile from the local school district's property tax. Under MCL 211.7cc(3)(b), a qualifying person is entitled to the PRE so long as they do not own a home in another state for which they claim an exemption that is substantially similar to the PRE. The Utah statute at issue allows a property owner to claim the exemption for their primary residence or for a residential property owned by the person but occupied by a tenant. The Utah Supreme Court has indicated that the purpose of the statute is to grant an exemption for residential property that is being used as a primary residence. The tribunal concluded that the Utah exemption received by Stirling's wife was not substantially similar to the Michigan PRE because it did not require the residence to be occupied by the owner of the property. The Utah exemption and the Michigan PRE are substantially similar. Substantial similarity does not require exactness. "Substantial" means "being largely but not wholly that which is specified," while "similar"

means "having characteristics in common" and "alike in substance or essentials." Utah's exemption is substantially similar to Michigan's PRE because the two statutory provisions are largely but not wholly alike in character and substance. The primary purpose of both the Utah and Michigan statutes is to grant property-tax relief to a person for a home that is used as a primary residence, and although the Utah exemption may also be claimed by a homeowner whose residence is occupied by a tenant as a primary residence, the primary character and substance of both the Utah and Michigan statutes is to provide an exemption to a homeowner for a primary residence that is occupied as a primary residence.

Reversed and remanded.

TAXATION — GENERAL PROPERTY TAX ACT — PRINCIPAL-RESIDENCE EXEMPTION — WORDS AND PHRASES — "SUBSTANTIALLY SIMILAR."

Under MCL 211.7cc of the General Property Tax Act, MCL 211.1 *et seq*., a qualifying person is entitled to the principal-residence exemption (PRE) so long as they do not own a home in another state for which they claimed an exemption that is "substantially similar" to the PRE; the "substantial similarity" standard does not require exactness; rather, the standard requires that the other state's principal-residence exemption and the PRE be largely but not wholly alike in character and substance.

Karla Stirling and *Wallace H. Tuttle & Associates PC* (by *Wallace H. Tuttle*) for Mack C. Stirling.

Clark Hill PLC (by *Zachary C. Larsen* and *Charles A. Lawler*) for the County of Leelanau.

Before: MURRAY, C.J., and M. J. KELLY and RICK, JJ.

MURRAY, C.J. Respondent, Leelanau County, appeals as of right the final opinion and order of the Michigan Tax Tribunal (MTT) granting summary disposition under MCR 2.116(C)(10) in favor of petitioner, Mack C. Stirling. In granting petitioner's motion, the MTT held that petitioner was entitled to utilize the Michigan principal-residence exemption (PRE) for his home in Leelanau County because the primary-residence exemption claimed by petitioner's wife for a residence in

Utah was not based upon an exemption "substantially similar" to the PRE. We conclude otherwise and thus reverse the final opinion and order of the MTT and remand for further proceedings consistent with this opinion.

I. BACKGROUND

The material facts are not in dispute. Petitioner has lived in his Leelanau County home since 1990. Petitioner's wife owned two rental properties in Utah, but she sold one of the properties in 2018. Petitioner and his wife filed joint tax returns for the pertinent tax years of 2016 to 2019. Neither petitioner nor his wife ever resided at either Utah property; however, the Utah tenants (petitioner's family members) used the properties as their principal residences. As a result, under Utah law, petitioner's wife claimed tax exemptions during the relevant tax years for these properties and disclosed that fact on petitioner's application for a PRE. Respondent denied petitioner's application, concluding that use of the Utah exemption rendered petitioner ineligible for a PRE because the Utah exemption was "substantially similar" to the PRE.

Petitioner then filed this matter in the Small Claims Division of the MTT and subsequently sought summary disposition on the undisputed facts. The MTT granted the motion, concluding that the Utah exemption received by petitioner's wife was not "substantially similar" to the PRE, primarily because to be eligible for the PRE a person had to be *both* an owner and occupier of the residence, while under Utah law a person was eligible if she owned and occupied the residence, *or* owned the residence and had tenants occupying the home as a primary residence. After the MTT denied respondent's motion for reconsideration, respondent filed this claim of appeal.

II. DISCUSSION

Our judicial task is to determine whether what is required under a Utah residential-property-tax-exemption statute is "substantially similar" to that provided by the Michigan residential-property-tax-exemption statute. "Absent fraud, our review of MTT decisions is limited to determining whether the MTT erred in applying the law or adopted a wrong legal principle." *VanderWerp v Plainfield Charter Twp*, 278 Mich App 624, 627; 752 NW2d 479 (2008). We review de novo the MTT's interpretation and application of statutes. *Id*. Although appellate courts "generally defer to the Tax Tribunal's interpretation of a statute that it is delegated to administer, that deference will not extend to cases in which the tribunal makes a legal error. Thus, agency interpretations are entitled to 'respectful consideration' but cannot control in the face of contradictory statutory text." *SBC Health Midwest, Inc v Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017) (some quotation marks and citations omitted).[1] In other words, "respectful consideration" is given to the MTT's construction of a statute, but ultimately the meaning of a statute is a legal question to which we owe no deference.[2] As we said just late last year:

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[1] We agree with respondent that because the MTT is not delegated authority to administer the Utah tax-exemption statutes, any deference warranted under *SBC Health Midwest*, 500 Mich at 71, is not applicable with respect to its view of Utah law.

[2] This "respectful consideration" is much like what we give to a trial court's view of a legal issue on de novo review. See, e.g., *Gillette Commercial Operations North America & Subsidiaries v Dep't of Treasury*, 312 Mich App 394, 405 n 3; 878 NW2d 891 (2015) ("Though we can give no deference to the trial court's legal rulings, unlike the deference we give to discretionary calls on evidence or findings of fact, we nevertheless give the trial court's legal rulings careful consideration.").

> Because these claims of error involve whether the Tax Tribunal properly interpreted and applied the statutes governing its jurisdiction, this Court's review is limited to determining whether the Tax Tribunal committed an error of law in its interpretation and application of the statutes. *Mich Props, LLC v Meridian Twp*, 491 Mich 518, 527-528; 817 NW2d 548 (2012). This Court reviews de novo whether the Tax Tribunal erred as a matter of law when interpreting and applying statutes. *Makowski v Governor*, 317 Mich App 434, 441; 894 NW2d 753 (2016). Agency interpretations of a statute are entitled to "respectful consideration, but they are not binding on courts and cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 117-118; 754 NW2d 259 (2008). [*New Covert Generating Co, LLC v Covert Twp*, 334 Mich App 24, 45; 964 NW2d 378 (2020).]

"It is well established that the primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature." *VanderWerp*, 278 Mich App at 627. "The words used by the Legislature in writing a statute provide us with the most reliable evidence of the Legislature's intent." *Drew v Cass Co*, 299 Mich App 495, 499; 830 NW2d 832 (2013). "If the statutory language is clear and unambiguous, this Court must apply the statute as written, and no further judicial construction is necessary or permitted." *VanderWerp*, 278 Mich App at 627. "Moreover, statutes exempting persons or property from taxation must be narrowly construed in favor of the taxing authority." *Drew*, 299 Mich App at 499-500 (quotation marks and citation omitted).

The PRE is part of the General Property Tax Act, MCL 211.1 *et seq*., and it allows taxpayers to exempt their domicile from the local school district's property tax. *Schubert v Dep't of Treasury*, 322 Mich App 439, 448; 912 NW2d 569 (2017). The PRE is governed by MCL 211.7cc, which provides in relevant part:

(1) A principal residence is exempt from the tax levied by a local school district for school operating purposes to the extent provided under section 1211 of the revised school code, 1976 PA 451, MCL 380.1211, if an owner of that principal residence claims an exemption as provided in this section. . . .

(2) . . . [A]n owner of property may claim 1 exemption under this section by filing an affidavit on or before May 1 for taxes levied before January 1, 2012 or, for taxes levied after December 31, 2011, on or before June 1 for the immediately succeeding summer tax levy and all subsequent tax levies or on or before November 1 for the immediately succeeding winter tax levy and all subsequent tax levies with the local tax collecting unit in which the property is located. For the 2020 tax year only, an owner may claim 1 exemption under this section by filing an affidavit on or before June 30, 2020 for the 2020 summer tax levy and all subsequent tax levies with the local tax collecting unit in which the property is located. *The affidavit shall state* that the property is owned and occupied as a principal residence by that owner of the property on the date that the affidavit is signed and shall state *that the owner has not claimed a substantially similar exemption, deduction, or credit on property in another state*. . . .

(3) Except as otherwise provided in subsection (5), a married couple who are required to file or who do file a joint Michigan income tax return are entitled to not more than 1 exemption under this section. For taxes levied after December 31, 2002, *a person is not entitled to an exemption under this section in any calendar year in which any of the following conditions occur*:

* * *

(b) . . . [*T*]*hat person or his or her spouse owns property in a state other than this state for which that person or his or her spouse claims an exemption*, deduction, or credit *substantially similar to the exemption provided under this*

> *section*, unless that person and his or her spouse file separate income tax returns. [Emphasis added.]

Thus, under Michigan law, a qualifying person is entitled to the PRE so long as they do not own a home in another state for which they claimed an exemption that is "substantially similar to" the PRE. See generally, *Campbell v Mich Dep't of Treasury*, 331 Mich App 312, 320-321; 952 NW2d 568 (2020).

Utah's residential-property exemption is governed by Utah Code 59-2-103[3], which provides in relevant part:

> (3) . . . [T]he fair market value of residential property located within the state is allowed a residential exemption equal to a 45% reduction in the value of the property.
>
> * * *
>
> (6)(a) Except as provided in Subsections (6)(b)(ii) and (iii), a residential exemption described in Subsection (3) is limited to one primary residence per household.
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> (b) An owner of multiple primary residences located within the state is allowed a residential exemption under Subsection (3) for:
>
> (i) subject to Subsection (6)(a), the primary residence of the owner;
>
> (ii) each residential property that is the primary residence of a tenant . . . .

In *Dennis v Summit Co*, 933 P2d 387, 389 (Utah, 1997), the court indicated that the purpose of this statute was to grant an exemption for residential property being used as a primary residence, which can occur in two ways:

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[3] After the decision by the MTT, the Utah legislature amended this code provision and the statutory provisions have been renumbered, though the substantive language at issue here was not affected by the amendment. We refer to the current version of the statute in this opinion.

> The crucial qualification for the exemption is the use to which the property is put, not the residency of the owner. A resident of Utah who owns residential property in Utah but does not *use* that property as a primary residence is taxed in the same manner as a nonresident who likewise owns residential property that he does not use as a primary residence. Such properties are valued at 100% of fair market value for purposes of calculating the property taxes owed. The tax exemption treats resident and nonresident taxpayers alike. Likewise, the Taxing Authorities point out that an individual, whether resident or nonresident, who owns residential property in Utah and rents it to someone who *uses* the property as a primary residence qualifies for the exemption. Both the resident owner and the nonresident owner can take advantage of the exemption as long as the property is being *used* as a primary residence by someone.

What the MTT decided in its opinion and order, and what we must resolve now, is whether the Utah residential-property exemption claimed by petitioner's wife, i.e., the exemption provided to homeowners whose home is used by tenants as a primary residence, is "substantially similar" to the PRE within the meaning of MCL 211.7cc(3)(b). As we have noted, the MTT held that it was not.[4]

In reaching its decision, the MTT concluded that "the Utah exemption received by Petitioner's spouse is not substantially similar to the Michigan PRE because it is not for property occupied by the *owner*, i.e., a homestead"; rather, "[t]he exemption in Utah applies

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[4] This is not the first time the MTT has addressed whether Utah's residential-property exemption is "substantially similar" to the PRE. In both *Whiting v Grand Traverse Co*, unpublished opinion of the Michigan Tax Tribunal, issued March 1, 2017 (Docket No. 16-005482), and *Boyd v Grand Traverse Co*, unpublished opinion of the Michigan Tax Tribunal, issued March 20, 2018 (Docket No. 17-004340), the MTT determined that the same Utah exemption claimed by petitioner's wife *was* substantially similar to the PRE.

as long as it is *a* primary residence and there is no requirement that the same person both own *and* occupy the property." It is true that there are some differences in the coverage of the primary-residence exemptions under the Michigan and Utah statutes, in that the availability of the exemption in Utah is broader than the PRE. Relevant to this case, Utah provides an exemption for a person who (1) owns a home that (2) is used as a primary residence by another. The Utah exemption also contains a provision *exactly* like the PRE, where the homeowner resides in the home as a primary residence.

Our focus in conducting the comparison is between the PRE and the exemption "claimed" by the taxpayer. MCL 211.7cc(3)(b). Here, that is the residential-property exemption contained in Utah Code 59-2-103(3), which is limited to one primary residence per household, Utah Code 59-2-103(6)(a), but which can be claimed by the property owner for residences occupied as the primary residence of the owner or as the primary residence of a tenant. Utah Code 59-2-103(6)(b)(i) and (ii).[5] This framework for our analysis steers us to the conclusion that the Utah exemption claimed by petitioner's wife was substantially similar to the PRE. This conclusion is based on several considerations. First, the "substantial similarity" standard is not so demanding that it requires exactness. The meaning of the common but statutorily undefined word "substantial" is "being largely but not wholly that which is specified," while "similar" is defined as "having characteristics in common" and "alike in substance

[5] Utah Code 59-2-103(6)(b)(iii) now permits an owner to claim the exemption for unoccupied property and property under construction per Utah Code 59-2-102(34)(b)(ii), but that provision, added in 2020, is not at issue in this case.

or essentials." *Merriam-Webster's Collegiate Dictionary* (11th ed).[6] Taken together, we conclude that the Legislature's requirement that the other state's exemption claimed by the homeowner be "substantially similar" to the PRE means that the sister state's exemption must be largely but not wholly alike in its characteristics and substance to the PRE.

Second, applying that definition here, there is no dispute that the main characteristic of the Utah statute, like the PRE, is to grant an exemption to a person who owns a primary residence in that state. It, in fact, seems clear that the primary purpose and characteristic of both statutes is to grant property-tax relief to a person for a home that is used as a primary residence. Third, when looking at the substance of the two exemptions, the Utah exemption claimed by petitioner's wife goes further than the PRE by granting the exemption to a homeowner when the homeowner does not occupy the home but the home is occupied by a tenant as a primary residence. Utah Code 59-2-103(6)(b)(ii). Although Michigan's PRE is more limited in that it applies only to the owner of a property who uses the property as a primary residence, MCL 211.7cc(2), the primary character and substance of both statutes is to provide an exemption for a *homeowner's* primary residence that is *occupied as a primary residence*. We hold that these overarching provisions make the Utah exemption claimed by petitioner's wife substantially similar to the PRE.

We cannot accept petitioner's argument that the Utah exemption does not meet the statutory test because a homeowner need not reside in the residence to receive the exemption. To do so would require demand-

[6] We consult a dictionary to determine the generally understood meaning of a nontechnical word or phrase left undefined by the Legislature. *People v Lewis*, 302 Mich App 338, 342; 839 NW2d 37 (2013).

ing an exactness between the two statutory exemptions that the law does not require. Indeed, to accept that argument would require ignoring the significant similarities between the two statutes (both their purposes and their primary applications) and placing too much emphasis on an additional provision available to homeowners under Utah law, and it would impose too stringent a definition on the phrase "substantial similarity."[7]

III. CONCLUSION

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

M. J. KELLY and RICK, JJ., concurred with MURRAY, C.J.

[7] We do not agree with the MTT that its prior decisions reflect that if the petitioners in *Whiting* and *Boyd* had utilized the Utah exemption taken by petitioners here, i.e., for a residence owned by them but occupied by others, they would have qualified for the PRE. We see no statement to that effect in either decision, and both cases involved Michigan residents who owned Utah residences that were occupied by relatives as their primary residences. Both *Whiting* and *Boyd* contain conclusions squarely in line with our reading and application of the Michigan and Utah statutes.

PEOPLE v ACKLEY (ON REMAND)

Docket No. 336063. Submitted December 2, 2020, at Lansing. Decided March 25, 2021, at 9:05 a.m. Leave denied 508 Mich 967 (2021).

Leo D. Ackley was convicted following a jury trial in the Calhoun Circuit Court, John A. Hallacy, J., of first-degree child abuse, MCL 750.136b(2), and first-degree felony-murder, MCL 750.316(1)(b). Defendant lived with his girlfriend and her two young daughters, including the 3½-year-old victim, B. He watched B and her sister while their mother was at work. B fell ill while in defendant's care, and defendant drove her to his mother's house for help. Defendant's mother called 911, and when first responders arrived, they found B unresponsive, but apparently breathing and conscious. The first responders also noticed a bruise along B's jawbone. B was transported to the hospital, where she was later pronounced brain-dead. After defendant was first convicted of these offenses in 2012, the Supreme Court granted defendant a new trial, concluding that his defense counsel had been constitutionally ineffective for failing to adequately investigate or secure expert assistance. 497 Mich 381 (2015). Defendant was retried and convicted again, and his convictions were affirmed in an unpublished opinion by the Court of Appeals, STEPHENS, P.J., and SHAPIRO and RONAYNE KRAUSE, JJ. The Supreme Court vacated the Court of Appeals' judgment in part and remanded to the Court of Appeals for reconsideration. 506 Mich 948 (2020).

The Court of Appeals *held*:

1. The Supreme Court remanded for reconsideration of the expert testimony presented at trial "in light of *McFarlane*," but the Court did not clarify what this meant. In *People v McFarlane*, 505 Mich 1059 (2020) (*McFarlane II*), the Supreme Court only denied leave to appeal. Therefore, the Supreme Court must have intended to refer to the Court of Appeals' decision in *People v McFarlane*, 325 Mich App 507 (2018) (*McFarlane I*). Further, the Supreme Court must have implicitly adopted the reasoning of *McFarlane I*, which determined that the diagnostic medical term "abusive head trauma," when used by an expert witness, invaded the province of the jury in cases involving allegations of abuse.

2. Expert witnesses are permitted to draw conclusions that encompass a question to be decided by the jury so long as the expert does not appear to purport to draw a legal conclusion. Further, there is nothing inherently forbidden about a medical expert testifying that a particular injury was unlikely or impossible to have been sustained accidentally. In *McFarlane I*, the issue before the Court of Appeals was whether medical-expert testimony invaded the province of the jury when it referred to accepted medical terminology that laypersons might misunderstand as having emotional or legally conclusory connotations. As noted, by implication, the Supreme Court apparently concluded that the diagnostic term "abusive head trauma" invades the province of the jury when used in cases involving allegations of abuse, even if it is a medically recognized term and it is possible to determine that a particular injury was not inflicted accidentally. Therefore, use of the term "abusive head trauma" automatically constitutes plain error. Because this case involved allegations of abuse, and because medical experts used the terms "abuse" and "abusive head trauma" during their testimony, plain error occurred. The issue then is whether the per se plainly erroneous use of these terms by the medical experts at defendant's second trial was so prejudicial that it deprived defendant of a fair trial. Even without the use of the improper terminology, the substance of the experts' testimony would have been conveyed to the jury, including (1) that the location of the bruising on B's body made it unlikely that the cause was accidental; (2) that certain bruises were consistent with having been caused by a cord or belt; and (3) that B's injuries were caused by significant force and were inconsistent with an accidental fall, contrary to defendant's claims. Multiple doctors also testified that B had no underlying illnesses or other factors that would have caused her injuries. The overwhelming majority of the experts presented by the prosecution provided permissible testimony indicating that B had sustained severe injuries that either could not have been or were highly unlikely to have been inflicted accidentally. Therefore, the use of the term "abuse" by some of the experts did not affect the outcome of the trial in light of the other overwhelming evidence of defendant's guilt.

Affirmed.

1. CRIMINAL LAW — EVIDENCE — CHILD ABUSE — EXPERT TESTIMONY — DIAGNOSES — ABUSIVE HEAD TRAUMA — IMPROPER LEGAL CONCLUSIONS — PLAIN ERROR.

Use of the medical-diagnostic term "abusive head trauma" by an expert witness while testifying in a case involving allegations of

child abuse improperly invades the province of the jury; use of the term at a trial involving abuse is per se plain error.

2. CRIMINAL LAW — EVIDENCE — CHILD ABUSE — EXPERT TESTIMONY — MEDICAL TERMINOLOGY — IMPROPER LEGAL CONCLUSIONS.

Expert witnesses are permitted to draw conclusions in their testimony that encompass a question to be decided by the jury, so long as the expert does not appear to purport to be drawing a legal conclusion; although a medical expert may testify that, in their opinion, a particular injury was not accidentally caused, the expert may not call the manner of the injury "abuse," even if that term is recognized by the medical community.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *David E. Gilbert*, Prosecuting Attorney, and *Jennifer S. Raucci*, Assistant Prosecuting Attorney, for the people.

Daniel D. Bremer for defendant.

ON REMAND

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

PER CURIAM. Defendant, Leo Duwayne Ackley, appeals by right his convictions by a jury of first-degree child abuse, MCL 750.136b(2), and first-degree felony-murder, MCL 750.316(1)(b). Defendant's convictions arise out of the death of 3½-year-old "B," the youngest daughter of defendant's girlfriend. This matter returns to us on remand from our Supreme Court. We again affirm.

I. BACKGROUND

This is not the first time this matter has come before us. Defendant was first convicted of the above offenses by a jury in 2012. Our Supreme Court ultimately granted defendant a new trial "because of his counsel's

constitutionally ineffective failure to investigate adequately and to attempt to secure appropriate expert assistance in the preparation and presentation of his defense." *People v Ackley*, 497 Mich 381, 397-398; 870 NW2d 858 (2015) (*Ackley I*). Defendant was retried and again convicted. In his initial appeal from that conviction, we set forth the following summary of the evidence and procedure:

> Defendant was living with B's mother, who he was dating at the time, [B,] and B's 6-year-old sister. He cared for both girls while their mother was at work. According to the mother, B developed some health and behavior concerns when defendant moved in, including unexplained bruising and regression in toilet training. Nevertheless, she testified that on the morning of July 28, 2011, B appeared to be in good health, alert, and talking. However, B had fallen from her bike and fallen from a trampoline a few days previously, which was not an uncommon occurrence. The previous day, B's temperature was approximately 100 degrees and she threw up during dinner.
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> When B's mother came home for lunch, defendant reported that B was upstairs not feeling well; according to the mother, B was apparently asleep but restless, with her head at the foot of the bed. B and her sister shared a room, and their beds were placed about a foot apart from one another. Defendant informed police officers that he discovered B on the floor, next to the bed, with her face down. He found her limp, so he initially tried to run water over her, but then drove her and her sister to his mother's house. He stated that he did not call 911 because he did not have a phone, but rather shared one with B's mother. Defendant's mother called 911 and initially decided to drive B to the hospital herself, but became too "shook up" to continue because B was foaming at the mouth.
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> When the EMTs and first responders arrived, B appeared to be breathing but was unresponsive and appeared to be unconscious. There appeared to be a bruise along the child's jawbone from the center toward the left.

B was transferred to the pediatric ICU at the hospital, where she was pronounced brain dead the next morning. Witnesses testified to defendant appearing calm throughout the events. Defendant and B's mother drove home together. She testified that he said, "I'm going to prison" to her, and when she asked why, he replied with "They think I did something to our daughter."

Numerous doctors testified. Dr. Douglas McDonnell testified that B was unresponsive when she arrived and that her white blood cell count was abnormally high, which could result from infection, dehydration, or trauma. B had a subdural hematoma, cerebral edema, and suffered a hypoxic ischemic injury, leading to herniation of the brain, causing brain death. Dr. Joyce DeJong performed the autopsy and came to the conclusion that in her opinion the manner of death was homicide. Dr. DeJong based the opinion[] in part on the fact that the child was asymptomatic for several days prior to her death and that it was more probable that the brain bleed resulted from a blow to the head which was consistent with an immediate onset of symptoms and death. In other words, the bleeding around the brain happened at the same time, because the bleeding would require a blow to the head and it would be exceptionally unusual for a child to sustain a lethal brain injury for several days without symptoms and then die.

Dr. Philip Ptacin, who had been B's doctor since early infancy, said she was anemic. B's test for thyroid problems were normal and he saw nothing that would cause concern and ultimately lead to her death. Dr. Stephen Guertin, who was qualified as an expert in the areas of child abuse, pediatrics, and pediatric intensive care, opined that B had suffered from abuse. Dr. Ljubisa Dragovic, who was qualified in the fields of forensic pathology and neuropathology, opined that the subdural hematoma B suffered did not occur on July 28 and was in fact a week old. [*People v Ackley*, unpublished per curiam opinion of the Court of Appeals, released August 2, 2018 (Docket No. 336063) (*Ackley II*), pp 1-2.]

On appeal, our Supreme Court vacated "in part" our judgment affirming defendant's convictions and remanded "for reconsideration . . . of the expert testimony presented at trial in light of *McFarlane*." *People v Ackley*, 506 Mich 948, 948-949 (2020) (*Ackley III*).

II. ISSUES ON REMAND

Our Supreme Court did not clarify exactly what it meant by "in light of *McFarlane*." In *People v McFarlane*, 505 Mich 1059, 1059 (2020) (*McFarlane II*), our Supreme Court only denied leave to appeal. We therefore infer[1] that our Supreme Court must have intended to refer to this Court's opinion in *People v McFarlane*, 325 Mich App 507; 926 NW2d 339 (2018) (*McFarlane I*), which was approved for publication five days after our prior opinion in this matter was released. Further, we infer that our Supreme Court must have implicitly adopted this Court's reasoning in *McFarlane I*.

The relevant[2] issue before this Court in *McFarlane I* was whether medical expert testimony invaded the

[1] Peremptory orders from our Supreme Court constitute binding precedent to the extent they can be comprehended, even if that comprehension must be achieved by seeking out and analyzing other opinions. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 115; 923 NW2d 607 (2018). See also footnote 2 of this opinion.

[2] In *McFarlane II*, Justice MARKMAN (joined by Justice ZAHRA) and Justice CAVANAGH (joined by Chief Justice MCCORMACK) wrote separate concurring statements, and each author either implicitly or explicitly indicated that the only issue from *McFarlane I* with which they were concerned was the "abusive head trauma" testimony. *McFarlane II*, 505 Mich at 1059-1061 (MARKMAN, J., concurring); *id*. at 1061-1063 (CAVANAGH, J., concurring). Thus, four out of seven justices—in other words, a majority—agreed that the pertinent issue from *McFarlane I* was the issue of an expert using the term "abusive head trauma." In cases where there is no majority opinion, any proposition or reasoning agreed to by a majority of the justices, in any combination, is binding precedent as to

province of the jury by referencing accepted medical terminology that might be misunderstood by laypersons as conveying emotional or legally conclusory connotations. See *McFarlane I*, 325 Mich App at 523. We are constrained to conclude that our Supreme Court has, by necessary implication, adopted a per se rule that the diagnostic term "abusive head trauma" does indeed invade the province of the jury when used in cases involving allegations of abuse, even if it is medically possible to determine that a particular injury was nonaccidentally inflicted and the term constitutes a formal diagnosis recognized in the medical community. Therefore, use of the term automatically constitutes plain error. See *id*. at 521-525. Because this is a case involving allegations of abuse, and because experts testified about "abusive head trauma" and "abuse," we are constrained to conclude that plain error occurred. The issue before us, therefore, is narrow: whether the per se plainly erroneous use of the words "abuse" or "abusive head trauma" by medical experts at defendant's second trial was so prejudicial

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that narrow point of agreement. See *Long Lake Twp v Maxon*, 336 Mich App 521, 537 & n 2; 970 NW2d 893 (2021); see also *Marks v United States*, 430 US 188, 193; 97 S Ct 990; 51 L Ed 2d 260 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .") (quotation marks and citation omitted). Therefore, based on a reading of the two concurrences in *McFarlane II* (signed by a total of four justices) and *Ackley II*, we conclude that our Supreme Court adopted the reasoning from *McFarlane I*, but only to the extent *McFarlane I* addressed the propriety of medical experts using the term "abusive head trauma" in their testimony. In other words, although *McFarlane I* involved other issues, we conclude that we are not compelled to address those issues today.

that it deprived defendant of a fair trial. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Conversely, however, *McFarlane I* accepted that "abusive head trauma" was, in itself, an accepted medical diagnosis despite its less-than-universal acceptance within the medical community. *McFarlane I*, 325 Mich App at 520-523. As noted, our Supreme Court only vacated our judgment "in part," implicitly on the basis of the portion of *McFarlane I* addressing the propriety of expert testimony including the word "abuse." Consequently, to the extent defendant repeats arguments made when last before this Court to the effect that "abusive head trauma" is "junk science" contrary to the trial courts' gatekeeping function,[3] that issue remains final and is not before us. Similarly, the other issues raised previously, including claims of prosecutorial misconduct, ineffective assistance of counsel, challenges to expert qualifications, and other evidentiary concerns, are also final and not before us.

Finally, our review for harmlessness is guided to some extent by the fact that this case was retried—and the experts' testimonies were provided—without the benefit of either *McFarlane I* or *McFarlane II*. A deliberately or intentionally created error may constitute an affront to the integrity of the proceedings that precludes a finding of harmlessness irrespective of the error's practical effect on the outcome. See *People v Robinson*, 386 Mich 551, 562-564; 194 NW2d 709 (1972). Under the circumstances, we find no indication of bad faith in this matter. However, in the future, the bench and bar must be mindful of any impermissible words used by experts, and experts should be cau-

[3] See *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008); *Chapin v A & L Parts, Inc*, 274 Mich App 122, 135-140; 732 NW2d 578 (2007) (DAVIS, J.).

tioned that some words and phrases may be accepted medical terminology but are unacceptable in a Michigan courtroom.

III. STANDARD OF REVIEW

As discussed, any use of the word "abuse" in the context of a medical diagnosis, irrespective of whether that is in fact an accepted medical diagnosis, constitutes plain error in a criminal proceeding involving charges of abuse. "However, a plain error will not warrant relief unless the defendant demonstrates that the error affected the outcome of the lower court proceedings." *McFarlane I*, 325 Mich App at 525. The issue before us is limited to whether expert testimony involving the word "abuse" affected the outcome of the proceedings. *Carines*, 460 Mich at 763. We consider the entire record to determine whether erroneously admitted evidence was prejudicial "in light of the weight and strength of the untainted evidence." *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998) (quotation marks and citation omitted).

IV. ANALYSIS

We emphasize at the outset that much of defendant's argument involves matters not before us, particularly whether "abusive head trauma" has any medical or scientific validity, either at all or as applied to noninfant children. The issue before us is whether the use of a word, forbidden because of its emotional and suggestive connotations, deprived this defendant of a fair trial under the circumstances and in the context of this case; not whether any of the prosecution's experts made an incorrect, impermissible, or inappropriate diagnosis. We are not here to revisit the question of whether it is medically possible to make a

reliable, scientifically valid diagnosis that a particular injury was sustained because of something other than an accident. We are likewise not here to conduct our own assessment of what actually occurred in this matter.

Furthermore, experts are permitted to draw and testify regarding conclusions that encompass a question to be decided by the jury, so long as the expert does not purport—or, importantly for this matter, even appear to purport—to draw a legal conclusion. *McFarlane I*, 325 Mich App at 518-519. Thus, where it is possible to draw a medical diagnosis based on a physical examination, as opposed to a complainant's self-reporting, an expert is fully permitted to testify that, in their opinion, a particular injury was not accidentally self-inflicted. See *id*. at 522-523. The expert may not call that manner of injury "abuse," because, even if that is a term used in the medical community, it is also a legal conclusion and would be understood by laypersons to connote something different from what another doctor might understand. See *id*. at 523. Therefore, much of defendant's argument misses the point: nothing in *McFarlane I* made it improper for any of the prosecution's experts to testify that, in their opinion, B did not sustain her injuries by accident or self-directed misadventure. Rather, the experts were prohibited from characterizing the nonaccidental way in which those injuries were sustained as "abuse" or "abusive."

In other words, our review for prejudice does not consider what outcome might have ensued if the prosecution's experts had not opined that B suffered nonaccidental injuries, but rather what might have ensued if the prosecution's experts had phrased their opinions using less emotionally and legally suggestive terminology. Defendant's contentions to the contrary notwith-

standing, there is nothing inherently forbidden about a medical expert testifying that a particular injury was unlikely or impossible to have been sustained accidentally.

As defendant points out, there were no eyewitnesses to the events that resulted in B's injuries, and defendant consistently denied harming B. Nevertheless, even without the use of improper terminology, the prosecution's experts still could have properly testified about the extent of B's injuries, that B's injuries were inflicted rather than accidental, and that some of B's injuries were sustained before the day of the incident. The jury still would have learned that although B might have been somewhat accident-prone, B's mother had noticed concerning physical changes in B—including bruising more easily and frequently, difficulty potty-training with frequent accidents, and picky eating—that seemed to correlate with defendant moving in. The jury would also have still learned that defendant spontaneously volunteered his belief that he was going to prison after B's death. In other words, for the most part, the *substance* of the experts' testimonies would have been conveyed to the jury in any event, and thus, the other nonscientific evidence would still have been considered in that context.[4]

Dr. Stephen Guertin testified that it would be concerning if a child who had been developing normally and had no history of bruising easily suddenly began

[4] We decline to consider defendant's arguments pertaining to Dr. Rudolph Castellani because he did not testify at trial, so any use of the word "abuse" by Dr. Castellani could not possibly have infringed upon the province of the trier of fact. The defense brought up a report from Dr. Castellani during cross-examination of Dr. Joyce DeJong, but because any error in doing so was created by defendant, it cannot be grounds for appellate relief. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

regressing in her toilet training and showing bruises. Furthermore, he testified that there were photos of the child showing bruising in the neck area, which was "usually a very protected area" and "not an area that is ordinarily harmed accidentally." He also explained that the neck area was soft and therefore exceptionally difficult to bruise. He did not "know of any activity that you would do that would cause that" accidentally. His testimony explained that the linear bruising on the child's buttocks would be consistent with a doubled-over cord or belt, and one was shown in one of the photographs he reviewed. He further emphasized that the child began showing these symptoms contemporaneously with defendant moving in. He explained that multiple areas of significant bruising on the child's head were revealed at the autopsy, and such bruises would normally be covered by hair. He noted that the bleeding inside the child's skull and in her eyes would only occur under "extremely rare situations." Further, he testified that there were "multiple impact sites," significant force would have been necessary to cause the injuries, and the injuries themselves were inconsistent with either an accidental fall from a bed or simply being found facedown. He also opined that the kinds of head injuries suffered would, "essentially 100 percent of the time," result in obvious symptoms of distress immediately after the injury with no "lucid interval." He emphasized that a fall from a bed simply could not generate the force necessary to cause this kind of serious head injury. Therefore, although Dr. Guertin also improperly opined that B had suffered abuse, Dr. Guertin provided proper factual expert testimony that allowed no room for any doubt that B's injuries had not been sustained accidentally.

Dr. Douglas McDonnell, the emergency-room physician who initially treated B, testified that he believed B

had a closed-head injury, and he opined that the bruising he observed on B's neck was not the kind of bruising that would result from someone forcing B's mouth open to administer CPR while she was having a seizure. Thus, Dr. McDonnell's testimony further supported the conclusion that B's bruising was not accidentally sustained.

Dr. Tammy Graves was one of the doctors who subsequently treated B, and she was the doctor who ultimately pronounced B to be brain-dead. She observed that B had suffered multiple sites of bleeding and swelling that had caused the oxygen supply to her brain to be cut off. Dr. Graves explained that in her experience, B's combination of injuries and other physical findings were not consistent with—and could not be explained by—a short accidental fall. She also opined that B had no disease, illness, and was not taking any medication that would cause her injuries. Again, the jury was properly informed that it was medically improbable or impossible that B accidentally caused her own injuries.[5]

Dr. Jon Walsh was a trauma surgeon who treated B upon B's transfer from the emergency room to the hospital. His initial assessment suggested an underlying brain injury, so B was given a CAT scan, which revealed blood around her brain. He stated that the blood indicated "some sort of force applied to the head that resulted in a rupturing of some small blood

[5] The term "abusive head trauma" was raised for the first time during Dr. Graves's testimony by the defense on cross-examination. Indeed, although Dr. Graves used the word "trauma" during direct examination, she did not use any variation on the word "abuse" at all during direct examination. To the extent there was any error regarding the word "abuse" during Dr. Graves's testimony, any such error was attributable to defendant and was not grounds for relief. See *Carter*, 462 Mich at 214-216.

vessels." He stated that in his more than thirty years of experience as a trauma surgeon, he had never seen a child sustain those kinds of injuries from a fall from a bed, although it was conceivable that tripping and falling on concrete could cause that kind of bleeding. Dr. Walsh opined that from what he could see, it was "difficult to say" whether B's injuries were accidental or inflicted. Nevertheless, he opined that it "would not be typical" to sustain her injuries from a two-foot fall onto carpet. He testified that he would expect to see signs of external bruising, but he conceded that he had not reviewed B's autopsy, nor was he involved in her care after the first day. Dr. Walsh did not use the word "abuse." Thus, his testimony, while not definitive, again properly conveyed to the jury that an accidental fall from a bed was unlikely to have caused B's injuries.

Dr. Joyce DeJong, a forensic pathologist, performed B's autopsy. Dr. DeJong found B's manner of death to be homicide, the alternatives being suicide, accident, natural, or indeterminate. Her finding was based not only on the physical examination, but on her review of any other available information and records. She testified that she had been immediately concerned about B's injuries at the time of the exam, even though she did not yet have B's medical records. During her testimony, she pointed out numerous bruises depicted on photographs of B's body; she explained that it was expected that children would have some bruises in some places, but the bruises on B's body were more numerous and in unusual locations. Although it was possible that any one of those bruises could have been sustained accidentally, their totality was unlikely to have been accidental. Dr. DeJong found nothing unusual inside B's chest, abdomen, or neck. However, B had numerous internal and external injuries from her neck up, which Dr. DeJong pointed out on photographs.

Dr. DeJong opined that there was no indication that B had any disease or was taking any medication that would cause her injuries; rather, her "death was caused by blunt force injuries to her head." She explained that it was possible for someone to fall, hit their head, and sustain injuries; however, it was extremely unusual for a child to sustain serious injury from a fall of less than three to four feet, let alone sustain a lethal injury. Furthermore, it would be "very rare" for a child who sustained this kind of lethal head injury to function normally for any time after the injury occurred. She also noted that it was unusual to sustain a bruise to the top of one's head and that none of the injuries could be considered in isolation from the others. She concluded that, in totality, B's injuries were indicative of being volitionally inflicted by someone else, probably an adult. Again, Dr. DeJong's testimony was proper, and it conveyed to the jury that B was unlikely to have been injured accidentally.

Dr. Michelle Halley was on the trauma team that attended B upon her transfer from the emergency room. She explained that a CAT scan was performed and B was found to have blood collection along her brain and hemorrhaging in her eyes. Dr. Halley opined that a fall from a bed onto carpet could not have caused B's injuries, nor would they have been caused by anything else in the minimal history B's mother had provided. She further opined that, given the severity of B's injuries, B would have been immediately symptomatic. Dr. Halley opined that B's "injury is consistent with a shaking injury and that was the cause of her death" and that B was a victim of abuse. Clearly, the use of the word "abuse" was error. However, we do not find error in Dr. Halley's opinion that B's injuries were "consistent with a shaking injury." Unlike Dr. Guertin's testimony, which was replete with extensive ex-

planations of how medically improbable it would be to accidentally sustain the kind of injuries found on B, Dr. Halley's opinion of abuse was largely conclusory. However, her testimony was also relatively brief, and it occurred after the jury had already been provided with extensive testimony setting forth why B's injuries were highly likely to have been intentionally inflicted.

Dr. Philip Ptacin had been B's regular family doctor from the time of her infancy. He testified that B's speech was delayed and that she had been brought in for hair loss and a scalp rash at one point. An ensuing blood test was "essentially normal," but showed that B was "mildly anemic." B was tested for thyroid issues, but her thyroid was found to be normal. He testified that he understood B to have died of a head injury, and in his opinion, nothing about her mild anemia or normal thyroid would cause such a death. He testified that he thought B should have been potty-trained by her age, and he was concerned that she was not; however, although he had referred B's mother to parenting classes, he did not suspect that B was being abused.

Dr. Ljubisa Dragovic testified for the defense. He opined that the bleeding injury around B's brain was about a week old and in the process of healing. He agreed that a blunt-force trauma was "part of the process that resulted eventually in [B's] death" but opined that there was only one such "significant injury." Nevertheless, he stated that he "may agree" with a conclusion that B was abused if a "plausible mechanism that supports that" could be shown, but he saw no supporting evidence. He emphasized that if similar injuries were sustained by a three-month-old infant, his conclusions would be different because an infant was immobile and necessarily in the care of someone,

whereas a child of B's age "is running around all the time" with ample opportunity to sustain accidental injuries. Dr. Dragovic estimated the age of the bleeding injury by examining tissue samples under a microscope. On cross-examination, Dr. Dragovic admitted that there were limits to how precisely the age of the injury could be determined, and it was pointed out that B was declared brain-dead four days after B was found unresponsive. Furthermore, Dr. Dragovic discounted reports from the police that B had bruising to her neck before she was placed in a collar because there was no photographic documentation of any such bruising. His report concluded that B's head struck an "unyielding surface," and he conceded that he could not rule out B having been pushed or thrown.

V. CONCLUSION

The overwhelming majority of the prosecution's expert witnesses provided concrete, permissible testimony to the effect that B sustained drastic injuries that either could not have been accidental or self-inflicted, or were highly unlikely to have been accidental or self-inflicted. Not all of them used the word "abuse," or at least did not do so on direct examination. Dr. Halley's diagnosis of abuse was essentially pure opinion and therefore the most erroneous; however, it was also a single reference during brief testimony toward the end of the prosecution's case-in-chief. We are not persuaded it had any effect on the outcome of the proceedings. Dr. Guertin made extensive references to "abuse" during his testimony. However, his testimony also provided extensive explanations of why defendant's theory of accidental injury was implausible to impossible. Furthermore, the prosecution's closing argument mostly focused on defendant's own

conduct as established by lay witnesses, arguing that defendant's conduct was consistent with a person who had injured B. The prosecution also emphasized that the lay witnesses saw bruising on B's neck before they put her in a collar. To the extent the prosecution focused on expert testimony, it was a relatively brief discussion to drive home the point that B's injuries were extremely severe and therefore inconsistent with an accidental fall. In the prosecutor's words, "the best evidence is the Defendant himself." We are again not persuaded that, in context, the use of the term "abuse" by some of the prosecution's experts made any difference to the outcome in light of the other overwhelming evidence of defendant's guilt. See *McFarlane I*, 325 Mich App at 526-527.

Affirmed.

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

TEUTSCH v VAN DE VEN

Docket Nos. 349674 and 349703. Submitted February 2, 2021, at Grand Rapids. Decided April 1, 2021, at 9:00 a.m.

In Docket No. 349674, Katie Teutsch, personal representative of the estate of Peyton Teutsch, filed an action in the Washtenaw Circuit Court against Dr. Cosmos[1] Van de Ven, Dr. Anita Malone, and others, asserting that defendants' medical malpractice resulted in Peyton's death. In Docket No. 349703, plaintiff filed a medical malpractice action in the Court of Claims against the University of Michigan Regents, the University of Michigan Health System, and the University of Michigan Medical Center based on the same underlying facts. By order of the State Court Administrative Office, the cases were joined and heard in the Washtenaw Circuit Court. During discovery, plaintiff moved to strike two of defendants' potential expert witnesses on the grounds that plaintiff had unsuccessfully attempted to retain the two experts, that the e-mail messages between plaintiff's attorney and the proposed witnesses had contained confidential attorney work product, and that there was a longstanding relationship between plaintiff's attorney and both experts. Defendants argued that plaintiff had not disclosed confidential information to the experts in question and that their opinions were not based on information provided by plaintiff. The court, Timothy F. Connors, J., granted plaintiff's motion to strike because of the prior relationship plaintiff's attorney had with the experts and because of the earlier contact between them when plaintiff attempted to retain the experts. Defendants appealed by leave granted.

The Court of Appeals *held*:

Courts are generally reluctant to disqualify expert witnesses, especially those who possess useful specialized knowledge. Under *Paul v Rawlings Sporting Goods Co*, 123 FRD 271, 278 (SD Ohio, 1988), and *Koch Refining Co v Jennifer L Boudreaux MV*, 85 F3d 1178, 1181 (CA 5, 1996), when one party seeks to disqualify an

[1] Although the record uses the spelling "Cosmos," the University of Michigan Health System website indicates that his first name should be spelled "Cosmas."

expert from testifying for the other party—other than those cases in which the expert clearly switched sides during the litigation—a court must consider (1) whether it was objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed, (2) whether any confidential or privileged information was disclosed by the first party to the expert, and (3) whether the public interest favors allowing or not allowing an expert to testify. With regard to the first factor, in evaluating the reasonableness of a party's assumption, courts may consider (a) whether the relationship was longstanding and involved frequent contacts, (b) whether the expert was to be called as a witness in the underlying case, (c) whether the parties entered into a formal confidentiality agreement, (d) whether the expert was retained to assist in the litigation or paid a fee, (e) whether work product was discussed or the party provided documents to the expert, and (f) whether the expert derived any of their specific ideas from work done under the direction of the retaining party. Although a confidential relationship can exist absent a confidentiality agreement between the retaining party and the expert, a confidential relationship is not necessarily established just because some information concerning the litigation is shared. With regard to the second factor (disclosure of confidential information), courts should consider whether the expert received or had reasonable access to information and whether that information was confidential, i.e., information of particular significance or information that can be readily identified as either attorney work product or within the scope of the attorney-client privilege. Applying that definition, confidential information includes, among other things: discussions of the retaining party's strategies in the litigation, the kinds of experts the party expected to retain, the party's views of the strengths and weaknesses of each side, the role of each of the party's witnesses to be hired, and anticipated defenses. Discussions between counsel and experts do not carry the presumption of confidentiality that accompanies attorney-client communication, and the confidential information must be sufficiently related to the instant litigation to merit disqualification. In applying the third factor (public interest), courts should weigh considerations including: preventing conflicts of interest, maintaining the integrity of the judicial process, maintaining accessibility to experts with specialized knowledge, whether another expert is available and whether the opposing party will be unduly burdened by having to retain another expert, and encouraging experts to pursue their professional calling. The party seeking disqualification bears the burden of proving that disqualification is warranted; in particular, the party seeking disqualification must identify specific and un-

ambiguous disclosures that if revealed would prejudice the party. In this case, the Court of Appeals adopted the standard set forth in *Paul* along with the public-interest factors noted in *Koch Refining*. Because at the time of the decision there was no existing caselaw for the trial court to follow regarding when an expert witness may be disqualified on the basis of a conflict of interest, the court's order granting plaintiff's motion to strike was vacated and the case was remanded for consideration of the adopted factors when re-addressing plaintiff's motion.

Vacated and case remanded for further proceedings.

EVIDENCE — WITNESSES — EXPERT TESTIMONY — DISQUALIFICATION OF EXPERTS — FACTORS TO CONSIDER.

When one party seeks to disqualify an expert from testifying for the other party—other than in those cases in which the expert clearly switched sides during the litigation—a court must consider (1) whether it was objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed, (2) whether any confidential or privileged information was disclosed by the first party to the expert, and (3) whether the public interest favors allowing or not allowing the expert to testify.

Fieger, Fieger, Kenney & Harrington, PC (by *Geoffrey N. Fieger*, *Stephanie L. Arndt*, and *Kierston Nunn*) for the Estate of Peyton Teutsch.

Tanoury, Nauts, McKinney & Garbarino, PLLC (by *Linda M. Garbarino* and *David R. Nauts*) for Cosmos Van De Ven, Anita Malone, University of Michigan Regents, University of Michigan Health System, and University of Michigan Medical Center.

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

PER CURIAM. In these consolidated medical malpractice cases, defendants Cosmos Van de Ven, M.D., and Anita Malone, M.D., and the University of Michigan Board of Regents, University of Michigan Health System, and University of Michigan Medical Center (collectively, "defendants") appeal by leave granted the

Washtenaw Circuit Court's order striking two defense expert witnesses. On appeal, defendants argue that the trial court abused its discretion and applied an incorrect rationale when it granted plaintiff's motion to strike the experts on the basis that plaintiff's counsel had longstanding personal and professional relationships with the experts and had shared nonconfidential information with them. We conclude that there is a need to establish a new rule of law regarding when an expert witness may be disqualified on the basis of a conflict of interest. Accordingly, rather than either affirming or reversing the trial court's decision, we vacate the trial court's order and remand for reconsideration in light of this opinion.

Because we decline to analyze the facts of this case in light of our determination of the appropriate standard, only a brief recitation of the underlying facts is necessary. Plaintiff filed a complaint alleging that medical malpractice by the defendant doctors in performing a cesarean delivery resulted in Peyton Teutsch's death. During discovery, defendants filed a witness list that included three potential expert witnesses: Dr. Mary D'Alton, Dr. Robert Gherman, and Dr. Steven Clark. Dr. D'Alton provided an affidavit of meritorious defense. Plaintiff moved to strike Drs. D'Alton and Clark. In support, plaintiff relied on a series of e-mails between plaintiff's counsel and those physicians seeking to retain them as experts for plaintiff. The physicians declined, and they were later retained by the defense. Plaintiff argued that the e-mails contained confidential attorney work product, as well as there being a longstanding relationship between plaintiff's counsel and both experts.[1] Defen-

[1] According to plaintiff, plaintiff's counsel had previously worked for many years doing medical malpractice defense work. It is through this

dants' response was that no confidential information had been revealed by plaintiff's counsel to the experts; in fact, the experts had little or no recollection of communicating with plaintiff's counsel about the case, and their opinions were not based on information provided by plaintiff. Following a hearing, the trial court granted plaintiff's motion to strike the experts because plaintiff's counsel had a prior relationship with the experts and because of the earlier contact between them on the case.

Two questions are presently before this Court: first, what test should a trial court apply when determining whether an expert witness should be disqualified on the basis of a conflict of interest; and second, applying that test to these cases, did the trial court abuse its discretion when it struck defendants' experts?[2] We will address the first question, but as indicated, we will leave it to the trial court on remand to address the second. Our state's appellate courts review de novo questions of law underlying evidentiary rulings. *Elher v Misra*, 499 Mich 11, 21; 878 NW2d 790 (2016). The parties agree that these cases present an issue of first impression.

In her motion to strike and in her brief on appeal, plaintiff relies on a two-part test first articulated in *Paul v Rawlings Sporting Goods Co*, 123 FRD 271, 278 (SD Ohio, 1988), which has since been adopted by

work that plaintiff's trial counsel argues that he had developed a professional relationship with the experts.

[2] Defendants do not appear to argue that an expert cannot, under any circumstance, be disqualified because of a conflict of interest. We note that MCL 600.2169 governs expert witnesses in medical malpractice actions. Although the statute provides criteria for determining the qualifications of experts, MCL 600.2169(3) provides that "[t]his section does not limit the power of the trial court to disqualify an expert witness on grounds other than the qualifications set forth in this section."

several federal courts and a handful of states. Although lower federal court decisions are not binding on state courts, they may be persuasive. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). The same is true for cases from foreign jurisdictions. *Hiner v Mojica*, 271 Mich App 604, 612; 722 NW2d 914 (2006). We are persuaded that, like many other courts, we should adopt the *Paul* test, with the addition of a public-policy element.

"Cases granting disqualification are rare because courts are generally reluctant to disqualify expert witnesses, especially those . . . who possess useful specialized knowledge." *Rhodes v EI Du Pont de Nemours & Co*, 558 F Supp 2d 660, 664 (SD W Va, 2008) (quotation marks and citation omitted). "Accordingly, the party seeking disqualification bears a high standard of proof to show that disqualification is warranted." *Id*. (quotation marks and citation omitted). In what appears to be the first case applying a variation of the test the parties present to this Court, in *Paul*, 123 FRD at 278, United States Magistrate Judge Terence P. Kemp explained:

> Under certain circumstances, it might be reasonable for an attorney or his principal to communicate privileged or confidential matters to an expert witness even in the absence of a formal contractual relationship. On the other hand, there may be situations where, despite the existence of a formal contractual relationship, so little of substance occurs during the course of the relationship that neither the integrity of the trial process, nor the interests of the party who retained the expert, would be served by blanket disqualification. Consequently, I believe the proper focus in such situations is to determine, first, whether the attorney or client acted reasonably in assuming that a confidential or fiduciary relationship of some sort existed and, if so, whether the relationship developed into a matter sufficiently substantial to make disqualification or

> some other judicial remedy appropriate. Stating each proposition negatively, if any disclosures of privileged or confidential material were undertaken without a reasonable expectation that they would be so maintained (so that, in effect, any confidentiality or privilege relating to the matters communicated was waived), or if, despite the existence of a relationship conducive to such disclosures, no disclosures of any significance were made, it would seem inappropriate for the court to dictate to the expert or his new employer that his participation in the case be limited or eliminated.

In *Koch Refining Co v Jennifer L Boudreaux MV*, 85 F3d 1178, 1181 (CA 5, 1996), the United States Court of Appeals for the Fifth Circuit summarized the state of the law:

> In disqualification cases other than those in which the expert clearly switched sides, lower courts have rejected a "bright-line" rule and have adopted the following test:
>
> > First, was it objectively reasonable for the first party who claims to have retained the expert to conclude that a confidential relationship existed?
> >
> > Second, was any confidential or privileged information disclosed by the first party to the expert?
>
> [Citation omitted.]

The *Koch* Court explained that "[o]nly if the answers to both questions are affirmative should the witness be disqualified." *Id*. The *Koch* Court also noted that "[m]any lower courts have considered a third element: the public interest in allowing or not allowing an expert to testify." *Id*. The party seeking disqualification bears the burden of proving these elements. *Id*.

Over the years, several federal and state courts have used or adopted the test articulated in *Paul* and *Koch*. In 2020, the Minnesota Court of Appeals, after recounting the development of the law, adopted the test. *Berthiaume v Allianz Life Ins Co of North America*, 946

NW2d 423, 427-429 (Minn App, 2020). The Minnesota Court of Appeals noted that this test has been used by several other federal courts and adopted by state courts in Colorado, Texas, New York, Virginia, and West Virginia.[3] *Id*. at 428.

"In applying the first prong of the test, courts focus on whether the party seeking disqualification acted reasonably in assuming that a confidential or fiduciary relationship existed." *Rhodes*, 558 F Supp 2d at 667 (quotation marks and citation omitted). According to the *Rhodes* court, courts have examined several factors in evaluating the reasonableness of a party's assumption: (1) whether the relationship was longstanding and involved frequent contacts, (2) whether the expert was to be called as a witness in the underlying case, (3) whether the parties entered into a formal confidentiality agreement, (4) whether the expert was retained to assist in the litigation or paid a fee, (5) whether work product was discussed or the party provided documents to the expert, and (6) whether the expert derived any of his specific ideas from work done under the direction of the retaining party. *Id*.; *Hewlett-Packard Co v EMC Corp*, 330 F Supp 2d 1087, 1093 (ND Cal, 2004). The *Rhodes* Court explained that "in cases where the expert met [only] once with counsel, was not retained, was not supplied with specific data relevant to a case, and was not requested to perform any services, courts have declined to find a confidential relationship existed." *Rhodes*, 558 F Supp 2d at 667 (quotation marks and citation omitted; alteration in

[3] *Berthiaume* involved an attorney serving as an expert. *Berthiaume*, 946 NW2d at 424. Therefore, the court also summarized how some courts differentiate between expert witnesses as a whole and attorneys serving as experts in these types of cases. See *id*. at 426-429.

original). In *Hewlett-Packard*, the United States District Court for the Northern District of California explained:

> There likely is a long term relationship when the record supports a longstanding series of interactions, which have more likely than not coalesced to create a basic understanding of [the retaining party's] modus operandi, patterns of operations, decision-making process, and the like." [*Hewlett-Packard*, 330 F Supp 2d at 1093 (quotation marks and citation omitted; alteration in original).]

The *Hewlett-Packard* Court further explained that although "a confidential relationship can exist absent a confidentiality agreement between the retaining party and the expert," "a confidential relationship is not necessarily established just because some information concerning the litigation is shared." *Id*. at 1094 (quotation marks and citation omitted).

As to the second prong, courts "consider whether the expert received or had reasonable access to information and whether that information was confidential." *Rhodes*, 558 F Supp 2d at 667 (quotation marks and citations omitted). Confidential information is information "of particular significance" or information "which can be readily identified as either attorney work product or within the scope of the attorney-client privilege[.]" *Id*. (quotation marks and citations omitted).

> Confidential information in this context includes, among other things: discussions of the [retaining party's] strategies in the litigation, the kinds of experts [the party] expected to retain, [the party's] views of the strengths and weaknesses of each side, the role of each of the [party's] witnesses to be hired, and anticipated defenses. The confidential information must also be sufficiently related

> to the instant litigation to merit disqualification. [*Id*. (quotation marks and citations omitted; alterations in original).]

In witness-disqualification cases, courts have emphasized that discussions between counsel and experts do not carry the presumption of confidentiality that accompanies attorney-client communication. *Rawlings*, 123 FRD at 281; *Hewlett-Packard*, 330 F Supp 2d at 1094. The party seeking disqualification must "point to specific and unambiguous disclosures that if revealed would prejudice the party." *Hewlett-Packard*, 330 F Supp 2d at 1094.

Finally, as to public-interest considerations, some courts consider factors such as "preventing conflicts of interest, maintaining the integrity of the judicial process, maintaining accessibility to experts with specialized knowledge, and encouraging experts to pursue their professional calling." *Rhodes*, 558 F Supp 2d at 667-668. The *Rhodes* Court also explained that a "court should also consider whether another expert is available and whether the opposing party will be unduly burdened by having to retain a new expert." *Id*. at 668 (quotation marks and citation omitted). The *Koch* Court added that "[c]ourts have also expressed concern that if experts are too easily subjected to disqualification, unscrupulous attorneys and clients may attempt to create an inexpensive relationship with potentially harmful experts solely to keep them from the opposing party." *Koch*, 85 F3d 1183 (quotation marks and citation omitted).[4]

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[4] Our Supreme Court has held that experts have property rights in their opinions. *Klabunde v Stanley*, 384 Mich 276, 282; 181 NW2d 918 (1970). Defendants also briefly argue that this Court has recognized that a party should be afforded its choice of experts. To advance this argument, defendants cite *Burris v KAM Transp, Inc*, 301 Mich App 482,

Because these cases do not present a "side-switching" issue (when an expert switches sides during the litigation),[5] we adopt the standard first articulated in *Paul*. But we additionally adopt the public-interest factors as a third part of the analysis. See *Berthiaume*, 946 NW2d at 428.

Lastly, we note that plaintiff's argument in regard to MCR 2.302(B)(4)(f)[6] appears misplaced and that a connection between this rule and any test this Court adopts is tenuous. Plaintiff argues that the *Paul* (and *Berthiaume*) tests are consistent with this court rule and that our court rules "make it clear that our Supreme Court intended communications between counsel and their retained expert witnesses to be confidential." In advancing this argument, plaintiff acknowledges that MCR 2.302(B)(4)(f) refers to "retained" expert witnesses. But plaintiff never retained the experts at issue in this case, and therefore, the rule does not appear to apply. If she had, the merits of

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487; 836 NW2d 727 (2013). It is unclear to us how this case supports defendants' argument. Plaintiff, however, does not dispute defendants' argument.

[5] Somewhat ironically, this issue stems from plaintiff's *counsel* switching sides after a long career as a defense counsel.

[6] MCR 2.302 governs discovery generally. MCR 2.302(B)(4)(f) provides as follows:

> Subrule (B)(3)(a) protects communications between the party's attorney and any expert witness under subrule (B)(4), regardless of the form of the communications, except to the extent that the communications:
>
> (i) relate to compensation for the expert's study or testimony;
>
> (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or
>
> (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

defendants' present appeal would likely be much weaker (and plaintiff's argument as to this court rule more material).

The order of the trial court striking the expert witnesses is vacated, and the matter is remanded to the trial court for reconsideration in light of this Court's opinion. We do not retain jurisdiction. No costs, a question of public importance involved.

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

JEFFREY-MOISE v WILLIAMSBURG TOWNE HOUSES COOPERATIVE, INC

Docket No. 351813. Submitted February 2, 2021, at Detroit. Decided February 18, 2021. Approved for publication April 1, 2021, at 9:05 a.m.

Cynthia Jeffrey-Moise brought an action in the Macomb Circuit Court against Williamsburg Towne Houses Cooperative, Inc., alleging that defendant was liable under theories of premises liability and ordinary negligence for injuries she sustained when she slipped and fell on ice while walking on a community walkway within the housing cooperative. Plaintiff was a member and resident of defendant, a corporation operating a housing cooperative; each resident member of the cooperative purchased a membership in the cooperative and enjoyed the right to exclusively occupy a housing unit, use the common areas of the cooperative's premises, and participate in the operation and management of the cooperative. Plaintiff's occupancy agreement with defendant required plaintiff to pay monthly fees to the cooperative for maintenance and administration of the cooperative. In addition, similar to a traditional landlord-tenant relationship, the cooperative could evict plaintiff if she breached the occupancy agreement. Plaintiff testified that on the day that she fell, there was "lots of snow" on the grass but that there was no snow on the walkway. Plaintiff's neighbor testified that in the area where plaintiff fell, there was a patch of black ice that looked like wet concrete. Defendant's snow-removal maintenance records indicated that defendant's maintenance employees removed snow from streets and walkways within the housing cooperative earlier that day and applied deicer to the walkways "where needed." Plaintiff alleged that she was an invitee on defendant's premises and that defendant had failed to keep the sidewalk fit for its intended use contrary to MCL 554.139. Plaintiff also alleged that defendant breached its duty to use reasonable care and caution under a theory of ordinary negligence. Defendant moved for summary disposition, arguing that because plaintiff was a co-owner of the cooperative, she was not on the land of another when she was injured and therefore could not recover under a theory of premises liability. Defendant also contended

that plaintiff's claims failed because the ice on which she slipped was open and obvious. Following a hearing, the trial court, Carl J. Marlinga, J., denied defendant's motion, concluding that MCL 554.139 applied because plaintiff did not have possession and control over the cooperative's common walkway and plaintiff's occupancy agreement established essentially a landlord-tenant relationship between the parties. The trial court further determined that a genuine issue of material fact existed regarding whether the condition on which plaintiff fell was open and obvious. Defendant sought leave to appeal in the Court of Appeals, and the Court of Appeals granted the application.

The Court of Appeals *held*:

1. Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land. When it is alleged that the plaintiff's injuries arose from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence. In this case, a review of plaintiff's complaint as a whole revealed that plaintiff's claim was one of premises liability. Plaintiff alleged that a condition on defendant's land, i.e., a patch of black ice on the walkway, constituted a dangerous condition on the property that gave rise to her injury. Because plaintiff's claim sounded in premises liability, defendant was entitled to summary disposition of plaintiff's claim of ordinary negligence.

2. In a premises-liability action, as in any negligence action, the plaintiff must establish the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. The initial inquiry when analyzing a claim of premises liability is to establish the duty owed by the possessor of the premises to a person entering the premises; the duty a possessor of land owes to a person who enters the land depends on whether the visitor is classified as an invitee, a licensee, or a trespasser. In this case, plaintiff alleged that she was an invitee. An invitee is a person who enters the land of another by an invitation that carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises and to make the premises safe for the invitee's presence. The possessor of land owes the greatest duty to an invitee, being the duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises. The possessor of the premises breaches that duty of care when he or she knows or should know of a dangerous condition on the premises of which the invitee is

unaware and fails to fix, guard against, or warn the invitee of the defect. However, a premises possessor generally has no duty to remove open and obvious dangers. Defendant argued that to be deemed an invitee for purposes of premises liability, plaintiff must have been on the land of another when she fell but that plaintiff, as a member of the housing cooperative, was a co-owner of the cooperative's premises and therefore was not on the land of another when she fell. A member of a cooperative corporation has a hybrid relationship with the cooperative in which the member is a shareholder of the corporation that owns the real property but at the same time is a tenant of the corporation. Plaintiff's membership in the cooperative did not give her independent authority over the common areas of the cooperative typically enjoyed by an owner. In fact, the occupancy agreement precluded plaintiff, as a member, from making alterations to the common areas of the premises, including the walkways. By contrast, defendant retained control over the maintenance of the common areas of the cooperative, including authority over the removal of snow and ice in those areas. Defendant thus retained sufficient control and dominion over the common areas such that defendant was in possession of the common areas; accordingly, plaintiff was on land that was in the possession of another when she fell.

3. However, even if plaintiff was an invitee upon the land of another when she fell, the ice upon which she slipped was an open and obvious condition, and a premises possessor generally has no duty to remove open and obvious dangers. Whether a condition is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. This is an objective test in which the court considers the objective nature of the condition of the premises at issue. With issues involving wintry conditions, Michigan courts have progressively imputed knowledge regarding the existence of a condition as should reasonably be gleaned from all the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months. In this case, wintry conditions clearly were present at the time of plaintiff's fall. It was January in Michigan, the temperature was 32 degrees Fahrenheit, and snow had been falling throughout the day. Plaintiff testified that the walkway where she fell appeared wet and that there was "lots of snow" on the grass nearby. There were patches of ice on the sidewalk that both plaintiff and her neighbor testified were visible. In fact, both plaintiff and her neighbor testified that they could see the patch of ice on which plaintiff fell following plaintiff's fall. The wintry conditions presented indicia of a potentially hazardous condition on the walkway sufficient to

alert an average user of ordinary intelligence to discover the danger upon casual inspection. The black ice on which plaintiff fell was therefore open and obvious, and the trial court erred by determining that an issue of fact existed regarding the open and obvious nature of the black ice.

4. MCL 554.139(1)(a) provides that in every lease or license of residential premises, the lessor or licensor covenants that the premises and all common areas are fit for the use intended by the parties. The statutory protection of MCL 554.139(1) arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease. In this case, MCL 554.139(1)(a) did not apply to defendant because defendant did not lease the common areas of the cooperative to plaintiff; rather, plaintiff acquired the use of the common areas by her purchase of a membership in the cooperative. Moreover, even if MCL 554.139(1)(a) were applicable to defendant in this case, plaintiff did not create a genuine issue of fact regarding whether the sidewalk was in a condition that rendered it unfit for its intended use. Plaintiff demonstrated only that the sidewalk had patches of ice, which at most indicated inconvenience of access or that the sidewalk was not in peak condition but did not render the sidewalk unfit for its intended purpose. Accordingly, the trial court erred by denying defendant's motion for summary disposition on the basis that defendant breached its duty to keep the walkway fit for the use intended as required under MCL 554.139(1)(a).

Reversed and remanded for entry of judgment in favor of defendant.

Mike Morse Law Firm (by *Marc J. Mendelson*, *Matthew R. Bates*, *Keith M. Banka*, and *Stacey L. Heinonen*) for Cynthia Jeffrey-Moise.

Fletcher Fealko Shoudy & Francis, PC (by *William L. Fealko* and *Victoria R. Ferres*) and *Pentiuk, Couvreur & Kobiljak, PC* (by *Randall A. Pentiuk*, *Creighton D. Gallup*, and *Alyssa M. Gunsorek*) for Williamsburg Towne Houses Cooperative, Inc.

Before: FORT HOOD, P.J., and GADOLA and LETICA, JJ.

GADOLA, J. Defendant appeals on leave granted the order of the trial court denying its motion for summary

disposition under MCR 2.116(C)(8) and (10) of plaintiff's claims of negligence and premises liability. We reverse and remand for entry of judgment in favor of defendant.

I. FACTS

This appeal arises from plaintiff's slip and fall on January 8, 2018. The facts underlying plaintiff's claim are essentially undisputed. On that day, plaintiff was a member and resident of defendant, Williamsburg Towne Houses Cooperative, Inc., a corporation operating a housing cooperative in St. Clair Shores, Michigan.

The housing cooperative is governed by its governing documents, being its Articles of Incorporation, Bylaws, and Occupancy Agreements. Each resident member of the cooperative purchases a membership in the cooperative and thereby enjoys the right to exclusively occupy a housing unit, as well as to use the common areas of the cooperative's premises. In addition, each member has the right to participate in the operation and management of the cooperative.

Plaintiff's Occupancy Agreement with defendant provided that plaintiff had the right to occupy a specific unit under the terms of the agreement for three years, renewable for successive three-year periods. The Occupancy Agreement further provided that defendant had the right to terminate plaintiff's membership upon notice to plaintiff four months before the expiration of the Occupancy Agreement. As a member of the cooperative, plaintiff could sell her membership interest or leave her membership interest to an heir through a will or trust only with the consent of the cooperative corporation. Similarly, plaintiff could sublet her individual unit only with the consent of the cooperative.

The Occupancy Agreement also required plaintiff to pay monthly fees to the cooperative for maintenance and administration of the cooperative. In addition, similar to a traditional landlord-tenant relationship, the cooperative could evict plaintiff if she breached the Occupancy Agreement. The Occupancy Agreement provides:

> The Member expressly agrees that there exists under this occupancy agreement a landlord-tenant relationship and that in the event of a breach or threatened breach by the Member of any covenant or provision of this agreement, there shall be available to [defendant] such legal remedy or remedies as are available to a landlord for the breach or threatened breach under the law by a tenant of any provision of a lease or rental agreement.

On January 8, 2018, at 10:00 p.m., plaintiff cleared snow from her personal walkway in the back of her townhome and then walked around the building on the community walkway toward the front of her townhome, where she planned to clear snow from her front porch. While on the community walkway, plaintiff slipped and fell, severely injuring her ankle. Plaintiff testified that she fell on black ice that she described as being "the color of the sidewalk." She testified that before she fell she did not notice any ice on the walkway and that the walkway appeared only wet, but that after she fell she noticed what appeared to be patches of ice "all the way down" the walkway. She further testified that there was no snow on the walkway where she slipped and fell but that there was "lots of snow" on the grass.

Plaintiff's neighbor, Jennifer Jaber, stated that at approximately 10:00 p.m. on January 8, 2018, she saw plaintiff lying on the walkway. Jaber observed that in the area where plaintiff fell a patch of black ice spanned

approximately 4 square feet. Jaber testified that the ice was not noticeable and looked like wet concrete. Jaber did not notice any deicer on the walkway where plaintiff fell. Defendant's snow-removal maintenance records for January 8, 2018, indicate that defendant's maintenance employees removed snow from streets and walkways within the housing cooperative between 7:30 a.m. and 2:30 p.m. that day, applying deicer to the walkways "where needed" during that period.

Plaintiff initiated this action, alleging in Count I of her complaint that defendant was liable under a theory of premises liability. Plaintiff asserted that as a tenant she was an invitee upon defendant's premises, that the icy condition of the sidewalk on which she slipped was not open and obvious, and that defendant had failed to keep the sidewalk fit for its intended use contrary to MCL 554.139. In Count II of her complaint, plaintiff alleged that defendant was liable under a theory of ordinary negligence, having breached its duty to use reasonable care and caution for her health, safety, and well-being, and to warn of dangerous conditions.

Defendant moved for summary disposition of plaintiff's complaint under MCR 2.116(C)(8) and (10). Defendant contended that plaintiff's claim of premises liability failed because plaintiff, as a co-owner of the cooperative, was not on the land of another when she was injured. Defendant further contended that plaintiff's claims failed because the ice on which plaintiff slipped was open and obvious and that plaintiff had not alleged a valid common-law negligence claim.

After a hearing, the trial court denied defendant's motion. The trial court concluded that MCL 554.139 applied because plaintiff did not have possession and control over the cooperative's common walkway and plaintiff's occupancy agreement established essentially

a landlord-tenant relationship between the parties. The trial court further determined that a genuine issue of material fact existed regarding whether the condition on which plaintiff fell was open and obvious. Defendant sought leave to appeal in this Court, and this Court granted defendant's application.[1]

II. ANALYSIS

Defendant contends that the trial court erred by denying its motion for summary disposition under MCR 2.116(C)(8) and (10). We agree.

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision to grant or deny summary disposition. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159; 934 NW2d 665 (2019). A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint; we accept all well-pleaded factual allegations as true and construe them in a light most favorable to the nonmovant. *Id*. at 159-160. A motion for summary disposition under MCR 2.116(C)(8) is properly granted when, considering only the pleadings, the alleged claims are clearly unenforceable as a matter of law and no factual development could justify recovery. *Id*.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *El-Khalil*, 504 Mich at 160. When reviewing an order granting summary disposition under MCR 2.116(C)(10), the reviewing court considers all documentary evidence

[1] *Jeffrey-Moise v Williamsburg Towne Houses Coop Inc*, unpublished order of the Court of Appeals, entered March 12, 2020 (Docket No. 351813).

submitted by the parties in the light most favorable to the nonmoving party. *Id*. Summary disposition under MCR 2.116(C)(10) is warranted when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*. "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018) (quotation marks, citation, and brackets omitted). We also review de novo the interpretation of statutes, *Cox v Hartman*, 322 Mich App 292, 298; 911 NW2d 219 (2017), and the trial court's determination whether a duty exists, *Hill v Sears, Roebuck & Co*, 492 Mich 651, 659; 822 NW2d 190 (2012).

B. NEGLIGENCE

In her complaint, plaintiff asserts that defendant is liable under theories of both negligence and premises liability. Unlike a claim of premises liability, a claim of ordinary negligence is based on the underlying premise that a person has a duty to conform his or her conduct to an applicable standard of care when undertaking an activity. *Lymon v Freedland*, 314 Mich App 746, 756; 887 NW2d 456 (2016). To establish a prima facie case of negligence, a plaintiff must demonstrate that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of those damages. *Composto v Albrecht*, 328 Mich App 496, 499; 938 NW2d 755 (2019). The threshold question in a negligence action is whether the defendant owed a legal duty to the plaintiff, *Fultz v Union-Commerce Assoc*, 470 Mich 460, 463; 683 NW2d 587 (2004), which is a question of law to be decided by the court, *Hill*, 492 Mich at 659. In a negligence action, if the plaintiff does not

establish that the defendant owed the plaintiff a duty, summary disposition is properly granted to the defendant under MCR 2.116(C)(8). *Halbrook v Honda Motor Co, Ltd*, 224 Mich App 437, 441; 569 NW2d 836 (1997).

Michigan law distinguishes between a claim of ordinary negligence and a claim premised on a condition of the land. *Lymon*, 314 Mich App at 756. Whether the gravamen of an action sounds in negligence or in premises liability is determined by considering the plaintiff's complaint as a whole, regardless of the labels attached to the allegations by the plaintiff. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). When it is alleged that the plaintiff's injuries arose from a dangerous condition on the land, the claim is one of premises liability rather than one of ordinary negligence. *Id*. at 692.

In this case, a review of plaintiff's complaint as a whole reveals that plaintiff's claim is one of premises liability. Plaintiff alleges that a condition on defendant's land, i.e., a patch of black ice on the sidewalk, constituted a dangerous condition on the property that gave rise to her injury. Because plaintiff's claim is based on defendant's duty as the possessor of the land on which she fell and not on defendant's ability to conform to a particular standard of care, we treat plaintiff's claim as one of premises liability. See *id*. Although plaintiff alleges that the dangerous condition was created by the actions of defendant or its employees—or more accurately, their failure to act—that allegation does not transform a premises-liability action into one of ordinary negligence. *Id*. Because plaintiff's claim sounds in premises liability, defendant was entitled to summary disposition of plaintiff's claim of ordinary negligence.

C. PREMISES LIABILITY

Defendant contends that the trial court also erred when it denied defendant's motion for summary disposition of plaintiff's premises-liability claim. Defendant argues that plaintiff may assert premises liability only if she was injured while on the land of another and that because she was a member of the defendant housing cooperative, she was a co-owner of the cooperative and therefore was not on the land of another when she fell.

As noted, under Michigan law a distinction exists "between claims arising from ordinary negligence and claims premised on a condition of the land." *Lymon*, 314 Mich App at 756 (quotation marks and citation omitted). In a premises-liability action, as in any negligence action, the plaintiff must establish the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach proximately caused the plaintiff's injuries, and (4) the plaintiff suffered damages. *Goodwin v Northwest Mich Fair Ass'n*, 325 Mich App 129, 157; 923 NW2d 894 (2018). However, a claim of premises liability arises "merely from the defendant's duty as an owner, possessor, or occupier of land." *Lymon*, 314 Mich App at 756 (quotation marks and citation omitted).

The initial inquiry when analyzing a claim of premises liability is to establish the duty owed by the possessor of the premises to a person entering the premises. *Hoffner v Lanctoe*, 492 Mich 450, 460; 821 NW2d 88 (2012). The element of duty in a negligence action ordinarily is a question of law to be decided by the court. *Hill*, 492 Mich at 659. The duty a possessor of land owes to a person who enters the land depends on whether the visitor is classified as an invitee, a

licensee, or a trespasser.[2] *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000). An invitee is a person who enters the land of another by an invitation that carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises and to make the premises safe for the invitee's presence. *Id*. A plaintiff will be deemed an invitee only if the purpose for which he or she was invited onto the owner's property was "directly tied to the owner's commercial business interests." *Id*. at 603-604. The possessor of land owes the greatest duty to an invitee, being the duty to use reasonable care to protect the invitee from an unreasonable risk of harm posed by a dangerous condition on the premises. *Hoffner*, 492 Mich at 460. The possessor of the premises breaches that duty of care when he or she knows or should know of a dangerous condition on the premises of which the invitee is unaware and fails to fix, guard against, or warn the invitee of the defect. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 8; 890 NW2d 344 (2016). The plaintiff must demonstrate that "the premises possessor had actual or constructive notice of the dangerous condition at issue." *Id*. (quotation marks and citation omitted). A premises possessor generally has no duty to remove open and obvious dangers. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

A licensee is a person who enters the land of another by the consent of the property possessor. *Stitt*, 462 Mich at 596. This category includes social guests.

[2] A trespasser is a person who enters upon another's land without the landowner's consent. *Stitt*, 462 Mich at 596. The possessor of land owes no duty to the trespasser except to refrain from injuring him by willful and wanton misconduct. *Id*. In this case, there is no suggestion that plaintiff was a trespasser.

Liang v Liang, 328 Mich App 302, 311 n 5; 936 NW2d 710 (2019). "A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596. A possessor of land does not owe a duty to a licensee to inspect or to repair to make the premises safe for the licensee's visit. *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004).

1. POSSESSION OF THE LAND

Plaintiff's complaint alleges that she was an invitee on defendant's land when she fell. Defendant argues that to be deemed either an invitee or a licensee for purposes of premises liability, plaintiff must have been on the land of another when she fell. Defendant argues that plaintiff, as a member of the housing cooperative, was a co-owner of the cooperative's premises and therefore was not on the land of another when she fell. In support of this argument, defendant relies on *Francescutti v Fox Chase Condo Ass'n*, 312 Mich App 640, 643; 886 NW2d 891 (2015). In *Francescutti*, the plaintiff, a condominium co-owner, slipped and fell on an icy sidewalk while walking his dog in a common area of the condominium complex. *Id*. at 641. The plaintiff filed a premises-liability action against the defendant condominium association, alleging that he was an invitee with respect to common areas of the complex. The condominium association argued that the plaintiff was a licensee. This Court rejected both arguments, stating as follows:

> But neither the parties nor the trial court provide any authority for the proposition that the status of an owner of a condominium unit is either an invitee or a licensee with

> respect to the common areas of the development. Nor were we able to find any such authority. But this question can easily be resolved by looking at the definitions of those terms. "A 'licensee' is a person who is privileged to enter *the land of another* by virtue of the possessor's consent," while "[a]n 'invitee' is 'a person who enters upon *the land of another* upon an invitation . . . .' "
>
> The key to the resolution of this case is the phrase in both definitions, "the land of another." Plaintiff did not enter on "the land of another." Plaintiff is, by his own admission, a co-owner of the common areas of the development. Plaintiff's brief acknowledges that the condominium owners are co-owners as tenants in common of the common areas of the development. And because plaintiff is neither a licensee nor an invitee, there was no duty owed to plaintiff by defendant under premises liability. [*Id*. at 642-643 (citation omitted).]

In this case, plaintiff slipped and fell while in a common area of the defendant housing cooperative of which she was a member. A housing cooperative "is a form of real estate ownership in which those who occupy the premises do not own them." 3 Cameron, Michigan Real Property Law, § 26.28, p 1509. Cooperative housing can take various forms; a common form is corporate, with the corporation owning the fee to the real estate and individual cooperative members holding shares of stock in the corporation and receiving leases from the corporation to individual apartments. *Id*. The cooperative association retains exclusive control over the common areas of the cooperative, however, and only the cooperative association has authority to maintain the common areas. *Stanley v Town Square Coop*, 203 Mich App 143, 146; 512 NW2d 51 (1993). As a result, a member of a cooperative corporation has a hybrid relationship with the cooperative in which the member is a shareholder of the corporation

that owns the real property but at the same time is a tenant of the corporation. Stated another way:

> "Cooperative ownership" is a form of ownership in which each owner of stock in a cooperative apartment building or housing corporation receives a proprietary lease on a specific apartment and is obliged to pay a rental which represents the proportionate share of operating expenses and debt service on the underlying mortgage, which is paid by the corporation. The cooperative apartment lease and the lessee's shares in the corporation that owns the apartment building are inseparable, and any transfer of one without the other is futile, and therefore ineffective. A cooperative housing association, comprised of the members who attain their membership by virtue of their purchase of stock in the association, creates a hybrid form of property ownership. The ownership of a cooperative membership, combined with the right to occupy a unit in the cooperative project, is a form of property ownership, even though cooperative owners do not directly hold the title to their properties; this form of home ownership is unlikely to have the economic value of fee simple ownership or a conventional long-term leasehold interest, but it has value and constitutes a right of property beyond mere possession. [15B Am Jur 2d, Condominiums and Cooperative Apartments (2020), § 56 (citations omitted).]

Similar to membership in a cooperative, ownership of a condominium unit entitles an owner to the exclusive possession of a unit and an undivided interest as tenants in common with other unit owners of the common areas of the condominium. 15B Am Jur 2d, Condominiums and Cooperative Apartments (2020), § 1. The basic difference between condominium and cooperative housing is that the individual purchasing a condominium takes title to the condominium unit while the individual purchasing a membership in a cooperative owns stock in a cooperative corporation and receives a lease for a specific unit for which the individual pays a regular amount to the corporation as

a proportionate share of the operating expenses of the cooperative. See 5 Michigan Civil Jurisprudence, Condominiums and Cooperative Housing, § 1. In Michigan, condominiums are governed by the Condominium Act, MCL 559.101 *et seq*., which provides that a condominium unit is the "portion of the condominium project designed and intended for separate ownership and use, as described in the master deed," MCL 559.104(3), in which the purchaser is a co-owner who enjoys "an exclusive right to his condominium unit and has such rights to share with other co-owners the common elements of the condominium project as are designated by the master deed," MCL 559.163.

In this case, the parties do not dispute that plaintiff purchased a membership in the cooperative, which entitled her to lease living space from defendant and to enjoy the use of all community property and facilities of the cooperative. Unlike the plaintiff in *Francescutti*, there is little support for the conclusion that plaintiff owned the land on which she fell. Plaintiff's purchase of a membership in the cooperative entitled her to occupy her townhome and entitled her to use the common areas of the cooperative as long as she paid the required monthly fees and complied with the rules of the cooperative. Plaintiff was thus in a business relationship with the cooperative in which she purchased certain rights of occupancy from the cooperative by buying a membership in the cooperative.

Plaintiff's membership in the cooperative did not give her independent authority over the common areas of the cooperative typically enjoyed by an owner. In fact, the Occupancy Agreement precluded plaintiff, as a member, from making alterations to the common areas of the premises, including the side-

walks. By contrast, defendant retained control over the maintenance of the common areas of the cooperative, including authority over the removal of snow and ice in those areas. Defendant thus retained sufficient control and dominion over the common areas that it may be said that defendant was in possession of the common areas of the cooperative in contrast to plaintiff's membership right to use those areas. Because defendant was in possession of the cooperative's common areas, we conclude that plaintiff was on land that was in the possession of another when she fell.

2. OPEN AND OBVIOUS

Defendant contends that even if plaintiff were deemed to be an invitee on the land of another when she fell, the ice on which she slipped was an open and obvious condition and defendant's duty did not extend to the removal of open and obvious dangers. We agree.

A premises possessor generally has no duty to remove open and obvious dangers. *Lugo*, 464 Mich at 516. The open and obvious danger doctrine is predicated on the strong public policy that people should take reasonable care for their own safety and precludes the imposition of a duty on a premises possessor to take extraordinary measures to keep people safe from reasonably anticipated risks. *Buhalis*, 296 Mich App at 693-694. The premises possessor therefore does not owe a duty to protect from—or warn of—dangers that are open and obvious because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner*, 492 Mich at 461. A premises possessor is not an absolute insurer of safety of either an invitee or a licensee, and accord-

ingly, the premises possessor's duty does not extend to open and obvious dangers.[3]

Whether a dangerous condition is open and obvious "depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. This is an objective test in which the court considers " 'the objective nature of the condition of the premises at issue.' " *Id*., quoting *Lugo*, 464 Mich at 523-524. The court does not consider whether a particular plaintiff should have realized that the condition was dangerous but rather whether a reasonable person in that position would have foreseen the danger. *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 713; 737 NW2d 179 (2007). The open and obvious danger doctrine is not an exception to the duty owed by the premises possessor but instead is an integral part of that duty; thus, the application of the open and obvious danger doctrine is part of the question of duty that is a question of law for the court to decide. *Buhalis*, 296 Mich App at 693.

In this case, applying the objective standard and viewing the evidence in the light most favorable to plaintiff, the ice on which plaintiff slipped was open and obvious. "Generally, the hazard presented by snow and ice is open and obvious, and the landowner has no duty to warn of or remove the hazard." *Buhalis*, 296 Mich App at 694 (quotation marks and citation omitted). With issues involving wintry conditions, "our courts have progressively imputed knowledge regard-

[3] A narrow exception exists when a "special aspect" of the open and obvious condition makes the risk unreasonable, thereby obligating the premises possessor to take reasonable steps to protect invitees from an unreasonable risk of harm. *Hoffner*, 492 Mich at 461. A condition that is common or avoidable is not considered uniquely dangerous. *Id*. at 463. In this case, plaintiff does not allege the existence of a special aspect creating an unreasonable risk of harm.

ing the existence of a condition as should reasonably be gleaned from all of the senses as well as one's common knowledge of weather hazards that occur in Michigan during the winter months." *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). In *Janson v Sajewski Funeral Home, Inc*, 486 Mich 934, 935 (2010), our Supreme Court explained:

> The Court of Appeals failed to adhere to the governing precedent established in *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 483 (2008), which renders alleged "black ice" conditions open and obvious when there are "indicia of a potentially hazardous condition," including the "specific weather conditions present at the time of the plaintiff's fall." Here, the slip and fall occurred in winter, with temperatures at all times below freezing, snow present around the defendant's premises, mist and light freezing rain falling earlier in the day, and light snow falling during the period prior to the plaintiff's fall in the evening. These wintry conditions by their nature would have alerted an average user of ordinary intelligence to discover the danger upon casual inspection.

Thus, when there are sufficient other "indicia of a potentially hazardous condition," black ice is deemed open and obvious. *Id*. In this case, wintry conditions clearly were present at the time of plaintiff's fall. It was January in Michigan, the temperature was 32 degrees Fahrenheit, and snow had been falling throughout the day. Plaintiff testified that the walkway where she fell appeared wet and that there was "lots of snow" on the grass nearby. There were patches of ice on the sidewalk that both plaintiff and her neighbor testified were visible. In fact, both plaintiff and her neighbor testified that they could see the patch of ice on which plaintiff fell following plaintiff's fall. The wintry conditions presented indicia of a potentially hazardous condition on the walkway suf-

ficient to alert an average user of ordinary intelligence to discover the danger upon casual inspection. The black ice on which plaintiff fell was therefore open and obvious.

In denying defendant's motion for summary disposition, the trial court noted that the ice on which plaintiff fell reportedly had no deicer on it. The trial court concluded that the ice therefore apparently was not open and obvious to the person distributing the deicer.[4] This Court has observed, however, that "[t]he overriding principle behind the many definitions of black ice is that it is either invisible or nearly invisible, transparent, or nearly transparent." *Slaughter*, 281 Mich App at 483. Thus, regardless of whether defendant's maintenance employees saw the black ice, the indicia of a potentially hazardous condition on the walkway was sufficient to alert an average user of ordinary intelligence to discover the danger upon casual inspection, and the black ice therefore created a condition that was open and obvious. The trial court therefore erred by determining that an issue of fact existed regarding the open and obvious nature of the black ice.

3. MCL 554.139

Defendant also contends that the trial court erred by denying its motion for summary disposition on the basis that defendant breached its duty to keep the walkway fit for the use intended as required under MCL 554.139(1)(a). We agree.

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[4] However, plaintiff testified that after she fell, she noticed patches of black ice on the sidewalk. Similarly, Jaber testified that she saw patches of black ice on the sidewalk where plaintiff fell, and one of the emergency medical workers responding to the scene also apparently saw the ice because he warned a coworker to avoid the ice.

In addition to the general common-law duties that a possessor of land owes to invitees, MCL 554.139 imposes further covenants and duties on landlords who lease or license their property to residential tenants. MCL 554.139 provides, in relevant part:

> (1) In every lease or license of residential premises, the lessor or licensor covenants:
>
> (a) That the premises and all common areas are fit for the use intended by the parties.

The statutory protection of MCL 554.139(1) "arises from the existence of a residential lease and consequently becomes a statutorily mandated term of such lease." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). The statute thus provides "a specific protection to lessees and licensees of residential property in *addition* to any protection provided by the common law." *Id*. The open and obvious danger doctrine is not available to preclude liability for a violation of MCL 554.139(1). *Benton v Dart Props, Inc*, 270 Mich App 437, 441; 715 NW2d 335 (2006).

In *Francescutti*, this Court determined that MCL 554.139 did not apply when the plaintiff was the owner of a condominium unit in the defendant condominium development because the statute imposes a duty only on a lessor of land. *Francescutti*, 312 Mich App at 642. This Court reasoned that although the plaintiff in that case had the right to use the common areas of the condominium, the defendant had not leased the common areas to the plaintiff. In this case, although defendant is a cooperative and not a condominium, nonetheless the relationship between plaintiff and defendant is not strictly that of lessor of land and tenant. As a member of defendant cooperative, plaintiff has a hybrid ownership interest in which she leases her housing unit; however, plaintiff also is a member of

the cooperative, and the cooperative's corporation owns the real property of the cooperative, including the common areas. As in *Francescutti*, it cannot be said that defendant in this case leased the common areas of the cooperative to plaintiff, nor that plaintiff acquired the use of the common areas by her lease of her unit in the cooperative; rather, plaintiff acquired the use of the common areas by her purchase of a membership in the cooperative.[5]

Moreover, even if MCL 554.139(1)(a) were applicable to defendant in this case, plaintiff did not create a genuine issue of fact regarding whether the sidewalk was in a condition that rendered it unfit for its intended use. MCL 554.139(1)(a) does not require lessors to maintain a common area in an ideal condition or even in the most accessible condition possible. *Allison*, 481 Mich at 430. Rather, the statute requires the lessor to maintain a common area in a condition that renders it fit for its intended use. *Id*. In this case, plaintiff did not establish that a genuine issue of material fact existed regarding whether the sidewalk was fit for its intended use. Plaintiff testified that the walkway was clear of snow and that the lighting where she fell was good. She testified that after she fell, she noticed patches of ice on the sidewalk. Plaintiff's neighbor similarly testified that she noticed patches of ice on the sidewalk. Accordingly, plaintiff demonstrated only that

[5] Plaintiff argues for the first time on appeal that MCL 554.139 applies to defendant by way of the Truth in Renting Act, MCL 554.631 *et seq*. This issue is therefore unpreserved. See *Elahham v Al-Jabban*, 319 Mich App 112, 119; 899 NW2d 768 (2017). Because this Court generally will decline to address an unpreserved issue unless a miscarriage of justice will result from the failure to do so, the question is one of law, and the facts necessary to resolve the issue have been presented, or it is necessary to do so for the proper determination of the case, *Autodie, LLC v Grand Rapids*, 305 Mich App 423, 431; 852 NW2d 650 (2014), we decline in this case to review this unpreserved issue.

the sidewalk had patches of ice, which at most indicated inconvenience of access or that the sidewalk was not in peak condition but did not render the sidewalk unfit for its intended purpose. See *Allison*, 481 Mich at 430.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

FORT HOOD, P.J., and LETICA, J., concurred with GADOLA, J.

MERECKI v MERECKI

Docket No. 353609. Submitted January 7, 2021, at Detroit. Decided April 1, 2021, at 9:10 a.m.

Plaintiff, Jeremy J. Merecki, obtained a divorce from defendant, Gloria L. Merecki, in the Macomb Circuit Court, Family Division, in 2010. Plaintiff and defendant were awarded joint legal custody of their three minor children, and plaintiff was awarded sole physical custody. On May 1, 2017, defendant moved to modify custody on the basis of allegations that plaintiff physically, mentally, and verbally abused the children. After a subsequent investigation by the Friend of the Court (FOC) revealed that the Department of Health and Human Services (DHHS) had previously filed multiple petitions against plaintiff that also alleged that plaintiff had abused the children, the DHHS placed the children with defendant. The trial court, Matthew S. Switalski, J., referred the motion to change custody to the FOC for its recommendations. In January 2018, the FOC referee recommended that defendant be granted sole legal and physical custody. The referee acknowledged that there was an established custodial environment with the plaintiff but found that there were circumstances warranting a review of that custodial arrangement and that eight of the best-interest factors set forth in MCL 722.23 weighed in favor of defendant. On January 31, 2018, the trial court entered a consent order adopting the recommendations of the FOC referee. The order affirmed the award of sole legal and physical custody of the children to defendant and granted plaintiff supervised parenting time. On November 8, 2019, plaintiff moved to set aside the January 31, 2018 consent order, or, alternatively, for change of custody. Plaintiff argued that he had previously consented to a change in custody to defendant under duress and, alternatively, that his progression in unsupervised parenting time and family counseling constituted a change in circumstance that warranted a redetermination of custody. After a hearing, the FOC referee recommended that plaintiff's motion to modify physical custody be denied and that his motion to modify joint legal custody and parenting time be referred for facilitation. On November 18, 2019, the trial court signed an interim order adopting the FOC referee's recommendation pur-

suant to MCR 3.215(G). Defendant objected to the failure to dismiss the request for a modification of joint physical custody, arguing that plaintiff had demonstrated neither proper cause nor a change in circumstances. Additionally, defendant objected to the use of facilitation because there was a history of significant domestic violence. After hearing oral argument on the objections to the interim order along with several other motions that were filed in this case, the court ruled that facilitation would not be used and, in a separate order, denied defendant's objections to the referee's November 18, 2019 recommendation and implicitly allowed the request for modification of joint legal custody and parenting time to go forward to an evidentiary hearing and a ruling on the merits. Defendant appealed.

The Court of Appeals *held*:

1. Plaintiff failed to meet the "proper cause" standard set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003), to justify a hearing on a change of custody. A proper cause is a significant circumstance regarding one or more of the best-interest factors that has the potential for a significant effect on the well-being of the child or children whose custody is at issue. The movant bears the burden to prove the existence of an appropriate ground by a preponderance of the evidence. Under *Vodvarka*, in order to establish a change of circumstances, a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed. The evidence must demonstrate something more than the normal life changes that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This determination is made on the basis of the facts of each case, with the relevance of the facts presented being gauged by the statutory best-interest factors. The only evidence presented by plaintiff that occurred after the entry of the January 31, 2018 custody order was three letters authored by a court-appointed counselor that noted improvement in the relationship between plaintiff and the children but did not recommend a modification of custody or release plaintiff and the children from counseling. Accordingly, the trial court's determination that plaintiff demonstrated a change in circumstances sufficient to justify reconsideration of legal custody was not supported by the evidence.

2. The court erred by bifurcating the issues of physical and legal custody, denying a hearing on one and referring the other to facilitation. While the Child Custody Act, MCL 722.21 *et seq*.,

draws a distinction between physical custody and legal custody, *Vodvarka* treated "custody" as logically referring to both legal and physical custody. Since that decision, this Court has applied the standard articulated in *Vodvarka* without distinguishing between physical custody and legal custody. Therefore, the trial court committed clear legal error by treating the two forms of custody differently.

3. The trial court erred by failing to make any factual findings as to whether proper cause or a change in circumstances occurred, and the record did not reflect evidence of a proper cause or a change in circumstances sufficient to justify the trial court's reconsideration of legal custody. While the letters from the counselor were relevant to the statutory best-interest factor of love, affection, and other emotional ties between the parties and the children, the improvement in the relationship between the children and plaintiff was not of such magnitude that it had a significant effect on the well-being of the children. While the counselor indicated that one of the children reported having a conflicted relationship with defendant and defendant's new husband, the concerns expressed by that child did not appear so serious as to warrant consideration of a change in custody, nor was it clear whether this conflict constituted a change of circumstance since the January 2018 custody determination. Without more information, there was no basis on which to find that the conflict warranted revisiting custody of that child, much less all the children. The case was remanded for further proceedings, and the trial court was reminded to address any review of the best interests of each child individually.

Reversed and remanded for further proceedings.

PARENT AND CHILD — CHANGE OF CUSTODY — PHYSICAL AND LEGAL CUSTODY.

When determining whether a change of custody is warranted under the Child Custody Act, MCL 722.21 *et seq*., a trial court errs when it bifurcates physical and legal custody, denying a hearing on one and referring the other to facilitation; the trial court must apply the standard articulated in *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003), without distinguishing between physical custody and legal custody.

James J. Sullivan for plaintiff.

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

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

STEPHENS, J. Defendant appeals by leave granted the trial court's February 25, 2020 order denying her objection to the November 18, 2019 recommended order from the Friend of the Court (FOC) referee regarding custody and parenting time.[1] We reverse and remand for further proceedings consistent with this opinion.

I. BACKGROUND

Plaintiff and defendant have three children, CO, SM, and CH. After the parties' divorce in 2010, plaintiff and defendant were awarded joint legal custody of the children, and plaintiff was awarded sole physical custody of the children. On May 1, 2017, defendant filed a motion to modify custody due to allegations that plaintiff physically, mentally, and verbally abused the children. It was revealed in the FOC's subsequent investigation of the allegations that the Department of Health and Human Services (DHHS) had previously filed multiple petitions against plaintiff that also alleged that plaintiff had abused the children. Later that May, DHHS placed the children with defendant. The trial court referred the motion to change custody to the FOC for its recommendations. In January 2018, the FOC referee recommended that defendant be granted sole legal and physical custody. The referee acknowledged that there was an established custodial environment with plaintiff but found that there were circumstances warranting a review of that custodial arrangement and that eight of the best-interest factors set forth in MCL 722.23 weighed in favor of defendant.

[1] *Merecki v Merecki*, unpublished order of the Court of Appeals, entered August 6, 2020 (Docket No. 353609).

On January 31, 2018, the trial court entered a consent order adopting the recommendations of the FOC referee. The order affirmed the award of sole legal and physical custody of the children to defendant and granted plaintiff supervised parenting time.

On November 8, 2019, plaintiff filed a motion to set aside the January 31, 2018 consent order, or, alternatively, for change of custody. Plaintiff argued, in part, that he had previously consented to a change in custody to defendant under duress. Plaintiff alternatively argued that his progression in unsupervised parenting time and family counseling constituted a change in circumstance that warranted a redetermination of custody. In support of his motion, plaintiff attached three letters written by a court-appointed counselor, Laura Henderson, stating that plaintiff exhibited appropriate, caring, supportive, and even-tempered behavior when visiting with the children.

After a hearing, the FOC referee made a written recommendation. Among other things, the recommendation provided:

> 3. Plaintiff's motion to modify physical custody is denied as Plaintiff has failed to set forth a basis for modification of physical custody.
>
> 4. Plaintiff's motion to modify joint legal custody and parenting time shall be referred to the Referee Department for facilitation.

On November 18, 2019, the trial court signed an interim order adopting the FOC referee's recommendation pursuant to MCR 3.215(G). Defendant filed timely objections to the interim order. Defendant objected to the failure to dismiss the request for a modification of joint physical custody, arguing that plaintiff had demonstrated neither proper cause nor a change in circumstances. Additionally, defendant ob-

jected to the use of facilitation in this matter where there was a history of significant domestic violence.

The court heard oral argument on the objections to the interim order along with several other motions that were filed in this case. The court took the legal issue of whether plaintiff demonstrated proper cause or a change in circumstances to justify the continuation of the request to modify joint legal custody and parenting time under advisement. However, the court orally ruled that facilitation would not be used. On January 13, 2020, the court entered an order formalizing the oral ruling regarding facilitation. Later, on February 25, 2020, the trial court entered an order that denied defendant's objections to the referee's November 18, 2019 recommendation and implicitly allowed the request for modification of joint legal custody and parenting time to go forward to an evidentiary hearing and a ruling on the merits. The trial court did not provide a rationale for its decision. This appeal followed.

II. STANDARD OF REVIEW

"We apply three standards of review in custody cases. The great weight of the evidence standard applies to all findings of fact." *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000). "In a child custody dispute, 'all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue.' " *Pennington v Pennington*, 329 Mich App 562, 569-570; 944 NW2d 131 (2019), quoting MCL 722.28. "Specifically, we review under the great-weight-of-the-evidence standard the trial court's determination whether a party dem-

onstrated proper cause or a change of circumstances." *Id*. at 570. "A finding of fact is against the great weight of the evidence if the evidence clearly preponderates in the opposite direction." *Id*. "An abuse of discretion standard applies to the trial court's discretionary rulings such as custody decisions." *Id*. "An abuse of discretion, for purposes of a child custody determination, exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias." *Butler v Simmons-Butler*, 308 Mich App 195, 201; 863 NW2d 677 (2014). "Questions of law are reviewed for clear legal error." *Id*. "A trial court commits legal error when it incorrectly chooses, interprets or applies the law." *Id*.

III. ANALYSIS

"The purposes of the Child Custody Act, MCL 722.21 *et seq*., are to promote the best interests of the child and to provide a stable environment for children that is free of unwarranted custody changes." *Pennington*, 329 Mich App at 570-571 (citation and quotation marks omitted). "The Child Custody Act authorizes a trial court to award custody and parenting time in a child custody dispute and also imposes a gatekeeping function on the trial court to ensure the child's stability." *Id*. at 571. Under MCL 722.27, "a trial court may modify or amend a previous child custody order or judgment for proper cause shown or because of change of circumstances if doing so is in the child's best interests." *Id*. (citations and quotation marks omitted). "Thus, a party seeking to modify an existing child custody order must first establish proper cause or a change of circumstances before the trial court may reopen the custody matter

and hold a hearing to assess whether the proposed modification is in the child's best interests." *Id*.

On appeal, defendant asserts that plaintiff failed to meet the "proper cause" standard set forth in *Vodvarka v Grasmeyer*, 259 Mich App 499; 675 NW2d 847 (2003), to justify a hearing on a change of custody. We agree.

In the context of a motion for change of custody, a proper cause or change in circumstance is a significant circumstance regarding one or more of the best-interest factors that has the potential for a significant effect on the well-being of the child or children whose custody is at issue.[2] *Id*. at 511-514. The movant bears the burden to "prove by a preponderance of the evidence the existence of an appropriate ground[.]" *Pennington*, 329 Mich App at 571-572.

> [I]n order to establish a "change of circumstances," a movant must prove that, since the entry of the last custody order, the conditions surrounding custody of the child, which have or could have a *significant* effect on the child's well-being, have materially changed. Again, not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. This too will be a determination made on the basis of the facts of each case,

[2] In contrast, "a lesser, more flexible, understanding of 'proper cause' or 'change in circumstances' is applicable to a request to modify parenting time. Specifically, the very normal life change factors that *Vodvarka* finds insufficient to justify a change in custodial environment are precisely the types of considerations that trial courts should take into account in making determinations regarding modification of parenting time." *Marik v Marik*, 325 Mich App 353, 367-368; 925 NW2d 885 (2018) (citations and quotation marks omitted).

> with the relevance of the facts presented being gauged by the statutory best interest factors. [*Vodvarka*, 259 Mich App at 513-514.]

The court's initial error was to bifurcate physical and legal custody, denying a hearing on one and referring the other to facilitation. In *Vodvarka*, this Court did not distinguish between the requisite standard for changing physical custody and legal custody. *Id*. at 509-514. Rather, this Court exclusively referred to the issue as involving "custody." *Id*. While the Child Custody Act draws a distinction between physical custody and legal custody,[3] *Vodvarka* treated "custody" as logically referencing both legal and physical custody. Since that decision, this Court has applied the standard articulated in *Vodvarka* without distinguishing between physical custody and legal custody. See, e.g., *Corporan v Henton*, 282 Mich App 599, 606-609; 766 NW2d 903 (2009). In light of the foregoing, the trial court committed clear legal error by treating the two forms of custody differently.

To compound this error, neither the FOC referee nor the trial court made any factual findings as to whether proper cause or a change in circumstances occurred. We cannot adduce evidence of a proper cause or a change in circumstances sufficient to justify the trial court's reconsideration of legal custody from the record below. At best, plaintiff presented evidence that Henderson authored three letters indicating that plaintiff interacted with the children in an appropriate, caring, supportive, and even-tempered manner, and seemed to

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[3] See *Grange Ins Co of Mich v Lawrence*, 494 Mich 475, 511; 835 NW2d 363 (2013) ("[W]e are cognizant that the Child Custody Act draws a distinction between physical custody and legal custody: Physical custody pertains to where the child shall physically 'reside,' whereas legal custody is understood to mean decision-making authority as to important decisions affecting the child's welfare.").

show that plaintiff's relationship with the children improved. While these letters were relevant to the statutory best-interest factor of love, affection, and other emotional ties between the parties and the children, the improvement in the relationship between the children and plaintiff was not of such magnitude that it had a significant effect on the well-being of the children. Notably, Henderson did not recommend a modification of custody in the letters. Additionally, an August 30, 2018 order of parenting-time review provided that plaintiff and the children were required to participate in family counseling with Henderson until such time as Henderson released plaintiff and the children from counseling. Henderson had not released plaintiff and the children from counseling, thereby indicating that plaintiff's relationship with the children had not progressed such that counseling was no longer necessary.

Plaintiff did offer Henderson's July 5, 2019 letter, which indicated that CO reported having a conflicted relationship with defendant and defendant's new husband. This conflict relates to the best interests of CO. However, while the letter notes conflict, the concerns expressed by CO are not significant, catastrophic, nor suggestive of conflagration. The record reflects that CO had been in therapy for several years prior, and it is reasonable to expect that Henderson would have made greater note of this issue if it had been a significant circumstance of the *Vodvarka* magnitude. Additionally, Henderson's July 5 letter does not indicate when this conflict arose such that it would have been a change of circumstance since the January 2018 custody determination.[4] Without more information, there was no basis

[4] See *Vodvarka*, 259 Mich App at 501 ("[I]n determining if a change of circumstances had occurred, the trial court was limited to basing its

on which to find that the conflict warranted revisiting custody of CO, much less all of the children.

Furthermore, there was not a change in circumstances regarding the relationship of the children with plaintiff such that the trial court could reopen the custody matter and hold a hearing to assess whether the proposed modification was in the children's best interests. In order to establish a change of circumstances, a movant must prove that the conditions surrounding the custody of the child have materially changed since the entry of the last custody order. *Vodvarka*, 259 Mich App at 513. The only evidence presented by plaintiff that occurred after the entry of the January 31, 2018 custody order was the three letters authored by Henderson. Again, those letters noted improvement in the relationship between plaintiff and the children, but Henderson did not recommend a modification of custody, nor did she release plaintiff and the children from counseling. The trial court's determination that plaintiff demonstrated a change in circumstances sufficient to justify reconsideration of legal custody was not supported by the evidence.

We also note that the evidence was also mostly focused on CO and otherwise referred to the children collectively. On remand, we remind the trial court to address any review of the best interests of each child individually. *Wiechmann v Wiechmann*, 212 Mich App 436, 440; 538 NW2d 57 (1995); *Foskett v Foskett*, 247 Mich App 1, 11; 634 NW2d 363 (2001).[5]

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decision on events occurring after entry of the most recent custody order . . . .").

[5] As *Foskett*, 247 Mich App at 11-12, explained:

> Incumbent on the trial court . . . is the duty to apply all the statutory best interests factors to each individual child. To fully

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

K. F. KELLY, P.J., and CAMERON, J., concurred with STEPHENS, J.

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discharge this duty, and arrive at a decision that serves a particular child's best interests, trial courts must recognize and appreciate that implicit in the best interests factors themselves is the underlying notion that as children mature their needs change. And, as a child progresses through the different life stages, what they need from each parent necessarily evolves therewith. Thus, what may be in the "best interests" of an eight-year-old child may materially differ from the "best interests" of that child's thirteen-year-old sibling. Accordingly, the best interests factors must be fluid enough in their application to accommodate these differences.

LeFEVER v MATTHEWS

Docket No. 353106. Submitted February 5, 2021, at Detroit. Decided April 1, 2021, at 9:15 a.m.

Kyresha LeFever filed an action in the Wayne Circuit Court against Lanesha Matthews, seeking an order establishing that plaintiff was the biological and legal mother of twin children, an order amending the birth certificates of those children to add plaintiff's name, and a custody order granting the parties joint physical and legal custody of the children. The parties held themselves out as being in a domestic partnership for several years before deciding to have children together. Plaintiff's eggs were fertilized with sperm from an anonymous donor and implanted in defendant's uterus. At the time of the twins' birth, Michigan only allowed one father and one mother to be listed on a birth certificate. Because of that practice, defendant was listed as the twins' mother when they were born; plaintiff was not listed on the birth certificates, but the twins were given her last name. The parties lived together, jointly raising the children, until they separated in 2014, before statutes excluding same-sex couples from marrying were deemed unconstitutional in *Obergefell v Hodges*, 576 US 644 (2015). The parties coparented and shared custody of the children until 2016, at which point plaintiff became the primary caretaker. In 2018, a custody dispute arose between the parties, resulting in plaintiff filing a complaint for custody and a motion to establish interim custody and parenting time. Because the referee assigned to the matter determined that parentage should be established first, the case was dismissed and plaintiff filed the instant action. Plaintiff argued that she was the children's natural mother because she was genetically connected to them and that defendant was only the gestational surrogate; plaintiff also asserted various due-process and equal-protection arguments. In turn, defendant asserted that the Surrogate Parenting Act (SPA), MCL 722.851 *et seq*., applied and invalidated any surrogacy contract between the parties and that she was the children's natural parent because she gave birth to them. Defendant further argued that plaintiff lacked standing to seek custody because Michigan law conferred maternity on a party only by way of birth and delivery of a child. The court, Melissa A. Cox, J., found that

plaintiff was the children's natural and legal mother, ordered their birth certificates amended to add plaintiff's name, and awarded joint legal custody on an interim basis until the court could determine whether defendant had standing in the action as a natural parent. Defendant asserted that she was the children's natural parent because she had a biological connection to them through gestation, that neither the Child Custody Act (CCA), MCL 722.21 *et seq*., nor dictionary definitions limit "natural parent" to only a genetic parent, and that such a narrow interpretation of the term would violate her equal-protection and due-process rights. Defendant also asserted that she had standing because of the comaternity arrangement she had with plaintiff and that plaintiff's action to revoke defendant's parentage was barred by the limitation period in MCL 722.1437(1) of the Revocation of Paternity Act, MCL 722.1431 *et seq*. The court ultimately concluded that the SPA applied to the facts of the case because the act broadly defined a surrogate-parentage contract, that the SPA identified the "mother" as a party with a genetic connection to the child, and that the SPA identified a surrogate carrier as one who gestates and births a child to whom she has no genetic relationship. The court acknowledged that the SPA did not resolve which party should have custody of the children and, instead, directed courts to apply the CCA to resolve the issue of parentage and custody. In analyzing the issue, the court was persuaded by the public-policy rationale set forth in *Belsito v Clark*, 67 Ohio Misc 2d 54 (1994), to conclude that through various Michigan statutes—i.e., the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., the Safe Delivery of Newborns Law, MCL 712.1 *et seq*., the Michigan Adoption Code, MCL 710.21 *et seq*., and the CCA—the Legislature had established that it was the state's public policy to identify a parent as a person with a biological connection to the child. Applying that reasoning, the court concluded that under the CCA, defendant was not a "parent" as defined in MCL 722.22(i) because defendant did not have a genetic connection to the children, unlike plaintiff whose ova were used in their conception. The court concluded that defendant had standing as a "third party" under the SPA but that under the CCA, because plaintiff was the children's natural mother by genetics, there was a presumption that it was in the best interests of the children to award custody to plaintiff. For those reasons, the court awarded sole legal and physical custody of the children to plaintiff, granted parenting time to defendant as a third party under MCL 722.27(1)(b), and ordered defendant's name removed from the children's birth certificates. Defendant appealed.

The Court of Appeals *held*:

1. The CCA governs custody, parenting time, and child support issues for minor children in Michigan, and it is the exclusive means of pursuing child custody rights. The act is equitable in nature and must be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved. MCL 722.25(1) provides that if a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. Under MCL 722.22(i), the term "parent" means the natural or adoptive parent of a child. While the CCA does not define "natural parent," the term was previously interpreted in *Stankevich v Milliron (On Remand)*, 313 Mich App 233 (2015), as meaning a blood relation. The meaning of "blood relation" is different from relation by affinity or adoption, and through its separate identification of natural parents and adoptive parents in MCL 722.22(i), the term "natural parent" in the CCA does not include relation by affinity or adoption. There is no dictionary definition of the term "natural parent." Given the analysis in *Stankevich* and the dictionary definitions of "blood relation," the differentiating factor is relation by birth versus relation by adoption. Thus, the term "natural parent" is elastic enough to include a woman who has no genetic connection to a child but is related to the child by the process of birthing the child rather than through marriage. In this case, defendant was a "natural parent" for purposes of the CCA because she gestated and birthed the children. The trial court erred by considering the genetic requirements in other family-law statutes—i.e., the Acknowledgment of Parentage Act, the Safe Delivery of Newborns Law, and the Michigan Adoption Code—when it determined that Michigan law generally requires a genetic component to establish maternity. The other statutes were not applicable to the facts of this case, and the plain language of the cited statutes did not indicate that the Legislature intended to limit the path to establishing maternity to the single route of demonstrating a genetic connection. In addition, the public-policy rationale in *Belsito* on which the trial court relied was not persuasive. The trial court's final order was vacated and the case remanded for the trial court to consider both parties as natural parents under the CCA.

2. The SPA governs surrogacy agreements, and under MCL 722.855, surrogate-parentage contracts are void and unenforceable as contrary to public policy. MCL 722.853(i) defines "surrogacy parentage contract" as a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to voluntarily relinquish her parental or custodial rights to the child. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child. Thus, a surrogate-parentage contract contains two necessary elements: (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) the voluntary relinquishment of her parental rights to the child. The party seeking to rebut the presumption of relinquishment of parental rights must demonstrate by a preponderance of the evidence that the relinquishment was not voluntary. Under MCL 722.861, if a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate-parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court must award legal custody of the child based on a determination of the "best interests of the child" as that term is defined in MCL 722.23 of the CCA. In this case, the trial court erred by concluding that the SPA applied because the evidence did not establish such a contract existed or that either woman agreed to relinquish their parental rights; indeed, they agreed to coparent the children. Moreover, the CCA is the exclusive means of pursuing child custody rights. Reversal on this issue was not necessary because, even if the SPA had applied, defendant was a "natural parent" for purposes of the CCA and the trial court's erroneous conclusion that the SPA applied did not alter the outcome of the case.

3. It was unnecessary to address defendant's constitutional arguments because the issues were disposed of on other statutory grounds.

Custody order vacated and case remanded for further proceedings.

GLEICHER, P.J., concurring, agreed fully with the majority's conclusion that both parties were the legal mothers of the children

for purposes of the CCA and that a genetic connection to one's child was not a requirement of establishing maternity. As stated by the majority, the trial court erred by interpreting the SPA as applying to this case because there was no surrogate contract and neither woman agreed to relinquish her parental rights. It was unnecessary for the majority to rely on dictionary definitions to conclude that defendant was a natural mother for purposes of the CCA. Instead, the majority should have looked to the common law to conclude that a woman who gives birth to a child is that child's natural mother; thus, defendant was a natural mother because the plain and ordinary meaning of that term includes a woman who bears a child. The majority should have addressed defendant's constitutional issues because they merit consideration and could become relevant on remand and in similar cases. The majority appears to have accepted the unarticulated proposition that by donating genetic material, i.e., her ova, plaintiff demonstrated an intent to parent, endowing her as a natural parent. However, a "natural parent" under the CCA is not defined by focusing solely on genetics or by focusing solely on gestation and birth; the term encompasses both. The CCA did not specifically address the facts of the case, and the Equal Protection and Due Process Clauses of the United States Constitution fill that gap, establishing that the parties had a constitutional right to custody of their children. Unmarried parents in same-sex relationships who do not use sophisticated reproductive technology allowing both parties to have a biological connection should also be considered natural parents under the CCA; biological relationships do not exclusively determine a family. Although the Supreme Court has refused to extend the equitable-parent doctrine to unwed nonbiological parents because it involves a public-policy issue, the Court's rationale in *Van v Zahorik*, 460 Mich 320 (1999), has been undermined by more recent statutes in Michigan that have established avenues by which unmarried men may seek parental rights.

PARENT AND CHILD — CHILD CUSTODY ACT — NATURAL PARENTS.

Under the Child Custody Act, if a child custody dispute is between the parents, the best interests of the child control, but if the dispute is between a parent a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent; the term "parent" is statutorily defined as the natural or adoptive parent of a child; a woman who has no genetic connection to a child but is related to the child by the process of birthing the child is a natural parent under the act (MCL 722.21 *et seq*.).

Regina D. Jemison and *National Center for Lesbian Rights* (by *Catherine P. Sakimura* and *Christopher F. Stoll*) for defendant.

Amici Curiae:

Bassett & Associates, PLLC (by *Jane A. Bassett*) for Professors of Family Law.

American Civil Liberties Union Fund of Michigan (by *Jay D. Kaplan* and *Daniel S. Korobkin*) and American Civil Liberties Union Foundation (by *Taylor Brown* and *Leslie Cooper*) for American Civil Liberties Union, American Civil Liberties Union of Michigan, Center for Reproductive Rights, Center for Genetics and Society, and Pro-Choice Alliance for Responsible Research.

Before: GLEICHER, P.J., and K. F. KELLY and RIORDAN, JJ.

RIORDAN, J. In this child custody case, defendant, Lanesha Matthews, appeals as of right the trial court's order of parentage, custody, and parenting time. The trial court awarded sole legal custody and sole physical custody of plaintiff's and defendant's two minor children to plaintiff, Kyresha LeFever, granted parenting time to defendant, and ordered defendant's name be removed from the children's birth certificates. The custody order was premised on an earlier determination that defendant was merely a third party and not a parent of the children because, although she gestated and birthed the children, she did not have a genetic connection to them, unlike plaintiff, whose ova were used in the procreation of the children.

However, we conclude that the trial court improperly interpreted the term "parent" as defined by MCL 722.22(i) in the Child Custody Act (CCA), MCL 722.21 *et seq*., as requiring a genetic connection and misap-

plied the Surrogate Parenting Act (SPA), MCL 722.851 *et seq*. Accordingly, we vacate the trial court's order and remand this case for further proceedings.

I. FACTS AND PROCEDURAL HISTORY

This case arises out of the dissolution of the parties' relationship and the subsequent custody dispute over their two minor children, twin girls. Plaintiff and defendant, both women, began a romantic relationship in 2011. At some point during the relationship, they decided to have children together using plaintiff's eggs, fertilized by a sperm donor and implanted in defendant's womb. The in vitro fertilization resulted in defendant's pregnancy with the twins. Although the parties intended for defendant to give birth in Ohio, where both women could be listed on the birth certificates, defendant gave birth two months early in Michigan. At that time, the Michigan Department of Health and Human Services Division for Vital Records permitted one father and one mother to be listed on a birth certificate. As a result of this practice, defendant was listed as the twins' mother, and although plaintiff was not listed on the birth certificates, the twins were given plaintiff's last name.

The parties cohabitated and parented the twins together until they separated in 2014—before statutes excluding same-sex couples from marriage were declared unconstitutional in *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015). The parties continued coparenting the twins and shared custody until defendant experienced serious health concerns in 2016. At that time, plaintiff became the twins' primary caretaker until 2018, when a custody dispute arose.

In November 2018, plaintiff filed a complaint for custody of the twins as well as a motion to establish

interim custody and parenting time. The matter was heard by a referee, who determined parentage should first be established. The case was dismissed and resubmitted by plaintiff as a complaint to establish parentage.

The trial court held a hearing to establish plaintiff's standing as a parent. Plaintiff argued that she was the twins' "natural mother" by virtue of her genetic connection to the children and that defendant, the "gestational surrogate," was merely "the woman who carried the eggs of [plaintiff] and the sperm of an anonymous donor[.]" Plaintiff also raised due-process and equal-protection arguments. Defendant countered that the SPA applied in such a way that it invalidated any surrogacy contract between the parties. Defendant reasoned that because there is no valid surrogacy contract, she is the twins' "natural parent" by default because she gave birth to them. Defendant further argued that Michigan law provides no avenue for conferring maternity on a party except by way of birth and delivery of a child and that, therefore, plaintiff lacked standing to seek custody. Defendant asserted that the parties decided not to have plaintiff recognized as a legal parent of the children at the time of their birth and that plaintiff must now live with the consequences of that decision.

The trial court found that plaintiff is the twins' "natural and legal mother" and ordered that the birth certificates be amended to add plaintiff. The trial court also awarded joint legal custody on an interim basis and set forth a parenting-time schedule. However, during the preliminary hearing, the trial court raised the issue of defendant's standing as a "natural parent" and ordered additional briefing on the matter. Defen-

dant moved for reconsideration of the trial court's orders; the trial court denied the motion.

Regarding defendant's standing, plaintiff then argued that defendant was not the twins' natural parent because she shared no genetic connection with them. In response, defendant maintained her position that her biological connection to the twins, by way of gestation, made her the twins' natural parent too. Defendant argued that neither the statute, nor the dictionary definition, limit "natural parent" to mean only a genetic parent and that such a narrow interpretation of the term is antithetical to the purpose of the CCA and would violate her constitutional rights to substantive due process and equal protection. Defendant also argued that she has "standing by agreement" by way of the parties' comaternity arrangement and that plaintiff's action to revoke defendant's parentage of the twins was barred by the limitations period in MCL 722.1437(1) of the Revocation of Paternity Act, MCL 722.1431 *et seq*.

The trial court concluded that the SPA applied to the facts of this case because the act broadly defines a surrogate-parentage contract as encompassing any arrangement in which a female agrees to conceive a child through artificial insemination or in which a female agrees to surrogate gestation. The trial court further reasoned that the SPA identifies the "mother" as a party with a genetic connection to the child, whereas a "surrogate carrier" gestates and births a child to whom she has no genetic relationship. The trial court recognized that the SPA does not indicate which party should have custody to the resultant offspring but, rather, directs courts to apply the CCA.

The trial court noted that this case presents a matter of first impression in Michigan, but it consid-

ered the various outcomes in other jurisdictions under similar factual circumstances. The trial court was persuaded by the public policy rationale in *Belsito v Clark*, 67 Ohio Misc 2d 54; 644 NE2d 760 (1994). The trial court also considered MCL 722.1003 of the Acknowledgment of Parentage Act, MCL 722.1001 *et seq*., the Safe Delivery of Newborns Law, MCL 712.1 *et seq*., the Michigan Adoption Code, MCL 710.21 *et seq*., and finally, the CCA, which defines a parent as "natural" or "adoptive," MCL 722.22(i). The trial court concluded that "the [L]egislature of this state has established that it is the public policy of this state to identify a parent as a person with a biological connection to the child." In this case, the trial court concluded that plaintiff, by way of her genetic connection to the twins, was the only party to establish a biological connection. As a result, this finding created a presumption that the best interests of the twins were served by awarding plaintiff custody, while the SPA granted defendant standing as a third party.

Defendant sought leave to appeal in this Court, but the application was dismissed for lack of jurisdiction because the opinion issued by the trial court was not a decision on a dispositive motion. *LeFever v Matthews*, unpublished order of the Court of Appeals, entered October 23, 2019 (Docket No. 351133). Accordingly, the matter progressed to trial where defendant was required to show by clear and convincing evidence that it was in the twins' best interests for her to have custody.

After a six-day trial, the court concluded that defendant failed to carry her burden to establish parentage. Plaintiff was awarded full legal and physical custody, and the trial court ordered that defendant's name be removed from the twins' birth certificates. However, the trial court granted parenting time to defendant

because of her standing as a third party under MCL 722.27(1)(b). Defendant now appeals and challenges the trial court's finding that she is not a natural parent. She argues that the trial court misinterpreted the CCA when it found that she is not a "natural parent," that it misapplied the SPA to the facts of this case, and that the trial court's order implicates her federal constitutional rights to substantive due process and equal protection under the law.

II. STANDARDS OF REVIEW

Legal standing constitutes a question of law that we review de novo. *Heltzel v Heltzel*, 248 Mich App 1, 28; 638 NW2d 123 (2001). Because it relates specifically to "the resolution of a child custody dispute," the CCA provides that "all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. "A clear legal error occurs when the circuit court incorrectly chooses, interprets, or applies the law . . . ." *Kubicki v Sharpe*, 306 Mich App 525, 538; 858 NW2d 57 (2014) (quotation marks and citation omitted); *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994). We review de novo matters of statutory interpretation and constitutional issues. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008); *In re MKK*, 286 Mich App 546, 556; 781 NW2d 132 (2009).

III. THE CHILD CUSTODY ACT

Defendant first argues that the trial court committed error requiring reversal when it concluded that she was not a "natural parent" under the CCA because she lacked a genetic connection to the twins. We agree.

The CCA governs custody, parenting time, and child support issues for minor children in Michigan, and it is the exclusive means of pursuing child custody rights. MCL 722.24(1); *Aichele v Hodge*, 259 Mich App 146, 153; 673 NW2d 452 (2003). It is "equitable in nature" and must be "liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parties involved." MCL 722.26(1). The CCA contains the following parental presumption:

> If a child custody dispute is between the parents, between agencies, or between third persons, the best interests of the child control. If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. [MCL 722.25(1).]

"Parent" is defined as "the natural or adoptive parent of a child." MCL 722.22(i). However, determining whether the term "natural parent" is elastic enough to include defendant is a matter of statutory interpretation. To that end, we consider the following principles:

> "The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. First, the court examines the most reliable evidence of the Legislature's intent, the language of the statute itself. When construing statutory language, the court must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined. Effect must be given to every word, phrase, and clause in a statute, and the court must avoid a construction that would render part of the statute surplusage or nugatory. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Generally, when language is included in one section of a statute but omitted from another section, it is presumed

> that the drafters acted intentionally and purposely in their inclusion or exclusion. The courts may not read into the statute a requirement that the Legislature has seen fit to omit. When the Legislature fails to address a concern in the statute with a specific provision, the courts cannot insert a provision simply because it would have been wise of the Legislature to do so to effect the statute's purpose. Statutes that address the same subject matter or share a common purpose are *in pari materia* and must be read collectively as one law, even when there is no reference to one another." *In re Jajuga Estate*, 312 Mich App 706, 712; 881 NW2d 487 (2015) (brackets omitted), quoting *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541-542; 849 NW2d 743 (2013).

The term "natural parent" is not defined by the statute. However, we have previously interpreted the term to mean a blood relation. *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 236; 882 NW2d 194 (2015) (*Stankevich III*) (citing the *Random House Webster's College Dictionary* (2005) definition of "natural"). A blood relation is different from relation by affinity or adoption, and the term "natural parent," as used in the CCA, does not include those relationships. This is supported by the inclusion of the term "adoptive parent" as a separate category from "natural parent" within the same subdivision, MCL 722.22(i). Thus a "parent" within the meaning of the CCA does not include relations such as stepparents (who are related to a child by marriage or affinity), foster parents (whose relationship to a child is determined and controlled by the agency foster/parent agreement), or grandparents (who may be related to a child by consanguinity, but are removed in their relation by one degree). Such parties are "third persons" under the CCA. See MCL 722.22(k) (defining "third person" as "an individual other than a parent"); *In re Anjoski*, 283 Mich App 41, 52; 770 NW2d 1

(2009) (considering a stepparent as a third party); *Tallman v Milton*, 192 Mich App 606; 482 NW2d 187 (1992) (considering foster parents as third parties); *Bowie v Arder*, 441 Mich 23, 48-49; 490 NW2d 568 (1992) (considering a grandparent as a third party). Here, defendant's relationship to the twins as their birth mother has a closer biological connection than a stepparent or foster parent; the connection is arguably even closer than that of a grandparent because she gave birth to the children.

Moreover, when interpreting an undefined statutory term, the term "must be accorded its plain and ordinary meaning." *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008). Consulting a lay dictionary is proper when defining common words or phrases that lack a unique legal meaning, but when the statutory term is a legal term of art, the term must be construed in accordance with its peculiar and appropriate legal meaning. *Id*. *Black's Law Dictionary* (11th ed) does not define "natural parent," but it defines "blood relative" as "[s]omeone who shares an ancestor with another." *Id*. at 1542. In addition, the entry for "genetic parent" refers to the definition of "biological parent," which is "[t]he woman who provides the egg . . . to form the zygote that grows into an embryo." *Id*. at 1340, 1341. "Birth parent" is defined as "[e]ither the biological father or the mother who gives birth to the child." *Id*. at 1340. Thus, plaintiff meets the definition of "biological parent" and "genetic parent," and defendant satisfies the definition of a "birth parent." However, those terms are not included in the definition of "blood relative" or otherwise mention the term "natural parent."

Accordingly, we must consider the lay dictionary definition as we did in *Stankevich III*, 313 Mich App at

236.[1] We have found no dictionary definition of "natural parent," but, building off our analysis in *Stankevich III*, we consider the various dictionary definitions of "blood relation" and conclude that the term is used to differentiate between those related by birth and those related by adoption. See *The American Heritage Dictionary of the English Language* (5th ed) (defining "blood relation" as "a person who is related to another by birth rather than by marriage"); Merriam-Webster.com Dictionary,

[1] In that case, the parties were a same-sex couple that was married in Canada in 2007. *Stankevich III*, 313 Mich App at 235. Using artificial insemination, the defendant became pregnant and gave birth before the parties separated in 2009 and a subsequent custody complaint was filed. *Id*. It was undisputed that the defendant was the biological parent of the child. *Id*. Rather, the issue before us concerned the application of the equitable-parent doctrine which recognizes that " 'a person who is not the biological father of a child may be considered a parent against his will, and consequently burdened with the responsibility of the support for the child,' such a person, in being treated as a parent, may also seek the rights of custody or parenting time." *Id*. at 238, quoting *Atkinson v Atkinson*, 160 Mich App 601, 610; 408 NW2d 516 (1987).

Initially, we concluded that the equitable-parent doctrine was inapplicable to the case because in *Van v Zahorik*, 460 Mich 320, 330-331; 597 NW2d 15 (1999), the Michigan Supreme Court had declined to extend application of the doctrine outside the context of marriage and because the doctrine was inapplicable to the facts of the case given that Michigan did not recognize same-sex marriage at the time of the appeal. *Stankevich v Milliron*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 3, (*Stankevich I*), vacated and remanded 498 Mich 877 (2015) (*Stankevich II*). While the appeal in *Stankevich I* was pending in our Supreme Court, the United States Supreme Court issued its decision in *Obergefell*, 576 US 644, which struck down as unconstitutional Michigan's statute that prohibited same-sex marriage. Accordingly, the Michigan Supreme Court vacated *Stankevich I* and remanded the case to the Court of Appeals for reconsideration in light of *Obergefell*. On remand, we maintained our interpretation of the term "natural parent" but concluded that the plaintiff was not barred from asserting the equitable-parent doctrine, and we remanded the matter to the trial court for an evidentiary hearing regarding the validity of the marriage and the other disputed factual issues. *Stankevich III*, 313 Mich App at 240-242.

blood relative <https://www.merriam-webster.com/dictionary/blood%20relative> [https://perma.cc/G3SL-N377] (defining "blood relative" as "someone who has the same parents or ancestors as another person"); MacmillanDictionary.com, *blood relation* <https://www.macmillandictionary.com/us/dictionary/american/blood-relation> [https://perma.cc/N8P5-HJDJ] (defining "blood relation" as "someone that you are related to by birth, rather than by marriage"); Dictionary.Cambridge.org, *blood relation* <https://www.dictionary.cambridge.org/us/dictionary/english/blood-relation> [https://perma.cc/54VZ-GVG3] (defining "blood relation" as "someone who is related to you by birth rather than through marriage"). Thus, the textual clues indicate that the term "natural parent" is elastic enough to include defendant, who, although she has no genetic connection to the twins, is related to them by the process of birthing them rather than through marriage.[2]

In concluding otherwise, the trial court erroneously considered the genetic requirements in other family-law statutes, namely, MCL 722.1003 of the Acknowledgment of Parentage Act, the Safe Delivery of Newborns Law, and the Michigan Adoption Code. "However, the first step of statutory interpretation is to review the language of the statute at issue, not that of another statute." *Spectrum Health Hosps v Farm Bureau Mut*

[2] The concurrence criticizes us for relying on dictionaries, rather than the common law, to ascertain the meaning of "natural parent." However, the CCA is "a comprehensive statutory scheme" concerning child custody matters. See *Van*, 460 Mich at 327. "In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter." *Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006) (quotation marks and citation omitted). Our duty is, therefore, to address the comprehensive statutory language of the CCA.

Ins Co of Mich, 492 Mich 503, 521; 821 NW2d 117 (2012). Although a statute must be read in conjunction with other relevant statutes and interpreted in a manner that ensures that it works in harmony with the entire statutory scheme, *Potter v McLeary*, 484 Mich 397, 411; 774 NW2d 1 (2009), none of these other statutes was implicated by the facts of this case.

In addition, a review of these statutes does not support the trial court's conclusion that Michigan law generally requires a genetic connection in order to establish maternity. Specifically, the trial court concluded that "MCL 722.1003, Michigan's Acknowledgment of Parentage Act has clearly identified that only a biological parent will have the 'duties of a child-parent relationship and legal status of [a] natural parent' . . . ." However, the act establishes paternity (not maternity). MCL 722.1004. The act defines the term "father" but not the term "mother." MCL 722.1002. Moreover, the act defines "father" as "the man who signs an acknowledgment of parentage of a child." MCL 722.1002(d). This definition does not hint at any legal requirement of a genetic connection between a parent and a child. In fact, "[n]othing in the Acknowledgement of Parentage Act requires that the man completing the acknowledgement form actually be the child's biological father." *In re Daniels Estate*, 301 Mich App 450, 456; 837 NW2d 1 (2013). MCL 722.1007(g)(*i*) expressly provides that the acknowledgment form must include notice that signing the form waives blood or genetic tests to determine if the man is the biological father of the child. The only indication in the act as to how maternity is determined is found in MCL 722.1002(b), which defines the term "child" as "a child conceived and born to a woman . . . ." This definition does not include a requirement that the child be conceived by the same

woman who births the child, and it does not indicate any preference for a genetic parent to take priority over a birth parent. Although MCL 722.1437 permits the revocation of an acknowledgment of parentage, "[n]othing in the act indicates that DNA results, standing alone, are sufficient to require revocation of an acknowledgment of parentage." *Helton v Beaman*, 304 Mich App 97, 108; 850 NW2d 515 (2014) (opinion by O'CONNELL, J.).

The Safe Delivery of Newborns Law states that a party petitioning for custody of a newborn may be ordered to submit to genetic testing "[u]nless the birth was witnessed by the emergency service provider and sufficient evidence exists to support maternity[.]" MCL 712.11(2). Thus, it appears that the act only contemplates scenarios in which a birth mother is also the genetic mother, and it is uninformative as to the statutory construction of the CCA in this case.

The trial court's reliance on the Adoption Code is also misplaced. The act does not define or otherwise address genetic parents or birth parents. In addition, the trial court did not consider the Genetic Parentage Act, MCL 722.1461 *et seq*., which permits a man to establish paternity by way of blood, tissue, or genetic testing. MCL 722.1467. The act focuses on a genetic parent-child connection, but considering it in the context of the entire statutory scheme, it does not support a conclusion that the Legislature intended for genetics to be the only way to establish parentage. Rather, the Legislature has provided numerous statutory paths to establishing paternity. *In re MKK*, 286 Mich App at 557. There is no indication in the plain language of any of these statutes that the Legislature intended to limit the path to establishing maternity to the single route of demonstrating a genetic connection.

In addition, the trial court relied on the public-policy rationale provided in *Belsito v Clark*, 67 Ohio Misc 2d 54. We do not find this case by the Ohio Court of Common Pleas to be persuasive. In that case, the plaintiffs, Anthony and Shelly Belsito, a heterosexual married couple, used in vitro fertilization to combine their own genetic material and produce an embryo that was implanted into a surrogate, Carol Clark (Shelly's younger sister). *Id*. at 56. Before the child was born, the local hospital informed Shelly that, in accordance with Ohio law, Carol would be listed on the birth certificate as the child's mother, and because Carol was not married to the child's father, Anthony, the child would be considered illegitimate. *Id*. at 58. Thereafter, Shelly, along with Anthony, sought a declaratory order recognizing that they were the child's legal and natural parents. *Id*. The court concluded that, although both Shelly and Carol would be considered legal mothers under the language of the applicable Ohio statutes, society would be served best by a determination that only one woman was the child's mother. *Id*. at 58, 65-66.

On public-policy grounds, the Ohio court rejected the "intent test" adopted by California courts whereby parentage was awarded to the intended parent. *Id*. at 61-62. Instead, the court, without reliance on any legal authority, concluded that in such cases, genetics wins out over gestation because the "genetic parent can guide the child from experience through the strengths and weaknesses of a common ancestry of genetic traits." *Id*. at 64. However, our Supreme Court has stated that "[i]t is not within the authority of the judiciary 'to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy.' " *Lash v Traverse City*, 479 Mich 180, 197; 735 NW2d 628 (2007), quoting *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 504; 638 NW2d 396 (2002).

Therefore, we vacate the trial court's final order and remand this case for the trial court to consider custody and parenting time with both parties as "natural parents" under the CCA.

IV. THE SURROGATE PARENTING ACT

Defendant also argues that the trial court erred when it concluded that the SPA applies to the facts of this case. We agree but conclude that the trial court's misapplication of the law does not require reversal.[3]

The SPA governs surrogacy agreements. MCL 722.855 renders invalid surrogate-parentage con-

[3] At the outset, we note that defendant has waived this issue by initially arguing in the trial court, during the May 7, 2019 hearing regarding plaintiff's standing, that the SPA *applies*. Now on appeal, defendant reverses course and argues that the trial court erred when it concluded that the SPA applies. "A waiver is a voluntary and intentional abandonment of a known right." *Braverman v Granger*, 303 Mich App 587, 608; 844 NW2d 485 (2014) (quotation marks and citation omitted). "A party cannot stipulate [to] a matter and then argue on appeal that the resultant action was error." *Holmes v Holmes*, 281 Mich App 575, 588; 760 NW2d 300 (2008) (quotation marks and citation omitted). "A party who waives a right is precluded from seeking appellate review based on a denial of that right because waiver eliminates any error." *The Cadle Co v Kentwood*, 285 Mich App 240, 255; 776 NW2d 145 (2009). To allow a party to assign error on appeal to something that he or she deemed proper in the lower court would be to permit that party to harbor error as an appellate parachute. *In re Hudson*, 294 Mich App 261, 264; 817 NW2d 115 (2011). Although an issue has been waived, we "may overlook the preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented." *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008) (quotation marks and citation omitted). Moreover, when the trial court "incorrectly chooses, interprets, or applies the law, it commits legal error that the appellate court is bound to correct." *Fletcher*, 447 Mich at 881. Accordingly, we address defendant's argument on appeal.

tracts. MCL 722.853(i) defines "surrogate parentage contract" as follows:

> [A] contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination, or in which a female agrees to surrogate gestation, and to *voluntarily relinquish her parental or custodial rights to the child*. It is presumed that a contract, agreement, or arrangement in which a female agrees to conceive a child through natural or artificial insemination by a person other than her husband, or in which a female agrees to surrogate gestation, includes a provision, whether or not express, that the female will relinquish her parental or custodial rights to the child. [Emphasis added.]

In turn, "surrogate gestation" means "the implantation in a female of an embryo not genetically related to that female and subsequent gestation of a child by that female." MCL 722.853(g). In addition, MCL 722.861 provides:

> If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in [the CCA, MCL 722.23].

There is no doubt that the parties had an arrangement, though not at arm's length, for plaintiff to provide the eggs and for defendant to carry and birth the twins. However, we have previously explained that the voluntary relinquishment of parental rights is a necessary element to finding that a surrogate-parentage contract exists:

> The statutory language clearly defines "a surrogate parentage contract" as consisting of two elements: (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) her voluntary relinquishment of her parental rights to the child. Only a contract, agreement, or arrangement combining these two elements constitutes a "surrogate parentage contract" that is void and unenforceable under the act.
>
> * * *
>
> To summarize, we hold:
>
> (1) A surrogate parentage contract is void and unenforceable under § 5;
>
> * * *
>
> (3) For a surrogate parentage contract to exist there must be present the elements of (1) conception, through either natural or artificial insemination, of, or surrogate gestation by a female and (2) the voluntary relinquishment of her parental rights to the child; and
>
> (4) A contract, agreement, or arrangement that does not contain both elements set forth in (3) above is neither void and unenforceable under § 5 nor unlawful and prohibited by § 9, even when entered into for compensation. [*Doe v Attorney General*, 194 Mich App 432, 441-443; 487 NW2d 484 (1992).]

MCL 722.853(i) does not state that the presumption of relinquishment of parental rights is conclusive,[4] but it also does not indicate what level of proof is required to rebut the presumption of relinquishment. Therefore, we must use the "the usual standard required to

[4] A statutory conclusive presumption may not be rebutted by other evidence. *Pearo v Mackinac Island*, 307 Mich 290, 293; 11 NW2d 893 (1943). In the absence of any language indicating that a statutory presumption is conclusive, we decline to make such an inference. *Maier v Gen Tel Co of Mich*, 247 Mich App 655, 662; 637 NW2d 263 (2001).

overcome a rebuttable presumption: competent and credible evidence." *Reed v Breton*, 475 Mich 531, 539; 718 NW2d 770 (2006). In addition, when a statute does not specify the standard of proof, the usual civil "preponderance of the evidence" quantum of proof applies. *Mayor of Cadillac v Blackburn*, 306 Mich App 512, 521-522; 857 NW2d 529 (2014); *Residential Ratepayer Consortium v Pub Serv Comm*, 198 Mich App 144, 149; 497 NW2d 558 (1993).[5]

The trial court did not make any finding on whether the evidence in this case successfully rebutted the statutory presumption of relinquishment of parental rights in MCL 722.853(i). However, the parties testified that they intended to coparent the twins, and the clinic forms filled out by the parties at the time of the in vitro fertility treatments state that the parties intended a comaternity arrangement. In any event, the trial court does not need to consider this issue on remand because, even assuming the SPA applies, MCL 722.861 of the SPA directs the trial court to consider the best-interest factors in the CCA when determining legal custody.[6] Notably, the SPA

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[5] MRE 301, entitled "Presumptions in Civil Actions and Proceedings," explains the effect of rebuttable presumptions:

> In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

[6] As already noted, MCL 722.861 states:

> If a child is born to a surrogate mother or surrogate carrier pursuant to a surrogate parentage contract, and there is a dispute between the parties concerning custody of the child, the party having physical custody of the child may retain physical

does not indicate that the surrogate mother is a third party under the CCA, nor does it cross-reference any other provision of the CCA. Nor does MCL 722.23 (the CCA's best-interest factors) cross-reference MCL 722.25(1) (the parental-presumption provision of the CCA). But because the CCA is the exclusive means of pursuing child custody rights,[7] there is no reason to conclude that MCL 722.25(1), which provides that the best interests of the child are served by awarding custody to the child's parent or parents unless there is clear and convincing evidence to the contrary, is inapplicable. In other words, even if the SPA applies, defendant remains a "natural parent" under the CCA, as already discussed, and the trial court's erroneous conclusion that the SPA applies does not alter the outcome of the case.

V. CONSTITUTIONAL CLAIMS

Defendant also argues that the trial court's order violates her constitutional rights under the Equal Protection Clause and Due Process Clause of the United States Constitution.[8] However, because we conclude that the trial court erred in its interpretation of the CCA and misapplied the SPA in this case, we need not address defendant's remaining constitutional arguments. See *Dep't of Health & Human Servs v Genesee Circuit Judge*, 318 Mich App 395, 407; 899 NW2d 57 (2016) (noting that the widely accepted and

custody of the child until the circuit court orders otherwise. The circuit court shall award legal custody of the child based on a determination of the best interests of the child. As used in this section, "best interests of the child" means that term as defined in [the CCA, MCL 722.23].

[7] *Aichele*, 259 Mich App at 153.

[8] See US Const, Am XIV.

venerable rule of constitutional avoidance counsels that we first consider whether statutory or general law concepts are instead dispositive).

VI. CONCLUSION

The trial court erred when it concluded that defendant is not a "natural parent" under the CCA because she lacks a genetic link to the twins whom she carried through gestation and birthed.[9] Accordingly, we vacate the custody order and remand this case to the trial court for a new custody hearing in which both parties are considered parents.

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

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[9] We conclude that the term "natural parent" is elastic enough to include both parents in this case, where the parties divided the female reproductive roles of conceiving a child so that each has assumed a function traditionally used to evidence a legal maternal relationship. However, we note that the advent of assisted reproductive technology has complicated an area of law that traditionally was fairly straightforward. The statutes at play in this case—specifically the CCA and the SPA (the latter being passed in 1988, 1988 PA 199)—were written and enacted in an era when modern forms of assisted reproductive technology that are commonly used today were considered science fiction, and the cutting-edge technology being developed now was unimaginable then. Certainly, the common law could not have anticipated the fairly common circumstances of the parties in this case, let alone the circumstances of families where one child has three genetic parents, or where a child is produced from the DNA of one egg fertilizing a second egg, or where a child has two genetic fathers and no genetic mother. Our current statutory schemes are poor vehicles for modern-made families to seek relief, and we question whether they are robust enough in their current form to provide equitable outcomes to such families. These new technologies have thrown a wrench into the legal understanding of parentage and have given rise to novel issues in contract law, insurance coverage, immigration law, and estate planning. Accordingly, we anticipate that the Legislature will need to modernize the law to keep pace with technological advancements and to appropriately balance various public-policy concerns.

GLEICHER, P.J. (*concurring*). Kyresha LeFever and Lanesha Matthews agreed to create and parent a child together. Using assisted reproductive technology, their efforts resulted in the birth of twins. The majority holds that both women are legal mothers of the twins. I fully concur.

As the majority cogently explains, the trial court erred by interpreting the Surrogate Parenting Act (SPA), MCL 722.851 *et seq*., as an impediment to the parental standing of Matthews, who bore the children. No surrogacy contract existed and neither woman agreed to relinquish her parental rights, removing this case from the SPA's ambit. The trial court further erred, the majority points out, by plucking excerpts from other unrelated, inapplicable statutory provisions in an effort to condition a mother's right to parent on a genetic relationship. I write separately to propose an additional analysis and to address the constitutional questions the majority abjures.

I. THE COMMON LAW AND THE CHILD CUSTODY ACT

The novel legal issue presented in this custody dispute is whether Matthews, who bore twins while in a committed, nonmarital relationship with LeFever, is entitled to be recognized as the children's mother. Given that LeFever supplied the ova that were fertilized by donor sperm and implanted in Matthews's uterus, the trial court determined that only LeFever qualified as the twins' "natural parent." Matthews, the trial court ruled, was a "third party" entitled to none of the rights of parenthood. In rejecting the trial court's reasoning and ruling, the majority centers its analysis on the Child Custody Act (CCA), MCL 722.21 *et seq*., specifically the act's definition of "parent" as "the natural or adoptive parent of a child." MCL 722.22(i).

My colleagues devote considerable effort to unraveling the meaning of "natural parent," consulting four different dictionaries before ultimately concluding that the term "is elastic enough to include" a child's birth mother.[1]

This dictionary-driven search for a suitable definition is unnecessary. A woman who gives birth to a child is that child's natural mother under the common law, and there is no reason to look elsewhere for the meaning.

For centuries, "natural mother" has meant a woman who gestates and bears a child; the common law knew no other possibility. "Historically, gestation

[1] The majority also unnecessarily relies on dicta in *Stankevich v Milliron*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2013 (Docket No. 310710), p 2 (*Stankevich I*), defining a "natural parent" as "related by blood." (Cleaned up.) *Stankevich I* arose from a custody suit brought by a woman whose wife gave birth to the couple's child. The panel granted summary disposition to the defendant, holding that the plaintiff lacked standing because she was not a "natural parent." *Id*. Relying on a dictionary, *Stankevich I* held that as used in the phrase "natural parent," "natural" meant " 'related by blood rather than by adoption: one's natural parents.' " *Id*. (quotation marks, citation, and emphasis omitted). Our Supreme Court vacated *Stankevich I* based on *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015), and remanded for further proceedings. *Stankevich v Milliron*, 498 Mich 877 (2015) (*Stankevich II*). On remand and in recounting the history of the case, this Court "noted" its holding in *Stankevich I* that the plaintiff was not a "natural parent" because she was not "related to the child by blood" but held that because of the parties' marriage, the plaintiff was "not barred from asserting" the "equitable-parent doctrine" described in *Atkinson v Atkinson*, 160 Mich App 601; 408 NW2d 516 (1987). *Stankevich v Milliron (On Remand)*, 313 Mich App 233, 236, 240; 882 NW2d 194 (2015) (*Stankevich III*). The "related by blood" definition advanced in *Stankevich I* was inconsequential to the holding of *Stankevich III* and has no precedential force. The term that requires interpretation in this case is "natural parent," the phrase the Legislature selected, rather than a term identified by an appellate court in a now-vacated opinion.

proved genetic parentage beyond doubt, so it was unnecessary to distinguish between gestational and genetic mothers." Roosevelt, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 Santa Clara L Rev 79, 97 (1998). This case involves children born to lesbian women who were legally prohibited from marrying at the time of the children's conception. Under the common law, an unmarried woman who gave birth was always considered the mother and had no need to legally establish her custodial rights. "At the moment of birth, the nonmarital child—unlike the marital child—had one legal parent: the mother. Gestation and birth evidenced the biological fact of maternity and furnished a relationship to the child that justified legal recognition." NeJaime, *The Nature of Parenthood*, 126 Yale LJ 2260, 2267 (2017).[2]

When the CCA was enacted in 1970, the Legislature undoubtedly assumed that a woman who bore a child would automatically qualify as the child's natural mother; it made no provision for an alternate choice, and nothing in the act even remotely contemplates a dispute regarding maternity. Three decades later, when enacting the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., the Legislature described various methods through which a man may attain the status of a "natural parent," but it again presumed that a woman bearing a child was the child's

[2] See also Roberts, *The Genetic Tie*, 62 U Chi L Rev 209, 253 (1995) ("At common law, a woman was the legal mother of the child to whom she gave birth."); D'Alton-Harrison, Abstract, *Mater Semper Incertus Est: Who's Your Mummy?*, 22 Medical Law Rev 357, 357 (2014) ("In English law, the legal term for father has been given a broad definition but the definition of mother remains rooted in biology with the Roman law principle *mater semper certa est* (the mother is always certain) remaining the norm.").

"natural" mother. See MCL 700.2114. Because the plain and ordinary meaning of the term "natural parent" includes a woman who bears a child, I would hold that Matthews is a "natural parent."[3] Accordingly, I concur with the majority that a genetic connection to one's child is unnecessary to establish maternity.

II. THE CONSTITUTION

The majority elects against addressing the constitutional arguments made by Matthews and amici.[4] In my view, the constitutional issues presented are weighty and merit consideration, particularly because they may become relevant on remand and in similar cases.

Excluding a *married* birth mother who achieved parenthood through assisted reproductive technology from consideration as a "natural parent" poses serious equal-protection problems. Michigan law provides that a husband is the legal parent of a child born to his wife through assisted reproduction technology if he consented to the procedure. MCL 333.2824(6). Analogously, a married woman in a same-sex relationship should have precisely the same right.

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[3] The CCA also uses the term "biological parent" in several places; see, e.g., MCL 722.26c(1)(b)(*i*), MCL 722.27a(4), and MCL 722.25(2). "Biological parent" is not defined in the act. In a brief order, our Supreme Court equated the term "biological parent" with "natural parent," but limited its statement to "the circumstances of this case[.]" *Porter v Hill*, 495 Mich 987, 987 (2014). Why did the Legislature choose the word "biological" and not "genetic"? The CCA was enacted in 1970, while the sections containing the world "biological" were added later. Having given birth to the twins, Matthews is, indisputably, their "biological parent."

[4] We had the benefit of two helpful amicus curiae briefs—one filed on behalf of a number of professors of family law and the other by the American Civil Liberties Union of Michigan.

Matthews and LeFever could not have legally married in Michigan when the twins were born, and when they separated, same-sex marriage remained illegal. At that time, the common law did not authorize or even recognize the concept of two legal fathers. See *Michael H v Gerald D*, 491 US 110, 118; 109 S Ct 2333; 105 L Ed 2d 91 (1989) (opinion by Scalia, J.) ("California law, like nature itself, makes no provision for dual fatherhood."). Before *Obergefell v Hodges*, 576 US 644; 135 S Ct 2584; 192 L Ed 2d 609 (2015), dual motherhood was also considered legally impossible. See *Johnson v Calvert*, 5 Cal 4th 84, 92; 851 P2d 776 (1993) ("Yet for any child California law recognizes only one natural mother, despite advances in reproductive technology rendering a different outcome biologically possible.").

The majority relies on the CCA to conclude that here, both women have parental standing, but it takes as a given that an unmarried egg donor such as LeFever is automatically a second "natural parent" under the CCA. The CCA does not identify genetics as a criterion establishing parenthood. Historically, when it came to paternity, genetics were not relevant to the fatherhood of a child born of a marriage; the marital presumption instead controlled.[5] The sperm donor who fertilized the eggs implanted in Matthews's uterus certainly is not a candidate for official fatherhood of the twins. Why should LeFever, whose role was analogous to the sperm donor, have automatic standing under the CCA?

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[5] "Under what became known as 'Lord Mansfield's Rule,' a husband was presumed to be the father of his wife's child and a declaration of the father or mother could not be admitted to bastardize the issue born after marriage." *Aichele v Hodge*, 259 Mich App 146, 157-158; 673 NW2d 452 (2003) (quotation marks and citations omitted).

I suggest that this gap in the majority's opinion remains unaddressed because the majority inherently accepts an unarticulated proposition: by donating genetic material, LeFever demonstrated her *intent* to parent, and that, combined with the commitment of her ova, sufficed to endow her with "natural parent" status.

In *DMT v TMH*, 129 So3d 320, 327 (Fla, 2013), the Florida Supreme Court confronted precisely this issue. There, the mother who gestated and bore the child asserted that her partner, the egg donor, had no fundamental right to parent the child. The Florida Supreme Court held that Florida's assisted reproduction statute was unconstitutional on due-process and equal-protection grounds, in part because it denied same-sex couples "the statutory protection against the automatic relinquishment of parental rights that it affords to heterosexual unmarried couples seeking to utilize the identical assistance of reproductive technology." *Id*. at 328. The Michigan and Florida statutory schemes are dissimilar. But the larger constitutional holding of Florida's Supreme Court resonates: "The due process guarantees in the Florida and United States Constitutions and the privacy provision of the Florida Constitution do not permit the State to deprive this biological mother of parental rights where she was an intended parent and actually established a parental relationship with the child." *Id*. at 347.

This approach dovetails with the purpose of the CCA: "This act is equitable in nature and shall be liberally construed and applied to establish promptly the rights of the child and the rights and duties of the parents involved." MCL 722.26(1). A "natural parent" paradigm focusing exclusively on genetics would exclude Matthews as a parent, despite that she birthed

the children and intended to parent them. Similarly, a "natural parent" paradigm focusing exclusively on gestation and birth would exclude LeFever from establishing her status as a parent, despite that she intended to parent the twins and her egg donation demonstrated her commitment to parenthood. Indisputably, LeFever is also a "natural parent" despite that there was nothing "natural" about the process through which the twins were conceived. In the majority's parlance, the CCA's use of the term "natural parent" is "elastic enough" to include LeFever as well as Matthews.

LeFever and Matthews also have a *constitutional* right to the custody of their children. Our Supreme Court has described the CCA as "a comprehensive statutory scheme" representing "the exclusive means for pursuing" rights to a child's custody, support, and parenting time. *Van v Zahorik*, 460 Mich 320, 327-328; 597 NW2d 15 (1999). As the majority points out, the CCA does not specifically address the unique question presented in this case. The United States Constitution fills this gap. Longstanding constitutional principles compel the conclusion that both LeFever and Matthews are legal parents of the twins and are entitled to a full complement of parental rights.

"The essence of the Equal Protection Clauses is that the government not treat persons differently on account of certain, largely innate, characteristics that do not justify disparate treatment." *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). The Genetic Parentage Act (GPA), MCL 722.1461 *et seq*., permits a man to establish paternity by way of genetic testing and to then acquire parental rights. The Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*., grants an unmarried man who claims to be the father of a child standing to challenge paternity determinations under

certain circumstances. No " 'exceedingly persuasive justification' " exists for treating men and women differently. *Mississippi Univ for Women v Hogan*, 458 US 718, 724; 102 S Ct 3331; 73 L Ed 2d 1090 (1982) ("Our decisions also establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification.") (citation omitted).

The GPA, MCL 722.1469(2) provides, in relevant part:

> Genetic testing that determines the man is the biological father of a child under this act may be the basis for court-ordered child support, custody, or parenting time without further adjudication under the paternity act. The child who is the subject of the genetic testing has the same relationship to the mother and the man determined to be the biological father under this act as a child born or conceived during a marriage and has identical status, rights, and duties of a child born in lawful wedlock effective from birth.

A genetically proven mother is entitled to the same "status, rights, and duties," *id*., as a genetically proven father, despite that she is unmarried to the birth mother. Under the EPIC, when a child is born out of wedlock or is not the "issue" of a marriage, a man is considered a child's "natural father" for purposes of intestate succession if he and the child "have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either." MCL 700.2114(1)(b)(*iii*). Interpreting this statute as allowing only men to utilize and benefit from alternative methods of establishing "natural parenthood" would violate basic equal-protection principles.

Further, LeFever and Matthews had a constitutional right to create the twins in the manner they chose, and it follows that both women have constitutionally protected due-process rights to parent the twins despite their nonmarital status. That Matthews lacks a genetic relationship with the twins is constitutionally irrelevant to her liberty interest in their custody. And even had she not personally gestated and birthed the children (or had an ovum from a donor other than LeFever been implanted in Matthews's womb), I suggest that both women would nonetheless be entitled to be considered parents of the twins.

"[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.). *Troxel* drew on a number of cases expressing the same sentiment, including *Wisconsin v Yoder*, 406 US 205, 232; 92 S Ct 1526; 32 L Ed 2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); and *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."). *Troxel*, 530 US at 66.

Had Matthews and LeFever been able to marry at the time the twins were born, it is likely both would have been named as parents on the birth certificates. This Court has developed an equitable-parent doctrine designed to permit *married*, nonbiological parents to se-

cure parental rights. In *Atkinson v Atkinson*, 160 Mich App 601, 608-609; 408 NW2d 516 (1987), we held that

> a husband who is not the biological father of a child born or conceived during the marriage may be considered the natural father of that child where (1) the husband and the child mutually acknowledge a relationship as father and child, or the mother of the child has cooperated in the development of such a relationship over a period of time prior to the filing of the complaint for divorce, (2) the husband desires to have the rights afforded to a parent, and (3) the husband is willing to take on the responsibility of paying child support.

Our Supreme Court has refused to apply the equitable-parent doctrine to an unwed nonbiological parent, however, holding that "the extension of substantive rights regarding child custody implicates significant public policy issues and is within the province of the Legislature, not the judiciary." *Van*, 460 Mich at 331.

Here, we confront a biological tie that makes the case for equitable parenthood stronger. And in the years that have elapsed since *Van*, our Legislature has signaled that neither marriage nor biology are central to parenthood. In addition to allowing unmarried men to establish paternity under the GPA, the Legislature allows an unmarried man to pursue parental rights under the ROPA. The ROPA defines an "alleged father" as "a man who by his actions could have fathered [a] child." MCL 722.1433(c). An "alleged father" may pursue an action to deprive a "presumed father," defined as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth," MCL 722.1433(e), of parental rights. By enacting this statute, the Legislature empowered unmarried men to seek parental

rights, signaling that marriage is not a prerequisite to legal parent status and custody of a child.[6]

Indeed, as Justice MARILYN KELLY pointed out in her dissent in *Van*, the CCA says nothing at all about biology or marriage and never defines the term "parent." *Van*, 460 Mich at 343, 346 (KELLY, J., dissenting). Given that "[o]ne-in-four parents living with a child in the United States today are unmarried," and that more than 24 million children in this county now live with an unmarried parent, conditioning custodial rights on marriage serves no legitimate interests, particularly those of the involved children. Livingston, *The Changing Profile of Unmarried Parents*, Pew Research Center, April 25, 2018, available at <https://www.pewresearch.org/social-trends/2018/04/25/the-changing-profile-of-unmarried-parents/> (accessed March 15, 2021) [https://perma.cc/8YCK-BLG5]. As Justice KELLY presciently observed, "when child custody or visitation is at issue, the Legislature has decreed that the overriding concern is not the ultimate preservation by the state of the institution of marriage. It is, instead, the attainment of the best interests of the children." *Van*, 460 Mich at 346 (KELLY, J., dissenting).

Applying the equitable and due-process principles described in a century of Supreme Court jurisprudence regarding parenthood and families, I conclude that unmarried parents in same-sex relationships who do not avail themselves of the sophisticated reproductive technology used by these parties should nevertheless be considered "natural parents" under Michigan law. Matthews and LeFever were able to afford a technology that

[6] See also MCL 722.1003(1) ("If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage.").

provided both of them with a biological connection to their child. Two men in a committed but unmarried same-sex relationship would not be able to avail themselves of that option, and for some lesbian couples, shared biology may also be impossible.

"[B]iological relationships are not the exclusive determination of the existence of a family. . . . No one would seriously dispute that a deeply loving and interdependent relationship between an adult and a child in his or her care may exist even in the absence of blood relationship." *Smith v Org of Foster Families for Equality & Reform*, 431 US 816, 843-844; 97 S Ct 2094; 53 L Ed 2d 14 (1977). See also *Stanley v Illinois*, 405 US 645, 652; 92 S Ct 1208; 31 L Ed 2d 551 (1972) (declaring that an unmarried father's "interest in retaining custody of his children is cognizable and substantial"). Matthews and LeFever share a liberty interest in the twins created by both biology and an established parental relationship. I suggest that *Van*'s logic has been undermined by the GPA and the ROPA, which opens the door to parental rights for unmarried fathers. Due-process and equal-protection principles similarly open the door to parental rights for unmarried, same-sex parents to enjoy the rights and obligations of parenthood.

PEOPLE v JOHNSON

Docket No. 351308. Submitted January 13, 2021, at Grand Rapids. Decided April 8, 2021, at 9:00 a.m. Leave to appeal sought. Oral argument ordered on the application 508 Mich 963 (2021).

Travis M. Johnson pleaded guilty in the Alpena Circuit Court to resisting or obstructing a police officer, MCL 750.81d(1). The trial court, Michael G. Mack, J., placed defendant on probation and ordered a one-year delayed sentence. Defendant later pleaded no contest to aggravated domestic violence, second offense, MCL 750.81a(3), and interference with electronic communications, MCL 750.540(5)(a). The trial court revoked defendant's delayed sentence and sentenced him to time served for resisting or obstructing and interference with electronic communications, and to 13 months to 5 years' imprisonment for aggravated domestic violence. The court also assessed a total of $1,200 in court costs pursuant to MCL 769.1k(1)(b)(*iii*). Defendant filed a delayed application for leave to appeal in the Court of Appeals arguing that MCL 769.1k(1)(b)(*iii*) was facially unconstitutional. The Court of Appeals granted the application.

The Court of Appeals *held*:

A facial constitutional challenge to a statute attacks the statute itself and requires the challenger to establish that no set of circumstances exists under which the act would be valid. MCL 769.1k(1)(b)(*iii*) provides that a court may impose any cost on a convicted defendant that is reasonably related to the actual costs incurred by the trial court, including salaries and benefits for court personnel, goods and services necessary for the operation of the court, and necessary expenses for the operation and maintenance of court buildings and facilities. According to defendant, MCL 769.1k(1)(b)(*iii*) provides judges with a financial incentive to convict defendants so that they can then order the defendant to pay costs with the monies collected and used to fund the courts in which the judges preside, depriving criminal defendants of their right to appear before an impartial judge and violating separation-of-powers principles. Regarding impartiality, the degree or kind of financial interest that is sufficient to disqualify a judge from sitting cannot be defined with precision. The United States Supreme

Court has stated that every procedure that would offer a possible temptation to the average person in the role of a judge to forget the burden of proof required to convict a defendant, or which might lead them not to "hold the balance nice, clear and true" between the state and the accused, denies the defendant due process. Here, contrary to defendant's argument that a trial court's discretion to impose costs is unconstrained under the statute, MCL 769.1k(1)(b)(*iii*) requires costs imposed by the trial court to have a factual basis and to be reasonably related to the actual costs incurred by the court. The statute does not provide trial courts with the authority to increase the costs imposed on defendants as a means for generating more revenue. Moreover, there was no evidence in this case of a direct correlation between the court costs imposed and the money received by the court that imposed the costs. That is, although MCL 769.1k(1)(b)(*iii*) is undeniably a revenue-generating statute, defendant did not show that it also authorizes courts to administer the revenue collected pursuant to it. Thus, defendant did not establish the type of direct nexus between a judge's compensation and any fees or costs imposed that has been required in other cases to establish a due-process violation. Regarding separation-of-powers principles, defendant contended that MCL 769.1k(1)(b)(*iii*) is unconstitutional because in enacting it the Legislature effectively created a court-funding system that interferes with the judiciary's obligation to maintain impartiality in criminal proceedings and with its authority to maintain and administer rules regulating judicial impartiality. In determining whether a statute disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which the act prevents one branch from accomplishing its constitutionally assigned functions. However, defendant did not show that the statute created a situation in which no set of circumstances existed under which a judge in the state could be impartial. Nothing in the plain language of the statute directs the flow of money or creates a funding system for the trial courts. Therefore, defendant did not establish that under MCL 769.1k(1)(b)(*iii*) it is impossible for trial courts to fulfill their constitutional mandates or that it is facially unconstitutional.

Affirmed.

SHAPIRO, J., dissenting, would have held that MCL 769.1k(1)(b)(*iii*) is unconstitutional because it violates due process, allows the amount imposed to vary from county to county and from judge to judge, and infringes the authority of the judiciary as a coequal branch of government. The statute does not actually impose a tax; rather, the statute imposes a fine on individuals who

have been convicted of a crime. MCL 769.1k(1)(b)(*iii*) requires courts to do exactly what Michigan's several constitutions have all barred—take money from convicted defendants and use it to fund the courts' operations, including the payment of judicial salaries. Making judges impose and collect costs from those who appear before them, at minimum, creates an appearance of impropriety. If these assessments were genuinely a tax, they would be applied to all litigants, or at least to all nonprevailing litigants, and not just to convicted defendants; there is no rational basis to apply court costs only to convicted criminal defendants. Court costs assessed only against convicted defendants are fines. Because they are not authorized by the statute defining the relevant crime, they may not be imposed.

CRIMINAL LAW — SENTENCING — COSTS — CONSTITUTIONALITY — DUE PROCESS.

MCL 769.1k(1)(b)(*iii*) provides that a court may impose any cost on a convicted defendant that is reasonably related to the actual costs incurred by the trial court; MCL 769.1k(1)(b)(*iii*) does not infringe a defendant's right to due process by violating their right to an impartial judge.

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

State Appellate Defender (by *Angeles R. Meneses*) for Travis M. Johnson.

Amicus Curiae:

Rubina Mustafa and *Geoffrey Leonard* for the Detroit Justice Center.

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

BECKERING, J. At issue in this criminal appeal is the constitutionality of MCL 769.1k(1)(b)(*iii*). MCL 769.1k(1)(b)(*iii*) permits a trial court to impose court costs on a convicted defendant that are reasonably related to the actual costs incurred in processing a criminal case. This statute has been the subject of

much scrutiny of late, both in our caselaw and by task forces and organizations seeking to ensure that our judicial system runs fairly and equitably, especially for our most economically vulnerable citizens and with respect to potential pressures placed on judges by local court funding sources. Defendant Travis Michael Johnson, whose case is before us on delayed leave granted,[1] raises a facial challenge to MCL 769.1k(1)(b)(*iii*), claiming it deprives criminal defendants of their due-process right to an impartial decision-maker and violates separation-of-powers principles. While we leave open the question whether a successful as-applied challenge could be made under certain presenting circumstances, in answer to the only legal questions squarely before us, we disagree that the statute is facially unconstitutional.

I. BASIC FACTS

Defendant pleaded guilty to resisting or obstructing a police officer, MCL 750.81d(1). The trial court placed him on probation and ordered a one-year delayed sentence. At a subsequent probation-violation hearing, defendant pleaded no contest to aggravated domestic violence, second offense, MCL 750.81a(3), and interference with electronic communications, MCL 750.540(5)(a). The trial court revoked defendant's delayed sentence and sentenced him to serve 138 days in jail for resisting or obstructing a police officer and 138 days in jail for interference with electronic communications, with 138 days of jailtime credit, and 13 months to 5 years' imprisonment for aggravated domestic violence. The court also assessed $600 in court costs in each lower-court file, for a total of $1,200.

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[1] *People v Johnson*, unpublished order of the Court of Appeals, entered December 27, 2019 (Docket No. 351308).

II. DISCUSSION

We review de novo constitutional issues and matters involving statutory interpretation. *People v Brown*, 330 Mich App 223, 229; 946 NW2d 852 (2019). A statute challenged on constitutional grounds "is presumed to be constitutional and will be construed as such unless its unconstitutionality is clearly apparent." *People v Solloway*, 316 Mich App 174, 184; 891 NW2d 255 (2016) (quotation marks and citation omitted).

"A constitutional challenge to the validity of a statute can be brought in one of two ways: by either a facial challenge or an as-applied challenge." *In re Forfeiture of 2000 GMC Denali & Contents*, 316 Mich App 562, 569; 892 NW2d 388 (2016). A facial challenge attacks the statute itself and requires the challenger to " 'establish that no set of circumstances exists under which the [a]ct would be valid. The fact that the . . . [a]ct might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . .' " *Council of Organizations & Others for Ed About Parochiaid, Inc v Governor*, 455 Mich 557, 568; 566 NW2d 208 (1997) (alterations in original), quoting *United States v Salerno*, 481 US 739, 745; 107 S Ct 2095; 95 L Ed 2d 697 (1987). An as-applied challenge alleges " 'a present infringement or denial of a specific right or of a particular injury in process of actual execution' of government action." *Bonner v City of Brighton*, 495 Mich 209, 223 n 27; 848 NW2d 380 (2014), quoting *Village of Euclid v Ambler Realty Co*, 272 US 365, 395; 47 S Ct 114; 71 L Ed 303 (1926).

Defendant does not argue that the trial judge in his case failed to act impartially when deciding to impose court costs under MCL 769.1k(1)(b)(*iii*). Rather, the thrust of his argument is that MCL 769.1k(1)(b)(*iii*)

operates in the state of Michigan to deprive all criminal defendants of their due-process right to appear before an impartial decision-maker because the statute incentivizes all judges to convict criminal defendants and impose court costs to raise revenue for the courts. This argument sets forth a facial challenge to the constitutionality of the statute at issue.[2] Accordingly, defendant "must establish that no set of circumstances exists under which the act would be valid." *Council of Organizations*, 455 Mich at 568 (quotation marks, citation, and alteration omitted).

The United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." US Const, Am XIV.[3] "It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Caperton v AT Massey Coal Co, Inc*, 556 US 868, 876; 129 S Ct 2252;

[2] The Detroit Justice Center (DJC) filed a brief as amicus curiae of defendant, attaching a copy of a pamphlet entitled "Highway Robbery: How Metro Detroit Cops & Courts Steer Segregation and Drive Incarceration." Although the DJC asserts that the statute at issue is unconstitutional because it deprives defendants of an unbiased decision-maker, the gravamen of its argument is that all fines, fees, and costs assessed for minor traffic offenses by Michigan courts in general, and Detroit courts in particular, have a disproportionate impact on poor people and on people of color. The DJC's argument goes more to an as-applied challenge than to a facial challenge.

[3] The Michigan Constitution provides, "No person shall be . . . deprived of life, liberty or property, without due process of law." Const 1963, art 1, § 17. Defendant does not state whether his argument is based on violation of due-process guarantees provided by the federal or the state Constitution. This Court has previously held that the "due process guarantee of the Michigan Constitution is coextensive with its federal counterpart." *Grimes v Van Hook-Williams*, 302 Mich App 521, 530; 839 NW2d 237 (2013). In his due-process argument, defendant cites caselaw applying only the federal Constitution. Therefore, we presume that defendant bases his challenge on an alleged violation of the federal Constitution and will analyze his argument accordingly.

173 L Ed 2d 1208 (2009) (quotation marks, citation, and brackets omitted). "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v Jerrico, Inc*, 446 US 238, 242; 100 S Ct 1610; 64 L Ed 2d 182 (1980). Among other things,

> [t]his requirement of neutrality in adjudicative proceedings . . . preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," *Joint Anti-Fascist Committee v McGrath*, 341 US 123, 172[; 71 S Ct 624, 649; 95 L Ed 817] (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. [*Id*.]

At the time defendant was sentenced, MCL 769.1k(1) provided, in relevant part:

> If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> (a) The court shall impose the minimum state costs as set forth in [MCL 769.1j].
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.
>
> (*ii*) Any cost authorized by the statute for a violation of which the defendant entered a plea of guilty or nolo contendere or the court determined that the defendant was guilty.

> (*iii*) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law,[4] *any cost reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case, including, but not limited to, the following*:
>
> (A) Salaries and benefits for relevant court personnel.
>
> (B) Goods and services necessary for the operation of the court.
>
> (C) Necessary expenses for the operation and maintenance of court buildings and facilities. [MCL 769.1k(1), as amended by 2014 PA 352 (emphasis added).]

Defendant contends in his brief to this Court that MCL 769.1k(1)(b)(*iii*) "provides a financial incentive for trial judges to see that criminal defendants are convicted so that they can then order the defendant to pay costs, which can then be used to fund the courts in which the judges preside." He further contends that this funding scheme deprives criminal defendants of their right to appear before an impartial judge and violates separation-of-powers principles by preventing "the judicial branch from carrying out its constitutionally assigned functions of maintaining impartiality in criminal trials and . . . maintaining and enforcing rules requiring that trial judges remain impartial in criminal proceedings." Defendant suggests that as a result of this arrangement, "all trial court judges lack neutrality in criminal proceedings [and] no trial court judge can accomplish his or her constitutionally assigned function of overseeing criminal trials."

As an initial matter, we question whether the "financial incentive[s] for trial judges to see that criminal defendants are convicted" are operative in cases such

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[4] The "sunset" date in MCL 769.1k(1)(b)(*iii*) has been periodically amended and is currently October 1, 2022. See 2020 PA 151.

as this one, involving defendants who choose to plead guilty and do not argue that their pleas were improperly entered and in which the costs imposed meet statutory requirements. Next, the degree or kind of financial interest that "is sufficient to disqualify a judge from sitting cannot be defined with precision." *Caperton*, 556 US at 879 (quotation marks and citations omitted). However, two seminal decisions from the United States Supreme Court identify circumstances relevant to the question of whether the financial interests of a trial court might raise due-process concerns.

The first of these two cases is *Tumey v Ohio*, 273 US 510, 523; 47 S Ct 437; 71 L Ed 749 (1927), in which the Supreme Court held that subjecting the liberty and property of a defendant to a court wherein the judge had a "direct, personal, substantial, pecuniary interest" in a conviction constituted denial of due process. In *Tumey*, state law and local ordinances allowed the mayor of the village of North College Hill, Ohio, to try cases involving violations of the state's prohibition act and to fine those convicted. *Id*. at 516-519. Half of the money collected from such fines went into the village's treasury. *Id*. at 518. The mayor also received $12 for each conviction, "in addition to his regular salary, as compensation for hearing such cases." *Id*. at 519, 523. The mayor did not receive this supplemental income from acquittals. *Id*. at 523. In addition to his judicial authority, the mayor also exercised executive authority for the village, including responsibility for the village's financial health. *Id*. at 533. The mayor's judicial role gave him a "direct, personal, substantial, pecuniary interest" in convicting defendants, *id*. at 523, and his executive role gave him a strong motive to help the finances of his village through convictions and heavy fines, *id*. at 533. The Supreme Court held that this

arrangement denied defendants due process of law, and it established the following general rule:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. [*Id*. at 532.]

In *Tumey*, the combination of judicial and executive authority in the mayor, which allowed him to generate, benefit personally from, and administer the revenue collected from assessments he imposed when sitting as a judge, "offer[ed] a possible temptation" to partiality and the attendant denial of due process. *Id*.

The second seminal case is *Dugan v Ohio*, 277 US 61, 65; 48 S Ct 439; 72 L Ed 784 (1928), wherein the Supreme Court held that due-process concerns did not arise because of the remoteness of a mayor's connection to the funds he generated when sitting as a judge. Like the mayor in *Tumey*, the mayor in *Dugan* could also judge cases involving violations of the state's prohibition act and fine those found guilty. *Id*. at 62-63. The fines the *Dugan* mayor imposed went into a general fund, out of which the mayor's salary was paid. *Id*. Unlike the mayor in *Tumey*, however, the mayor in *Dugan* received no supplemental income from convictions. *Id*. at 65. Further, as one of five commissioners who, along with the city manager, exercised the city's executive power, the mayor was only remotely responsible for the executive and financial policy of the city. See *id*. at 63. The Supreme Court determined that the *Dugan* mayor's relation under the city's charter "to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, [was] remote," and held that the

arrangement in *Dugan* did not violate the right of criminal defendants to due process. *Id*. at 65.

In *Ward v Village of Monroeville*, 409 US 57; 93 S Ct 80; 34 L Ed 2d 267 (1972), the Supreme Court appears to have extended *Tumey* to situations in which the personal benefit from court assessments appears more indirect than direct. The defendant in *Ward* had to stand trial for a traffic offense in the mayor's court. *Id*. at 57. In addition to his judicial role, the mayor had wide executive powers. Among other things, he was president of the village council, had general overall supervision of village affairs, and accounted annually to the village council for the village's finances. *Id*. at 58. The court assessments—fines, forfeitures, costs, and fees—imposed in the mayor's court provided between 37% and 51% of the village's income during the years surveyed. See *id*. The Supreme Court determined that *Tumey* governed resolution of the case, reasoning that the limits of the principle set forth in *Tumey* were not defined by the fact that the *Tumey* mayor shared directly in the fees and costs he generated in his judicial role. *Id*. at 60. Rather, "the test is whether the mayor's situation is one 'which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused . . . .' " *Id*., quoting *Tumey*, 273 US at 532. The Court concluded that " 'possible temptation' may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court." *Ward*, 409 US at 60.

Two recent decisions by the United States Court of Appeals for the Fifth Circuit provide examples of cir-

cumstances deemed to fall within the ambit of *Ward*.[5] In *Caliste v Cantrell*, 937 F3d 525, 526 (CA 5, 2019), the defendant, Judge Cantrell, presided over the initial appearance of all defendants in the Orleans Parish Criminal District Court (OPCDC). He required about half the defendants who appeared before him to secure a commercial bond as a condition of their pretrial release. *Id*. Under Louisiana law, 1.8% of the bond's surety value was deposited in the court's Judicial Expense Fund (JEF), a fund administered by the 13 judges on the district court and used to pay the salaries of court staff, office supplies, travel, and other costs. *Id*. In recent years, the covered expenses had totaled more than a quarter of a million dollars for each of the 13 judges of the court, and the bond fees contributed approximately 20% to 25% of that amount. *Id*.

In holding that this "uncommon arrangement violate[d] due process," *id*. at 532, the Fifth Circuit concluded that Judge Cantrell was "more like the *Ward* mayor than the *Dugan* mayor" because he had a "a direct and personal interest in the fiscal health of the public institution that benefits from the fees his court generates and that he also helps allocate," *id*. at 531. Although the fees in *Caliste* accounted for only 20% to 25% of the JEF, the court deemed this percentage "sizeable enough that it [made] a meaningful difference in the staffing and supplies judges receive." *Id*. Therefore, Judge Cantrell's dual role of generator and administrator of court fees, and the benefit he derived from use of the fees, had the potential to make him "partisan to maintain the high level of contribution"

[5] The decisions of lower federal courts are not binding on this Court but may be considered persuasive. *People v Walker (On Remand)*, 328 Mich App 429, 444-445; 938 NW2d 31 (2019) (quotation marks and citation omitted).

from the bond fees. *Id*. at 531-532, quoting *Ward*, 409 US at 60. Similarly, in *Cain v White*, 937 F3d 446, 454 (CA 5, 2019), the Fifth Circuit held that because the OPCDC judges had exclusive authority over how the JEF is spent and had to account for the OPCDC budget to the New Orleans city council and New Orleans mayor, and the court fines and fees deposited in the JEF made up a significant portion of the judges' annual budget, the situation fell within the ambit of *Ward*. The court emphasized that it based its conclusion on "the totality of this situation, not any individual piece." *Id*.

Turning to the present case, defendant contends that MCL 769.1k(1)(b)(*iii*) encroaches on the judiciary's impartiality by creating financial incentives and pressure for judges to ensure that criminal defendants are convicted and assessed court costs so as to fund the trial courts. Defendant contends that under this funding scheme, "[t]he more money the judge orders the defendant to pay the more money she will generate for the county, and ultimately, for the court where she presides." We recently addressed similar arguments in *People v Alexander*, unpublished per curiam opinion of the Court of Appeals, issued May 14, 2020 (Docket No. 348593). Although we are not bound by the decision in *Alexander*, MCR 7.215(C)(1), we do find *Alexander*'s analysis and application persuasive.

To the extent defendant suggests that a trial court's discretion to impose costs under MCL 769.1k(1)(b)(*iii*) is unconstrained, he is mistaken. As this Court explained in *Alexander*:

> [A] trial judge does not have unfettered discretion with respect to the amount of costs to impose under this provision because the costs imposed must be "reasonably related to the actual costs incurred by the trial court without separately calculating those costs involved in the particular case," MCL 769.1k(1)(b)(*iii*); see also *People v*

> *Konopka (On Remand)*, 309 Mich App 345, 350-351; 869 NW2d 651 (2015), and there must be a factual basis demonstrating that the imposed costs are reasonably related to the actual costs incurred by the trial court, *Konopka*, 309 Mich Ap[p] at 359-360. Hence, contrary to defendant's argument, MCL 769.1k(1)(b)(*iii*) does not provide the trial court with the authority to increase the costs imposed on criminal defendants as a means for generating more revenue. [*Alexander*, unpub op at 14.]

Therefore, contrary to the implication of defendant's argument that trial courts may impose any amount of costs they deem necessary to generate revenue, the costs imposed by a trial court must have a factual basis and must be reasonably related to the actual costs incurred by the court.

Further, defendant provides no evidence for his assumption that there is a direct correspondence between the court costs imposed and the money the cost-imposing court receives. Undeniably, "MCL 769.1k(1)(b)(*iii*) is a revenue-generating statute." *People v Cameron*, 319 Mich App 215, 224; 900 NW2d 658 (2017). However, defendant has failed to show that MCL 769.1k(1)(b)(*iii*) also authorizes courts to administer the revenue so collected. As this Court explained in *Alexander*, "MCL 769.1k(1)(b)(*iii*)(A)-(C) provide guidance for establishing the requisite factual basis, but these provisions *do not* indicate where the money flows after the costs have been imposed on and paid by a convicted defendant." *Alexander*, unpub op at 14. Defendant has not established "the type of direct nexus between a judge's compensation and any fees or costs imposed that was present in *Tumey*." *Id*. Indeed, Michigan's Constitution provides that " '[n]o judge or justice of any court of this state shall be paid from the fees of his office nor shall the amount of his salary be measured by fees, other moneys received or the amount of

judicial activity of his office.' " *Id*., quoting Const 1963, art 6, § 17. Nor has defendant provided any evidence that "the costs imposed under MCL 769.1k(1)(b)(*iii*) are funneled into a special or specific fund to be administered by judges, analogous to the Judicial Expense Fund at issue in *Caliste* and *Cain*." *Alexander*, unpub op at 14. In other words, defendant has not shown that the nexus between the courts and the costs they impose under the statute at issue more closely resembles the circumstances in *Tumey*, *Ward*, *Caliste*, or *Cain*, than in *Dugan*, in which the entity exercising the judicial role benefited from a portion of the revenue generated by court assessments but did not have control over administration of the revenue.

Defendant points to observations in Chief Justice MCCORMACK's concurrence in *Cameron* to support his argument that the pressure put on judges to generate revenue by assessing costs pursuant to MCL 769.1k(1)(b)(*iii*) violates the right of criminal defendants to an impartial judge. *People v Cameron*, 504 Mich 927, 927-929 (2019) (MCCORMACK, C.J., concurring). The Michigan District Judges Association (MDJA) argued in an amicus curiae brief filed in *Cameron* that MCL 769.1k(1)(b)(*iii*) violated the Fourteenth Amendment, and it also submitted letters that provided anecdotal evidence of the pressure some district judges were under to ensure that their courts were well-funded. Opining that the MDJA might be right, Chief Justice MCCORMACK stated:

> No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units (and perhaps even from the electorate), could create at least the appearance of impropriety. Assigning judges to play tax collector erodes confidence in

> the judiciary and may seriously jeopardize a defendant's right to a neutral and detached magistrate. [*Id*. at 928.]

The letters to which Chief Justice MCCORMACK refers are not part of the record in this case. Even if they were, they would not affect the outcome of this case. While we agree that use of the funds generated pursuant to MCL 769.1k(1)(b)(*iii*) to finance the operations of the sentencing judge's court, coupled with intense pressure placed on that court by its local funding unit, could create, at a minimum, an appearance of impropriety, anecdotal evidence from a few judges fails to establish that "no set of circumstances exists under which [MCL 769.1k(1)(b)(*iii*)] would be valid. The fact that the . . . [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient . . . ."[6] *Council of Organizations*, 455 Mich at 568 (quotation marks and citation omitted).[7] Rather,

[6] We acknowledge the impassioned dissent of our colleague, and to the extent that it rests on anecdotal evidence submitted in *Cameron*, we, again, agree with Chief Justice MCCORMACK's assessment of that material. There seems to be a growing consensus that the court-financing scheme requires legislative reform. Defendant attached to his appellate brief State Court Administrative Office data on all court costs imposed and collected under MCL 769.1k from 2016 to 2018, not just those imposed and collected under the authority of MCL 769.1k(1)(b)(*iii*), and a copy of the April 8, 2019 interim report of the Trial Court Funding Commission, which makes a very strong case for amendment of Michigan's court-funding scheme but does not affect our analysis of defendant's argument that the statute at issue is unconstitutional on its face. Like Chief Justice MCCORMACK, however, we agree that the Trial Court Funding Commission's Interim Report shows great potential to reduce the pressure some judges have experienced, and we likewise urge the Legislature to take its recommendations seriously.

[7] Like the panel that decided *Alexander*, "[w]e leave open the question whether a successful as-applied challenge could be made against the constitutionality of this statute, as there appear to be general grounds for concern related to the constitutionality of this statute regarding the manner of funding trial courts in Michigan and pressures placed by

such pressure calls into question the conduct of the local funding units, as MCL 769.1k(1)(b)(*iii*), on its face, does not address how the funds are to be utilized.

Finally, defendant argues that MCL 769.1k(1)(b)(*iii*) is unconstitutional because, by enacting it, the Legislature "effectively created a funding system for our courts that interferes with the judiciary's obligation to maintain impartiality in criminal proceedings and its authority to maintain and administer rules regulating trial judges' impartiality."

"[I]n determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents . . . [one] [b]ranch from accomplishing its constitutionally assigned functions." *Nixon v Administrator of Gen Servs*, 433 US 425, 443; 97 S Ct 2777; 53 L Ed 2d 867 (1977). The gravamen of defendant's argument is that MCL 769.1k(1)(b)(*iii*) prevents the judicial branch "from accomplishing its constitutionally assigned functions," by rendering it impossible for any trial judge in the state to operate in accordance with his or her oath of office and the constitutional mandates of due process. However, as already explained, and as a panel of this Court explained in *Alexander*, "defendant has not shown that this statute creates a situation where there exists no set of circumstances under which a judge in this state is impartial," nor has he "shown that all trial judges must be disqualified" because the statute "creates a financial interest in the judiciary to cause them to ignore their constitutional mandates." *Alexander*, unpub op at 15. Further, although MCL 769.1k(1)(b)(*iii*) generates revenue, *Cameron*, 319 Mich App at 224,

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some local funding units on district court judges to ensure their courts are well-funded." *Alexander*, unpub op at 7 n 8 (quotation marks and citation omitted).

nothing in the plain language of the statute "direct[s] the flow of money or create[s] a funding system for the trial courts . . . ." *Alexander*, unpub op at 15. For these reasons, defendant's separation-of-powers argument does not establish that the Legislature has made it impossible for trial courts to fulfill their constitutional mandates or that MCL 769.1k(1)(b)(*iii*) is facially unconstitutional. *Id*.

Affirmed.

SAWYER, J., concurred with BECKERING, J.

SHAPIRO, P.J. (*dissenting*). I respectfully dissent and would hold that MCL 769.1k(1)(b)(*iii*) is unconstitutional.

This "tax" case becomes much clearer once we set aside the fact that all the "taxpayers" are convicts. Of course, their status is central to the question before us, and I will return to it. But the fact that they have all been convicted of criminal offenses acts as a veil, blurring our consideration of what is in fact an unconstitutional tax.

Consider the hypothetical adoption of a new statewide tax that is not limited to convicts. The statute defining it directs trial courts to assess each person in their locality a per capita share of the cost to operate the courts (on top of what is already paid in income, property, and sales taxes). The amount of this court-funding tax is undefined in the statute, and unlike any other statewide tax, the amount that must be paid will depend on which county or city the taxpayer lives in. Moreover, even within a single locality, the tax assessors will retain discretion to vary the tax from person to person as they see fit. This hypothetical statute further provides that if the tax is not paid

on the due date, a 20% penalty shall be automatically and immediately imposed. Finally, if someone fails to pay, they will be ordered to appear at the tax collector at a certain time and date to prove that they are indigent. If they fail to show up at the time and place ordered, or the tax collector concludes that they are able to pay, they are subject to arrest and incarceration.

I doubt that anyone in the state would consider such a tax constitutionally sound, yet it accurately describes the tax scheme imposed by MCL 769.1k(1)(b)(*iii*) and the related statutory provisions. The scheme violates due process, allows the tax to vary from county to county and even from judge to judge, and it infringes on the authority of the judiciary as a coequal branch of government.[1] When we add to the facts that the judiciary is the tax assessor, the tax collector, the beneficiary of the taxes, and vested with the authority to promptly incarcerate those who fail to pay, the question of constitutionality seems almost quaint.

So why is it different when the only persons burdened with this tax are those convicted of crimes? How can we uphold such a "tax"? If the sole basis to do

[1] I also conclude that taxing court costs is inconsistent with the separation of powers, not because the Legislature lacks the authority to delegate as was argued in *People v Cameron*, 319 Mich App 215; 900 NW2d 658 (2017), but because the judiciary cannot be legislatively commanded to perform the legislative function of determining the amount of a tax and the executive function of enforcing it. In addition, I would conclude, contrary to *Cameron*, that the tax violates the Distinct Statement Clause, which requires that "[e]very law which imposes . . . a tax shall *distinctly* state the tax." Const 1963, art 4, § 32 (emphasis added). I cannot construe a statewide tax that varies from county to county, city to city or possibly from judge to judge, as having "distinctly state[d] the tax." Nor is a tax distinctly described by indicating that the amount must be "reasonable."

so is that these taxpayers have been convicted of a crime, then the notion that this is a tax, rather than a fine, collapses. I recognize that in *People v Konopka (On Remand)*, 309 Mich App 345, 372-373; 869 NW2d 651 (2015), a panel of this Court opined that the language of MCL 769.1k(1)(b)(*iii*) "does not reflect an intent by the Legislature to make the imposition of court costs a criminal punishment" because the statute "does not refer to a fine but instead provides for the imposition of costs reasonably related to the actual costs incurred in the operation of the court." (Emphasis omitted.) "But legislative labeling cannot preclude judicial determination, or excuse a court from its responsibility to give realistic construction to terms employed in statutes." *People v Barber*, 14 Mich App 395, 401; 165 NW2d 608 (1968). Simply changing the nomenclature from "fine" to "costs" does not alter the nature or the effect of the charge imposed. More to the point, the Legislature's allowance of costs without any limitation on the amount did not arise from a nonpunitive intent, but to execute an end-run around Michigan's constitutional provision—in effect since 1835—that penal fines may not be used to financially support the courts.[2] Using the term "costs" masks the punitive nature of the assessment but does not change

[2] Const 1963, art 8, § 9 provides:

> All fines assessed and collected in the several counties, townships and cities for any breach of the penal laws shall be exclusively applied to the support of . . . public libraries, and county law libraries as provided by law.

In *Bd of Library Comm'rs of the Saginaw Pub Libraries v Judges of the 70th Dist Court*, 118 Mich App 379, 389; 325 NW2d 777 (1982), it was held that monies obtained through civil fines, i.e., fines imposed for actions that are not punishable by imprisonment, are not subject to this constitutional limitation given its reference to "penal laws."

it. MCL 769.1k(1)(b)(*iii*) requires courts to do exactly what our several constitutions have all barred—take money from convicted defendants and use it to fund the courts' operations, including paying judicial salaries.

Indeed, many judges do not accept this linguistic pretense and have, in fact, experienced quite the opposite. It is either naïve or insincere to suggest that local judges are not pressured by local government officials to increase their "contribution" to the general fund and that this has no effect on a judge's decision regarding whether to assess costs and in what amount. Should there be any doubt, one need merely review the brief and exhibits submitted by the Michigan District Judges Association in its amicus brief to the Supreme Court in *People v Cameron*, 504 Mich 927 (2019). The heading of one section of the brief reads, "MCL 769.1k(1)(b)(iii) creates a conflict of interest for every judge in this State who has to report to the court's funding unit about the revenues generated to operate the court and the county." It goes on to point out that in our system of an elected judiciary, a local judge who does not assess sufficient court costs to satisfy the municipality runs a real risk of losing their position. As one judge stated, "[T]here is a direct relationship between maintaining court funding and a judge's reelection." Another judge recounted that her municipality threatened to evict the court from the courthouse unless the court generated more revenue through assessments on criminal defendants. Other judges reported that they were told by their funding units that unless their court generated more revenue, its budget would be slashed. Yet another judge noted that her court's budget is not predicated on the needs of the court's operation "but is tied exactly to the amount of revenue we generate through

fines and costs."[3] Thus, there is an ongoing incentive to continue and expand the amount and collection of costs assessed against criminal defendants.

When court costs were first imposed, the amounts to be assessed were specifically set forth by statute and were *de minimis*. For instance, the amounts at issue in *Bd of Library Comm'rs of the Saginaw Pub Libraries v Judges of the 70th Dist Court*, 118 Mich App 379, 387, 389, 390; 325 NW2d 777 (1982), were a $5 judgment fee and an additional $3 fee imposed on certain cases. I would agree that such a *de minimis* sum need not trigger constitutional review. However, *Saginaw Pub Libraries* went on to say that "[a] fee which . . . would be considerably greater than [the $5 fee] involved here might offend the constitutional or statutory provisions," *id*. at 389, and that when one also considers the

[3] Contrast this situation to Principle 1.5, Court Funding and Legal Financial Obligations, established by the National Center for State Courts' National Task Force on Fines, Fees and Bail Practices:

> Courts should be entirely and sufficiently funded from general governmental revenue sources to enable them to fulfill their mandate. Core court functions should generally not be supported by revenues generated from court-ordered fines, fees, or surcharges. Under no circumstances should judicial performance be measured by, or judicial compensation be related to, a judge's or a court's performance in generating revenue. A judge's decision to impose a legal financial obligation should be unrelated to the use of revenue generated from the imposition of such obligations. Revenue generated from the imposition of a legal financial obligation should not be used for salaries or benefits of judicial branch officials or operations, including judges, prosecutors, defense attorneys, or court staff, nor should such funds be used to evaluate the performance of judges or other court officials. [National Center for State Courts, *Principles on Fines, Fees, and Bail Practices*, p 3, available at <https://www.ncsc.org/__data/assets/pdf_file/0016/1609/principles-fines-fees.ashx.pdf> (accessed March 25, 2021) [https://perma.cc/6Y88-AEMM].]

sometimes-imposed $3 fee in addition to the $5 judgment fee, i.e., a total of $8, the sum was "closer to the line, [but] the Legislature has not exceeded a reasonable base cost that may be assessed in all cases," *id*. at 390. That sum, which this Court concluded was "closer to the line," amounts to $22 in present value.[4] However, these modest assessments skyrocketed following the adoption of MCL 769.1k in 2005, which authorized imposition of court costs in criminal cases of "[a]ny cost in addition to the minimum state cost . . . ." MCL 769.1k(1)(b)(*ii*), as added by 2005 PA 316.

In *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012), overruled on other grounds by *People v Cunningham*, 496 Mich 145 (2014), we held that court costs of $1,000 were not "obviously unreasonable," but we made no reference to *Saginaw Pub Libraries* or to its conclusion that court costs in excess of $8 might be constitutionally excessive.

If these assessments were genuinely a tax, they would be applied to all litigants, or at least to all nonprevailing litigants, and not just to convicted defendants. There is no rational basis to apply the fees only to convicted defendants other than the fact that, having broken the law, they may be punished.[5] And as persons

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[4] See United States Department of Labor, Bureau of Labor Statistics, *CPI Inflation Calculator* <https://www.bls.gov/data/inflation_calculator.htm> (accessed March 25, 2021) [https://perma.cc/P8F5-ZTGJ].

[5] It would be difficult to argue that imposing a substantial tax on mostly indigent people is grounded in sound revenue planning. Moreover, it is a uniquely expensive tax to enforce. According to the Brennan Center, the cost of collecting court costs, including jailing nonpayers who have not obtained a court-ordered waiver, constitutes 41 cents out of every dollar collected. In contrast, the IRS "spends just $0.34 for every *hundred dollars* in taxes collected." Brennan Center for Justice, *The Steep Costs of Criminal Justice Fees and Fines* (2019), p 9, available to download at

convicted of a crime, they have little, if any, standing in the political process or public opinion and so can be forced to pay extraordinary sums to the government, compelled under the threat of further incarceration. In other words, they are a group of people whose protests against these "taxes" are unlikely to be heard, let alone addressed.[6] But the fact that the individuals subject to this tax are essentially unrepresented in the legislative and executive branches should heighten, rather than lessen, the care with which we address the constitutional question.

The state points out that judges do not personally receive funds as a result of cost assessments. However, institutions, just like people, have financial interests. And those financial interests become the concern of the individuals assigned the task of assessing and collecting the necessary funds. When a district court is threatened with having its funding cut because it has not imposed high enough court costs, it has an effect on those who must determine the amount of those costs, namely judges. Making judges impose and collect taxes from those who appear before them exposes them to the "temptation . . . not to hold the balance nice, clear and true between the State and the accused . . . ." *Tumey v Ohio*, 273 US 510, 532; 47 S Ct 437; 71 L Ed 749 (1927). At a minimum, there is an appearance of impropriety. As Justice Scalia has observed, "it makes sense to scrutinize governmental action more closely when the

<https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines> (accessed March 25, 2021) [https://perma.cc/2HV7-MMPJ].

[6] Nor is it necessarily wise criminal-justice policy. As the amicus brief observes, "Far from being an effective measure of public safety, the imposition of these costs leaves poor defendants increasingly unable to function safely in society, as they face warrants and other barriers to stable employment, caused by their inability to pay."

State stands to benefit." *Harmelin v Michigan*, 501 US 957, 979 n 9; 111 S Ct 2680; 115 L Ed 2d 836 (1991) (opinion by Scalia, J.). A system that funds a branch of government by taking, under threat of additional incarceration, large sums from persons convicted of crimes, many, if not most, of whom are indigent and wholly without political influence, deserves such "close" judicial scrutiny. I agree with the majority that legislative action would be welcome and is needed. But it is the judiciary that demands, collects, and uses the funds obtained. And it is the judiciary that determines whether or not the statute is constitutional.

"Court costs" assessed only from convicted defendants are fines. Because they are not authorized by the statute defining the relevant crime, I would conclude that they may not be imposed. For these reasons, I respectfully dissent and would hold that MCL 769.1k(1)(b)(*iii*) is unconstitutional.

In re PILAND, MINORS

Docket No. 353436. Submitted April 7, 2021, at Lansing. Decided April 15, 2021, at 9:00 a.m.

The Department of Health and Human Services petitioned the Ingham Circuit Court, Family Division, to terminate respondents' parental rights to their children. Respondents' third child, AP, was born at their home with the assistance of a midwife. The midwife visited respondents' home the day after AP was born and expressed concern to respondent-mother that AP was showing signs of jaundice on her face and chest. The midwife suggested that respondents take AP to the doctor. Respondents refused, instead praying over the child. AP's condition continued to worsen, and respondents did not call emergency services when they discovered that she was not breathing. Instead, respondent-father placed his hands on AP's chest and started praying. He contacted friends and family with whom he shared similar religious beliefs, and they came to the home and prayed with him and respondent-mother for several hours. Nearly nine hours after AP's death, respondent-mother's brother called law enforcement and Child Protective Services (CPS). Concerned that respondents would decline to seek medical treatment for their older two children, the Department of Health and Human Services filed the termination petition, which the court, Laura L. Baird, J., authorized. The matter was scheduled for an adjudication trial before a jury. Before trial, respondents requested a jury instruction based on MCL 722.634, which the court denied. Respondents appealed, and the Court of Appeals, SHAPIRO, P.J., and M. J. KELLY, J. (O'BRIEN, J., concurring in part and dissenting in part), held that MCL 722.634 applies to child protective proceedings and that the trial court must provide an instruction reflecting the statutory language. 324 Mich App 337 (2018). The Department of Health and Human Services sought leave to appeal in the Supreme Court, and the Supreme Court ordered oral argument on the application. 503 Mich 893 (2018). Following oral argument, the Supreme Court issued an order affirming that MCL 722.634 applies to child protective proceedings but vacating the part of the Court of Appeals opinion directing the trial court to instruct the jury in accordance with the statute. 503 Mich 1032 (2019). The

Supreme Court explained that the directive to instruct the jury was premature because respondents' entitlement to a jury instruction based on MCL 722.634 would depend on the evidence ultimately presented at respondents' adjudication trial. Consequently, the Supreme Court remanded the case to the trial court for further proceedings, ordering the trial court to provide an instruction consistent with MCL 722.634 if respondents requested the instruction and if a rational view of the evidence supported the conclusion that respondents' failure to provide medical treatment was based on respondents' legitimate practice of their religious beliefs. On remand, respondents requested the instruction. The trial court, Richard J. Garcia, J., denied the request, finding that a rational view of the evidence did not support giving the instruction. The trial court focused on the word "legitimately" and stated that the jury instruction was not warranted because respondents' religious beliefs "were not in accordance with the legitimate practicing of any religions [sic] laws, rules or standards." Respondents appealed.

The Court of Appeals *held*:

1. MCL 722.634 provides, in relevant part, that a parent or guardian legitimately practicing their religious beliefs who thereby does not provide specified medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian. Acceptance of the trial court's interpretation of the word "legitimately" would render the statute unconstitutional. The government has no role in deciding or even suggesting whether the religious ground for a person's actions is legitimate or illegitimate. Accordingly, the trial court improperly held that respondents' religious beliefs lacked legitimacy solely because their beliefs were not represented by a tenet or rule of a religious organization. Furthermore, the trial court's interpretation was inconsistent with the statutory language. "Legitimately" is not defined in MCL 722.634. The trial court defined "legitimate" as "being in compliance with law" or "being in accordance with established or accepted patterns or standards." However, the word "legitimately" modifies the word "practicing." Therefore, by interpreting the word in connection with "religious beliefs" as opposed to the practice of religious beliefs, the trial court misconstrued the statute. The correct inquiry required consideration of what it means to be "legitimately practicing" a religious belief. *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "practice" as to "carry out, apply." Accordingly, the appropriate definition of "legitimate" in this context was "being exactly as purposed : neither spurious nor false." Therefore, to be "legitimately practicing" a religious belief,

the parent or guardian must have been actually practicing their religious beliefs at the time that they did not provide their child with specified medical treatment. If a rational view of the evidence supports that finding, then an instruction in accordance with MCL 722.634 is required. In this case, the record was replete with testimony that respondents were actually, i.e., legitimately, practicing their religious beliefs when they did not seek medical treatment for AP. Given the substantial evidence showing that respondents were legitimately practicing their religious beliefs when they did not seek medical treatment for AP, the trial court erred by not instructing the jury in accordance with MCL 722.634. Because respondents' case went before the jury without a clear and unambiguous charge substantially covering their theory of the case, the case went before the jury without proper instructions and reversal was required.

2. The trial court incorrectly held that MCL 722.634 was unconstitutional because it impermissibly interfered with AP's constitutional right to life. MCL 722.634 does not preclude consideration of the parent or guardian's decision to not provide specified medical treatment. Instead, the statute only precludes that from being the *only*, i.e., the sole, reason for determining that the parent or guardian is negligent. Therefore, the jury may consider the decision or failure to provide specified medical treatment in connection with other evidence showing that the parent or guardian is a negligent parent or guardian. Additionally, MCL 722.634 expressly states that a court is not precluded from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child when the child's health requires it, nor does it abrogate the responsibility of a person required to report child abuse or neglect. Thus, although the statute offers some protection to a parent or guardian legitimately practicing their religious beliefs, it nevertheless balances the state's need to intercede to protect the child's health. Consequently, MCL 722.634 only precludes consideration of the failure to provide medical support from being the *only* consideration, permits the state to intervene to protect the child's health, and does not exempt mandatory reporters from reporting abuse or neglect, so the child's health and safety is not unprotected.

3. The trial court did not err by admitting photographs from AP's autopsy. MRE 402 provides that all relevant evidence is admissible except as otherwise provided by law. MRE 401 provides that evidence is relevant if it has 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. In this case, respondents contended that the photo

graphs were inadmissible under the balancing test of MRE 403, which provides, in relevant part, that although evidence is relevant, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. The photographs here were more than marginally probative. One of the disputes was whether, before her death, AP's jaundice improved. The photographs, although taken after her death, depicted the yellowness of her body, her eyes, and her gums. Expert testimony supported that the yellow pigment shown in the photographs would not have increased after her death. Consequently, the photographs were highly probative as to how yellow AP appeared before her death. The autopsy photographs, because of the way the body was laid out in two of the photographs, showed how extensive the yellowness really was throughout the surface of the body. In addition, four of the photographs were close-ups and showed that the yellowness had permeated AP's eyes and gums. Under all these circumstances, it was not outside the range of principled outcomes for the trial court to admit the photographs.

Reversed and remanded.

INFANTS — CHILD PROTECTION PROCEEDINGS — JURY INSTRUCTIONS — PROVIDING MEDICAL TREATMENT — RELIGIOUS BELIEFS.

MCL 722.634, a provision of the Child Protection Law, MCL 722.621 *et seq*., provides, in relevant part, that a parent or guardian legitimately practicing their religious beliefs who thereby does not provide specified medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian; to be "legitimately practicing" a religious belief, the parent or guardian must have been actually practicing their religious beliefs at the time that they did not provide their child with specified medical treatment; if a rational view of the evidence supports that finding, then an instruction in accordance with MCL 722.634 is required.

Carol A. Siemon, Prosecuting Attorney, and *Kahla D. Crino*, Appellate Division Chief, for the Department of Health and Human Services.

Sharon Jones for respondents.

Michael D. Staake for the minor children.

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

M. J. KELLY, J. Respondents appeal as of right the orders terminating their parental rights to their children, MP, JP, and VP, under MCL 712A.19b(3)(b)(*i*) and (j). Respondents argue that the trial court erred by denying their request for a jury instruction based on MCL 722.634 in the adjudicative phase of a child protective proceeding. Because a rational view of the evidence supported giving the instruction, the trial court erred by denying the request for the instruction. We reverse and remand for a new adjudication trial.

I. FACTS

On February 6, 2017, respondents' third child, AP, was born at their home with the assistance of a midwife. Less than 20 hours later, on February 7, 2017, the midwife observed that AP was showing signs of jaundice on her face and chest.[1] Concerned about the presence and severity of jaundice within 24 hours of AP's birth, the midwife strongly emphasized to respondent-mother that the baby should be seen by a doctor. Respondent-mother refused, telling the midwife that "God makes no mistakes, our baby is fine." Respondent-mother conferred with respondent-father; together, they declined to seek medical care for AP. Multiple witnesses, including respondents, testified that respondents' religious beliefs precluded them from seeking modern medical care for themselves or for their children. Instead, respondents relied on faith-based or divine healing.[2]

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[1] According to the testimony, jaundice is caused by elevated bilirubin levels, and bilirubin is a byproduct created by the breaking down of hemoglobin.

[2] At the time of AP's death, respondents were part of two religious groups, Free Saints Assembly and Faith Tech Ministries. Respondents testified that both groups supported divine healing but noted that

The next day, February 8, 2017, respondent-mother told the midwife that AP was "darkening" but declined a scheduled follow-up appointment from the midwife. Respondent-mother explained that she and respondent-father had decided to stand on faith for AP's healing. AP's condition continued to worsen. She was lethargic, had poor suck, did not eat for approximately 16 hours, and her skin and eyes showed signs of jaundice. Respondents were concerned, but the night before her death, at 4:30 a.m., AP finally drank some milk. She spit up bloody phlegm and had five bowel movements. Respondent-mother believed that the yellow in her eyes had lessened and that her condition was improving. The maternal grandmother held AP in the hours before her death. She stated that at the time, AP seemed to struggle a little to breathe. She also recounted that AP was tightening her hands and feet, which she now believes were signs that AP was having seizures.[3] The maternal grandmother was very concerned, but she did not call 911 because she thought respondent-father would be extremely angry. Instead, she left the home to get groceries, called the midwife's assistant to report AP's condition, and then returned to the home. When she arrived, respondent-mother told her that AP was "showing signs of lifelessness."

Respondents did not call emergency services when they discovered AP was not breathing. Instead, respondent-father placed his hands on her chest and started praying. Later, he contacted various friends and family whom he believed shared similar religious

neither group prohibited a person from seeking modern medical care. Rather, it was up to each individual to determine whether they would rely solely on divine healing or would use a combination of modern medicine and divine healing.

[3] An expert witness testified that a tightening of the hands or feet is consistent with the signs of a seizure in a baby.

beliefs. They came to the home and prayed with him and respondent-mother for several hours. Nearly nine hours after AP's death, respondent-mother's brother called law enforcement and Child Protective Services (CPS), who then arrived.

The CPS investigation ultimately resulted in the older two children being removed from the home. And, when VP was born approximately 18 months later, she was also removed from respondents' care. Throughout the case, respondents have maintained their belief that AP will be resurrected, and they shared that belief with their still-living children, all of whom were under the age of seven. Additionally, the record reflects that throughout the case, respondents continued to object to their children receiving medical care. One child went to the hospital for an apparent allergic reaction. He was prescribed an EpiPen, which respondents adamantly stated that they would not rely on even if he were showing signs of an allergic reaction. When another child broke his foot, respondent-mother told him that he did not have a broken bone because if he believed in and obeyed God, his bones would not break. Respondents also objected to the lifesaving medical treatment that VP received after she was removed from respondents' care. The record reflects that, like AP, she was jaundiced within 24 hours of her birth. She was diagnosed with hemolytic disease of the infant.[4] To

[4] Dr. Sarah Brown, an expert in child-abuse pediatrics, testified that although jaundice is common in babies, if it develops within the first 24 hours after birth, it is indicative of serious medical problems that should prompt further medical investigation. Relevant to this case, based upon AP's symptoms, respondent-mother's blood type, and the medical history of VP, Dr. Brown opined that AP's jaundice was also caused by hemolytic disease of the infant. A baby with such a disease would experience hyperbilirubinemia, which Dr. Brown explained is caused by excessively high levels of bilirubin in a baby's blood. The symptoms of

treat it, she required seven days of phototherapy and required an exchange transfusion. Without the treatment, she would have died. Even knowing that, respondents maintained that they would not have sought medical treatment for her. At trial, respondents testified that under no circumstances would they seek modern medical care for their children.

II. JURY INSTRUCTIONS

A. STANDARD OF REVIEW

Respondents argue that the trial court erred by not instructing the jury in accordance with MCL 722.634. Claims of instructional error involve questions of law, which this Court reviews de novo. *People v Craft*, 325 Mich App 598, 604; 927 NW2d 708 (2018). A trial court's determination regarding whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes." *Craft*, 325 Mich App at 604. "A trial court necessarily abuses its discretion when it makes an error of law." *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012). Questions of statutory interpretation are reviewed de novo. *In re Medina*, 317 Mich App 219, 227; 894 NW2d 653 (2016).

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hyperbilirubinemia include yellow color, sleepiness, lack of appetite, and, as the condition worsens, lethargy, poor muscle tone, lack of coordination, and poor suck. She stated that in the hours and minutes before death, a baby with hyperbilirubinemia would experience seizures but that the actual event leading to death would be when the respiratory drive is no longer present and the baby stops breathing. Dr. Brown maintained that if AP had received medical treatment, even if it had been sought in the hours before her death, there would have been an 80 to 90% survival rate.

B. ANALYSIS

MCL 722.634 provides a limited, religious-belief defense for a parent or guardian who does not provide a child with a specified medical treatment. In relevant part, the statute states that "[a] parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian." Respondents first requested an instruction based on this statute before the adjudication trial. The trial court denied the request, and respondents appealed to this Court. In our earlier decision, this Court held that MCL 722.634 applies to child protective proceedings and that the trial court must provide an instruction reflecting the statutory language. *In re Piland*, 324 Mich App 337, 345; 920 NW2d 403 (2018) (*Piland I*), vacated in part 503 Mich 1032 (2019) (*Piland II*). Our Supreme Court affirmed that MCL 722.634 applies to child protective proceedings but vacated the part of our opinion directing the trial court to instruct the jury in accordance with the statute. *Piland II*, 503 Mich at 1032-1033. The Court explained that the directive to so instruct the jury "was premature, because the respondents' entitlement to a jury instruction based on MCL 722.634 depends on the evidence that is ultimately presented at the respondents' adjudication trial." *Id*. at 1033. Consequently, the Court remanded to the trial court for further proceedings, ordering the trial court to "provide an instruction that is consistent with MCL 722.634 if such an instruction is requested by the respondents and if a rational view of the evidence supports the conclusion that the failure to provide medical treatment was based on the respondents' legitimate practice of their religious beliefs." *Id*.

On remand, following the presentation of the proofs at the adjudication trial, respondents requested such an instruction, but the trial court denied the request, finding that a rational view of the evidence did not support giving the instruction. In finding no rational basis for giving the instruction, the trial court focused on the meaning of the word "legitimately." The court reasoned:

> Now, the Court believes that *for a religious belief to be legitimate*, it must conform to the law or rules. . . . [T]here needs to be at least some recognized standards or acceptable, uh—recognized or acceptable standards that we are gaging those relief—beliefs against to determine whether or not *those beliefs are legitimate*.
>
> The legislature, in my estimation, did not intend to provide this exception to all strongly held beliefs. They also didn't intend to provide this exception to all strongly held religious beliefs, but *only those beliefs that were in accordance with practicing a religion, uh, or religious rules or laws, or in—in conformance with acceptable religious standards, and acceptable religious practices*.
>
> Individual acts of faith or following subjected—subjective individualized beliefs *do not constitute legitimately practicing your religious beliefs*. . . .
>
> * * *
>
> The Court is not, um, ruling in this instance that the [respondents'] faith is not heartfelt or dis—dishonest. Uh, they have been steadfast an—and earnest in their beliefs. However, *those beliefs are not supported by any law, doctrine, or cannon* [sic] *of any religion*. They are religious in nature, *but that does not rise to the level of a legitimate practicing of a religious belief*.
>
> Their own assembly, or sect, or—or group, made it clear that medical treatment is not prohibited by the tenants [sic] of their faith. And the [respondents] have taken

> scripture and have personally interpreted in this way, which is not covered by MCL 722.634.
>
> The Court, therefore, believes that the proffered instruction based upon the statute is, therefore, not warranted. [Emphasis added.]

Subsequently, in its order terminating respondents' parental rights, the trial court again stated that the jury instruction was not warranted because respondents' decision to not provide AP with treatment was based on religious beliefs, but those beliefs "were not in accordance with the legitimate practicing of any religions [sic] laws, rules or standards." In doing so, the court turned to the dictionary definition of the word "legitimate," noting that the *American Heritage Dictionary* (4th ed) defined it as "being in compliance with law" or "being in accordance with established or accepted patterns or standards."

We conclude that the trial court's interpretation of the word "legitimately" would render the statute unconstitutional and must be rejected. When interpreting a statute, we "must presume a statute is constitutional and construe it as such, unless the only proper construction renders the statute unconstitutional." *Grebner v Michigan*, 480 Mich 939, 940 (2007) (quotation marks and citation omitted). Therefore, "assuming that there are two reasonable ways of interpreting [a statute]—one that renders the statute unconstitutional and one that renders it constitutional—we should choose the interpretation that renders the statute constitutional." *People v Skinner*, 502 Mich 89, 110-111; 917 NW2d 292 (2018).

The trial court's interpretation of the word "legitimately" as used in MCL 722.634 is that the religious beliefs being practiced must be legitimate. And, that in order to be legitimate, those beliefs had to be part of

the doctrine or tenets of a religion as opposed to a parent or guardian's subjective interpretation of scriptures.[5] The trial court's interpretation, however, renders the statute unconstitutional. It is well established that "government has no role in deciding or even suggesting whether the religious ground" for a person's actions "is legitimate or illegitimate." *Masterpiece Cakeshop, Ltd v Colorado Civil Rights Comm*, 584 US ___, ___; 138 S Ct 1719, 1731; 201 L Ed 2d 35 (2018). Instead, in order "to respect the [United States] Constitution's guarantee of free exercise [of religion], [the government] cannot . . . act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." *Id*. See also *Church of the Lukumi Babalu Aye, Inc v Hialeah*, 508 US 520, 531; 113 S Ct 2217; 124 L Ed 2d 472 (1993) (stating that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection") (quotation marks and citation omitted). As our Supreme Court explained in *People v DeJonge (After Remand)*, 442 Mich 266, 282; 501 NW2d 127 (1993):

> This Court must accept a worshiper's good-faith characterization that its activity is grounded in religious belief because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those

[5] The factual basis for the court's finding is not entirely consistent with the record testimony. For instance, respondent-father admitted that some people involved with Free Saints Assembly rejected modern medical care and some did not and that neither Faith Tech Ministries nor Free Saints Assembly had a tenet rejecting medical treatment. Instead, it was left to each person to make an individual choice. Thus, this was not something that was forbidden by their religious organizations; rather, it was something that was permissible and recognized by the groups—at least prior to AP's death—as an acceptable option for healing.

> creeds." *Hernandez v Comm'r of Internal Revenue*, 490 US 680, 699; 109 S Ct 2136; 104 L Ed 2d 766 (1989). This must be so because "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." [*United States v*] *Ballard*, [322 US 78,] 86[; 64 S Ct 882; 88 L Ed 1148 (1944)].
>
> Nor is religious orthodoxy necessary to obtain the protection of the Free Exercise Clause. Religious belief and conduct need not be endorsed or mandated by a religious organization to be protected. [*Dep't of Social Servs v*] *Emmanuel Baptist Preschool*, [434 Mich 380,] 392[; 455 NW2d 1 (1990)] (CAVANAGH, J., concurring). Indeed, because popular religious beliefs are rarely threatened by elected legislators, the Free Exercise Clause's major benefactors are religious minorities or dissidents whose beliefs and worship are suppressed or shunned by the majority. To hold otherwise would be to deny that "Religion . . . must be left to the conviction and conscience of every man . . . ." [Citations omitted.]

See also *Frazee v Illinois Dep't of Employment Security*, 489 US 829, 834-835; 109 S Ct 1514; 103 L Ed 2d 914 (1989) (noting that "the Free Exercise Clause does not demand adherence to a tenet or dogma of an established religious sect" and rejecting as improper the state's contention that although the appellant's conviction was religious, it was "inadequate because it was not claimed to represent a tenet of a religious organization of which he was a member"). As is clear from the above authority, the trial court improperly held that respondents' religious beliefs lacked legitimacy solely because their beliefs were not represented by a tenet or rule of a religious organization.

We also hold that the trial court's interpretation is inconsistent with the statutory language. As we explained in our prior opinion:

> Analysis of the Legislature's intent with respect to MCL 722.634 requires statutory interpretation. "The goal of statutory interpretation is to give effect to the Legislature's intent as determined from the language of the statute." *Bukowski v Detroit*, 478 Mich 268, 273; 732 NW2d 75 (2007). The words in the statute are interpreted in "light of their ordinary meaning and their context within the statute and read . . . harmoniously to give effect to the statute as a whole." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (quotation marks and citation omitted). In addition to a phrase's plain meaning, courts must consider "its placement and purpose in the statutory scheme." *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (quotation marks and citation omitted). [*Piland I*, 324 Mich App at 344.]

MCL 722.634 states that "[a] parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child, for that reason alone shall not be considered a negligent parent or guardian." "Legitimately" is not defined by the statute. Undefined words are given their plain meaning, which may be ascertained by reference to a dictionary. *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). "Legitimately" is the adverb form of the adjective "legitimate." *Merriam-Webster's Collegiate Dictionary* (11th ed). The word "legitimate" has more than one meaning. According to *Merriam-Webster's Collegiate Dictionary* (11th ed), "legitimate" is defined as follows:

> **1 a :** lawfully begotten . . . **2 :** being exactly as purposed **:** neither spurious nor false . . . **3 a :** accordant with law or with established legal forms and requirements <a ~ government> **b :** ruling by or based on the strict principle of hereditary right <a ~ king> **4 :** conforming to recognized principles or accepted rules and standards . . . **5 :** relating to plays acted by professional actors but not including revues, burlesque, or some forms of musical comedy . . . .

The trial court relied on the third definition because the court was considering the meaning of the word "legitimate" as it would be used to modify religious beliefs formed by association with a religious organization. That makes sense, as that definition clearly relates to the structure of organizations such as governments and monarchies. However, the word "legitimately" modifies the word "practicing." Therefore, by interpreting the word in connection with "religious beliefs" as opposed to the practice of religious beliefs, the trial court misconstrued the statute.

The correct inquiry requires consideration of what it means to be "legitimately practicing" a religious belief. In relevant part, to "practice" is to "CARRY OUT, APPLY <~ what you preach> . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, the only definition of "legitimate" that makes sense in the context that it is used is the second definition, i.e., "being exactly as purposed **:** neither spurious nor false." Together, then, in order to be "legitimately practicing" his or her religious beliefs, the parent or guardian must have been actually practicing his or her religious beliefs at the time that he or she did not provide his or her child with specified medical treatment. And, if a rational view of the evidence supports that finding, an instruction in accordance with MCL 722.634 is required.

The record is replete with testimony showing that respondents were actually, i.e., legitimately, practicing their religious beliefs when they did not seek medical treatment for AP. Multiple witnesses testified that respondents had long been advocates of divine healing. For example, the maternal grandmother testified that she had "no doubt" that respondents believed what they professed about divine healing, and she noted that respondent-mother had held those beliefs for

approximately 10 years before AP's death. The maternal grandmother also stated that none of respondents' children had received medical care because of respondents' religious beliefs. The oldest child was approximately six years old, which shows that for six years before AP's death, respondents held and practiced the same religious beliefs that they were practicing at the time of her death. Respondents also spoke at a divine healing conference in 2016, and respondent-mother recounted times that she had stood on faith of her healing and had been healed without any modern medical treatment. The speakers at the conference held varied beliefs on divine healing, with some rejecting all modern medicine and others allowing for a blend of divine healing and medical intervention. Also, respondent-mother's brother testified that before AP's death he had concerns that respondents' religious beliefs would be taken to the extreme to the detriment of their children, which shows that he, too, was aware of those beliefs.

More evidence exists to show that during AP's short life, respondents were actually relying on divine healing. The midwife's testimony shows that respondent-mother repeatedly told her that they were going to stand in faith for AP and would not take her for medical evaluation. The maternal grandmother similarly recounted that respondent-mother refused medical treatment for AP, stating that she would instead pray for her. She heard respondent-mother listening to sermons with AP and praying. Respondents also both testified—and have stated consistently throughout the case—that they relied on divine healing for AP.

After AP's death, respondents made no effort to conceal what happened. They did not call 911. Instead, they called what they described as like-minded friends

and family, including the pastor of the Free Saints Assembly.[6] The individuals who arrived did not call emergency services. They, like respondents, prayed in the bedroom for AP. When emergency services did arrive, respondent-mother cited religious beliefs as the reason they did not call 911, and respondents freely spoke with CPS, law enforcement, and others to explain that their actions in not seeking medical care were because of their religious beliefs. A witness for CPS testified that respondents never gave her any reason to believe that their religious beliefs were less than sincere. And, following the presentation of the proofs, the trial court expressly stated that respondents' faith was not "dishonest" and that respondents had been both steadfast and earnest in their beliefs.

Given the substantial evidence showing that respondents were legitimately practicing their religious beliefs when they did not seek medical treatment for AP, the trial court erred by not instructing the jury in accordance with MCL 722.634.[7] Because the Supreme

[6] Respondents did not believe that their pastor was ordained by a religious organization. However, the fact that they called a man they regarded as their pastor is evidence that they were seeking spiritual aid following AP's death.

[7] By so holding, we are not depriving the jury from making its own determination as to whether respondents were legitimately practicing their religious beliefs. The record plainly indicates that they sought medical treatment for themselves, including once when respondent-father went to urgent care to have glass shards removed from his arm and to have the injury "glued" and bandaged. Both respondents also rely on prescription eyewear. Finally, for the births of their first three children, respondents sought and consented to treatment by a midwife. Although they rejected some treatment options, they consented to others, including routine checks of respondent-mother's blood pressure and evaluation of the fetal heartbeat. They also had both of their older children circumcised by a medical professional. A jury could very well conclude that respondents' decision to provide themselves with medical care but to deny it to their children is evidence that their religious

Court ordered the jury to be instructed in accordance with MCL 722.634 if (1) respondents requested such an instruction and (2) if a rational view of the evidence supported the conclusion that respondents' failure to provide medical treatment was based on their legitimate practice of their religious beliefs, the trial court was required to give the jury the instruction.

As an alternative basis for its decision denying the request for a jury instruction based on MCL 722.634, the trial court sua sponte held that the statute was unconstitutional because it impermissibly interfered with AP's constitutional right to life. We disagree. Notably, MCL 722.634 does not preclude consideration of the parent or guardian's decision to not provide specified medical treatment. Instead, the statute only precludes that from being the *only*, i.e., the sole, reason for determining that the parent or guardian is negligent. Therefore, the jury may consider the decision or failure to provide specified medical treatment in connection with other evidence showing that the parent or guardian is a negligent parent or guardian. Additionally, MCL 722.634 expressly states that a court is not precluded "from ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate the responsibility of a person required to report child abuse or neglect." Thus, although the statute offers some protection to a parent or guardian legitimately practicing his or her religious beliefs, it nevertheless balances the state's need to intercede to protect the child's health. Consequently, the statute only precludes consideration of the failure

beliefs were not being legitimately practiced. The court and the lawyers, however, should take care not to suggest that the legitimacy of respondents' religious beliefs is a matter for consideration by the jury.

to provide medical support from being the *only* consideration, permits the state to intervene to protect the child's health, and does not exempt mandatory reporters from reporting abuse or neglect, so the child's health and safety is not unprotected. Again, MCL 722.634 is not an absolute exception. A jury instructed in accordance with MCL 722.634 is not required to return a finding of no jurisdiction.

Having concluded that the jury instruction should have been given, we must next consider whether the failure to give it is an error requiring reversal. Petitioner correctly notes that MCL 722.634 creates a limited exemption to a finding that a parent or guardian is a *negligent* parent or guardian. There are many grounds for a court to take jurisdiction over a child, and not all of them are dependent upon a finding that the parent or guardian is negligent. For instance, under MCL 712A.2(b)(2), jurisdiction is proper over a child "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, . . . is an unfit place for the juvenile to live in." As only one of the options relates to a negligent parent, a jury could find grounds for jurisdiction if it found that the minor children's home was an unfit place for them to live in because of cruelty, drunkenness, criminality, or depravity.

Petitioner suggests that because the jury was given options to find grounds for jurisdiction based upon MCL 712A.2(b)(2), the failure to give the requested instruction is harmless. Petitioner's alternative argument is not persuasive. The jury was given a verdict form allowing for a binary choice; it was asked to either find jurisdiction or find no jurisdiction. If this Court were to conclude that a finding of jurisdiction under MCL 712A.2(b)(1) was inappropriate because of the

failure to provide the jury instruction at issue and then go on to conclude that jurisdiction under MCL 712A.2(b)(2) was nevertheless established, the Court would, in essence, be usurping the jury's function. Indeed, it is simply not clear on which subparagraph each juror relied in finding that jurisdiction had been established, and it is not the role of this Court to decide in the first instance whether MCL 712A.2(b)(2) was established. We, therefore, reject petitioner's alternative argument.

If substantial error exists in a jury instruction and a party is prejudiced by the instructions, the appellate court must grant a new trial. See, e.g., *Camden Fire Ins Co v Kaminski*, 352 Mich 507, 511-512; 90 NW2d 685 (1958). In *Camden*, our Supreme Court explained:

> "Each party to an action is entitled to have the jury instructed with reference to his theory of the case, where such theory is supported by competent evidence and the instruction is properly requested, and this although such theory may be controverted by evidence of the opposing party." [*Id*. at 511, quoting 53 Am Jur, Trial, § 626, p 487.]

The Court held that the defendant "was entitled to a clear and unambiguous charge covering substantially his theory of the case as supported by the testimonial picture created by him." *Camden*, 352 Mich at 512. Because "[h]e did not get [his requested instruction] or anything like it," the Supreme Court reversed and remanded for a new trial, concluding that the defendant's case "went to the jury without proper instructions." *Id*. Here, respondents' case went before the jury without a clear and unambiguous charge substantially covering their theory of the case. Because respondents did not get their requested instruction, the case went before the jury without proper instructions and reversal is required.

III. AUTOPSY PHOTOGRAPHS

A. STANDARD OF REVIEW

Respondents contend that the trial court erred by admitting photographs from AP's autopsy. This Court reviews the admission of evidence for an abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). An abuse of discretion occurs if the decision falls outside the range of principled outcomes. *Id*. at 251-252.

B. ANALYSIS

"All relevant evidence is admissible" except as otherwise provided by law. MRE 402. Evidence is relevant if it has "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 401. Respondents contend that the photographs were inadmissible under the balancing test of MRE 403, which states, in pertinent part, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The Supreme Court has noted that MRE 403 does not prohibit prejudicial evidence but only prohibits evidence that is unfairly prejudicial. *People v Feezel*, 486 Mich 184, 198; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.). This unfairness arises if there is a danger that marginally probative evidence will be given undue weight by the jury. *Id*. The photographs here were not marginally probative. One of the disputes was whether, prior to her death, AP's jaundice improved. The photographs, although taken after her death, depicted the yellowness of her body, her eyes, and her gums. Expert testimony supported that the yellow pigment shown in the pho-

tographs would not have increased after her death. Consequently, the photographs were highly probative as to how yellow she appeared before her death. Photographs that are relevant are not inadmissible merely because they vividly depict shocking details. *People v Head*, 323 Mich App 526, 541; 917 NW2d 752 (2018).

Respondents also claim that the autopsy photographs were cumulative to two photographs taken at respondents' home by police. The police photographs show some yellowness on AP, but the autopsy photographs, because of the way the body is laid out in two of the photographs, show how extensive the yellowness really was throughout the surface of the body. In addition, four of the photographs are close-ups and show that the yellowness had permeated AP's eyes and gums. A doctor testified that he would not expect the yellowness of AP to have changed between death and the time of the autopsy. Moreover, contrary to respondents' argument on appeal, the autopsy photographs did not show AP's body in a state of decomposition. Nor did they show any incisions made by the medical examiner. Under all these circumstances, it was not outside the range of principled outcomes for the trial court to admit the photographs. *Thorpe*, 504 Mich at 251-252.

IV. CONCLUSION

The trial court's interpretation of MCL 722.634 was both unconstitutional and inconsistent with the statutory language. By relying on an incorrect interpretation of the law as support for its finding that a rational view of the evidence did not support giving the requested instruction, the trial court necessarily abused its discretion. The phrase "legitimately practicing"

requires a parent or guardian to be actually practicing their religious beliefs at the time that they did not provide a child with specified medical treatment. That means that the parent or guardian's reason for not providing treatment cannot be a false or spurious reason. Here, because the record contains substantial evidence showing that respondents' actual practice of their religious beliefs was the reason they did not seek medical treatment for AP, a rational view of the evidence supported the jury instruction and the trial court erred by not giving it. Reversal is required. On remand, the trial court shall instruct the jury in accordance with MCL 722.634.[8]

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

CAMERON, P.J., and K. F. KELLY, J., concurred with M. J. KELLY, J.

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[8] Given our resolution, we need not address respondents' unpreserved argument that MCL 722.634 is unconstitutionally vague. Likewise, we decline to address respondents' argument that the trial court erred by finding that it was in the children's best interests to terminate their parental rights.

In re JCB

Docket No. 349975. Submitted October 8, 2020, at Grand Rapids. Decided April 15, 2021, at 9:05 a.m.

CJB petitioned the Gladwin Circuit Court for an ex parte personal protection order (PPO) against his neighbor, respondent JCB. Petitioner alleged that respondent had verbally harassed him and threatened him with physical harm three to four times a month for the previous five of six years; that he had called the police on at least 10 occasions during that period; and that after each time the police spoke with respondent, his behavior only changed for several days. Petitioner asserted that he was afraid to go outside, that he was afraid to see respondent, and that he was afraid respondent would physically assault him. In July 2017, citing the pattern of threats, the trial court signed the ex parte PPO, which was effective until July 17, 2019. The order specifically prohibited respondent from stalking petitioner as defined in MCL 750.411h and MCL 750.411i. Respondent moved to terminate the PPO, claiming that petitioner's assertions were false. On September 6, 2017, following a hearing on the motion, the court found respondent not credible and denied his request to terminate the order. More than one year later, on September 28, 2018, petitioner moved for a show-cause hearing, asserting that respondent had violated the PPO by walking up to petitioner while petitioner was mowing a neighbor's yard, punching petitioner in the face, ripping his shirt, and scratching his arm. The neighbor stated that petitioner was mowing his grass when the mower stopped for about 10 minutes. Respondent then knocked on his door and returned DVDs to the neighbor. The neighbor, who did not see an altercation between the parties, informed respondent that he should leave because petitioner was present. Even though respondent questioned the neighbor why petitioner was mowing the neighbor's lawn instead of him, respondent later told the police that he had not seen petitioner at the neighbor's house and denied any assault. After the show-cause hearing, the court, Roy G. Mienk, J., found petitioner's testimony credible and held respondent in criminal contempt for violating the PPO. Respondent appealed.

The Court of Appeals *held*:

1. MCR 3.709(A) provides that appeals involving PPOs must comply with MCR 7.200 *et seq*. and that either party has an appeal of right from an order granting or denying a PPO after a hearing under MCR 3.705(B)(6) or after the ruling on the respondent's first motion to rescind or modify the order if an ex parte order was entered. Under MCR 7.204(A)(1), a respondent has 21 days after the denial of a motion to terminate a PPO to appeal by right the denial order. A contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and in that way become a retrial of the original controversy. In this case, the order denying respondent's motion to terminate the PPO was entered on September 6, 2018, but respondent did not challenge the validity of the order until the instant appeal was filed on July 29, 2019. Because more than 21 days had passed from the time the court denied respondent's motion to terminate the PPO, the Court of Appeals did not have jurisdiction to hear respondent's challenge to the validity of the PPO underlying the criminal contempt.

2. Under MCL 750.411h(1)(d), "stalking" is defined as a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. In turn, "course of conduct" is defined in MCL750.411h(1)(a) as meaning a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose. In a hearing to determine whether a respondent should be held in criminal contempt for violating a PPO that prohibits stalking as defined in MCL 750.411h, the petitioner does not have to demonstrate anew the requirements that were necessary to obtain the PPO in the first place. In other words, a petitioner does not have to establish a "course of conduct" as defined and used in MCL 750.411h to establish that the respondent violated the terms of the PPO. Instead, the petitioner must only prove that the respondent violated the terms of the PPO itself. In this case, the PPO prohibited stalking as defined in MCL 750.411h, which included the prohibition against approaching or confronting the petitioner in a public place or on private property. The order plainly apprised respondent that if he committed a listed prohibited act, he was subject to immediate arrest and civil and criminal contempt. Petitioner was not required to demonstrate a pattern of action before seeking to hold respondent in criminal contempt, and respondent could not relitigate the validity of the PPO in his challenge to the criminal contempt. There was sufficient evidence related to the incident at the neighbor's house to permit a rational

trier of fact to find beyond a reasonable doubt that respondent violated the PPO. Accordingly, the trial court properly found respondent in criminal contempt.

Affirmed.

PERSONAL PROTECTION ORDERS — VIOLATIONS OF PERSONAL PROTECTIONS ORDERS — CRIMINAL CONTEMPT.

In a hearing to determine whether a respondent should be held in criminal contempt for violating a personal protection order (PPO) that prohibits stalking as defined in MCL 750.411h, the petitioner does not have to demonstrate anew the requirements that were necessary to obtain the PPO in the first place; thus, a petitioner does not have to establish a "course of conduct" as defined and used in MCL 750.411h to establish that the respondent violated the terms of the PPO; the petitioner must only prove that the respondent violated the terms of the PPO itself to establish grounds for a criminal contempt order.

The Law Office of Ashley Siegel, PLLC (by *Ashley Siegel*) for respondent.

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

K. F. KELLY, J. Respondent appeals as of right the order finding him in criminal contempt for violating a personal protection order (PPO). Respondent was sentenced to serve three days in jail and to pay $200 in fines and $600 for court costs and attorney fees. We hold a party must timely challenge a trial court's order denying the motion to terminate a PPO; when a party fails to comply, a review of the validity of the PPO is foreclosed. Additionally, a party may be held in criminal contempt for violating the plain, written conditions delineated in the PPO. Because respondent failed to timely appeal the denial of the motion to terminate the PPO and the trial court found that criminal contempt was proven beyond a reasonable doubt with credible evidence of an assault by respondent upon petitioner, respondent is not entitled to appellate relief. Therefore, finding no errors warranting reversal, we affirm.

I. BASIC FACTS

On July 11, 2017, petitioner filed a request for an ex parte nondomestic PPO against respondent, his neighbor. To obtain the PPO, petitioner filled out a questionnaire that requested information regarding the name of the respondent, the length of the relationship with that person, any threats by the respondent, any verbal statements and physical actions by the respondent, the frequency of the contacts, the dates of the contacts, and if threatened, the impact of those threats on the petitioner. Petitioner wrote that he had been neighbors with the respondent for nearly 15 years. On June 29–30, 2017, petitioner was working in his yard when respondent verbally harassed him. Specifically, respondent yelled out that petitioner was "worthless" and "couldn't get a job." The verbal harassment occurred three to four times a month for the last five to six years. Respondent also engaged in name calling; he referred to petitioner as "stupid" and "uneducated." More troubling, respondent threatened to harm petitioner by coming over to petitioner's property to "kick [his] ass." If petitioner ignored respondent, the physical threats became more pervasive until petitioner went inside his home. Petitioner asserted that he had called 911 on at least 10 occasions, and law enforcement spoke to respondent. However, any change in respondent's behavior only lasted for several days after the police contact. Petitioner repeatedly asked respondent to leave him alone and stop yelling. With regard to the impact of respondent's conduct, petitioner wrote:

> I feel afraid to go outside of my house. I am afraid of seeing him, or him seeing me; I never know if he will try to beat me up. I am always nervous to be in my own yard. I feel very frustrated that he continues to bully me.

On July 11, 2017, the trial court signed the ex parte PPO, citing the repeated patterns of threats, and provided that it was immediately enforceable and in effect until July 17, 2019. A deputy served respondent with the PPO on July 18, 2017.

On August 14, 2017, respondent filed a motion to terminate the PPO, asserting that it was "full of untruths." He claimed that petitioner had been arrested and fined for petitioner's assault upon respondent. It was alleged that petitioner blamed respondent for having to pay the fines related to the assault and initiated the PPO as a form of revenge.

On September 6, 2017, the parties appeared at a hearing on respondent's request to terminate the PPO. The trial court questioned petitioner regarding his contacts with respondent. Petitioner reiterated in his testimony that respondent engaged in repeated name calling and threats and that the contacts had been occurring for years. Petitioner admitted that, on one occasion, he was arrested by the police for his interaction with respondent. However, petitioner took measures to avoid respondent. He recently purchased noise-cancelling headphones with a radio feature to prevent him from hearing respondent. Yet in July 2017, respondent threw eggs at petitioner's lawn mower while petitioner was using his trimmer, and he submitted a picture of his lawn mower to support his testimony.

On the contrary, respondent testified that petitioner was not truthful. He denied that the police had been repeatedly called to address neighborly disputes but, rather, only came to respondent's home to serve the PPO. Respondent claimed that petitioner was a "pervert" who came onto his property and peeked into his windows. He acknowledged that the police were called because of petitioner's assault on respondent, but he

could not recall the date of the assault because of back pain and a closed head injury. The assault occurred because respondent tried to collect money that he had lent to petitioner. When petitioner did not pay the debt, respondent said he should have known not to "hand it out to a dork that [he would not] get it back from." This caused petitioner to charge at respondent with a pipe. Respondent testified that petitioner was jealous of what respondent had and raised the false allegations against respondent as evidenced by the groundless PPO. Despite referring to petitioner as a "pervert" and "dork" earlier in the hearing, respondent testified that he was college educated and would not engage in name calling. Respondent also claimed that he was poor and would not waste eggs by throwing them at petitioner. In fact, he invited the deputy to come to his home and see that all his eggs were "accounted for."

When asked if he had anything to add, petitioner stated, "Please keep the PPO intact so I can feel a little safer in my yard." The trial court found that it was evident petitioner was afraid of respondent, the court found that respondent was "pretty egregious," and it did not find respondent to be credible. The trial court denied the request to terminate the PPO.

On September 28, 2018, petitioner filed a motion to show cause for respondent's violation of the PPO. Petitioner submitted a written statement, alleging:

> On Sunday, Sept. 23, 2018, I was mowing a neighbor's yard. I had just met this neighbor & offered to mow his lawn. I was on a riding lawn mower with noise-cancelling head phones on. Out of the corner of my eye I saw a truck pull in & a man get out.
>
> All of a sudden he walked up to me & punched me on the right cheek, ripped my shirt & scratched me. It was [respondent]—who I have a PPO . . . out against.

> After violating the PPO by punching me, he drove off. I called 911 & reported the violence. They sent an officer out and he took a report, I have enclosed a copy.
>
> I need to live beside this person & I am so frustrated with his bullying me for years. Things were better after I got the PPO—but now he seems to not respect that order any more[.] Please help me with this situation.
>
> [Respondent] has called 5 various agencies trying to get me in trouble: Township, DEQ, Health Dept, lawyers. Not one of these agencies filed any citations. I would like for him to stop trying to get me in trouble.

After the assault occurred, the police responded to the incident and did record that the sleeve of petitioner's t-shirt was ripped and that he had a scratch under his sleeve. An injury to his face was not recorded as visible. At the time of the assault upon petitioner, he was cutting the grass of David Pillard. Pillard gave a statement to the police that petitioner was cutting his grass when the mower stopped for about 10 minutes. He then heard a knock at the door, and respondent arrived at his home to return DVDs. Pillard advised respondent that petitioner was present and that he should leave. Pillard looked over at petitioner, and he was on the phone. Thus, Pillard's statement did not indicate that he saw a confrontation or assault between the parties. However, Pillard did report that respondent questioned why petitioner was cutting the lawn instead of respondent. When the police contacted respondent, he denied seeing petitioner at the Pillard home that day and denied any assault.

On October 10, 2018, the hearing on the order to show cause for the PPO violation and to find respondent in criminal contempt was adjourned to appoint counsel to represent respondent in light of the fact that respondent was subject to criminal penalties if found in contempt. On November 6, 2018, a hearing was held

on the PPO show-cause violation and criminal contempt. Petitioner testified that he was mowing a neighbor's lawn in Gladwin, Michigan, on September 23, 2018, when respondent approached him and grabbed his arm. He testified that respondent then ripped his shirt, scratched his arm, and punched him in the face before walking away to his vehicle, a red Ford Explorer. He acknowledged that he only saw his assailant for a split second and watched the perpetrator walk away. However, petitioner recognized respondent and his vehicle. No one else was outside when these events occurred. Petitioner called the police, and they investigated by conducting interviews, photographing petitioner's ripped shirt and arm scratch, and preparing a report. Petitioner also claimed that respondent called various agencies in an attempt to cause trouble for petitioner, but the agencies did not find any violations or name the complainant. Petitioner added that respondent violated the PPO by yelling at him, and he wanted to feel safe in his yard.

Respondent confirmed that he had gone to Pillard's house that day, but he testified that it was only to return items to Pillard. Respondent testified that Pillard told him to wait in the car because, unbeknownst to respondent, petitioner was on the property mowing the lawn. Upon learning that petitioner was present, respondent told Pillard that he had to leave before he ever saw petitioner. Respondent admitted that he drove a burgundy or red Ford Explorer. No other witness was presented to testify whether a confrontation occurred. However, in his statement, Pillard mentioned to the police that respondent questioned why petitioner was mowing the lawn instead of respondent.

At the conclusion of the testimony, the trial court found petitioner's testimony credible and held respon-

dent in criminal contempt for violating the PPO, concluding:

> Basically, this does come down to credibility of the two witnesses, since we only have two witnesses, and they both live on Peace Haven.
>
> The personal protection order is against [respondent] in this matter. The Court finds the petitioner's testimony credible and finds that since they're in close proximity that he would recognize his vehicle and recognize [respondent] walking away without even seeing his face, because they are neighbors.
>
> And the Court finds, beyond a reasonable doubt, that [respondent] violated the personal protection order and finds him guilty of contempt of court in this matter.

The written order finding respondent in criminal contempt expressly stated that the proofs were established beyond a reasonable doubt. Although sentencing was adjourned, the trial court warned respondent that the PPO was still in effect and that he faced a penalty of jail time for a violation.

On November 18, 2018, respondent appeared for sentencing. The trial court was advised that respondent was on oxygen and had multiple medical conditions and treating physicians. Counsel for respondent sought leniency, citing his compliance with the PPO for over a year and the fact that this was his first violation. Petitioner made the following statement before sentencing:

> I'm tired of being bullied. He has done other things that—
>
> * * *
>
> . . . —I haven't reported, hollering at me and making gestures. He has even gave me the finger the same day we

> were in court, when he got home. He was found guilty. I don't know if he will ever learn or quit, but I would feel at peace as long as he's in jail.

The trial court advised respondent of the maximum penalty of 93 days in jail and/or a $500 fine. The trial court sentenced respondent to three days in jail, a $200 fine, and $600 for court costs and attorney fees. In determining the sentence, the court cited the need for punishment in light of "what you have done," the attempt to rehabilitate, and to deter others. From this decision, respondent appeals.

II. VALIDITY OF THE PPO

Respondent first argues that the trial court erred by denying his motion to terminate the nondomestic ex parte PPO because it was invalid. However, respondent failed to timely challenge this issue, and appellate relief is precluded.

We review a trial court's determination on whether to issue a PPO for an abuse of discretion. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). "An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes." *Id*. A trial court's findings of fact are reviewed for clear error. *Id*. Additionally, questions of statutory interpretation are reviewed de novo. *Id*.

However, although respondent seeks to challenge the validity of the PPO, the court rules addressing appeals involving PPOs indicate that his request is untimely. Thus, his challenge to the issuance of the PPO fails.

MCR 3.709 governs appeals in PPO cases and provides:

> (A) Rules Applicable. Except as provided by this rule, appeals involving personal protection order matters must

comply with subchapter 7.200. Appeals involving minor personal protection actions under the Juvenile Code must additionally comply with MCR 3.993.

(B) From Entry of Personal Protection Order.

(1) Either party has an appeal of right from

(a) an order granting or denying a personal protection order after a hearing under subrule 3.705(B)(6), or

(b) the ruling on respondent's first motion to rescind or modify the order if an ex parte order was entered.

(2) Appeals of all other orders are by leave to appeal.

(C) From Finding after Violation Hearing.

(1) The respondent has an appeal of right from a sentence for criminal contempt entered after a contested hearing.

(2) All other appeals concerning violation proceedings are by application for leave.

On July 11, 2017, petitioner applied for the nondomestic ex parte PPO, and the trial court signed the PPO that day, citing the repeated patterns of threats, and provided that the PPO was immediately enforceable and in effect until July 17, 2019. A deputy served respondent with the PPO on July 18, 2017. On August 14, 2017, respondent filed a motion to terminate the PPO, asserting that it was "full of untruths." On September 6, 2017, the parties appeared at a hearing on respondent's request to terminate the PPO. Following the testimony of both parties, the trial court denied respondent's motion to terminate. Consequently, the time for filing respondent's claim of appeal commenced on September 6, 2017, and pursuant to MCR 7.204(A)(1), respondent had 21 days after the denial of the motion to terminate to file his claim of appeal as of right. However, respondent did not file his claim of appeal until July 29, 2019, after the finding of criminal contempt. Accordingly, we do not

have jurisdiction to address the validity of the PPO. Furthermore, the longstanding rule is that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *United States v Rylander*, 460 US 752, 756; 103 S Ct 1548; 75 L Ed 2d 521 (1983) (quotation marks and citation omitted). Consequently, respondent's challenge to the validity of the PPO underlying the criminal contempt is foreclosed.

III. FINDING OF CRIMINAL CONTEMPT

Respondent contends that there was insufficient evidence to support his conviction of criminal contempt because the evidence did not establish a violation of the PPO. We disagree.

Under MCL 600.2950a(23), a person who fails to comply with a PPO is subject to the criminal-contempt powers of the court. The rules of evidence apply to criminal-contempt proceedings, and the petitioner has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt. MCR 3.708(H)(3). We review a trial court's decision to hold a party in contempt for an abuse of discretion. *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 714; 624 NW2d 443 (2000). The nature of the contempt order and whether the contempt statute permitted the sanctions imposed are questions of law that are reviewed de novo. *Id*. When examining the sufficiency of the evidence to support a criminal-contempt finding following a bench trial, this Court views the evidence presented in a light most favorable to the prosecution to determine if the elements of the crime were proven beyond a reasonable doubt. *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009). Further-

more, the trial court's factual findings in a contempt proceeding are reviewed for clear error, and we must affirm if there is competent evidence to support them. *In re Kabanuk*, 295 Mich App 252, 256; 813 NW2d 348 (2012). We do not weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the findings. *Id*. Circumstantial evidence and the reasonable inferences arising from that evidence can constitute satisfactory proof of the elements. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The PPO prohibited respondent from "stalking as defined under MCL 750.411h and MCL 750.411i[.]" An ex parte PPO can only be issued when "specific facts" show "that immediate and irreparable injury, loss, or damage will result from the delay required to effectuate notice or that the notice will precipitate adverse action . . . ." MCL 600.2950a(12). Additionally, MCR 3.705(A)(2) states that if the court grants an ex parte order, "the court must state in writing the specific reasons for issuance of the order."

MCL 750.411h(1)(d) defines "stalking" as

> a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

" 'Course of conduct' means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). MCL 750.411h(1)(c) provides:

> "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable indi-

> vidual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.

"Emotional distress" is defined to mean "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." MCL 750.411h(1)(b). And MCL 750.411h(1)(e) states:

> "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:
>
> (*i*) Following or appearing within the sight of that individual.
>
> (*ii*) Approaching or confronting that individual in a public place or on private property.
>
> (*iii*) Appearing at that individual's workplace or residence.
>
> (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual.
>
> (*v*) Contacting that individual by telephone.
>
> (*vi*) Sending mail or electronic communications to that individual.
>
> (*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual.

Petitioner's questionnaire in support of his PPO petition stated that he had been threatened and insulted by respondent "3-4 times a month for 5-6 years." He indicated that respondent's insults were always focused on his intelligence and worth as a person and that his threats involved physical harm to petitioner. Petitioner indicated that the recurrence of respondent's threats

and yelling caused him to seek refuge in his home. Thus, to obtain the PPO, petitioner alleged a pattern or course of improper conduct by respondent, and respondent cannot relitigate the validity of the PPO in his challenge to the criminal contempt. *Rylander*, 460 US at 756.

Nonetheless, respondent submits that to present sufficient evidence to support criminal contempt premised on a violation of the PPO, a petitioner must demonstrate *again* to the court a course of conduct and harassment causing emotional distress.[1] Because petitioner alleged "only the one instance of assault throughout all the hearings," respondent claimed that there was insufficient evidence to support the criminal contempt. We disagree.

In the present case, petitioner filed a petition seeking a nondomestic ex parte PPO. After a written submission and hearing, the trial court issued the PPO. In light of respondent's request to terminate the PPO, a second hearing was held during which witnesses were sworn and evidence was presented. At the conclusion of this hearing, the trial court found that respondent's testimony that he did not threaten or harass petitioner was simply not credible. Indeed, respondent's contention that he did not engage in juvenile behavior such as name calling was belied by his testimonial references to petitioner as a "pervert" and "dork."

After petitioner was assaulted by respondent while mowing a neighbor's lawn, he requested a show-cause order, seeking to hold defendant in criminal contempt for the violation of the PPO. Contrary to respondent's assertion, petitioner was not required to demonstrate

[1] Respondent's brief on appeal states, "In order to establish a violation for non-domestic stalking, the Petitioner was required to establish stalking by Respondent beyond a reasonable doubt."

anew the requirements necessary to obtain a PPO. Moreover, petitioner need not allow repeated assaults to occur to obtain relief. Instead, when a PPO is premised on the stalking statute, MCL 750.411h, a course or pattern of conduct is examined, and therefore, "all relevant present and past incidents arising between the parties" is pertinent for consideration. See *PF v JF*, 336 Mich App 118, 130; 969 NW2d 805 (2021). Furthermore, the plain language of the PPO itself instructs on the next course of action. The PPO expressly stated that respondent was prohibited from stalking as defined in "MCL 750.411h and MCL 750.411i" and that this conduct includes, but is not limited to:

- ❑ following or appearing within sight of the petitioner.
- ❑ appearing at the workplace or the residence of the petitioner.
- ❑ approaching or confronting the petitioner in a public place or on private property.
- ❑ entering onto or remaining on property owned, leased, or occupied by the petitioner.
- ❑ sending mail or other communications to the petitioner.
- ❑ contacting the petitioner by telephone.
- ❑ placing an object on or delivering an object to property owned, leased, or occupied by the petitioner.
- ❑ threatening to kill or physically injure the petitioner.
- ❑ purchasing or possessing a firearm.

* * *

6. Violation of this order subjects the respondent to immediate arrest and to the civil and criminal contempt powers of the court. If found guilty, respondent shall be imprisoned for not more than 93 days and may be fined not more than $500.00.[2]

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[2] On the PPO, each checkbox was marked with a handwritten "X."

At the show-cause hearing, petitioner testified that he was mowing the lawn of neighbor Pillard when he was suddenly punched and scratched by respondent and his shirt was torn. Although the assault occurred very fast, petitioner nonetheless recognized respondent as the perpetrator and saw respondent depart in his red Ford Explorer. This conduct violated the court's PPO because it fell within the prohibition against "approaching or confronting the petitioner in a public place or on private property."[3] The issuance of the PPO plainly apprised respondent that if he committed a listed prohibited act, he was subject to immediate arrest and civil and criminal contempt. Respondent's contention that petitioner had to demonstrate a pattern of action before seeking to hold respondent in criminal contempt is not supported by the language of the order.

We reject respondent's contention that the punching incident did not occur. The trial court was presented with two diametrically opposed versions of the event. Following the testimony, the trial court found that the assault occurred by respondent upon petitioner. As the

[3] We note that the PPO also provided that respondent was prohibited from "following or appearing within sight of the petitioner." We question the validity of the breadth and scope of this prohibition, particularly in light of the facts of this case. Petitioner and respondent are neighbors, and under these terms, respondent could be deemed in violation by merely exiting his home and being viewed by petitioner. However, petitioner did not raise this ground as a basis for the violation of the PPO and criminal contempt. Moreover, petitioner did not assert that respondent's sole appearance was problematic, but rather, it was respondent's presence, yelling, verbal abuse, and threats of violence. We cannot address the constitutional breadth of the "appearing within sight" of the petitioner provision because our resolution would be premised on a hypothetical when our focus must be on the specifics of the case at hand. *People v Lockett*, 295 Mich App 165, 176; 814 NW2d 295 (2012). Nonetheless, we caution against a literal application of the "appearing within sight" provision.

reviewing court, we do not weigh the evidence or credibility of witnesses. *In re Kabanuk*, 295 Mich App at 256. Evidence was presented that petitioner was harassed and attacked by respondent, and the trial court found this evidence to be credible. The conduct occurred despite the trial court order precluding its occurrence. We conclude that the evidence was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that respondent violated the PPO and was properly found in criminal contempt.

IV. TRIAL COURT'S FINDINGS

Respondent contends that the trial court provided insufficient findings of fact and law, requiring reversal of his conviction. We disagree.

The proper interpretation and application of a court rule presents a question of law reviewed de novo. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). We review a trial court's findings of fact for clear error. *Hayford*, 279 Mich App at 325. An issue of statutory construction is also reviewed de novo. *Id*.

MCR 3.708(H)(4) requires a trial court at a PPO violation hearing to "find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." The requirements of MCR 3.708(H)(4) are also addressed in MCR 2.517. MCR 2.517 is satisfied when "it appears that the trial court was aware of the issues in the case and correctly applied the law, and where appellate review would not be facilitated by requiring further explanation." *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176; 530 NW2d 772 (1995).

As noted, the trial court made the following findings on the record:

> Basically, this does come down to credibility of the two witnesses, since we only have two witnesses, and they both live on Peace Haven.
>
> The personal protection order is against [respondent] in this matter. The Court finds the petitioner's testimony credible and finds that since they're in close proximity that he would recognize his vehicle and recognize [respondent] walking away without even seeing his face, because they are neighbors.
>
> And the Court finds, beyond a reasonable doubt, that [respondent] violated the personal protection order and finds him guilty of contempt of court in this matter.

A review of the trial court's decision reveals that it was aware of the issues, correctly applied the terms of the PPO to the facts, and found respondent in criminal contempt for violating the PPO. A remand for further explanation would not aid our appellate review. *Triple E Produce Corp*, 209 Mich App at 176. Although respondent correctly notes that the trial court could have provided more details regarding the basis for its decision, it complied with the provisions of MCR 3.708(H)(4). The trial court found that the punching incident occurred and found that the incident violated the terms of the PPO. As discussed above, this was a correct application of the law. Therefore, the trial court did not err in providing its findings of fact and law.

V. CUMULATIVE EFFECT OF ERRORS

Finally, we reject respondent's argument that the cumulative effect of several errors deprived him of due process. Cumulative error only warrants reversal when several errors combine to undermine confidence in the reliability of a verdict. *People v Dobek*, 274 Mich

App 58, 106; 732 NW2d 546 (2007). Because no errors have been identified, respondent is not entitled to appellate relief.

Affirmed.

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