MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

January 13, 2015, through March 19, 2015

CORBIN R. DAVIS
REPORTER OF DECISIONS

VOLUME 309

FIRST EDITION

THOMSON REUTERS™

2016

Copyright 2016

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
MICHAEL J. TALBOT	2021
Chief Judge Pro Tem	
CHRISTOPHER M. MURRAY	2021
Judges	
DAVID H. SAWYER	2017
WILLIAM B. MURPHY	2019
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
KURTIS T. WILDER	2017
PATRICK M. METER	2021
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2019
MICHAEL F. GADOLA	2017

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2017
RICHARD H. BERNSTEIN	2023

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

TIMOTHY J. RAUBINGER	MICHAEL S. WELLMAN
LYNN K. RICHARDSON	GARY L. ROGERS
NELSON S. LEAVITT	RICHARD B. LESLIE
DEBRA A. GUTIERREZ-McGUIRE	KATHLEEM. DAWSON
ANNE-MARIE HYNOUS VOICE	SAMUEL R. SMITH
DON W. ATKINS	ANNE E. ALBERS
JÜRGEN O. SKOPPEK	AMY L. VanDYKE

State Court Administrator

JOHN A. HOHMAN, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

TABLE OF CASES REPORTED

PAGE

A

Adanalic v Harco National Ins Co 173
Adler v Dormio 702
Al-Amin, Clark v 387
Anton, Sowerby & Associates, Inc v Mr. C's Lake Orion, LLC 535
Application of Michigan Electric Transmission Co, *In re* 1
Aubert v Reed City Area Schools Bd of Ed 507

B

Baldes, People v 651
Baumgartner v Perry Public Schools 507
Bitterman v Village of Oakley 53
Blackmer, People v 199

C

Carrier, People v 92
Chrysler Group, LLC, City of Sterling Heights v 676
Chrysler Group LLC, Omian v 297
City of Pontiac No 1, Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v 590

PAGE

City of Pontiac No 2, Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v 611
City of Sterling Heights v Chrysler Group, LLC 676
Clark v Al-Amin 387
Comerica Bank, Marketplace of Rochester Hills v 579
Cooper, People v 74
Costner, People v 220

D

Decatur Public Schools, Van Buren County Ed Ass'n & Decatur Ed Support Personnel Ass'n, MEA/NEA v 630
Demski v Petlick 404
Dormio, Adler v 702

E

Edel-Harrelson, Pace v 256
Eickelberg v Eickelberg 694

F

Flint Community Schools Bd of Ed, Wright v ... 507
Fuller v GEICO Indemnity Co 495

G

GEICO Indemnity Co, Fuller v 495
Genesee County, Genesee County Drain Comm'r v 317
Genesee County Drain Comm'r v Genesee County 317
Gerald L Pollack Trust, *In re* 125

PAGE

H

Harco National Ins Co, Adanalic v 173

I

In re Application of Michigan Electric Transmission Co 1
In re Gerald L Pollack Trust 125
In re KMN 274
In re Spears 658

J

Johnson, People v 22

K

KMN, *In re* 274
Kaeb v Kaeb 556
Konopka, People v (On Remand) 345

L

Lansing Fire Dep't, McLain v 335
Loutts v Loutts (After Remand) 203

M

Marketplace of Rochester Hills v Comerica Bank 579
Martin v Murray 37
McFall, People v 377
McLain v Lansing Fire Dep't 335
Mr. C's Lake Orion, LLC, Anton, Sowerby & Associates, Inc v 535
Murray, Martin v 37

O

Omian v Chrysler Group LLC 297

PAGE

P

Pace v Edel-Harrelson 256
People v Baldes 651
People v Blackmer 199
People v Carrier 92
People v Cooper 74
People v Costner 220
People v Johnson 22
People v Konopka (On Remand) 345
People v McFall 377
People v Putman 240
People v Triplett 252
Perry Public Schools, Baumgartner v 507
Petlick, Demski v 404
Pontiac (City of) No 1, Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v 590
Pontiac (City of) No 2, Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v 611
Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 1 590
Pontiac Police & Fire Retiree Prefunded Group Health & Ins Trust Bd of Trustees v City of Pontiac No 2 611
Putman, People v 240

R

Reed City Area Schools Bd of Ed, Aubert v 507

S

Spears, *In re* 658

PAGE

Sterling Heights (City of) v Chrysler Group, LLC 676

T

Triplett, People v 252

V

Van Buren County Ed Ass'n & Decatur Ed Support Personnel Ass'n, MEA/NEA v Decatur Public Schools 630
Village of Oakley, Bitterman v 53

W

Wright v Flint Community Schools Bd of Ed .. 507

COURT OF APPEALS CASES

In re APPLICATION OF MICHIGAN ELECTRIC TRANSMISSION CO

Docket Nos. 317872 and 317893. Submitted November 4, 2014, at Lansing. Decided November 18, 2014. Approved for publication January 13, 2015, at 9:00 a.m.

The Michigan Electric Transmission Company (METC) applied in the Public Service Commission (PSC) for a voluntary certificate of public convenience and necessity (CPCN) under MCL 460.569, a provision of the Electric Transmission Line Certification Act (Act 30), MCL 460.561 *et seq*., to construct two transmission lines above ground in Oshtemo Charter Township (the township) and an electrical transmission substation in Almena Township. After the application was filed, the township amended its utility ordinance to require new transmission lines to be located underground if they would come within 250 feet of a public right-of-way, and it also petitioned to intervene in the application proceeding, as did several affected landowners. An administrative law judge granted the petitions to intervene and held an evidentiary hearing, after which the PSC issued an order granting METC a CPCN for its proposed transmission line along METC's preferred route. The intervening landowners and the township appealed.

The Court of Appeals *held*:

1. The PSC followed the requirements of Act 30, and in particular MCL 466.568, in granting METC's application for a CPCN. The PSC was required to issue a CPCN if it determined that the quantifiable and nonquantifiable public benefits of the proposed transmission line justified its construction, the proposed or alternative route was feasible and reasonable, and the proposed transmission line did not present an unreasonable threat to public health or safety. Although the landowners had proposed an alternative plan, the PSC's finding that it was not viable was supported by the requisite evidence. The PSC was entitled to choose to accept the testimony of METC's expert on this point even though the landowners' expert gave contradictory testimony. The PSC correctly concluded that METC was not required to provide a cost-benefit analysis of its proposal, and the PSC was not required to make its judgment based solely on cost. The PSC did not err by finding that METC's proposed route for the

transmission line was feasible and reasonable. Under MCL 460.568(5)(b), the PSC was not required to find that the proposed route was more feasible and more reasonable than any other route proposed by any party in order to grant a CPCN.

2. The PSC's approval of METC's application did not allow METC to take private property from landowners without due process. METC held public meetings on its proposal, the PSC conducted a contested-case hearing on METC's application, and the landowners intervened and fully participated in the proceeding. Furthermore, the PSC's act of granting a CPCN was subject to review under MCL 460.575(1). Although the CPCN would have been binding as to the public convenience and necessity for that transmission line in an eminent domain or other related proceeding, the CPCN was not binding on the Court of Appeals.

3. The PSC's order granting the CPCN did not violate the Separation of Powers Clause, Const 1963, art 3, § 2, by allowing METC to ignore the township's ordinance requiring portions of the transmission line to be placed underground. MCL 460.570(1) provides that a CPCN granted by the PSC preempts local ordinances regarding the placement underground of transmission lines, and MCL 460.563(2) provides that Act 30 controls if it conflicts with any other law of this state. Because the PSC's actions were authorized by statute, they did not violate the separation-of-powers doctrine.

4. A local ordinance cannot prevail over a conflicting CPCN issued by the PSC under Act 30. Although local governments have the right to the reasonable control of their highways, streets, alleys, and public places under Const 1963, art 7, § 29, that right is subject to limitation by Const 1963, art 7, § 22, which provides that municipal ordinances are subject to the Constitution and law.

5. The PSC did not err by failing to determine whether the township's ordinance conflicted with state law. Under the plain language of MCL 460.570(1), the CPCN took precedence over the township's conflicting ordinance that required a portion of METC's proposed transmission line to be constructed underground. The Legislature had the authority to enact laws such as MCL 460.570(1) that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29. The argument that the PSC's analysis was required to expand beyond the conclusion that the CPCN took precedence over the township's conflicting local ordinance, and that the PSC was required to determine whether the ordinance conflicted with some other state law, was unsupported.

6. Act 30 was not an unconstitutional delegation of power. Although the Legislature cannot delegate its power to make a law, it can enact a law that delegates a power to determine a fact or status on which the law makes, or intends to make, its own action depend. Such a statute must be sufficiently broad to permit efficient administration designed to carry out legislative policy, but not so broad as to leave an administrative body with uncontrolled and arbitrary power. The guiding principles in determining whether a statute provides sufficient standards for the exercise of administrative discretion are: (1) the provision in question should be read with reference to the act as a whole; (2) the standard should be as reasonably precise as the subject matter requires or permits; and (3) if possible, the statute must be construed in such a way as to render it valid rather than invalid, i.e., as conferring administrative, not legislative power, and as vesting discretionary, not arbitrary, authority. Because the evaluation of an application for a CPCN requires the PSC to consider a multitude of factors, including any conflicting local zoning ordinances, each application presents its own unique facts and circumstances, and the Legislature could not have specified with any practicality or feasibility what routes or configurations the PSC would be required to consider in each case. Accordingly, the standards set out in MCL 460.568(5) were as reasonably precise as the subject matter permitted.

Affirmed; stay pending appeal lifted.

UTILITIES — PUBLIC SERVICE COMMISSION — PROPOSED TRANSMISSION LINES — CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY — CONFLICTING LOCAL ORDINANCES.

A certificate of public convenience and necessity issued by the Public Service Commission under 1995 PA 30 to an applicant who seeks to construct a transmission line takes precedence over a conflicting local ordinance; the right of local governments to the reasonable control of their highways, streets, alleys, and public places under Const 1963, art 7, § 29 is subject to limitation by Const 1963, art 7, § 22.

Dykema Gossett PLLC (by *Albert Ernst*, *Gary P. Gordon*, and *Shaun M. Johnson*) for the Michigan Electric Transmission Company.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Michael J. Watza*, *Robert T. Kent*, and *Joshua D. Trexler*) for HAR Company LLC and others.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, *B. Eric Restuccia*, Counsel of Record, and *Steven D. Hughey* and *Lauren D. Donofrio*, Assistant Attorneys General, for the Michigan Public Service Commission.

James W. Porter for Oshtemo Charter Township.

Amici Curiae:

Bauckham, Sparks, Lohrstorfer, Thall & Seeber, PC (by *Kenneth C. Sparks* and *Robert E. Thall*), for the Michigan Townships Association, the Michigan Municipal League, the Public Corporation Law Section of the State Bar of Michigan, and the Michigan Coalition to Protect Public Rights-of-Way.

Fraser Trebilcock Davis & Dunlap, PC (by *Michael S. Ashton*), for the Michigan Cable Telecommunications Association.

James A. Ault for the Michigan Energy Providers Group.

Before: OWENS, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM. In these consolidated cases, appellants Landowners[1] and Charter Township of Oshtemo appeal as of right an order of the Michigan Public Service Commission (PSC) approving the application of Michi-

[1] "Landowners" refers to the appellants in Docket No. 317872—namely, HAR Company, LLC; Ken Irish; Margaret Irish; Jack Kuipers; Jane Kuipers (individually and as trustee of the Jane Kuipers Trust); JMK Holdings, LLC; Doug Maxwell (individually and as trustee of the Douglas E. Maxwell 2000 Trust); Micki Maxwell (individually and as trustee of the Micki A. Maxwell 2000 Trust); Ward Squires; and Henrietta Squires.

gan Electric Transmission Company, LLC (METC), for a certificate of public convenience and necessity (CPCN) for construction of an overhead transmission line. We affirm in both cases and lift the stay imposed pending appeal of these cases.

I. BACKGROUND

The Legislature enacted the Electric Transmission Line Certification Act (Act 30), 1995 PA 30, MCL 460.561 *et seq*., effective May 17, 1995, to regulate the construction and location of certain electric transmission lines. Act 30 provides that if an electric utility with 50,000 or more residential customers plans to construct a major transmission line,[2] the utility must submit a plan to the PSC and may not begin construction on the line until the PSC has issued a CPCN. MCL 460.565. A utility that wishes to construct a transmission line[3] other than a major transmission line may, but is not required to, submit an application for a CPCN to the PSC. MCL 460.569(1). If the utility applies for a CPCN, the utility may not begin construction on the transmission line until the PSC has issued a CPCN. MCL 460.569(1). With one exception, "the provisions of [Act 30] that apply to applications and certificates for major transmission lines apply in the same manner to applications and certificates issued under [MCL 460.569]." MCL 460.569(2). The PSC proceeds in the same manner on both mandatory and

[2] A "major transmission line" is "a transmission line of 5 miles or more in length wholly or partially owned by an electric utility, affiliated transmission company, or independent transmission company through which electricity is transferred at system bulk supply voltage of 345 kilovolts or more." MCL 460.562(g).

[3] A "transmission line" is "all structures, equipment, and real property necessary to transfer electricity at system bulk supply voltage of 100 kilovolts or more." MCL 460.562(k).

voluntary applications. MCL 460.569(2). A CPCN takes "precedence over a conflicting local ordinance, law, rule, regulation, policy, or practice that prohibits or regulates the location or construction of a transmission line for which the commission has issued a certificate." MCL 460.570(1). In addition, Act 30 controls "in any conflict between this act and any other law of this state." MCL 460.563(2).

II. UNDERLYING FACTS AND PROCEEDINGS

METC filed an application with the PSC seeking a CPCN "for the construction of two double-circuit 138 kilovolt ('kV') transmission lines on a 220-foot right-of-way running through Oshtemo Township, Kalamazoo County, and an electrical transmission substation in Almena Township, Van Buren County," which METC referred to collectively as the "Proposed Transmission Line." After METC proposed the new transmission line, however, Oshtemo Township amended its utility control ordinance to require METC to prove the necessity of the proposed line and receive Township approval before beginning construction of the line. In addition, the ordinance required METC to locate the proposed line underground in any area in which the line would come within 250 feet of a public right-of-way. METC asserted that the issuance of a CPCN would take precedence over any conflicting local ordinance.

Evidence produced at the evidentiary hearing showed that the parties had conflicting views regarding the efficacy of METC's proposed project. A witness for METC testified that the Kalamazoo area was served by three 345/138 kV transformers located at the Argenta substation. METC's proposal to add more lines and a new substation at Weeds Lake would enable METC to comply with national mandatory planning criteria.

METC's witness stated that METC had considered two alternative routes for the lines, but rejected them because they failed to meet planning criteria. METC had also considered the option of adding a fourth transformer at the Argenta substation, but rejected that option because it would not have protected against the risk that the entire substation could be disconnected from the 345 kV power source or the 138 kV transmission lines that served an area that included Kalamazoo and Battle Creek.

A witness for Oshtemo Township testified that the Township preferred two identified alternative routes over METC's preferred route because the alternative routes relied in part on public lands and an existing corridor and would impose less of a burden on private property owners.

A witness for the Landowners testified that the quantifiable and nonquantifiable benefits of the proposed project did not offset the detriments, including the cost of the project, the adverse impact caused by locating the project close to private residences, and the loss of woodlands and croplands. The witness maintained that the installation of a fourth transformer at the Argenta substation would cost less and would achieve results comparable to METC's proposed project. The witness also asserted that an alternative referred to as "B Avenue" was preferable to METC's Weeds Lake proposal because it required only one transmission line, and power flow control protectors could guard against unbalanced power flows.

The PSC issued an order granting METC a CPCN for the construction of METC's proposed transmission line along METC's preferred route. The PSC noted that the "most contentious issue in this case is whether METC sufficiently demonstrated that the quantifiable

and nonquantifiable public benefits of the project justify its construction." The PSC found that "a formal benefit/cost analysis of the project is not strictly required; however, it appears that the most straightforward way to demonstrate that a project's benefits justify its construction, as the Commission must find under [MCL 460.568(5)(a)], is through the submission of at least some reasonable estimate of the value of benefits of the project."

The PSC found that the record established that two realistic proposals existed to address the contingency issue: (1) the Weeds Lake proposal, estimated by METC to cost $45 million, and (2) the B Avenue proposal put forth by the Landowners, and estimated to cost $37 to $47 million. The PSC stated:

> The Landowners presented evidence that the value of the benefit of increased efficiency resulting from the Weeds Lake Project was $1.3 million per year, thus offsetting the difference in cost between the two proposals by that amount. In addition, METC identified, but did not quantify, the benefits of 500 MW of additional capacity and the establishment of a geographically separate and distinct source of power for the Kalamazoo area, thus resulting in a more robust system and addressing a NERC Category D contingency. As the Staff pointed out, while a NERC Category D contingency is unlikely, the costs to businesses, industry, and residents in the event of the loss of the lines to the Argenta station are potentially catastrophic. The Commission notes that the costs to Kalamazoo and Battle Creek area customers, in the event of a loss of the lines to the Argenta station, are certainly higher than the minor cost difference between the Weeds Lake project, which would provide a geographically distinct source of power, and the B Avenue alternative, which would not.
>
> The Commission recognizes that transmission infrastructure can provide a host of benefits, both in economic and reliability terms, some of which are more easily

> quantified than others. The Commission also sees value in planning for the longer term and designing projects that provide comprehensive system benefits, even if there are incremental costs for a more robust transmission solution. In this case, the proposed project is clearly needed and the alternatives proposed by Landowners, while potentially feasible, do not provide comparable benefits. Moreover, the associated cost savings are not entirely clear or less costly than the proposed project after including the ancillary upgrades. Therefore, the Commission finds it appropriate to approve the CPCN because the overall benefits justify construction and there is a clear need to proceed with construction to maintain reliability.

The PSC agreed with METC's assertion that MCL 460.568(5)(b) did not require a finding that the proposed route was the best or most reasonable. The PSC also found that METC presented ample evidence that the I-94 route was not a realistic alternative to the Weeds Lake Project.

The PSC found that under MCL 460.563 and MCL 460.570, the grant of a CPCN to METC preempted Oshtemo's ordinance. In addition, the PSC found that Oshtemo Township, not METC, had the burden of demonstrating the cost and practicality of placing a portion of the transmission line underground and that the Township failed to carry its burden.

III. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well defined. Under MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by

an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statutory provision or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. See *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966) (O'HARA, J., dissenting).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987). We give respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and we will not overrule that construction absent cogent reasons. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. *Id*. However, the construction given to a statute by the PSC is not binding on us. See *id*. Whether the PSC exceeded the scope of its authority is a question of law that we review de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003). Issues of constitutional and statutory construction are also questions of law that we review de novo. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

IV. ANALYSIS

A. DOCKET NO. 317872

On appeal, the Landowners argue that the PSC did not follow the requirements of Act 30, and in particular MCL 460.568, in making its decision. According to the Landowners, METC was required to prove that the quantifiable and nonquantifiable benefits of its proposed Weeds Lake Project justified the construction of the project and that a new transmission line was needed; however, METC stated only that the line was needed to address a reliability issue that could arise if two of the three transformers at the Argenta substation became unavailable at the same time. Therefore, the Landowners argue, the PSC erred by granting METC's application for a CPCN. We disagree.

The PSC is required to issue a CPCN if it makes certain determinations. MCL 460.568(5) provides in part:

> The commission shall grant the application and issue a certificate if it determines all of the following:
>
> (a) The quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction.
>
> (b) The proposed or alternative route is feasible and reasonable.
>
> (c) The proposed major transmission line does not present an unreasonable threat to public health or safety.

The Landowners argued that METC did not prove that the proposed transmission line was needed. However, MCL 460.568(5) does not specifically state that an applicant for a proposed transmission line must prove

that the line is needed.[4] Nevertheless, the PSC found that METC's proposed transmission line was needed to address a reliability issue.

The PSC's finding that the Landowners' alternative plan of installing a fourth transformer at the Argenta substation was not a viable solution was supported by the requisite evidence. The Landowners countered METC's assertion that installing a fourth transformer would increase loads on other circuits by demonstrating that the installation of power flow control reactors would address this issue. The PSC, however, concluded that the addition of a fourth transformer at the Argenta substation would not solve the reliability issue. Most of the power for the Kalamazoo area would continue to originate from a single substation; therefore, if two or three transformers ceased to be operational, the overload on other circuits could cause blackouts. Both METC and the Landowners presented expert testimony on the viability of the fourth-generator plan. The PSC was entitled to accept the testimony of METC's expert even though the testimony of the Landowners' expert contradicted it. See *ABATE v Pub Serv Comm*, 192 Mich App 19, 27; 480 NW2d 585 (1991). The testimony of one expert constitutes substantial evidence in PSC cases. *Id*.

The PSC correctly concluded that METC was not required to do a cost-benefit analysis of the Weeds Lake project, even though that project was estimated to cost $32 million more than the fourth-transformer project. No statute required METC to perform a cost-benefit analysis, and the PSC was not required to make its judgment based solely on cost. The reliability

[4] MCL 460.567(2)(f) states that the applicant for a CPCN must include in the application information "supporting the need for the proposed major transmission line[.]" MCL 460.568(5) contains no such language.

issue was the primary reason for METC seeking a CPCN to install a transmission line, and the evidence showed that the fourth-transformer project would not solve the reliability issue. The PSC was entitled to accept METC's evidence on this issue. *ABATE*, 192 Mich App at 27.

The PSC did not err by concluding that METC's proposed route for the transmission line was feasible and reasonable, in spite of the fact that, in a route study METC performed, METC's proposed route did not get the highest score using METC's own scoring methods. MCL 460.568(5)(b) required only that the PSC find that METC's proposed route was feasible and reasonable, not that it was more feasible and more reasonable than any other route proposed by any party. Although the Landowners suggested that METC could have used alternatives such as a quad circuit or a tapping variant to address right-of-way concerns, the PSC did not err by finding that those alternatives were not as reliable as METC's Weeds Lake project.

Next, the Landowners argue that the PSC's approval of METC's application for a CPCN allowed METC to violate municipal zoning ordinances and to take private property from landowners without due process. We disagree.

A person cannot be deprived of property without due process of law. US Const, Am V; Const 1963, art 1, § 17. In an administrative proceeding, due process requires that a person "be afforded notice, an opportunity to be heard, and a written statement of findings." *Mich Elec Coop Ass'n v Pub Serv Comm*, 267 Mich App 608, 622; 705 NW2d 709 (2005).

METC applied for a CPCN under MCL 460.569, and held public meetings on its proposal as required by MCL 460.566(1). Moreover, the PSC conducted a

contested-case hearing on METC's application and the Landowners intervened in the proceeding, as was their right under MCL 460.568(2). The Landowners fully participated in the case and were not deprived of due process during the proceedings before the PSC. *Mich Elec Coop Ass'n*, 267 Mich App at 622.

Furthermore, we reject the Landowners' argument that the PSC's act of granting a CPCN is not subject to review and therefore denies them due process. A PSC order granting a CPCN is appealable as of right to this Court. MCL 460.575(1); MCL 462.26(1). A CPCN is "binding as to the public convenience and necessity for that transmission line" in "an eminent-domain or other related proceeding arising out of or related to a transmission line for which a certificate is issued[.]" MCL 460.570(3). This Court does not conduct eminent-domain proceedings; a CPCN is not binding on this Court.

In order to grant a CPCN to METC, the PSC was required to find that "[t]he quantifiable and nonquantifiable public benefits of the proposed major transmission line justify its construction." MCL 460.568(5)(a). Logically, to make such a finding, the PSC would have to conclude that the proposed transmission line would fulfill a public purpose. As noted, a CPCN is "binding as to the public convenience and necessity for that transmission line" in an eminent-domain case. MCL 460.570(3). Thus, the requisite showing of a public purpose would have been made before the commencement of any subsequent condemnation proceeding.

The Separation of Powers Clause of the Michigan Constitution states: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another

branch except as expressly provided in this constitution." Const 1963, art 3, § 2. The Landowners' argument that the PSC's decision violates the Separation of Powers Clause because it allows METC to ignore Oshtemo Township's ordinance requiring that a portion of the transmission line be placed underground is without merit. The Legislature enacted statutes providing that a CPCN granted by the PSC preempts the Township's ordinance regarding the placement underground of transmission lines, MCL 460.570(1), and that Act 30 controls if it conflicts with any other law of this state, MCL 460.563(2). Because the PSC's actions were authorized by statute, they did not violate the separation-of-powers doctrine.

The Landowners have not demonstrated that the PSC erred or abused its discretion by granting METC's application for a CPCN.

B. DOCKET NO. 317893

The appeal by Oshtemo Township and the briefs of amici curiae Michigan Townships Association and Michigan Energy Providers Group[5] present the question whether a local ordinance can prevail over a conflicting CPCN issued by the PSC under Act 30.

The Michigan Constitution grants a municipality the right to control its public places. Const 1963, art 7, § 29 provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have a right to the use of the highways, streets, alleys or other

[5] The amici represented in the Michigan Energy Providers Group brief are American Transmission Company, DTE Electric Company, DTE Gas Company, Enbridge Energy Limited Partnership, Michigan Electric and Gas Association, Michigan Electric Cooperative Association, and Wolverine Power Supply Cooperative.

> public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

The provisions of the Michigan Constitution and state laws concerning local governments are to be liberally construed in favor of those entities. Const 1963, art 7, § 34. But the grant of authority in Const 1963, art 7, § 29 is not absolute. Const 1963, art 7, § 22 provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

In *City of Taylor*, 475 Mich 109, our Supreme Court considered whether the plaintiff's ordinance requiring the defendant to bear the cost of relocating the defendant's transmission lines underground conflicted with the PSC's authority over cost allocation in this area. The *Taylor* Court, citing Const 1963, art 7, § 29, stated that "the authority reserved to local units of government to exercise reasonable control over the enumerated subject areas is explicitly made subject to the other provisions of the Constitution." *Taylor*, 475 Mich

at 116. The *Taylor* Court identified Const 1963, art 7, § 22 as one such provision. *Id*. The *Taylor* Court reasoned that a local unit of government could exercise reasonable control "to regulate matters of local concern, but only in a manner and to the degree that the regulation does not conflict with state law." *Taylor*, 475 Mich at 117-118, citing *People v McGraw*, 184 Mich 233; 150 NW 836 (1915).[6]

In *City of Lansing v State of Michigan*, 275 Mich App 423; 737 NW2d 818 (2007), this Court considered whether MCL 247.183(2), which permits a utility to construct transmission lines "longitudinally within limited access highway rights-of-way and under any public road, street, or other subsurface that intersects any limited access highway" without obtaining the consent of the governing municipality, was unconstitutional because it eliminated the requirement in Const 1963, art 7, § 29 that a utility must first obtain such consent. The plaintiff asserted that Const 1963, art 7, § 29 gave a municipality "the absolute right to refuse to consent to the use of" its streets by a utility. *Lansing*, 275 Mich App at 429. This Court disagreed, noting that the grant of authority in Const 1963, art 7, § 29 "is not absolute." *Id*. at 432. In addition, this Court reasoned that because, as stated in Const 1963, art 7, § 22,

> a city's authority to grant or withhold consent to use its highways, streets, alleys, and other public places can only be exercised through an ordinance or resolution, it follows that a city's ability to grant or withhold consent is also subject to the constitution and laws. Consequently, when Const 1963, art 7, §§ 22 and 29 are read in conjunction,

[6] The *Taylor* Court concluded that the plaintiff's ordinance might conflict with PSC rules and, if so, that that portion of the ordinance was invalid. In addition, the *Taylor* Court concluded that the PSC had primary jurisdiction over the issue of cost allocation. *Taylor*, 475 Mich at 123-124.

> the Legislature has the authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29. [*Id*. at 433.]

This Court concluded that because MCL 247.183(2) limited a local government's authority in a narrow manner, the statute was "a proper exercise of the Legislature's authority to limit the manner and circumstances under which a city may grant or withhold consent under § 29." *Id*. at 433-434.

Oshtemo Township enacted an ordinance that required a utility seeking to construct a transmission line to place the line and all related facilities "underground within the public road right-of-way and to a point within 250 feet either side of said public right-of-way." Oshtemo Ordinances, 230.004(b). The CPCN issued by the PSC allowed METC to construct an overhead transmission line. The PSC ruled that the CPCN preempted the ordinance.

Oshtemo Township argues that the PSC erred as a matter of law by failing to determine whether the ordinance conflicted with state law. Oshtemo Township asserts that the ordinance does not conflict with any state law or regulations[7] because it does not regulate the construction or location of the proposed line, even though it might impose additional requirements (i.e., location of a portion of the proposed line underground).

Contrary to arguments made by Oshtemo Township and its supporting amici, the PSC did not hold that Act 30 preempted all local regulation by the Township and did not eliminate the authority granted to Oshtemo

[7] Regulations dealing with underground electric facilities are located at Mich Admin Code, R 460.511 through 460.519. However, these regulations refer specifically to "electric distribution facilities" operated at 15,000 or 20,000 volts or less. These regulations do not apply to the proposed transmission line at issue in these cases.

Township by Const 1963, art 7, § 29 to control its roads and rights-of-way. The arguments that Act 30 preempted Oshtemo Township's ordinance and is unconstitutional ignore the clear language of the Constitution, MCL 460.570(1), and binding precedent.

Const 1963, art 7, § 29 makes a utility's use of public places and rights-of-way subject to local approval. A local government is authorized to enact resolutions and ordinances relating to such matters; however, those enactments are "subject to the constitution and law." Const 1963, art 7, § 22.

METC used Act 30 to apply for a CPCN to build a new transmission line. In making its application, METC was required to include any zoning ordinance that would affect, i.e., regulate the location or construction of, the proposed route. MCL 460.567(2)(d). Oshtemo Township's relevant ordinance, if applicable, would require METC to locate a portion of its proposed transmission line underground. The ordinance did not provide any exceptions to this requirement. METC determined that locating a portion of the proposed line underground would be prohibitively expensive, and so sought a CPCN for a line to be constructed entirely above ground. The PSC was entitled to accept METC's evidence regarding the cost and preferability of constructing a line above ground, notwithstanding the fact that the record also contained contradictory evidence. See *Great Lakes Steel Div of Nat'l Steel Corp v Pub Serv Comm*, 130 Mich App 470, 481-482; 344 NW2d 321 (1983). The PSC issued a CPCN allowing METC to construct a transmission line that was entirely above ground. The PSC could have found that METC was required to comply with Oshtemo Township's ordinance. However, once the PSC issued a CPCN allowing METC to build a line above ground, Oshtemo Township's ordinance conflicted with the

CPCN. Under the plain language of MCL 460.570(1), that certificate took precedence over Oshtemo Township's conflicting ordinance that required that a portion of the transmission line be constructed underground.

MCL 460.570(1) is not an unconstitutional blanket usurpation of Oshtemo Township's ability to pass regulations and ordinances regarding its municipal affairs. The Legislature has the authority to enact laws that limit the way in which a local government can exercise the power granted to it under Const 1963, art 7, § 29. See *Lansing*, 275 Mich App at 433; see also Const 1963, art 7, § 22. The argument that the PSC's analysis was required to expand beyond the conclusion that the CPCN took precedence over Oshtemo Township's conflicting local ordinance, and that the PSC was required to determine whether the ordinance conflicted with some state law as well as with the CPCN, finds no support in the language of any portion of Act 30, particularly not MCL 460.570(1), or in any caselaw.

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. In *Michigan Elec Coop Ass'n* this Court stated:

> The Legislature cannot delegate its power to make a law; however, it can enact a law that delegates a power to determine a fact or status upon which the law makes, or intends to make, its own action depend. Such a statute must be sufficiently broad to permit efficient administration designed to carry out legislative policy, but not so broad as to leave an administrative body with uncontrolled and arbitrary power. The guiding principles in determining whether a statute provides sufficient standards for the exercise of administrative discretion are: (1) the provision in question should be read with reference to the act as a whole; (2) the standard should be as reasonably precise as the subject matter requires or permits; and (3) if possible,

> the statute must be construed in such a way as to render it valid rather than invalid, i.e., as conferring administrative, not legislative power, and as vesting discretionary, not arbitrary, authority. *Dep't of Natural Resources v Seaman*, 396 Mich 299, 308-309; 240 NW2d 206 (1976). [*Michigan Elec Coop Ass'n*, 267 Mich App at 622-623.]

Act 30 is not an unconstitutional delegation of power. The evaluation of an application for a CPCN requires the PSC to consider a multitude of factors, including any conflicting local zoning ordinances. MCL 460.567(2)(d). Each application presents its own unique facts and circumstances. The Legislature could not have specified with any practicality or feasibility what routes or configurations the PSC would be required to consider in each case. The standards set out in MCL 460.568(5) are as reasonably precise as the subject matter permits. See, e.g., *Kent Co Aeronautics Bd v Dep't of State Police*, 239 Mich App 563, 588; 609 NW2d 593 (2000). Moreover, the PSC can grant a CPCN only if it finds that the applicant has made the required showings set out in MCL 460.568(5). Neither Oshtemo Township nor its supporting amici has established that Act 30 is an unconstitutional delegation of power from the Legislature to the PSC.

V. CONCLUSION

The issues raised by appellants and amici in these consolidated cases are without merit and do not warrant reversal of the PSC's order granting METC's application for a CPCN.

We affirm and lift the stay. No taxable costs pursuant to MCR 7.219, a question of public policy being involved.

OWENS, P.J., and MARKEY and SERVITTO, JJ., concurred.

PEOPLE v JOHNSON

Docket No. 317206. Submitted November 5, 2014, at Grand Rapids. Decided January 15, 2015, at 9:00 a.m. Vacated in part, 497 Mich 1042.

Christopher L. Johnson was convicted of second-degree home invasion, MCL 750.110a(3), in the Kent Circuit Court, George S. Buth, J., following a jury trial. The perpetrator gained access to the victims' home by kicking in two different doors. The perpetrator then entered the home and took several items including a television and jewelry. Investigation led the police to Jackie Sturgis, who admitted her involvement in the crime and implicated defendant as the person who kicked in the doors, entered the home, and stole the victims' belongings. Sturgis testified that after the break-in, she drove defendant to his brother's home, where defendant also lived, and that she helped defendant unload some of the stolen goods into the garage. Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to 8 to 25 years' imprisonment. He appealed.

The Court of Appeals *held*:

1. Under MRE 404(b)(1), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including proof of identity. Specifically, evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if (1) the evidence is offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) it is relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. In this case, a witness testified regarding a separate burglary, linked to defendant, that bore characteristics similar to the charged offense. The other-acts-evidence witness testified that her home had been broken into by someone who had kicked in her front door. She identified several items that were stolen during the break-in of her home that had later been located in defendant's brother's garage. The witness's testimony was relevant to the identification of the perpetrator of the charged home invasion

because of the substantial similarity in how the crimes were accomplished and the similarity with respect to where the stolen items were thereafter taken. The potential for unfair prejudice did not substantially outweigh the probative value of the evidence given that the probative value regarding identity was substantial, the court gave the jury a proper limiting instruction regarding its consideration of the evidence, and in light of the other evidence of guilt. The evidence, therefore, was admissible under MRE 404(b)(1).

2. Under MRE 404(b)(2), evidence of other crimes, wrongs, or acts may only be admitted when the prosecution provides reasonable pretrial notice of the evidence, or if the prosecution fails to give reasonable pretrial notice, if the court excuses the failure because of good cause shown. Although MRE 404(b)(2) does not state that the pretrial notice must be in writing, if the notice is not given in writing, it must be provided orally in open court so that both parties and the trial judge will know as a matter of record whether and what notice was in fact provided. If the record does not demonstrate compliance by the prosecution with the notice requirement, upon objection by the defense, the court must exclude the evidence absent a showing of good cause for the failure to provide the notice. In this case, the prosecution failed to provide notice or show good cause during the trial for the failure to provide the requisite notice. The admission of the evidence despite the absence of notice in accordance with MRE 404(b)(2) was plain error. Reversal, however, is only warranted if a plain, forfeited error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. Given the overwhelming and unrebutted affirmative evidence of defendant's guilt, independent of the other acts evidence, reversal was not warranted.

3. Defendant failed to establish plain error affecting substantial rights with regard to any of the unpreserved sentencing issues he raised on appeal. The trial court was not required to articulate why the sentence was proportionate given that it fell within the statutory sentencing guidelines. And defendant failed to support his argument that a downward departure was warranted.

Affirmed.

EVIDENCE — OTHER ACTS EVIDENCE — NOTICE.

Under MRE 404(b)(2), evidence of other crimes, wrongs, or acts may only be admitted when the prosecution provides reasonable

> pretrial notice of the evidence, or if the prosecution fails to give reasonable pretrial notice, if the court excuses the failure because of good cause shown; if the notice is not given in writing, it must be provided orally in open court; if the record does not demonstrate compliance by the prosecution with the notice requirement, upon objection by the defense, the court must exclude the evidence absent a showing of good cause for the failure to provide the notice.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

Gary L. Kohut for defendant.

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

SHAPIRO, J. Defendant, Christopher Lee Johnson, was convicted by a jury of second-degree home invasion, MCL 750.110a(3), and sentenced as a fourth-offense habitual offender, MCL 769.12, to 8 to 25 years' imprisonment. He appeals his conviction and sentence as of right. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The home of Nicholas Simon and Serena Norris was broken into on April 18, 2012. The perpetrator gained access to the home by kicking in two different doors, as evidenced by the broken frames and a boot mark left on one of the doors. Among the items stolen from the home were a 52-inch flat-screen television and several pieces of jewelry, including an heirloom ring with a cross on it, and a class ring. Investigation eventually led police to Jackie Sturgis, who admitted to the home invasion and implicated defendant.

At trial, Sturgis testified that she helped defendant commit the home invasion. She stated that she drove defendant to the home and saw him go around the back. Through a window she viewed defendant inside the house and then witnessed him exit the home with various items, including a large television. She thereafter drove defendant to his brother's home, where defendant lived, and helped defendant unload some of the stolen items into the garage. She then accompanied defendant to Grand Rapids, where defendant sold the television. She also, per defendant's instructions, sold the ring with a cross on it and gave defendant the proceeds.

Chet Wood, who was incarcerated with defendant while awaiting trial, testified that he and defendant spoke about the charged home invasion. Wood testified at trial that he asked defendant, "[B]ottom line, did you do it?" Defendant responded, "Yeah, but I can't tell them that." Wood also recounted a discussion with defendant in which defendant told him that "between sellin' heroin and breakin' into houses, he was gettin' about 600 bucks a day." He also testified that Defendant told him that he had female accomplices—including "some Jackie girl"—and that some of them were going to testify against him.

Another witness testified that at defendant's request he pawned a class ring that was later determined to have come from the burglarized home and gave defendant the proceeds.

The prosecution also introduced testimony from Rory Bancroft who gave testimony regarding a separate burglary linked to defendant, which bore characteristics similar to those of the charged offense. She testified that the person who broke into her home had gained access by breaking in the front door and that

she had observed a large footprint on the door. At trial, the prosecution showed Bancroft several items found in defendant's brother's garage, which she identified as having been stolen in the break-in of her home.

II. OTHER ACTS EVIDENCE

On appeal, defendant argues that the trial court erred by allowing Bancroft to testify and that evidence concerning the invasion of Bancroft's home was inadmissible under both MRE 404(b)(1) and (2). Defendant failed to preserve this evidentiary issue for appeal by raising it in the trial court. Therefore, our review is for plain error affecting defendant's substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant also claims that his trial counsel was ineffective for failing to object to admission of this evidence.

A. MRE 404(b)(1)

MRE 404(b)(1) sets out the substantive rule regarding admission of "other crimes, wrongs, or acts" of a person, including an accused. It provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

As MRE 404(b)(1) makes clear, "Michigan's Rules of Evidence proscribe the use of character evidence to

prove action in conformity therewith." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Specifically, MRE 404(b)(1) prohibits the introduction of evidence of an individual's "other crimes, wrongs, or acts" for that purpose. However, evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if (1) the evidence is offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) it is relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Bancroft's testimony was relevant to the identification of the perpetrator of the charged home invasion given that the burglary of her home, to which defendant was linked, was highly similar to the charged crime in the way the crimes were carried out and the location of the recovered stolen goods. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). In this case, both home invasions shared significant common features. They were each accomplished by kicking in a door at an unoccupied home, leaving a large boot mark on the door, and, in each, some of the items stolen were stored at defendant's brother's home, where defendant was living. The substantial similarity in how these crimes were accomplished, and the similarity with respect to where the stolen items were thereafter taken were relevant to, and probative of, identity. See MRE 401; *Sabin*, 463 Mich at 66.

We agree that evidence that defendant committed another home invasion carried with it the potential that the jury would consider it as propensity evidence and rely on that consideration in reaching a verdict. However, on the facts of this case, we do not believe that the potential for unfair prejudice "substantially outweighed" its probative value. MRE 403. First, the probative value of the evidence as to identity was substantial given the signature characteristics of the crimes. Second, the trial court gave a limiting instruction directing the jury to consider the other acts evidence only for its permissible purpose. See MRE 105. Third, though probative of identity, the overall impact of this testimony was minor in the context of the other evidence of guilt, which included defendant's own admission of guilt and identification of his accomplice by name, as well as detailed testimony from that accomplice and others.

Accordingly, because the other acts evidence was offered for a proper purpose and the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, we conclude that its admission was not barred by MRE 404(b)(1).

B. MRE 404(b)(2)

MRE 404(b)(2) governs the procedural requirements for admission of MRE 404(b)(1) evidence. It provides that evidence of other crimes, wrongs, or acts may only be admitted when the prosecution provides reasonable pretrial notice of such evidence or, if the prosecution fails to do so, if the trial court excuses the failure because of good cause shown. The provision reads:

> The prosecution in a criminal case *shall* provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the

> general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination. [MRE 404(b)(2) (emphasis added).]

A review of the record confirms that the prosecution failed to adhere to this notice provision. See *Hawkins*, 245 Mich App at 453. No written notice of the intent to introduce other acts evidence is contained in the record,[1] and the prosecution has not referred us to any proceeding in which oral notice was provided. The record also makes clear that the prosecution did not seek an exception from this requirement on the basis of good cause.

We reject the prosecution's argument that MRE 404(b)(2) should not be applied as written. The language of the rule is both unequivocal and mandatory given its use of the word "shall," i.e., "[t]he prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial . . . ." It is well-settled that "[u]se of the word 'shall' indicates that . . . [the directed action] is mandatory and imperative." *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000) (citation and quotation marks omitted). Our Supreme Court recently reemphasized this principle:

> When a statute provides that a public officer "shall" do something within a specified period of time and that time period is provided to safeguard someone's rights or the public interest, as does the statute here, it is mandatory,

[1] The only item in the record cited in the prosecution's brief was its witness list, which contained Bancroft's name. However, it provided no information as to her identity or the nature of her testimony.

> and the public officer who fails to act timely is *prohibited from proceeding* as if he or she had acted within the statutory notice period. [*In re Bail Bond Forfeiture*, 496 Mich 320, 339-340; 852 NW2d 747 (2014) (emphasis added).]

Given the statutory language, we must therefore conclude that the prosecution was prohibited from proceeding with the introduction of the other acts evidence because it failed to provide the notice required by MRE 404(b)(2) or otherwise show good cause during trial for failing to provide the requisite notice.

Though the issue is settled by the plain text of the rule, we note that this conclusion is also supported by the Supreme Court's analysis in *VanderVliet*, 444 Mich 52, and the Court's amendment of MRE 404(b)(2) following that decision, see *id*. at 89. Before *VanderVliet*, introduction of other acts evidence against an accused was sharply limited by the rule in *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), which interpreted MRE 404(b) as a rule of exclusion, not inclusion, as was later determined in *VanderVliet*. *VanderVliet*, 444 Mich at 64-65.

VanderVliet directed trial court judges to render individual decisions concerning other acts evidence not in the abstract but with consideration of the "shifting mosaic of consequential facts" from case to case. *Id*. at 87. It also "caution[ed] the bench and bar that other acts evidence must move through a permissible intermediate inference, such as mens rea, lack of accident, or common plan or scheme, to be relevant to actus reus." *Id*. "Absent such an intermediate inference, the other acts evidence bears only on propensity and is inadmissible." *Id*.

Given the fact that other acts evidence is often *both* probative and prejudicial, the *VanderVliet* Court noted

that the determination of admissibility regarding other acts evidence could be "extraordinarily difficult." *Id*. at 89.[2] Accordingly, the Supreme Court opined that such decisions should not have to be rendered during "the inherent complexity . . . of the modern day trial," *id*. at 87, and announced its intent to "require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial," *id*. at 89. It went on to state that "[a] notice requirement prevents unfair surprise and offers the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice." *Id*. at 89 n 51.

Not long after *VanderVliet*, that rule change was effectuated by adding the language of MRE 404(b)(2). As noted in *Hawkins*, 245 Mich App at 454-455, the

> essential value and underlying aims of MRE 404(b)(2) are (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record. [Citations omitted.][3]

The prosecution argues that MRE 404(b)(2) does not mandate that notice be in writing. We agree because the plain text of the rule does not include such a requirement. However, we reject any suggestion that if there is a question whether oral notice was provided, the trial court must hold a hearing and determine whether the oral communication occurred and whether

---

[2] In *Sabin*, 463 Mich at 57 n 5, the Supreme Court noted that even when notice is provided, "the trial court's task is not an easy one."

[3] Given that *Hawkins* involved a bench trial, any error under MRE 404(b) in that case presented a substantially lower risk of prejudice to the defendant than it would have presented in a jury trial.

its content satisfied the notice requirement. Such a mechanism would be highly inefficient and unnecessarily place the court in the position of taking testimony from participating counsel as to their recollection of oral communications. It is far simpler, and more consistent with *VanderVliet*, to require that the mandated notice be provided either in writing or orally in open court so that both parties and the trial judge will know as a matter of record whether and what notice was in fact provided. Accordingly, we hold that if the record does not demonstrate compliance by the prosecution with the mandatory notice requirement of MRE 404(b)(2), upon objection by the defense, the trial court must exclude the evidence absent a showing of "good cause" for the failure to provide the notice.[4] Therefore, the admission of the evidence despite the absence of notice in accordance with MRE 404(b)(2) was plain error. See *Hawkins*, 245 Mich App at 453 ("[F]ailure to give notice [of prior-bad-acts evidence] is plain error because the court rule unambiguously requires notice to the defense at some time *before* the prosecutor introduces [it].").

Having concluded that there was plain error, we must consider whether, in the context of the other evidence, it requires reversal. Reversal is only warranted "when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006) (quotation marks and citation omitted; alteration in original). Applying that standard, we conclude that

[4] The prosecution has not argued that there was good cause for its failure to provide pretrial notice. Moreover, any such determination must first be made by the trial court.

reversal is not warranted in this case. As discussed earlier, the jury heard detailed testimony from defendant's accomplice that she personally saw defendant break down the door and then enter the victims' home several times, each time emerging from the home with several items (matching those that the victims later reported as stolen). She testified that she and defendant then drove to his brother's garage, where he stored several of the items and where they were later found. She also testified that she traveled with defendant to another location where he sold the stolen television. Another witness testified that during a conversation defendant explicitly admitted his guilt. A third witness testified that defendant asked him to pawn a ring for him that was later identified as belonging to the victims. In response to this evidence, defendant offered no rebuttal. Given these proofs, we cannot say that the "plain, forfeited error resulted in the conviction of an actually innocent defendant" or that the "error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings . . . ." *Id*.

In sum, we agree that admission of the other acts evidence was error. However, given the overwhelming and unrebutted affirmative evidence of defendant's guilt, independent of the other acts evidence, we conclude that reversal is not warranted in this case.

Defendant also argues that by virtue of his counsel's failure to object to the admission of the other acts evidence on notice grounds, he was deprived of the effective assistance of counsel. We agree that counsel's failure to object fell below an objective standard of reasonableness and that there was no strategic reason for this failure. However, for the same reasons just discussed, we conclude that there is not a reasonable

probability that the result of the trial would have been different had counsel objected to the admission of the evidence. See *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010).

III. SENTENCING

Defendant next raises a host of unpreserved sentencing issues, which we review for plain error affecting substantial rights. *People v Loper*, 299 Mich App 451, 456-457; 830 NW2d 836 (2013). Defendant first argues that the trial court failed to articulate how it arrived at defendant's sentence and why the sentence was proportionate. We disagree. "A trial court must articulate its reason for imposing a sentence on the record at the time of sentencing." *People v Conley*, 270 Mich App 301, 312; 715 NW2d 377 (2006). "The articulation requirement is satisfied if the trial court expressly relies on the sentencing guidelines in imposing the sentence or if it is clear from the context of the remarks preceding the sentence that the trial court relied on the sentencing guidelines." *Id*. at 313. In this case, the trial court expressly indicated that it had reviewed defendant's Presentence Investigation Report (PSIR) and that it was sentencing defendant within the guidelines. Thus, it satisfied the articulation requirement. See *id*. Moreover, the trial court was not required to articulate why the sentence was proportionate because it was within the guidelines range and was therefore presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008); *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000).

Defendant next argues that the trial court failed to consider various mitigating factors, such as his mental health and substance abuse histories, his family

support, and his remorse. However, as defendant readily acknowledges, the trial court was not required to consider such mitigating factors when it sentenced him. *People v Osby*, 291 Mich App 412, 416; 804 NW2d 903 (2011). In any event, defendant's claim is belied by the record, which indicates that the trial court reviewed defendant's PSIR and the information contained therein. Defendant also argues that based on his history of substance abuse, there is an inference that he suffers from a "serious mental disease" that warranted a downward departure, and that the trial court erred by failing to conduct an assessment of his rehabilitative potential. However, defendant cites no authority to support his argument that a downward departure is warranted based on such facts under Michigan's sentencing guidelines. Moreover, there is no record support that defendant actually suffered from a mental illness and we reject defendant's argument that such an illness should be inferred simply because defendant had a history of substance abuse. Finally, there is no requirement for a trial court to conduct a detailed assessment of defendant's rehabilitative potential, despite defendant's claim to the contrary. Defendant also argues that he was entitled to a downward departure for accepting responsibility for his crime. However, he cites no authority that a downward departure is required in such a case. Moreover, a review of the sentencing transcript demonstrates that the defendant did not accept responsibility for his crime.

Defendant next argues that his sentence was "excessive" under state and federal constitutional principles. We assume that defendant is arguing that his sentence constitutes cruel or unusual punishment or both under either US Const, Am VIII or Const 1963, art 1, § 16. However, defendant's sentence was within the recom-

mended minimum sentence range under the legislative guidelines and, therefore, constitutes neither cruel nor unusual punishment. *Powell*, 278 Mich App at 323; *People v DiVietri*, 206 Mich App 61, 63-64; 520 NW2d 643 (1994).

Defendant also summarily claims that the trial court relied on incomplete and inaccurate information in sentencing him. However, defendant's claim that the trial court relied on incomplete information is anchored to his claims that the trial court should have considered various mitigating factors and fully assessed his rehabilitative potential, which, as already discussed, lack merit. Moreover, with respect to defendant's claim that the trial court relied on inaccurate information, defendant does not identify what information the trial court relied on that was allegedly inaccurate. Therefore, these claims lack merit.

Finally, defendant summarily argues that his trial counsel was ineffective for failing to object to his sentence. However, as none of defendant's various arguments relating to the validity of his sentence have any merit, his trial counsel was not ineffective for failing to raise these claims. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

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

MARTIN v MURRAY

Docket No. 319509. Submitted January 14, 2015, at Detroit. Decided January 20, 2015, at 9:00 a.m.

Roy Roberts, as the emergency manager for the Detroit Public Schools (DPS), brought an action in the Wayne Circuit Court against the 11 members of the DPS Board of Education on August 8, 2012, alleging that defendants were acting or threatening to act outside their authority and seeking declaratory, injunctive, and other relief. The first DPS emergency manager had been appointed under a 1990 emergency-manager law. The Governor's appointment of Roberts on May 4, 2011, as successor emergency manager and subsequent reappointment on March 30, 2012, were done under a new emergency-manager law, the Local Government and School District Fiscal Accountability Act, 2011 PA 4 (MCL 141.1501 *et seq*.). A referendum on 2011 PA 4 took place in the general election of November 6, 2012, however, and the electors rejected 2011 PA 4, which permanently revived the 1990 act. The Legislature then enacted the Local Financial Stability and Choice Act, 2012 PA 436 (MCL 141.1541 *et seq*.), effective March 28, 2013. It repealed the 1990 act and was intended to be a successor statute to both the 1990 act and 2011 PA 4. Carol Banks (one of the defendants in this case) resigned from the board effective June 28, 2013, creating a vacancy. At a regularly scheduled board meeting on July 11, 2013, the remaining 10 members voted to appoint Sherry Gay-Dagnogo to fill the vacancy. One day earlier, however, Roberts had issued an order in his capacity as emergency manager appointing Jonathan Kinloch to fill the vacancy. Later, on July 15, 2013, the Governor appointed Jack Martin under 2012 PA 436 to succeed Roberts as the emergency manager. On October 8, 2013, defendants moved to set aside the emergency manager's appointment of Kinloch and declare that an emergency manager is not authorized to fill vacancies on the board, arguing that notwithstanding the financial emergency within the school district and the broad powers conferred on the emergency manager by law, the remaining board members had the exclusive authority to fill the vacancy. Defendants further contended that the provisions of 2012 PA 436 granting emergency managers the authority to fill vacancies

violated the separation-of-powers doctrine. The court, Annette J. Berry, J., agreed that under the Revised School Code, MCL 380.1 *et seq*., and the Michigan Election Law, MCL 168.1 *et seq*., the 10 remaining board members would have had the authority to fill the vacancy had there been no declared financial emergency at the time. The court ruled, however, that the emergency manager had the exclusive power to fill the vacancy unless he specifically delegated that power to the board in writing. Because the emergency manager had not done so, the court held that his appointment of Kinloch was valid and that the board's purported appointment of Gay-Dagnogo was void. The court also held that the grant of appointment powers to emergency managers by 2012 PA 436 did not violate the separation of powers. Defendants appealed.

The Court of Appeals *held*:

1. The circuit court did not err. MCL 380.411a(6) (for first-class school districts) and MCL 168.311(1) (for general-powers school districts) provide that when a vacancy occurs on a board of education, the remaining board members may fill the vacancy by appointment. These general statutes, however, give way to more specific enactments if a financial emergency exists within the school district. When an emergency manager is appointed for a local government, MCL 141.1542(q) provides that the local government enters receivership. Under MCL 141.1552(2), the authority of the chief administrative officer and the governing body to exercise power on behalf of the local government is suspended during the receivership and is vested instead in the emergency manager. Emergency managers are specifically empowered under MCL 141.1552(1)(ff) to remove members from or appoint members to any office, board, commission, authority, or other entity within the local government and under MCL 141.1552(1)(ee) may take any action or exercise any power of an officer, employee, department, board, commission, or other similar entity of the local government relating to its operation. Following the appointment of an emergency manager and during the receivership, the governing body and the chief administrative officer may exercise only those powers of their offices that the emergency manager specifically authorizes in writing or as otherwise provided by the act. Because 2012 PA 436 is both more specific and more recently enacted than the Revised School Code and the Michigan Election Law, the provisions of 2012 PA 436 control over MCL 168.311(1) and MCL 380.411a(6) when a school district is in receivership. Because the emergency manager here did not delegate any

authority in writing, he had the exclusive authority to fill vacancies on the board by appointment during DPS's receivership.

2. The provisions of 2012 PA 436 at issue in this case did not violate the doctrine of separation of powers. Under Const 1963, art 3, § 2, no person exercising the powers of one branch of state government may exercise powers properly belonging to another branch except as expressly provided in the Constitution. This separation of powers, however, applies only to the state level of government and does not apply to local units of government. Therefore, the separation-of-powers doctrine did not prohibit the Legislature from authorizing an emergency manager to fill vacancies on a board of education by appointment at the same time he or she was exercising the powers of the chief administrative officer of the school district. Nor does the emergency manager's appointment of Kinloch to fill the vacancy constitute an impermissible conflict of interest because 2012 PA 436 does not empower the board to exercise broad oversight powers or act as a check on the emergency manager's actions during the receivership.

Affirmed.

SCHOOLS — EMERGENCY MANAGERS — APPOINTMENT POWERS — SCHOOL BOARD VACANCIES.

When a vacancy occurs on a board of education, the remaining board members generally may fill the vacancy by appointment; if an emergency manager has been appointed for a local unit of government (such as a school district) under the Local Financial Stability and Choice Act, 2012 PA 436, MCL 141.1541 *et seq*., however, that local unit enters receivership, and the authority of the chief administrative officer and the governing body of the local unit to exercise power on behalf of the local unit is suspended during the receivership and is vested instead in the emergency manager; the emergency manager is specifically empowered to remove members from or appoint members to any office, board, commission, authority, or other entity within the local unit of government and may take any action or exercise any power of an officer, employee, department, board, commission, or other similar entity of that local unit relating to its operation; in the case of a school district, the emergency manager has the exclusive power to fill the vacancy on the board unless he or she specifically delegates that power to the board in writing (MCL 141.1542(q), MCL 141.1552(1)(ee) and (ff) and (2), MCL 168.311(1), and MCL 380.411a(6)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Scott R. Shimkus*, *Michelle M. Brya*, and *Joshua O. Booth*, Assistant Attorneys General, for plaintiff.

Constitutional Litigation Associates, PC (by *Hugh M. Davis* and *Cynthia Heenan*), for defendants.

Before: BECKERING, P.J., and JANSEN and BOONSTRA, JJ.

JANSEN, J. Defendants, present and former members of the Detroit Public Schools Board of Education ("board of education" or "board"),[1] appeal by right the circuit court's opinion and order of November 22, 2013, confirming the authority of the Detroit Public Schools Emergency Manager ("emergency manager") to fill vacancies on the board of education and denying defendants' motion to set aside the emergency manager's appointment of Jonathan Kinloch to the board. We affirm.

I

In late 2008, the Superintendent of Public Instruction declared the existence of a financial emergency within the Detroit Public Schools ("DPS"). In accordance with Michigan's then-existing emergency financial manager law, 1990 PA 72,[2] the Governor appointed Robert Bobb to serve as the DPS emergency manager.

[1] Defendants David Murray, Ida Short, Lamar Lemmons, Tawanna Simpson, Elena Herrada, Annie Carter, Judy Summers, Herman Davis, Wanda Redmond, and Juvette Hawkins-Williams are current members of the board of education. As discussed more fully hereinafter, defendant Carol Banks was formerly a member of the board of education.

[2] Former MCL 141.1201 *et seq*.

The Legislature subsequently enacted the Local Government and School District Fiscal Accountability Act, 2011 PA 4,[3] effective March 16, 2011, which repealed and replaced the provisions of 1990 PA 72. On May 4, 2011, the Governor appointed Roy Roberts to succeed Bobb as the DPS emergency manager. The Governor reappointed Roberts on March 30, 2012, and the reappointment became effective on April 2, 2012. See *Davis v Emergency Manager for the Detroit Pub Sch*, 491 Mich 899, 901, 904 (2012) (YOUNG, C.J., concurring).

Meanwhile, on February 29, 2012, petitions seeking a referendum on 2011 PA 4 were filed with the Secretary of State. On a 2-2 vote, the Board of State Canvassers initially refused to certify the petitions. However, our Supreme Court ultimately ordered the Board of State Canvassers to certify the petitions and submit the matter to the electors. *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 595; 822 NW2d 159 (2012) (opinion by KELLY, J.). On August 8, 2012, following the Supreme Court's decision in *Stand Up For Democracy*, the Board of State Canvassers unanimously voted to certify the petitions and place the referendum on the November 6, 2012, general election ballot.

2011 PA 4 was suspended for the duration of the referendum process, and the provisions of 1990 PA 72 temporarily came back into effect pending the certification of the November 2012 general election results. Const 1963, art 2, § 9; see also OAG, 2011-2012, No. 7,267, p 72, at 78 (August 6, 2012). At the general election of November 6, 2012, the electors rejected 2011 PA 4 by a vote of 2,130,354 in favor to 2,370,601 in opposition. The electors' rejection of 2011 PA 4 perma-

[3] Former MCL 141.1501 *et seq*.

nently revived 1990 PA 72. See *McDonald v Grand Traverse Co Election Comm*, 255 Mich App 674, 680-681; 662 NW2d 804 (2003); see also OAG, No. 7,267 at 77.[4]

Soon thereafter, the Legislature enacted the Local Financial Stability and Choice Act, 2012 PA 436,[5] effective March 28, 2013, repealing and replacing 1990 PA 72. The Legislature specifically declared that it intended 2012 PA 436 to "function and be interpreted as a successor statute to . . . former 1990 PA 72, and former 2011 PA 4 . . . ." 2012 PA 436, enacting § 2. In particular, the statute provides that the determination or confirmation of a financial emergency within a local unit of government under the former 1990 PA 72 or the former 2011 PA 4 remains effective. MCL 141.1570(1). On July 15, 2013, in accordance with 2012 PA 436, the Governor appointed Jack Martin to succeed Roberts as the DPS emergency manager.[6]

II

The board of education presently consists of 11 members.[7] Board member Carol Banks submitted her

[4] Opinions of the Attorney General are not binding on the courts. *Frey v Dep't of Mgt & Budget*, 429 Mich 315, 338; 414 NW2d 873 (1987); *Attorney General v PowerPick Player's Club of Mich, LLC*, 287 Mich App 13, 34; 783 NW2d 515 (2010). Nevertheless, we agree with the Attorney General that 2011 PA 4 was constitutionally stayed upon certification of the referendum petitions by the Board of State Canvassers, that 1990 PA 72 was simultaneously brought back into temporary effect pending the certification of the referendum results, and that 1990 PA 72 was permanently revived when the Board of State Canvassers certified the results of the November 2012 general election.

[5] MCL 141.1541 *et seq*.

[6] Martin had previously served as emergency manager of the Highland Park Public Schools and as a financial officer for the city of Detroit.

[7] In a first-class school district wherein the electors have not approved a reconfiguration of the board of education under MCL 380.410, the board of education consists of 11 members, MCL 380.403a(2), 4 of whom

letter of resignation, effective June 28, 2013, thereby creating a vacancy on the board of education. The remaining board members publicized the vacancy through social media and solicited applications from interested persons. At a regularly scheduled meeting on July 11, 2013, the remaining 10 members of the board of education interviewed 3 applicants and ultimately voted to appoint Sherry Gay-Dagnogo to fill the vacancy. Gay-Dagnogo was purportedly sworn in at that time. One day earlier, on July 10, 2013, Roberts had issued an order in his capacity as emergency manager appointing Jonathan Kinloch to fill the vacancy on the board of education; it appears that Roberts personally administered the oath of office to Kinloch at the time of his appointment. Kinloch appeared at the regular meeting of July 11, 2013, but the officers of the board of education refused to acknowledge him or include him in the roll call of board members.

III

The present action was commenced on August 8, 2012, when Roberts sued defendants for declaratory, injunctive, and other relief. Roberts alleged that defendants, the 11 members of the board of education, were acting or threatening to act outside their authority. Roberts requested that the circuit court enjoin them from abrogating plans, changing programs, canceling

---

are elected at large, MCL 380.411a(2), and 7 of whom are elected to represent voting districts, MCL 380.412a(2) and (5). The Attorney General has opined that because the pupil membership of DPS has fallen below 100,000, DPS no longer qualifies as a first-class school district under MCL 380.402 and is now a general-powers school district under MCL 380.11. OAG, 2009-2010, No. 7,234, p 66, at 75 (July 20, 2009). However, we need not resolve this issue on appeal because our ultimate conclusion is the same irrespective of whether DPS is a first-class school district or a general-powers school district.

contracts, and altering budgets in advance of the upcoming 2012-2013 school year. Litigation was protracted, and numerous motions seeking additional relief were filed throughout the course of the circuit court proceedings. Eventually, on October 8, 2013, defendants filed a motion requesting that the circuit court (1) set aside the emergency manager's appointment of Kinloch to the board of education and (2) declare that the emergency manager is not authorized to fill vacancies on the board of education. Defendants argued that notwithstanding the existence of a financial emergency within the district and the broad powers conferred upon the emergency manager by law, the remaining board members—and not the emergency manager—possessed the exclusive authority to fill any vacancy on the board of education occasioned by a member's resignation. Defendants contended that the sections of 2012 PA 436 granting emergency managers the authority to fill such vacancies were unconstitutional and violated the separation-of-powers doctrine.

The circuit court acknowledged that under the Revised School Code, MCL 380.1 *et seq*., and the Michigan Election Law, MCL 168.1 *et seq*., the 10 remaining members of the board of education would have possessed the authority to fill the vacancy occasioned by Banks's resignation if there had been no declared financial emergency within DPS at the time. However, citing MCL 141.1549(2), MCL 141.1552(1)(ee) and (ff), and MCL 141.1552(2), the circuit court ruled that the emergency manager possessed the exclusive power to fill the vacancy occasioned by Banks's resignation unless that power was specifically delegated to the board of education in writing. Because this power of appointment had not been delegated to the board, the circuit court held that the emergency manager's appointment of Kin-

loch was valid and that the board of education's purported appointment of Gay-Dagnogo was void. In addition, the court rejected defendants' argument that the sections of 2012 PA 436 which grant appointment powers to emergency managers violate the constitutional doctrine of separation of powers.

IV

Whether the authority to fill the vacancy on the board of education rested with the emergency manager or the remaining board members is a question of law. "Questions of law, including questions of statutory interpretation, are reviewed de novo on appeal." *Risk v Lincoln Charter Twp Bd of Trustees*, 279 Mich App 389, 396; 760 NW2d 510 (2008). Similarly, "[w]hether a violation of the separation of powers doctrine has occurred is a question of law that this Court reviews de novo." *Harbor Tel 2103, LLC v Oakland Co Bd of Comm'rs*, 253 Mich App 40, 50; 654 NW2d 633 (2002). Inasmuch as defendants sought declaratory and injunctive relief, we generally review such matters for an abuse of discretion. *Mich Coalition of State Employee Unions v Civil Serv Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001); *Allstate Ins Co v Hayes*, 442 Mich 56, 74; 499 NW2d 743 (1993); *Barrow v Detroit Election Comm*, 305 Mich App 649, 662; 854 NW2d 489 (2014).

V

As a preliminary matter, we note that defendants actually sought two different forms of relief from the circuit court. First, they sought a declaration that the emergency manager lacked the authority to fill vacancies on the board of education in general. Second, they sought a judgment invalidating the emergency manager's appointment of Kinloch to the board of education.

Examining their second request first, we note that defendants' attempt to invalidate the emergency manager's appointment of Kinloch, and to effectively "try title" to the office of member of the board of education, likely should have been brought by way of quo warranto rather than by way of a motion. "Quo warranto is the *only* appropriate remedy for determining the proper holder of a public office, including who is the proper holder of the position of school board member." *Davis v Chatman*, 292 Mich App 603, 612; 808 NW2d 555 (2011) (citations omitted) (emphasis added). See also *Layle v Adjutant General*, 384 Mich 638, 641; 186 NW2d 559 (1971) (noting that quo warranto is the "exclusive remedy to try title to office finally and conclusively"). Nonetheless, because defendants' claim concerning the proper officeholder is subordinate to and inextricably tied to their other claim—namely, that the emergency manager lacked the authority to fill the vacant position in the first instance—we will overlook any procedural irregularities that might have been committed by defendants in this regard.

VI

In general, when a vacancy occurs on a board of education,[8] the remaining board members possess the authority to fill the vacancy by appointment. This is true for both first-class school districts and general-powers school districts. With respect to first-class school districts, § 411a(6) of the Revised School Code, MCL 380.411a(6), provides:

[8] "The legislature may provide by law the cases in which any office shall be vacant . . . where no provision is made in this constitution." Const 1963, art 4, § 38. MCL 168.310(2) enumerates the specific conditions under which the office of school board member becomes vacant. These include, among other things, the resignation, removal, disqualification, or death of a school board member.

> If a vacancy occurs on the first class school district board from among the at large members, the vacancy shall be filled by majority vote of the remaining first class school district board members at a meeting called by the president of the board for that purpose. If a person is appointed to fill a vacancy for which the unexpired term is more than 1 year and 8 months, that person shall serve until January 1 following the next general election. At that first general election the vacancy shall be filled for the unexpired term. A vacancy shall not be filled later than 60 days before a primary election at which at large board members are to be nominated.[9]

With regard to general-powers school districts, § 311(1) of the Michigan Election Law, MCL 168.311(1), provides:

> If less than a majority of the offices of school board member of a school district become vacant, the remaining school board members shall fill each vacant office by appointment. If a vacancy in the office of school board member is not filled within 30 days after the vacancy occurs or if a majority of the offices of school board member of a school district become vacant, the intermediate school board for that school district shall fill each vacancy by appointment. An individual appointed under this subsection serves until a successor is elected and qualified.

However, these general statutes give way to more specific enactments when a financial emergency exists within the school district. When an emergency manager is appointed for a local government under 2012 PA 436, that local government enters receivership. MCL 141.1542(q); MCL 141.1549(2). Except as otherwise provided by 2012 PA 436,

---

[9] Banks was one of the four at-large members of the board of education.

> during the pendency of the receivership, the authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government[10] under law, charter, and ordinance shall be suspended and vested in the emergency manager. [MCL 141.1552(2).]

The Legislature has conferred upon emergency managers broad authority to act for and in place of the governing body of the local government:

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government. The emergency manager shall have broad powers in receivership to rectify the financial emergency and to assure the fiscal accountability of the local government and the local government's capacity to provide or cause to be provided necessary governmental services essential to the public health, safety, and welfare. Following appointment of an emergency manager and during the pendency of receivership, the governing body and the chief administrative officer of the local government shall not exercise any of the powers of those offices except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act and are subject to any conditions required by the emergency manager. [MCL 141.1549(2).]

Among other things, emergency managers are specifically empowered to "[r]emove, replace, appoint, or confirm the appointments to any office, board, commission, authority, or other entity which is within or is a component unit of the local government," MCL 141.1552(1)(ff), and "[t]ake any other action or exercise any power or authority of any officer, employee, department, board, commission, or other similar entity of the

---

[10] For purposes of 2012 PA 436, the term "local government" includes school districts such as DPS. MCL 141.1542(k); see also MCL 141.1542(t).

local government, whether elected or appointed, relating to the operation of the local government," MCL 141.1552(1)(ee). "The power of the emergency manager shall be superior to and supersede the power of any of the foregoing officers or entities." MCL 141.1552(1)(ee).

As a remedial statute, 2012 PA 436 exists to provide specific tools for resolving financial emergencies within local governments that are not available under more general legislation. It is axiomatic that "when two statutes appear to control a particular situation, the more recent and more specific statute applies." *People v Bragg*, 296 Mich App 433, 451; 824 NW2d 170 (2012). See also *Attorney General v Pub Serv Comm*, 183 Mich App 692, 705; 455 NW2d 724 (1990). 2012 PA 436 is both more specific and more recently enacted than the Revised School Code and the Michigan Election Law. The provisions of 2012 PA 436 therefore control over MCL 168.311(1) and MCL 380.411a(6) when a school district is in receivership.

"The legislature may provide by law . . . the manner of filling vacancies where no provision is made in this constitution." Const 1963, art 4, § 38. As 2012 PA 436 makes clear, unless the emergency manager has specifically delegated the power of filling vacancies to the board of education in writing, the board of education is divested of its authority to exercise that power during the pendency of the receivership. MCL 141.1549(2); see also MCL 141.1552(2). Because no such written delegation has been made in this case, we conclude that the emergency manager has the exclusive authority to fill vacancies on the board of education by appointment during the pendency of the DPS receivership. MCL 141.1549(2); MCL 141.1552(1)(ff); see also MCL 141.1552(1)(ee).

We are not persuaded by defendants' argument that the aforementioned provisions of 2012 PA 436 violate the constitutional doctrine of separation of powers. In essence, defendants argue that the emergency manager, having assumed the executive powers of the chief administrative officer of the school district, may not constitutionally appoint individuals to the legislative body of the district. Just as the Governor may not constitutionally fill vacancies in the Michigan Legislature by appointment, defendants contend, the emergency manager, vested with the executive powers of the school district, may not constitutionally fill vacancies on the board of education. We cannot agree.

It is true that "[t]he powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2. It is equally true that the Governor may not constitutionally fill vacancies in the Legislature. Const 1963, art 5, §§ 11 and 13. But it does not follow that the emergency manager may not constitutionally fill vacancies on the school board.

"[T]he separation of powers doctrine stated in Const 1963, art 3, § 2 applies only to the state level of government and therefore does not apply to local governmental units." *Harbor Tel*, 253 Mich App at 50-51; see also *Rental Prop Owners Ass'n of Kent Co v Grand Rapids*, 455 Mich 246, 266-267; 566 NW2d 514 (1997). Indeed, many local governmental officials such as city managers and township supervisors exercise both executive and legislative functions. See *Rental Prop Owners*, 455 Mich at 267-268; *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 587-588; 640 NW2d 321 (2001). Likewise, the legislative bodies of

local governments may exercise executive and quasi-judicial powers at times. *Rental Prop Owners*, 455 Mich at 267-268. See also Const 1963, art 7, § 8 (granting both legislative and administrative powers to county boards of commissioners); Const 1963, art 7, § 18 (granting both legislative and administrative powers to township boards). The constitutional doctrine of separation of powers does not prohibit the Legislature from authorizing an emergency manager to fill vacancies on the board of education by appointment while at the same time exercising the powers of the chief administrative officer of the school district.

Nor can we agree with defendants' novel contention that the emergency manager's appointment of Kinloch to fill the vacancy on the board of education was infected by an impermissible conflict of interest because the board must remain free of the emergency manager's control. Defendants argue that in order for 2012 PA 436 to operate as intended, the board of education must remain independent of the emergency manager. They contend that if the emergency manager is permitted to fill vacancies on the board of education by appointment, the board will no longer be able to function as an independent check on the emergency manager's actions. The statutory text provides no support for these assertions.

True enough, 2012 PA 436 permits the governing body of a local government to remove an emergency manager by a supermajority vote after the emergency manager has served for 18 months. MCL 141.1549(6)(c). Without question, however, the Legislature did not intend for the governing body to retain any other significant oversight powers during the pendency of the financial emergency. As previously explained, "during the pendency of the receivership, the

authority of the chief administrative officer and governing body to exercise power for and on behalf of the local government . . . *shall be suspended and vested in the emergency manager*," MCL 141.1552(2), and the governing body and chief administrative officer "*shall not exercise any of the powers of those offices* except as may be specifically authorized in writing by the emergency manager or as otherwise provided by this act," MCL 141.1549(2). (Emphasis added.) There is simply no support for defendants' argument that 2012 PA 436 empowers the board of education to exercise broad oversight powers and act as a check on the emergency manager's actions during the receivership. Consequently, there was no conflict of interest.

VII

During the pendency of the receivership, the emergency manager has the exclusive authority to fill any vacancies on the board of education by appointment. The power of the remaining board members to fill such vacancies is suspended during the financial emergency unless the emergency manager delegates that power to the board in writing. We affirm the circuit court's ruling to this effect. We also affirm the circuit court's order validating the emergency manager's appointment of Kinloch and invalidating the board of education's purported appointment of Gay-Dagnogo.

Affirmed. No taxable costs pursuant to MCR 7.219, a public question having been involved.

BECKERING, P.J., and BOONSTRA, J., concurred with JANSEN, J.

BITTERMAN v VILLAGE OF OAKLEY

Docket No. 320984. Submitted October 15, 2014, at Lansing. Decided January 22, 2015, at 9:00 a.m. Leave to appeal denied, 497 Mich 987.

Shannon Bitterman brought an action in the Saginaw Circuit Court against the village of Oakley, alleging violations of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*., with regard to the village's denial of requests by Bitterman seeking records, documents, and information about village police reservists from the previous three years, a copy of an audio recording of a specific village counsel meeting, and a list containing the names, full addresses, and telephone numbers of all donors to the Village of Oakley Police Donation Fund for the previous five years. Following cross-motions for summary disposition, the trial court, Robert L. Kaczmarek, J., ruled that the names, addresses, and telephone numbers of the donors to the police fund were exempt from disclosure under the privacy exemption of the FOIA, MCL 15.243(1)(a). The court also held that the names of active police reservists were exempt from disclosure under the FOIA's exemption regarding public records of a law enforcement agency that identify or provide a means of identifying a person as a law enforcement officer, agent, or informant, MCL 15.243(1)(s)(*viii*). The court additionally held that the names of the inactive police reservists were not exempt and ordered disclosure of that information. Finally, the court held that, because the audio recording had been destroyed before Bitterman made her request, the village did not have to disclose the recording. Bitterman appealed and the village cross-appealed. While the appeal was pending, the trial court issued an injunction prohibiting the village's police department from operating, in effect rendering all the reservists inactive reservists, and the village counsel ordered the release of the names of all police officers and reservists who have served the village. The Court of Appeals ordered the parties to submit supplemental briefs regarding the effect of those developments on the appeal, and the parties complied.

The Court of Appeals *held*:

1. Unless a FOIA exemption provides otherwise, the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption. The determinative legal question for a judicial body reviewing a denial is whether the public body erred because the FOIA exemption did not apply when it denied the request. Subsequent developments are irrelevant to that FOIA inquiry. The exemptions relevant in this case do not provide that a judicial body reviewing a denial may consider information not available to the public body when it denied the request. Therefore, the Court of Appeals need not consider the fact that the police department's operations were halted and all the reservists became inactive when evaluating the applicability of the relevant exemptions.

2. Although the subsequent release of a requested public record by the public body would render moot an appeal of the public body's decision to deny a request, the issue in this case concerning the release of the names of the reservists was not rendered moot as a result of the village counsel's decision to release the names of the reservists because the names, in fact, have not been released to the public.

3. The village was not estopped from raising any new defenses in support of its decision to deny Bitterman's FOIA requests after it made its "final determination to deny the request" pursuant to MCL 15.235(4). A public body may assert for the first time in the circuit court defenses not originally raised at the administrative level.

4. A public body, to withhold a record from disclosure under the privacy exemption of the FOIA, MCL 15.243(1)(a), must first establish that the requested information is "of a personal nature," and, if it meets this burden, it also must show that the public disclosure "would constitute a clearly unwarranted invasion of an individual's privacy," which is determined by balancing the public interest in disclosure against the interest the Legislature intended the exemption to protect.

5. Information is of a personal nature under the first prong of the privacy exemption if it is intimate, embarrassing, private, or confidential. Absent special circumstances, an individual's name is not information of a personal nature.

6. The fact that the donors to the police fund used private assets to contribute to the fund does not necessarily make the information of a personal nature. The names of the donors to the police fund are not information of a personal nature exempted from disclosure under the privacy exemption.

7. The risk of exposing the donors to the police fund to unwanted solicitations, when weighed against the public's interest in knowing the sources of the funds, does not outweigh the public's interest in such disclosure. The trial court erred by concluding that the names of the donors to the police fund were exempt from disclosure under the privacy exemption. The order granting summary disposition in favor of the village is reversed to the extent that the court declined to order the disclosure of the names of the donors.

8. If a requested public record does not exist, a public body is under no obligation to scrutinize its existing records to create a responsive document. Because the village admitted that documents containing the names of inactive police reservists already exist, it must produce copies of the existing responsive documents.

9. The record does not indicate the village police reservists' powers or duties relating to law enforcement or preserving the peace. The case must be remanded to the trial court to properly resolve the issue whether the reservists should be considered "law enforcement officers" for purposes of the law enforcement exemption in MCL 15.243(1)(s)(*viii*).

10. Bitterman is entitled to attorney fees pursuant to MCL 15.240(6). An award of attorney fees can include appellate attorney fees if an appeal was necessary to compel disclosure of requested information. Because a remand is necessary, determination of the appropriate award must wait until the extent to which Bitterman has prevailed is determined.

Affirmed in part, reversed in part, and remanded.

Outside Legal Counsel PLC (by *Philip L. Ellison*) for plaintiff.

Plunkett Cooney (by *Mary Massaron*, *Audrey J. Forbush*, *Rhonda R. Stowers*, and *Hilary A. Ballentine*) for defendant.

Before: METER, P.J., and WHITBECK and RIORDAN, JJ.

RIORDAN, J. Plaintiff, Shannon Bitterman, appeals as of right the circuit court's order granting partial summary disposition in favor of defendant, village of

Oakley (the "Village"), in this case brought under the Freedom of Information Act (FOIA), MCL 15.231 *et seq*. The Village cross-appeals. We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

On March 20, 2013, Bitterman made a two-part FOIA request to the Village, seeking records, documents, and information about Village police reservists from the previous three years. She also requested a copy of an audio recording from a September 13, 2011 Village council meeting. On March 21, 2013, the Village's clerk denied both requests, citing the civil litigation exemption, MCL 15.243(1)(v). On April 3, 2013, Bitterman filed a complaint in the circuit court, alleging that her requests were wrongfully denied. Bitterman also submitted a second FOIA request to the Village on April 3, 2013, requesting a list containing the names, full addresses, and telephone numbers of every donor to the Village of Oakley Police Donation Fund for the previous five years. On April 8, 2013, the Village denied the request for donor information, citing the privacy exemption, MCL 15.243(1)(a). Bitterman amended her complaint to add allegations that the April 3 FOIA request was wrongfully denied.

Subsequently, on April 19, 2013, the Village asserted an additional ground for denying Bitterman's request for information relating to the police reservists. It sent Bitterman a letter stating that it was denying her FOIA request because she failed to sufficiently identify the information she sought. The Village also denied her request for the audio recording of the council meeting because the recording had been destroyed before Bitterman submitted her FOIA request, so it had no existing recording.

The parties filed cross-motions for summary disposition. In its motion, the Village argued that the information on the police reservists was exempt from disclosure because Bitterman's request was overly broad and failed to sufficiently describe a public record. The Village contended that it does not maintain a list of police reservists—active or inactive. The Village also argued that the disclosure of the information regarding the police reservists was protected by numerous FOIA exemptions and that the privacy exemption of MCL 15.243(1)(a) applied to Bitterman's request. Bitterman contended that the Village should not be able to assert in the circuit court the additional defenses listed in its April 19 letter.

The circuit court ruled that the names, addresses, and telephone numbers of the donors to the police fund were exempt from disclosure under the privacy exemption, MCL 15.243(1)(a). Further, the court held that the names of *active* police reservists were exempt from disclosure under Subparagraph (*viii*) of the law enforcement exemption, MCL 15.243(1)(s)(*viii*). However, the court held that the names of *inactive* police reservists were not exempt pursuant to either the law enforcement exemption or the privacy exemption and ordered disclosure of the nonexempt information. Finally, the court held that the Village did not have to disclose the audio recording because the recording was not in existence at the time that Bitterman made her March 20 FOIA request.[1]

II. MORE RECENT DEVELOPMENTS

On October 10, 2014, the circuit court issued an injunction prohibiting the Village's police department

[1] The parties have not appealed the court's order as it relates to the audio recording.

from operating.[2] Thus, in effect, all village of Oakley police reservists now are inactive. Subsequently, on October 14, 2014, the Village council ordered the release of the names of all police officers and reservists who have served the Village. At oral argument in this Court on October 15, 2014, Bitterman's counsel advised us of the recent developments. We then ordered supplemental briefing on the effect of those recent developments on this appeal.

In her supplemental brief, Bitterman argues that by deciding to release the names of the police reservists, the Village has waived its challenge to disclosure under the FOIA. She relies on the public domain doctrine from federal freedom of information act cases. The Village responds that the recent events are not relevant to the issue before this Court, i.e., whether the Village lawfully refused to disclose the requested information on the basis of the cited exemptions. The Village maintains that this Court should review the circuit court's decision in light of the information that was before the Village when it decided the issue. The Village also argues that the public domain doctrine does not apply because Bitterman has not shown that the information at issue has been preserved in a permanent public record.

In *State News v Mich State Univ*, 481 Mich 692, 703-704; 753 NW2d 20 (2008), our Supreme Court explained:

> We agree with the Court of Appeals statement that "public bodies and trial courts can only make decisions on FOIA matters on the basis of the information that is before them at the time, and it is not the function of appellate courts to second-guess those decisions on the basis of

[2] The court's order was to be in effect until the newly elected village of Oakley council was sworn in and seated, or until further order of the court.

> information that later becomes available." We disagree, however, with the panel's further, contrary musings that the passage of time and subsequent events could negate the applicability of a FOIA exemption. Rather, we hold that unless the FOIA exemption provides otherwise, the appropriate time to measure whether a public record is exempt under a particular FOIA exemption is the time when the public body asserts the exemption.
>
> The denial of a FOIA request occurs at a definite point in time. The public body relies on the information available to it at that time to make a legal judgment whether the requested public record is fully or partially exempt from disclosure. The determinative legal question for a judicial body reviewing the denial is whether the public body erred because the FOIA exemption applied [sic: did not apply?] *when it denied the request*. Subsequent developments are irrelevant to that FOIA inquiry. There is no indication from the text of either the privacy or the law-enforcement-purposes exemption or from another, independent FOIA provision that the public body's assertion of a FOIA exemption may be reexamined by the circuit court or an appellate court while taking into consideration information not available to the public body when it denied the request.

In accordance with *State News*, we will not consider the fact that the Village police department's operations were halted and all of the police reservists became inactive when evaluating the applicability of the relevant exemptions in this matter.

In addition, although our Supreme Court noted that the "release of the requested public record by the public body would render the FOIA appeal moot because there would no longer be a controversy requiring judicial resolution," *id*. at 704 n 25, the issue in this case is not moot because the parties' supplemental briefs indicate that despite the Village council's decision to release the names of reservists, the names, in fact, have not been released to the public. Accordingly, notwithstanding the recent developments, we will address the arguments raised in the appeal and cross-appeal.

III. THE FREEDOM OF INFORMATION ACT

The FOIA is written to provide to those who seek it " 'full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.' " *Amberg v Dearborn*, 497 Mich 28, 30; 859 NW2d 674 (2014), quoting MCL 15.231(2). Further, MCL 15.231(2) states in its entirety that "[i]t is the public policy of this state that all persons, except those persons incarcerated in state or local correctional facilities, are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and public employees, consistent with this act. The people shall be informed so that they may fully participate in the democratic process."

Except under certain specifically delineated exceptions, a person who " 'provid[es] a public body's FOIA coordinator with a written request that describes a public record sufficiently to enable the public body to find the public record' is entitled 'to inspect, copy, or receive copies of the requested public record of the public body.' " *Amberg*, 497 Mich at 30, quoting MCL 15.233(1); see also *Coblentz v City of Novi*, 475 Mich 558, 573; 719 NW2d 73 (2006) ("A FOIA request must be fulfilled unless MCL 15.243 lists an applicable specific exemption.").

A. THE VILLAGE'S ASSERTION OF NEW DEFENSES AFTER ITS FIRST RESPONSE

Bitterman argues that the Village is estopped from raising any new defenses in support of its decision to deny her FOIA requests after it made its "final determination to deny the request" pursuant to MCL 15.235(4).

This exact issue was addressed in *Stone Street Capital, Inc v Bureau of State Lottery*, 263 Mich App 683, 688 n 2; 689 NW2d 541 (2004), where we explained that "a public body may assert for the first time in the circuit court defenses not originally raised at the administrative level." Accordingly, Bitterman's argument is without merit.

B. THE DONORS TO THE POLICE FUND

Bitterman next argues that the circuit court erred by holding that the names[3] of the donors to the police fund were exempt from disclosure. We review de novo a circuit court's legal determinations in a FOIA case. *King v Mich State Police Dep't*, 303 Mich App 162, 174; 841 NW2d 914 (2013). The court's factual findings are reviewed for clear error if a party challenges the underlying facts supporting the court's decision. *Id*. Discretionary determinations in a FOIA case are reviewed for an abuse of discretion. *Id*. at 175. "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id*. Questions of statutory interpretation are reviewed de novo. *Id*.

The privacy exemption permits a public body to exempt from disclosure "[i]nformation of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy." MCL 15.243(1)(a). The burden is on

[3] Although Bitterman sought disclosure of the donors' names, addresses, and telephone numbers, on appeal she argues that even if the addresses and telephone numbers are personal information exempt from disclosure under the privacy exemption, the names are not. See *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 680; 753 NW2d 28 (2008) (home addresses and telephone numbers are personal information and not subject to disclosure).

the public body to sustain "its decision to withhold the requested record from disclosure." *Mich Federation of Teachers & Sch Related Personnel, AFT, AFL-CIO v Univ of Mich*, 481 Mich 657, 665; 753 NW2d 28 (2008). A public body must first establish that the requested information is " 'of a personal nature.' " *Id*. at 675, quoting MCL 15.243(1)(a). If the public body meets this burden, it also must show that the public disclosure " 'would constitute a clearly unwarranted invasion of an individual's privacy,' " *id*., which is determined by balancing the public interest in disclosure—the core purpose of the FOIA—against the interest the Legislature intended the exemption to protect. *Mager v Dep't of State Police*, 460 Mich 134, 144-145; 595 NW2d 142 (1999).

"Under the first prong of the privacy exemption, information is 'of a personal nature' if it is 'intimate,' 'embarrassing,' 'private,' or 'confidential.' " *Rataj v Romulus*, 306 Mich App 735, 750; 858 NW2d 116 (2014) (citation omitted). "In the absence of special circumstances . . . an individual's name is not '[i]nformation of a personal nature' within the meaning of MCL 15.243(1)(a)." *Id*. at 753 (brackets in original). The Village does not argue that the names of donors to the Village of Oakley Police Donation Fund for the past five years are intimate or embarrassing.

This Court's opinion in *Detroit Free Press, Inc v Southfield*, 269 Mich App 275; 713 NW2d 28 (2005), is instructive. In that case, we held that

> the names of pension recipients combined with their pension amounts is not information of a personal nature. The information does not solely relate to private assets or personal decisions. Rather, the pension amounts reflect specific governmental decisions regarding retirees' continuing compensation for public service. Therefore, the pension amounts are more comparable to public salaries

> than to private assets. . . . The precise manner of expenditure of public funds is simply not a private fact. [*Id*. at 282-283 (quotation marks and citations omitted).]

Here, the fact that the donors used private assets to contribute to the police fund does not necessarily make the information "of a personal nature." See *id*. at 283 ("Records are not automatically exempt under the FOIA merely because they contain information about private assets."). "[I]f private information is included in the records of a public body, the court must determine whether the information is exempt because it relates to an individual's 'private life' according to the community standards, customs, and views." *Id*. Bitterman does not seek disclosure of the amount of each donor's contribution, only the names of the donors. Of added significance to this is that the private funds were donated for public use and, as Bitterman alleges, for the entitlement of being labeled a village police reservist. In addition, the record shows that donations to the police fund were not used solely to fund the police department. Village council meeting minutes reflect that large amounts—$30,000, for example—have been transferred from the police fund to cover other governmental operating expenses. Thus, this case is distinguishable from *Clerical-Technical Union v Mich State Univ Bd of Trustees*, 190 Mich App 300; 475 NW2d 373 (1991), in which the addresses of donors[4] to the university were kept anonymous because their donations were unrelated to how the university functioned as a public institution. Accordingly, in the instant case, we hold that the names of the donors are not information of a personal nature, and that, as a result, the privacy exemption in MCL 15.243(1)(a) does not exempt the information from disclosure.

---

[4] Donor names were not at issue on appeal.

Moreover, even if the information were of a personal nature, the Village cannot satisfy the second prong of the privacy exemption. The second prong of the provision considers whether public disclosure of the information " 'would constitute a clearly unwarranted invasion of an individual's privacy.' " *Rataj*, 306 Mich App at 751, quoting MCL 15.243(1)(a). In order to answer this question, the court must

> balance the public interest in disclosure against the interest [the Legislature] intended the exemption to protect[.] . . . [T]he only relevant public interest in disclosure to be weighed in this balance is the extent to which disclosure would serve the core purpose of the FOIA, which is contributing significantly to public understanding of the operations or activities of the government. [*Rataj*, 306 Mich App at 751; slip op at 7 (quotation marks and citations omitted; alterations in original).]

We must ask "whether the requested information would shed light on the governmental agency's conduct or further the core purposes of FOIA." *Id*. " 'In all but a limited number of circumstances, the public's interest in governmental accountability prevails over an individual's, or a group of individuals', expectation of privacy.' " *Id*., quoting *Practical Political Consulting, Inc v Secretary of State*, 287 Mich App 434, 464; 789 NW2d 178 (2010).

Standing alone, the names of donors to the police fund would not reveal useful information about the local government's conduct. But, Bitterman suspects that a "pay to play" scheme exists, by which donors are allowed to become police reservists in exchange for their donations. When the names of persons in each group are cross-referenced, and the percentage of reservists who are also donors, or the percentage of donors who are also reservists, is determined, the information could shine light on the Village's method of

selecting its police reservists and whether this is a "pay to play" situation, as Bitterman describes it. Again, the record contains evidence to support Bitterman's suspicions and those suspicions establish a legitimate public interest in the disclosure of the names.

The ratio of reservists to residents is striking—a town of 300 residents has 100 reserve police officers. Given this apparent imbalance, the Village's use of private citizens as reservists has sparked significant public interest about possible over-policing, or, perhaps, nonpolicing by the "reservists," and into the processes that lead to one being named a "reservist." These issues have been discussed in the mainstream media and on the Internet for over a year. Further, Police Chief Robert Reznick admits that some of the donors are police reservists. In a September 11, 2013 MLive article, Chief Reznick was reported as having referred to the police department as " 'self-funded,' with donations from the reserve officers paying for equipment, community events, uniforms and more." Further, as already discussed, the donations to the police fund are being used in large amounts—$30,000, for example—to fund Village operations other than those connected to the police department.

The only potential harm to the donors that the Village identifies is that the release of their names "would leave these philanthropists vulnerable to unwanted solicitors." This risk, when weighed against the public's interest in knowing the sources of nontax funds that support Village operations and the criteria by which reservists are chosen, does not outweigh the interest in disclosure. Further, disclosure of the names will serve a core FOIA purpose by facilitating the public's access to information regarding the affairs of its local government. *Rataj*, 306 Mich App at 751

("[W]e cannot hold our [police] officials accountable if we do not have the information upon which to evaluate their actions.") (quotation marks and citation omitted; alterations in original). Accordingly, the circuit court erred by concluding that the information was exempt under the privacy exemption in MCL 15.243(1)(a).

C. IDENTITY OF THE POLICE RESERVISTS

The circuit court held that Bitterman's request sufficiently described the information she sought regarding the police reservists, that there were responsive records, that the law enforcement exemption in MCL 15.243(1)(s)(*viii*) applied to exempt the names of active police reservists, that MCL 15.243(1)(s)(*viii*) did not exempt the names of inactive police reservists, that the law enforcement exemption in MCL 15.243(1)(s)(*ix*) did not apply, and that the privacy exemption in MCL 15.243(1)(a) did not apply to shield the names of the inactive police reservists.

Bitterman argues that because the Village has the burden of proving the applicability of an exemption,[5] the Village's failure to adequately brief the applicability of the law enforcement exemption during the lower court proceedings was a permanent waiver of the issue. However, even if a party abandons an issue by failing to support it with sufficient authority, a reviewing court may nevertheless consider the issue. See *King*, 303 Mich App at 176. Here, because the circuit court reviewed this issue, it apparently concluded that the issue was adequately briefed. Moreover, our review of the Village's arguments that the law enforcement exemption applies show it put forth more than merely

[5] MCL 15.240(4) states that the public body bears the burden of proving the applicability of all exemptions from disclosure of public records.

generic contentions. Instead, the Village's arguments were sufficient to "prime the pump" and allow consideration of the issue in the circuit court. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

1. THE VILLAGE'S CLAIM OF NO RESPONSIVE RECORDS

The Village contends that it has no obligation to furnish Bitterman a copy of documents providing the names of inactive police reservists because no such documents exist. Under the FOIA, the right to receive a copy of a public record is contingent on the requester first providing a "written request that describes a public record sufficiently to enable the public body to find the public record . . . ." MCL 15.233(1); *Detroit Free Press*, 269 Mich App at 281.[6] "The request need not specifically describe the records containing the sought information; rather, a request for information contained in the records will suffice." *Detroit Free Press*, 269 Mich App at 281. However, except in circumstances not applicable to this case, a public body is not required to compile, summarize, or create a report of information in response to a request, MCL 15.233(4), or to "create a new public record," MCL 15.233(5). In other words, if the record requested does not exist, then the public body is under no obligation to scrutinize its existing records in order to create a responsive document.

The Village argues that compliance with Bitterman's request would require it to search all of its records in all of its departments in an effort to cull the existing information and compile it into a new record. However, during discovery, the Village admitted that it

[6] The FOIA defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e).

likely had numerous documents containing the requested information. Because those documents already exist, the Village is not being asked to create a new document or to compile, summarize, or create a report of the information. Therefore, the Village's argument that it would have to create a new record is dubious at best.

The Village need only produce copies of the *existing* responsive documents, such as copies of the reservist cards. Additionally, even if the responsive documents contain exempt information, the FOIA statute provides that "the public body shall separate the exempt and nonexempt material and make the nonexempt material available for examination and copying." MCL 15.244(1). Further, the FOIA provides that "[a] public body may charge a fee for a public record search, the necessary copying of a public record for inspection, or for providing a copy of a public record." MCL 15.234(1). Thus, while a search for the requested information—which the Village admits it has in its public records—may be time-consuming or costly, the Village can charge Bitterman a fee for the search within the limits of MCL 15.234.

2. PERSONAL PRIVACY AND LAW ENFORCEMENT INVESTIGATIVE DOCUMENT EXEMPTIONS

The Village argues that the personal privacy exemption in MCL 15.243(1)(a) and the exemptions regarding investigating records compiled for law enforcement purposes in MCL 15.243(1)(b)(*i*) to (*iii*) shield it from Bitterman's requests.

The Village cites only authority for the applicability of the personal privacy exemption, MCL 15.243(1)(a), and it gives scant attention to the investigative document exemptions. Further, the Village provides no

supporting authority or legal analysis in support of the applicability of the investigative document exemptions, especially regarding how those exemptions may relate to the inactive reservists.[7] Accordingly, we hold that the Village has abandoned its argument that the names of the inactive police reservists are exempted from disclosure by the investigative document exemptions of MCL 15.243(1)(b), or by the investigative records exemptions of MCL 15.243(1)(s)(*i*) to (*vii*), (*ix*), or (*x*). *Mitcham*, 355 Mich at 203. Moreover, even if the issue has not been abandoned on appeal, the Village has failed to sustain its burden of proving the applicability of those exemptions in this case because it has offered no facts or legal analysis in support of its position. See MCL 15.240(4).

D. APPLICABILITY OF THE LAW ENFORCEMENT EXEMPTION

The parties disagree about the facts bearing on the applicability of Subparagraph (*viii*) of the law enforcement exemption, MCL 15.243(1)(s)(*viii*), which provides:

---

[7] The Village argues that if the law enforcement exemption does not apply to shield the names of the inactive police reservists, the privacy exemption in MCL 15.243(1)(a), discussed later in this opinion, applies. Again, the Village has the burden of establishing the exemption. MCL 15.240(4). In its brief in support of its motion for summary disposition, the entirety of the Village's argument that the privacy exemption applied consisted of quoting the operative language of the privacy exemption, but not citing the actual statutory provision. Additionally, in its brief in reply to Bitterman's response to the Village's motion for summary disposition, the Village merely cited MCL 15.243(1)(a) without any accompanying legal analysis or citation of authority explaining how the exemption applied. On these facts, the circuit court held that the Village had failed to adequately support its contention that the privacy exemption applied in lieu of the law enforcement exemption. Because the Village failed to carry its burden of proof, the circuit court did not err by holding that the names of the inactive police reservists were not exempt pursuant to the privacy exemption. See *Coblentz*, 475 Mich at 574.

> (1) A public body may exempt from disclosure as a public record under this act any of the following:
>
> * * *
>
> (s) Unless the public interest in disclosure outweighs the public interest in nondisclosure in the particular instance, public records of a law enforcement agency, the release of which would do any of the following:
>
> * * *
>
> (*viii*) Identify or provide a means of identifying a person as a law enforcement officer, agent, or informant.

The FOIA does not define the terms "law enforcement officer" or "law enforcement agent." See MCL 15.232. No appellate decision applying MCL 15.243(1)(s)(*viii*) has construed those terms. The question whether a reservist police officer (or voluntary police officer) is a law enforcement officer or agent for purposes of the FOIA is an issue of first impression.

The primary goal of judicial interpretation of statutes is to discern and give effect to the intent of the Legislature by focusing first on the plain language of the statute. *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). This Court recently articulated the purpose of the FOIA and principles of its construction in *Rataj*, 306 Mich App at 748:

> FOIA is a manifestation of this state's public policy favoring public access to government information, recognizing the need that citizens be informed as they participate in democratic governance, and the need that public officials be held accountable for the manner in which they perform their duties. Our Supreme Court has repeatedly described FOIA as a "prodisclosure statute," and this Court has held that FOIA's disclosure provisions must be interpreted broadly to ensure public access. [Citations and some quotation marks omitted.]

"[E]ach FOIA exemption, by its plain language, advances a separate legislative policy choice." *Mich Federation of Teachers*, 481 Mich at 680 n 63. "Courts narrowly construe any claimed exemption and place the burden of proving its applicability on the public body asserting it." *Detroit Free Press*, 269 Mich App at 281. "Unless otherwise defined in the statute, or understood to have a technical or peculiar meaning in the law, every word or phrase of a statute will be given its plain and ordinary meaning." *Landry v Dearborn*, 259 Mich App 416, 421; 674 NW2d 697 (2003). "If a term used in a statute is undefined, a court may look to a dictionary for interpretative assistance." *Spartan Stores, Inc v Grand Rapids*, 307 Mich App 565, 574; 861 NW2d 347 (2014).

Black's Law Dictionary defines "law-enforcement officer" simply as

> [a] person whose duty is to enforce the laws and preserve the peace.—Sometimes shortened to *law officer*.—Also termed *law-enforcement agent*. See peace officer; sheriff. [*Black's Law Dictionary* (10th ed), p 1018.]

In *People v Bissonette*, 327 Mich 349, 356; 42 NW2d 113 (1950), our Supreme Court accepted that the term peace officer[8] "generally . . . includes sheriffs and their deputies, constables, marshals, members of the police force of cities, and other officers whose duty is to enforce and preserve the public peace." (Quotation marks and citation omitted.) See also *Mich State Employees Ass'n v Attorney General*, 197 Mich App 528, 530-531; 496 NW2d 370 (1992). On first blush, it appears as though a person given the title of "police reservist" satisfies the broad definition of law enforcement officer, or perhaps law enforcement agent, to the

[8] The term "peace officer" often is used interchangeably with the term "law enforcement officer."

extent that persons given those titles often are charged with the duty of preserving the public peace. However, Bitterman alleges that the reservists are doing nothing more than participating in a "pay to play" scheme allowing them to use the title "police reservists" without actually doing any duties related to law enforcement. In this case, there is nothing in the record showing whether the village of Oakley's 100 police reservists ever engaged in anything that could be construed as enforcing laws or preserving the peace.

Because the record is devoid of anything concerning the Oakley reservists and their powers or duties relating to law enforcement or preserving the peace, we cannot properly resolve the issue of whether the Oakley reservists should be considered "law enforcement officers" for the purpose of a FOIA exemption. Therefore, we remand this issue for further development by the circuit court.[9]

IV. ATTORNEY FEES

Finally, Bitterman correctly argues that she is entitled to attorney fees on appeal pursuant to MCL 15.240(6), which provides for the award of reasonable attorney fees, costs, and disbursements to a plaintiff who prevails in whole or in part in a FOIA action. The award of attorney fees can include appellate attorney fees if an appeal was necessary to compel disclosure of requested information. *Rataj*, 306 Mich App at 756. We

[9] The Village also contends that the disclosure of the police reservist names would implicate the reservists' privacy interests because they would be identified as owning and having permits to carry firearms. However, there is nothing in the record relating to when reservists carry firearms and whether such possession is pursuant to their status as private citizens or pursuant to their status as Oakley police reservists. Likewise, this issue should be more fully developed on remand.

are mindful that by this opinion, Bitterman already has prevailed in part and is undoubtedly entitled to an appropriate portion of her attorney fees, costs, and disbursements pursuant to MCL 15.240(6). However, because remand is necessary to determine if the police reservists are law enforcement officer or agents within the meaning of MCL 15.243(1)(s)(*viii*), any award or determination of attorney fees would be premature at this point.

V. CONCLUSION

We reverse the circuit court's grant of summary disposition in favor of the Village to the extent that the court declined to order disclosure of the names of the donors to the police fund. The circuit court erred as a matter of law by ruling that the information was exempt from disclosure under the FOIA.

We remand for further proceedings consistent with this opinion regarding whether the police reservists qualify as law enforcement officers or agents within the meaning of MCL 15.243(1)(s)(*viii*).

Until the extent to which Bitterman has prevailed in this FOIA action is determined, it is premature to fully consider the appropriate attorney fees, costs, and disbursements she is entitled to under MCL 15.240(6).

In all other respects, we affirm the circuit court.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We retain jurisdiction. No taxable costs pursuant to MCR 7.219, no party having prevailed in full.

METER, P.J., concurred with RIORDAN, J.

WHITBECK, J., not participating, having resigned from the Court of Appeals effective November 21, 2014.

PEOPLE v COOPER

Docket No. 318159. Submitted January 14, 2015, at Detroit. Decided January 22, 2015, at 9:05 a.m. Leave to appeal sought.

James G. Cooper, Jr., was convicted following a jury trial in the Lenawee Circuit Court, Timothy P. Pickard, J., of first-degree home invasion, MCL 750.110a(2), assault with intent to commit murder, MCL 750.83, and torture, MCL 750.85. The victim's daughter told defendant that the victim had raped her, an allegation she later admitted was a lie. Defendant, high on drugs and angered by the allegation, went to the victim's home with another man and proceeded to beat and torture the victim. Defendant was sentenced as a twelfth-offense habitual offender, MCL 769.12, to 320 to 640 months in prison for first-degree home invasion, life in prison for assault with intent to commit murder, and 900 to 1,800 months in prison for torture. Defendant appealed and moved to remand the case to the trial court. The Court of Appeals granted the motion to remand while retaining jurisdiction of the case. On remand, defendant moved for a new trial. The court, Margaret M. S. Noe, J., held an evidentiary hearing and subsequently denied defendant's motion for a new trial.

The Court of Appeals *held*:

1. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that the defendant was prejudiced by counsel's performance. In this case, defendant contended that his trial counsel's representation was deficient because counsel failed to object to, and actually elicited, allegedly irrelevant and unfairly prejudicial evidence that defendant was involved in drug use and drug dealing. Defendant also contended that counsel was constitutionally ineffective because he failed to cross-examine defendant's accomplice. With regard to the testimony concerning drug-dealing, defendant's trial counsel elicited the testimony in an attempt to undermine the witness's identification of defendant, a matter of trial strategy that the Court of Appeals would not second-guess. With regard to the evidence of defendant's drug use, it was not prejudicial given that other

evidence of defendant's drug use was admitted. With regard to evidence that defendant had previously assaulted one witness, trial counsel was attempting to use the testimony to establish that the witness's perceptions were altered by her drug use. A failed strategy does not constitute deficient performance. With regard to trial counsel's failure to cross-examine the accomplice, defendant was not prejudiced by the failure given the victim's identification of defendant as one of the perpetrators of the crime.

2. Although the phrase "prosecutorial misconduct" has become a term of art in criminal appeals, the term "misconduct" is more appropriately applied only to those extreme instances when a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. Less extreme claims might be better and more fairly presented as claims of "prosecutorial error." Claims of prosecutorial error are reviewed to determine whether the prosecutor committed errors during the course of trial that deprived the defendant of a fair and impartial trial. If the issue is not preserved, reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. In this case, defendant contended that the prosecution improperly bolstered the credibility of two witnesses. But the mere disclosure of a plea agreement with a prosecution witness, including a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecution, provided the prosecution does not suggest special knowledge of the truthfulness of the witness. Because the prosecution did not make any additional comments about the credibility of the witnesses at issue, there was nothing improper about the prosecution's questioning.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *R. Burke Castleberry, Jr.*, Prosecuting Attorney, and *Jennifer L. Bruggeman*, Assistant Appellate Prosecuting Attorney, for the people.

State Appellate Defender (by *Randy E. Davidson*) for defendant.

Before: MURRAY, P.J., and SAAD and K. F. KELLY, JJ.

MURRAY, P.J. Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), assault with intent to commit murder, MCL 750.83, and torture, MCL 750.85. Defendant was sentenced to 320 to 640 months' imprisonment for first-degree home invasion, life in prison for assault with intent to commit murder, and 900 to 1,800 months' imprisonment for torture. Defendant was sentenced as a *twelfth-offense* habitual offender, MCL 769.12. We affirm.

I. INTRODUCTION

We review thousands of criminal cases each year. Unfortunately, far too many involve murder or other severe criminal depravity. This case is among the worst. The facts presented to the jury were established in large part by the victim, who unequivocally identified defendant as the main attacker. Also testifying against defendant were two of his former associates, both of whom provided the background leading to this truly horrific attack. We conclude that none of defendant's arguments has any merit. Consequently, we affirm all the challenged rulings of the trial court.

II. FACTS

Typical of many of the violent crimes committed in this state, the events leading to this case started off with the use of illegal narcotics, and quickly led to an escalation of criminal activity. In December 2012, the victim, Henry Merritt, allowed his adult daughter, Jessica Tabernero, and her daughter to live in his home with him. Tabernero had a bad drug addiction. After her work ended at a local bar in the early morning hours of

December 30, 2012, Tabernero went to the home of defendant's brother-in-law, Eric Williams, where defendant also lived, and began using crack cocaine. Also present were defendant; defendant's wife, Leah Cooper; Williams; and Jessica Miller. All were, and had been, ingesting significant amounts of crack cocaine. Soon after her arrival, defendant asked Tabernero to have sex with Leah as a birthday present to her; she agreed, and after doing so she exited the room and began showing signs of overdosing. While in that condition she stated that her father had raped her. Hearing this, defendant asked for her father's name and address, left the house and picked up Leondre McCarver, defendant's drug supplier, and proceeded to Merritt's home.

Thus, in the early morning of December 30, 2012, Merritt heard a noise that sounded like a loud boom coming from his kitchen. Merritt went to his kitchen and saw two men, a black man and a white man. Merritt identified the white man as defendant, though he had never seen either man before.[1] Merritt asked the two men why they were in his home, to which they responded, " 'We're here to do a job.' " After this interaction, Merritt was "subdued by both of them and beat unmercifully around [his] face area." The men then took Merritt to his bedroom, where defendant accused Merritt of having sex with Tabernero. Merritt told them that he did not have sex with his daughter,[2] but that his ex-wife's husband had done so.

Undeterred by Merritt's statement, both men continued to beat and choke Merritt while also continuing to accuse him of having sex with Tabernero. Defendant

[1] Merritt was shown a photo array before trial and selected defendant without hesitation.

[2] Tabernero subsequently indicated that this was true. Merritt had not raped her.

told Merritt that if he had "anything to do with sex" in his home, defendant was going to kill him. After this, Merritt was in and out of consciousness. Eventually, the two men dragged Merritt to the bathroom, "[f]orcibly," with a belt around his neck. Defendant and McCarver continued to beat Merritt in the bathroom.

Defendant then put Merritt in the bathtub, continued punching Merritt, and told McCarver to get a gas can that was just outside Merritt's house. Defendant then doused Merritt with gasoline and said, " 'You're going to feel it, you're going to feel the wrath of me, you're going to feel the pain.' " Defendant then lit Merritt on fire. Merritt's neck was the only part of his body that caught on fire.

Merritt prayed "the whole time out loud and to [himself] asking God to help [him] . . . ." The pain from the fire was indescribably hot, and Merritt endured the heat until the gasoline burned itself out. To help with the pain, Merritt turned on the shower. Defendant reacted violently after Merritt turned on the water, punching him repeatedly. After that, defendant repeatedly hit Merritt's head with a hammer. Merritt was lit on fire again, burning his neck and upper back. Eventually, defendant and McCarver left the bathroom, and Merritt moved a dresser to block the bathroom door. However, both men obtained reentry after they broke the door down.

Eventually, defendant and McCarver left. The damage to Merritt's body was horrific. His middle finger was sliced off and he was stabbed in the arm either with a knife or the claw of a hammer. Merritt's arm was broken, his neck and the top part of his shoulders were burnt, and his face was bloody and swollen. Before getting help for his injuries, Merritt went down-

stairs in his home to smoke a cigarette. After he finally[3] lit the cigarette, Merritt went outside and called for help; Merritt's neighbors, Laurie Damon and Tori Helsel, came to his rescue. Both testified that his injuries were so horrific that they were surprised that he could talk. Merritt was evacuated by helicopter to a hospital.

Based on these facts defendant was convicted of the aforementioned crimes by a jury of his peers. After his appeal was filed, we granted defendant's motion to remand for a *Ginther*[4] hearing to develop his argument that he was denied the effective assistance of counsel. *People v Cooper*, unpublished order of the Court of Appeals, entered May 6, 2014 (Docket No. 318159). Based on the evidence at trial and the record developed during the hearing on remand, we now turn to defendant's arguments on appeal.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that he was denied the effective assistance of counsel when defense trial counsel failed to object to, or actually elicited, irrelevant and unfairly prejudicial evidence that defendant was allegedly involved in drug use and drug dealing.

This issue is preserved because a hearing was held pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the

[3] Despite being soaked in gasoline, Merritt did not catch himself on fire. When asked if he was able to light his cigarette, Merritt explained: "Yeah, but my finger that was cut off, hanging off, the end of my finger, by doing this it put it out, the cigarette out." The blood from Merritt's missing finger was putting the cigarette out.

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

facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008) (citation and quotation marks omitted). "This Court reviews for clear error a trial court's factual findings, while we review de novo constitutional determinations." *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).

There is a presumption that counsel was effective, and a defendant must overcome the strong presumption that counsel's challenged actions were sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, " 'the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment.' " *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Furthermore, "[w]hether defense counsel's performance was deficient is measured against an objective standard of reasonableness." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Thus, to prevail, a defendant must show that "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 US at 687-688, and he must show that he was prejudiced by counsel's performance, which can be shown by proving that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*. at 694. This Court "will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *People v Unger*, 278 Mich App

210, 242-243; 749 NW2d 272 (2008). The defendant "bears the burden of demonstrating both deficient performance and prejudice[;] the defendant [also] necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

A. LAURIE DAMON'S DRUG TESTIMONY

First, defendant contends that defense trial counsel improperly elicited testimony from Damon regarding drugs. Specifically, defense trial counsel asked Damon whether she knew defendant, and in response Damon testified that she knew defendant from her "past" because her child's father, Mike Wotring, had received pills from defendant. While Damon had never met defendant face-to-face, she was certain that defendant was the same person who knew Wotring and had given him pills some 10 years earlier.

At the *Ginther* hearing, defense trial counsel testified that he "never really thought of Miss Damon as being that critical of a witness," but defendant "was convinced that she had him . . . confused with another Mr. Cooper." Defense trial counsel further elaborated that defendant is an intelligent person, "and [defense trial counsel] deferred to him thinking that we could elicit that she was somehow biased or confused as to who [defendant] actually was." Defense trial counsel explained that this was why he elicited testimony from Damon that showed she had never actually met the Mr. Cooper that she believed had sold drugs to Wotring. Defense trial counsel did acknowledge, however, that "we failed in asserting that she was mistaken."

As stated previously, there is a presumption that defense counsel was effective, and a defendant must overcome the strong "presumption that . . . the chal-

lenged action might be considered sound trial strategy." *LeBlanc*, 465 Mich at 579 (citations and quotation marks omitted). Because this Court will not substitute its judgment for counsel's judgment as it relates to trial strategy, defendant's argument that his trial counsel was ineffective for eliciting prejudicial testimony that defendant was involved in selling drugs fails. See *Unger*, 278 Mich App at 242-243. Defense trial counsel attempted to discredit Damon's testimony, pursuant to defendant's requests, by showing that Damon did not actually know defendant and that the Mr. Cooper she knew to be a drug dealer was not the same person as defendant. Thus, trial counsel's performance with regard to questioning Damon was constitutionally effective.[5]

B. BEARDEN'S DRUG TESTIMONY

Second, defendant contends that his trial counsel was ineffective for failing to object to the prosecution's questioning of Detective Luann Bearden regarding police searches of two residences associated with defendant which resulted in narcotics being removed from at least one of the locations searched.

We initially note that the record is unclear regarding whether drugs were recovered from both locations searched. Rather, the record only reveals that drugs

[5] Defendant contends that he was prejudiced by this drug related testimony. Pursuant to MRE 402, "All relevant evidence is admissible . . . ." However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." MRE 403. Foreclosing defendant's argument is the fact that defendant, himself, told Luann Bearden, the detective assigned to the case, that he had been heavily using crack cocaine on December 29 and December 30, 2012. Thus, defendant's own statements already conveyed to the jury that he was a person who bought and used drugs.

were recovered from the house in which defendant resided. At trial, Bearden testified that during a search of two houses associated with defendant, police recovered some drugs and a blue notebook that belonged to McCarver. It is unclear how this testimony was prejudicial at all given defendant's own unchallenged statements to Bearden that on December 29, 2012, defendant used "a lot" of drugs, including crack cocaine. In other words, even if we rejected defense trial counsel's testimony that this testimony "played into [defendant's] trial strategy," this additional fact was not prejudicial because of defendant's admitted drug use. Consequently, defense trial counsel's failure to object to the prosecution's question does not constitute ineffective assistance of counsel. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

C. JESSICA MILLER'S TESTIMONY

Third, defendant contends that his trial counsel improperly "opened the door" to Miller testifying that defendant had previously assaulted her when she was high, prejudicing defendant. Once again, we disagree.

Pursuant to defense trial counsel's questioning, Miller testified that she had worried, in the past, about her safety whenever she did drugs with defendant because defendant had assaulted her when she was high on crack cocaine. At the *Ginther* hearing, defense trial counsel explained that his strategy in questioning Miller was to attack her credibility by focusing on her drug use, particularly her heavy use of crack cocaine, and how it impacted her perception. Also, defense trial counsel explained the decision and strategy in questioning Miller about the time defendant assaulted her:

> I discussed with Mr. Cooper the down side to asking those types of questions. I had some interaction with Miss

> Miller, I had interviewed her and I had also seen different recorded statements and she was hysterical and her statements often shifted. And part of [the discussion] about the prior alleged assault by Mr. Cooper was to show that she was hysterical and that she, and this was something that Mr. Cooper kind of relayed to me, that she remembered things in this kind of grandiose way and that, you know, after she was not high for a while, that maybe she would remember that it didn't quite happen the way that she perceived it to at the time. So what we were trying to show, and I had actually talked to Miss Miller a little bit about it, is that -- is that there was an assault and that the assault that -- well, that there wasn't an assault; that she believed there was an assault and played it up in her head but now that she was sober she realized that that's not exactly what had happened and that she was hysterical at the time that this thing -- these things were going on. We were trying to attack her credibility.

As part of this strategy, trial counsel also elicited testimony from Miller that she was bipolar.

Defense trial counsel's questioning of Miller did allow Miller to testify about her fear of defendant because he had previously assaulted her. However, this was a consequence of the overall trial strategy in questioning Miller—which was to point out Miller's heavy use of drugs and how it affected her perceptions. "A failed strategy does not constitute deficient performance." *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Thus, defense trial counsel's performance did not constitute ineffective assistance.

D. MCCARVER'S DRUG TESTIMONY

Fourth, defendant contends that defense trial counsel was ineffective for failing to object to McCarver's testimony that defendant was his best customer and purchased $500 to $1,000 worth of crack cocaine each time that he purchased drugs from McCarver.

At trial, the prosecution asked McCarver why he would go with defendant to Merritt's home, and McCarver responded that he did so because defendant was his best customer because he purchased between $500 and $1,000 worth of crack cocaine at a time. At the *Ginther* hearing, defense trial counsel explained that he did not object to this line of questioning because it made McCarver's testimony look incredible:

> I felt that that particular testimony was -- also played into my client's hands. I also felt that just given the nature of how much money he was talking about that it -- that it -- it made me question Mr. McCarver's credibility and I thought it was doing the same for the jury. It seemed somewhat ridiculous. And I . . . when I was questioning him, the tone in which I was questioning him about that particular issue was somewhat . . . it was more of a, "Really? That's -- that's the type of customer Mr. Cooper is? That seems pretty farfetched." And I believed it to be a way to attack Mr. McCarver's credibility.

Defense trial counsel's decision not to object was trial strategy, based on the idea that McCarver's testimony was unbelievable. Because this Court will not substitute its judgment for counsel's judgment as it relates to trial strategy, defendant's argument that his trial counsel was ineffective for eliciting prejudicial testimony that defendant was involved in selling drugs fails. See *Unger*, 278 Mich App at 242-243.

E. FAILURE TO CROSS-EXAMINE MCCARVER

Defendant's final contention is that his trial counsel did not cross-examine McCarver and, in particular, notes counsel's failure to point out McCarver's plea deal. Specifically, defendant contends that he was prejudiced by this decision because if McCarver had been cross-examined, it is likely that the jury would

have discounted McCarver's testimony about participating with defendant in the attack on Merritt because the jury would have known that McCarver had reduced his exposure from life imprisonment to 10 years.

At the *Ginther* hearing, defense trial counsel admitted that he knew McCarver took a plea bargain, and although he was not sure of the exact charges levied against McCarver, he nonetheless addressed McCarver's plea in his opening statement. Defense trial counsel further elaborated:

> [P]art of the rationale was that the prosecutor had elicited the fact that they were taking plea bargains. They all showed up in orange jumpsuits. They all admitted to heavy cocaine use and being a part of this and taking plea bargains already. And part of my trial strategy was to attack other aspects of their credibility. I felt that the jury was very much aware of the fact that they were all there testifying as part of a plea agreement. Like I said, they were all -- every one of them showed up in a prison uniform. Every one of them admitted while the prosecutor was -- during direct examination that they had taken a plea bargain. I didn't focus as much on that because I believed that there were other aspects of their credibility that would benefit us more.

During his opening statement, defense trial counsel stated that some witnesses would lie during trial "to protect their own skin."

It is not entirely clear why counsel did not cross-examine McCarver because he would be wearing his jail clothing even if he did question him, so defendant would get the benefit of McCarver's appearance *and* his being subject to cross-examination. However, this Court "will not substitute [its] judgment for that of counsel on matters of trial strategy, nor will [this Court] use the benefit of hindsight when assessing counsel's competence." *Unger*, 278 Mich App at 242-

243. But even if this were an unreasonable trial strategy, defense trial counsel's decision did not prejudice defendant because Merritt identified defendant before trial and at trial as the man who broke into his house and committed these crimes against him. Thus, even without McCarver's testimony, Merritt's powerful identification evidence was still admissible, and defendant was not prejudiced by defense trial counsel's failure to cross-examine McCarver.

IV. PROSECUTORIAL ERRORS

Defendant also contends that the prosecution committed prosecutorial "misconduct" by bolstering the credibility of two witnesses and that defense trial counsel was ineffective for failing to object to the prosecution's bolstering. Before addressing this claim of error, we once again acknowledge another prosecutor's contention[6] that it is a misnomer to label claims such as this one as "prosecutorial misconduct." This concern for the proper phrase is not a case of mere political correctness, for the term misconduct has a specific legal meaning and connotation when it comes to attorney conduct, and is in general limited to instances of illegal conduct, fraud, misrepresentation, or violation of the rules of professional misconduct. See MRPC 8.4 and *Grievance Administrator v Deutch*, 455 Mich 149, 164; 565 NW2d 369 (1997). Although we recognize that the phrase "prosecutorial misconduct" has become a term of art in criminal appeals,[7] we agree

[6] See *People v McCrary*, unpublished opinion per curiam of the Court of Appeals, issued June 13, 2013 (Docket. No. 308237), p 3.

[7] We note that our Court began using this phrase by at least the late 1960s, see *People v Bloom*, 15 Mich App 463, 474; 166 NW2d 691 (1969), while the Supreme Court started in the mid-1970s, see *People v Hammond*, 394 Mich 627, 630; 232 NW2d 174 (1975) (opinion by

that the term "misconduct" is more appropriately applied to those extreme—and thankfully rare—instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct. See, e.g., MRPC 8.4. In the vast majority of cases, the conduct about which a defendant complains is premised on the contention that the prosecutor made a technical or inadvertent error at trial—which is not the kind of conduct that would warrant discipline under our code of professional conduct. Therefore, we agree that these claims of error might be better and more fairly presented as claims of "prosecutorial error," with only the most extreme cases rising to the level of "prosecutorial misconduct."

No matter what operative phrase is used, we must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). "Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id*., citing *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). A plain error is one that is "clear or obvious," and the error must affect the defendant's "substantial rights." *Carines*, 460 Mich at 763. That is, the defendant must have been prejudiced by the plain error. *Id*. "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial pro-

---

KAVANAGH, C.J.). In its earlier decisions our Supreme Court appears to have addressed these claims as claims that there was error warranting reversal and not as prosecutorial misconduct. See, e.g., *People v Allen*, 351 Mich 535, 543-544; 88 NW2d 433 (1958) (reviewing the "ground of error" premised on the prosecutor's admittedly "intemperate and perhaps better left unsaid" remarks).

ceedings independent of defendant's innocence." *Id*. at 763 (citation and quotation marks omitted; alteration in original).

The specific sections of questioning that defendant challenges both relate to the prosecution questioning its own witnesses about their agreements to testify truthfully in order to obtain a plea bargain from the prosecutor.

A. PROSECUTION'S QUESTIONING OF MILLER

Q. [Y]ou're here testifying because it was part of a plea offer that I made for you, isn't it?

A. Yes.

Q. Okay. Jessica, is it true that you pled guilty to a felony with a maximum penalty of up to four years of incarceration?

A. Yes.

Q. And that was a plea reduction from what you were originally charged with, isn't it?

A. Yes.

Q. Okay. And what were the conditions of that plea offer that I made to you?

A. That I testify truthfully.

Q. Okay. Now, Jessica, you and I had a chance to talk prior to you coming in here and testifying today, didn't we?

A. Yes.

Q. Okay. And what did I tell you to do?

A. Just to be honest.

Q. Okay. And you understand that that condition of your plea bargain is that you must testify truthfully; is that true?

A. Yes.

B. PROSECUTION'S QUESTIONING OF MCCARVER

Q. Mr. McCarver, I notice that as you sit there to testify today you are in oranges with handcuffs; is that true?

A. Yes, sir.

Q. Okay. And is it also true, sir, that you're currently incarcerated in the Lenawee County Jail?

A. Yes, sir.

Q. And that's a result of a guilty plea that you entered this week on this matter; is that true?

A. Yes, sir.

Q. Okay. Is it also true, sir, that I made a plea agreement with you whereby I reduced the charges that you were facing at that time down to a felony charge that you pled guilty to that has a maximum sentence of up to ten years of incarceration?

A. Yes, sir.

Q. Okay. Is it also true, sir, that I did not, I personally, the prosecutor's office, did not make any sentencing agreement with you?

A. Yes, sir.

Q. Okay. Now, the condition of that plea agreement is that you come to court and testify truthfully against any co-defendants; is that true?

A. Yes, sir.

Q. Okay. Is that what you're here to do today?

A. Yes, sir.

Q. Okay. Prior to you testifying in this courtroom today, sir, is it true that you and I met? We talked?

A. Yes, sir.

Q. Okay. And what did I tell you to do here today, sir?

A. Tell the truth.

Q. Okay. And again, that's what you're here to do?

A. Yes, sir.

Generally, "[p]rosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citation and quotation marks omitted; alteration in original). "Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id*. at 276. The mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecutor, provided the prosecutor does not suggest special knowledge of truthfulness. *Id*. Because the prosecution did not make any additional comments about the credibility of Miller and McCarver, there was nothing improper about the prosecutor's questioning. Furthermore, because the prosecution asked no questions of McCarver or Miller that bolstered either witness's credibility, any objection defense trial counsel could have made would have been futile. See *Thomas*, 260 Mich App at 457. Thus, defense trial counsel's decision to not object to the prosecution's questioning was constitutionally effective.

Affirmed.

SAAD and K. F. KELLY, JJ., concurred with MURRAY, P.J.

PEOPLE v CARRIER

Docket No. 322020. Submitted January 14, 2015, at Lansing. Decided January 27, 2015, at 9:00 a.m.

Following a preliminary examination, Brandon W. Carrier was bound over to the Bay Circuit Court on one count of making a terrorist threat and one count of possession of a firearm during the commission of a felony. In support of the charge of making a terrorist threat, the prosecution sought to introduce evidence regarding a phone conversation between defendant and Christian Ginther, an emergency services specialist, during a call that defendant placed to a mental health crisis hotline. After the call was concluded, Ginther had contacted 911 and reported specific threats to people that defendant had made during the crisis hotline call. Before defendant had called the crisis hotline, he had spent time consuming alcohol with Jason Felber. While drinking at Felber's home, defendant had become upset and threatened to harm specific people. Felber eventually asked defendant to leave and, after defendant left, Felber called 911 to report his concerns about the threats. Officers from the sheriff's office proceeded to defendant's home in response to Felber's 911 call. After Michigan State Police officers were contacted and arrived at the home and a search warrant was secured, defendant was taken into custody and two semiautomatic rifles were located in his residence. Defendant filed a motion to exclude defendant's statements to Ginther on the basis of the psychiatrist-patient privilege and to quash the information. The court, Harry P. Gill, J., held that the statements were protected by the privilege, that defendant had effectively asserted the privilege, and that Ginther would not be allowed to testify at trial regarding his crisis hotline conversation with defendant. The court determined that the police could testify regarding what they overheard when defendant was talking with Ginther on the crisis hotline when the police arrived at defendant's home in response to Felber's 911 call but that the recording of Ginther's 911 call was inadmissible. The court denied the motion to quash the charges, finding enough untainted evidence to support the charges. The Court of Appeals granted the prosecutor's application for leave to appeal.

The Court of Appeals *held*:

1. Defendant's conversation with Ginther over the hotline was generally privileged communication; however, the privilege was effectively waived or lost to the extent that defendant voiced threats of physical violence against reasonably identifiable third persons with regard to whom he had the apparent intent and ability to carry out the threats in the foreseeable future, MCL 330.1946(1). The order providing that Ginther could not testify regarding his crisis hotline conversation with defendant is reversed and the matter is remanded to the trial court for further proceedings. On remand, testimony regarding portions of defendant's communications that provide context to any threats are also not barred by privilege.

2. There was a duty on the part of Ginther or his supervisor to warn and protect under MCL 330.1946.

3. The Legislature, in enacting MCL 330.1946, intended the use of an otherwise privileged communication in a court case or proceeding when the duty to warn or protect stated in the statute is implicated in a matter. Once MCL 330.1946 was implicated and the duty to warn or protect became mandatory, the privilege enjoyed by defendant was effectively and permanently waived or lost by operation of law to the extent of communications that threatened physical violence against reasonably identifiable third persons with regard to whom defendant had the apparent intent and ability to carry out the threats in the foreseeable future.

4. The trial court may address on remand the issue whether the recording of Ginther's 911 call is inadmissible hearsay evidence.

Reversed and remanded.

1. EVIDENCE — PRIVILEGED COMMUNICATIONS — MENTAL HEALTH CODE.

The Mental Health Code provides that, except in certain circumstances, privileged communications shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege; a "privileged communication" is a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law (MCL 330.1700(h); MCL 330.1750(1)).

2. EVIDENCE — PRIVILEGED COMMUNICATIONS — PUBLIC HEALTH CODE — MENTAL HEALTH CODE.

A person registered or licensed under Part 185 of the Public Health Code, MCL 333.18501 *et seq*., is not required to disclose a communication or a portion of a communication made by a client to the person in the course of professional employment; a communication between a registrant or licensee or an organization with which the registrant or licensee has an agency relationship and a client is a confidential communication that shall not be disclosed except as otherwise provided in MCL 333.18513; a registrant or licensee may disclose a communication or a portion of a communication made by a client in order to comply with the duty set forth in § 946 of the Mental Health Code, MCL 330.1946.

3. EVIDENCE — PRIVILEGED COMMUNICATIONS.

The Legislature, in enacting MCL 330.1946, intended the use of an otherwise privileged communication in a court case or proceeding when the duty to warn or protect stated in the statute is implicated in the matter.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kurt C. Asbury*, Prosecuting Attorney, and *Sylvia L. Linton*, Assistant Prosecuting Attorney, for the people.

Gower Reddick PLC (by *Marcus R. Garske* and *Jason P. Gower*) for defendant.

Before: MURPHY, P.J., and METER and SERVITTO, JJ.

MURPHY, P.J. Defendant was charged with one count of making a terrorist threat, MCL 750.543m, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In support of the threat-of-terrorism charge, the prosecution relied, in part, on phone communications between defendant and an emergency services specialist while the specialist was manning a mental health crisis hotline. After the 80-minute call was concluded, the emergency services specialist contacted 911 and reported specific threats

that defendant had made during the crisis hotline call. Defendant argued that his conversation with the emergency services specialist and the related 911 recording concerned privileged communications and were thus inadmissible in the criminal case brought against him. The district court bound defendant over on the two charges following the preliminary examination, declining to address the privilege issue, because it found that other unchallenged evidence existed that adequately established the probable cause threshold. Subsequently, the circuit court ruled that defendant's statements and threats that were conveyed to the emergency services specialist during the crisis hotline call constituted privileged communications, absent any waiver of the privilege. Accordingly, the circuit court granted defendant's motion to exclude the testimony of the specialist and the associated 911 recording, but the court denied defendant's accompanying motion to quash the information. The prosecutor then filed an application for leave to appeal, challenging the circuit court's evidentiary ruling and arguing that the doctrine of privilege did not require exclusion of the evidence. The application was granted by this Court. *People v Carrier*, unpublished order of the Court of Appeals, entered July 29, 2014 (Docket No. 322020). We now hold that although defendant's communications were generally privileged, the privilege was effectively waived or lost to the extent that defendant voiced threats of physical violence against reasonably identifiable third persons with regard to whom he had the apparent intent and ability to carry out the threats in the foreseeable future, MCL 330.1946(1). We therefore reverse and remand.

I. FACTS

At the preliminary examination, Jason Felber testified that on August 13, 2013, he went with defendant to

a local bar and had a couple of drinks. Felber indicated that they left the bar well after midnight and then went to Felber's house and consumed more alcohol. According to Felber, defendant thereafter became upset and started threatening to harm people. Felber testified that defendant threatened to put defendant's girlfriend in a wood chipper and to kill Deputy Tony Peter of the Bay County Sheriff's Department, as well as Peter's family. Felber then asked defendant to leave and called 911 to report his concerns about defendant's threats.

Christian Ginther, an emergency services specialist at Bay Arenac Behavioral Health, testified at the preliminary examination that his job involved answering the mental health crisis hotline. As part of his employment, and when not answering the crisis hotline phones, Ginther also "perform[ed] mental health evaluations on . . . individuals presenting for hospitalization." Ginther testified that he was qualified to perform these tasks because he had a bachelor's degree in social work. He also indicated that he was 10 months away from completing a master's degree in social work. More testimony regarding Ginther's credentials was elicited at the subsequent circuit court hearing on defendant's motion to exclude the challenged evidence and to quash the information. At that motion hearing, Kristy Moore took the stand and testified that, at the time of the incident, she was employed by Bay Arenac Behavioral Health and managed the clinical services program. Moore stated that she had a master's degree in social work and was a licensed social worker. Moore supervised Ginther, and she testified that Ginther's licensing status when he received the call from defendant was as follows, "Limited license, Bachelor of social work." Moore then discussed differences between limited and full licenses

with respect to social work and counseling. She agreed with the prosecutor's characterization that a "limited license is kind of a temporary measure where you've got to obtain the full license." Moore testified that Ginther was not a licensed physician, a licensed psychologist, a registered professional nurse, a master's licensed social worker, a licensed professional counselor, nor a marriage or family therapist. We shall examine hereinafter additional testimony from Moore on other matters.

Returning to Ginther's testimony at the preliminary examination, he indicated that defendant called the crisis hotline around 3:00 a.m. on August 14, 2013, and that he was on the phone with defendant for about 80 minutes. Ginther testified that defendant requested to speak with "Vanessa" from Crossroads who had told him to contact the hotline if he needed help after hours.[1] Defendant had seen Vanessa within the past day to address certain issues. The record was never developed in order to identify Vanessa's last name, title, educational background, or licensing status.

Ginther next testified with respect to the substance of his conversation with defendant during the crisis hotline call, noting that defendant started off polite and agreeable but became more frustrated and angry toward the end of the conversation. We shall limit our discussion of the statements made by defendant to

[1] Ginther testified that Crossroads was an outpatient facility that provided services for indigent consumers who lacked insurance to cover mental health treatment. With respect to defendant and his treatment at Crossroads, Moore explained that Crossroads was a "contract agency" and that defendant had been sent to Crossroads through her department at Bay Arenac Behavioral Health. Moore testified that therapists at Crossroads were instructed to give patients the contact information for the mental health crisis hotline so that patients could call after hours if a crisis arose.

Ginther to those related to threats of physical violence against identifiable third persons. Ginther testified that defendant was very upset about an ex-girlfriend and stated that he could see her down the scope of his gun. When Ginther told defendant, "you said you're at home, I know you don't see her through your gun," defendant proceeded to list the types of guns that he had in his possession and expressed that he had ammunition. According to Ginther, defendant told him to call the police. Defendant threatened that he was "locked and loaded," waiting for the "first badge" to arrive. Ginther testified that toward the end of the conversation, defendant was making comments about people being outside of his house and was becoming increasingly agitated. Ginther indicated that after he heard a loud bang, defendant stopped talking for a moment and it seemed as if defendant had gone outside to check something, but defendant did eventually return to the phone. Other testimony detailed later in this opinion established that the police had arrived at defendant's home in response to Felber's 911 call. Ginther claimed that he never told defendant that he was going to call the police or 911. Ginther quickly ended the conversation when defendant threatened Ginther, stating: "I'm gonna come up to the hospital, I know where you work, I know where that office is, I'm gonna shoot you, I'm gonna shoot your wife and your kids."

Ginther testified that after he hung up the phone, he immediately called 911 for the following reason:

> [A]nytime a person is expressing suicidal or homicidal allegations we go over in their HIPAA[2] rights with them that those are things that we're not privileged to keep

[2] HIPAA is an acronym for the Health Insurance Portability and Accountability Act, 42 USC 1320d *et seq*.

> secret, that we have a mandated duty to report.[3] . . . I had a duty to call 9-1-1 if only to do a safety check on him to make sure that he was doing all right. I wasn't calling 9-1-1 to get him trouble, I was calling 9-1-1 to make sure that he was all right because he had been drinking and he had been claiming that he had guns in his possession and he was expressing thoughts of wanting to hurt other people.

Sergeant Michael Shore, a shift commander at the Bay County Sheriff's Office, testified that at 3:41 a.m. on August 14, 2013, he received a call from the 911 dispatcher. Shore explained that the dispatcher "had informed me they . . . received a phone call from [Felber] and he stated a friend had just left his house agitated and had made threats towards the police." Shore indicated that he was provided information that defendant had consumed alcohol, was agitated, had made direct threats against Deputy Peter, and possibly had weapons in his residence. Shore testified that he notified other deputies on duty and that they all proceeded to defendant's home. Shore explained that he and the other deputies parked several blocks away from defendant's residence and approached the house undetected. Shore asserted that he overheard defendant talking on his phone through a kitchen window that was open. According to Shore, at one point he heard a door on the side of the garage open and someone walk out of the residence. Shore could not see whether it was defendant. Shore testified that afterward, defendant's phone conversation resumed. He overheard defendant saying, "I'm locked and loaded,

---

[3] Ginther testified on cross-examination that he did not go over HIPAA rules with defendant, but he was sure that those rules would have been provided to defendant as part of entering into services with Crossroads. However, Ginther conceded that he had no direct knowledge that Crossroads went over HIPAA rules with defendant.

I'm waiting for the first badge I see." Shore further testified that he also heard defendant ranting that "he was in the Michigan Militia and we don't know who we're fuckin' with." Shore stated that, upon hearing this remark, he and the deputies decided to pull back. Shore then contacted the Michigan State Police's Emergency Services Team (EST) to come in and handle the matter.

Shore testified that when he returned to the scene after obtaining a search warrant for defendant's home, the EST had already arrived. The EST detonated two flash grenades and directed defendant to come out of the house. Shore indicated that defendant eventually surrendered and was taken into custody. Upon entry into defendant's residence, police located a .270 semiautomatic rifle and a .22 semiautomatic rifle.

As indicated earlier, Kristy Moore, the clinical services program manager who supervised Ginther, testified at the hearing on defendant's motion to exclude both Ginther's testimony and the 911 recording and to quash the information. Moore testified that her department provided after-hours emergency services and prescreening. According to Moore, five psychiatrists worked in the department and were supervised by a medical director. Regarding the crisis hotline, Moore explained:

> If someone is in crisis, we try to help determine what level they're at, first of all, [so] we can calm them down. And we try to help them problem-solve. We talk about coping skills. If we think that they're in extreme crisis and they need to be hospitalized, we will encourage them to come in to be screened. Sometimes, people call in and really sound like they could need extra help, and we will . . . encourage them to enter services. And, if they give us permission, we can refer them on to our Access Department. So, it's kind of a point of entry as well.

Moore indicated that her crisis hotline workers did not diagnose mental health disorders over the phone, given that it was a complicated process and generally done face-to-face. When asked if crisis hotline workers provided any treatment, Moore responded, "we are helping people, we're assisting people. Some people use it as part of their treatment." Moore testified that crisis hotline workers did not provide any psychotherapy or counseling to callers. When Moore was queried whether it would be fair to say that Ginther had collected information on defendant for use by people who diagnose and treat patients, Moore responded, "Yes."

Moore additionally testified that the crisis hotline workers were under the supervision of a clinician—herself—and that after workers talked to callers, she would typically review the workers' notes and related paperwork. Ginther had previously testified that he took notes during his conversation with defendant, but he had not turned those notes over to the police because, in his view, they were privileged. Moore testified that Ginther phoned her at home after he had called 911 because it was the protocol that "any time we have to call 9-1-1 for a duty to warn, . . . we immediately call the supervisor in case we feel any other action is necessary." Moore stated that she reviewed Ginther's documentation concerning the incident and determined that he had properly and professionally handled the situation.

Defendant was arrested and charged with one count of making a terrorist threat, MCL 750.543m,[4] and one

[4] MCL 750.543m(1)(a) provides, in relevant part, that "[a] person is guilty of making a terrorist threat . . . if the person . . . [t]hreatens to commit an act of terrorism and communicates the threat to any other person." MCL 750.543b(a) defines an "act of terrorism," providing:

count of felony-firearm, MCL 750.227b. As reflected earlier in this opinion, the circuit court subsequently granted defendant's motion to exclude the challenged evidence on the basis of privilege, finding that Ginther was a "paraprofessional" who collected information for the purpose of assisting the "treater" in making a mental health diagnosis and providing treatment. The court ruled that although Ginther was not a licensed psychologist or counselor, he had been acting in a role meant to gather information that was then made part of defendant's file and utilized by licensed professionals in formulating a treatment plan for defendant's care. On this basis, the circuit court determined that defendant's statements to Ginther were protected by the psychiatrist-patient privilege. The court ruled that defendant had effectively asserted the privilege and, accordingly, Ginther would not be allowed to testify at trial regarding his crisis hotline conversation with defendant.

The circuit court rejected the prosecution's argument that, under MCL 330.1946, defendant lost or waived the protection of any assumed privilege when he made violent threats. The court agreed that the statute gave rise to a duty to warn under the circumstances. This duty, according to the circuit court, carved out an exception to the privilege, but nothing in

---

"Act of terrorism" means a willful and deliberate act that is all of the following:

(i) An act that would be a violent felony under the laws of this state, whether or not committed in this state.

(ii) An act that the person knows or has reason to know is dangerous to human life.

(iii) An act that is intended to intimidate or coerce a civilian population or influence or affect the conduct of government or a unit of government through intimidation or coercion.

the statute indicated that the privilege would be lost for other purposes after Ginther fulfilled his duty to warn by calling 911 and reporting the threats. The circuit court found, therefore, that the 911 recording and Ginther's testimony about the conversation with defendant were inadmissible. The court further ruled that, contrary to the prosecution's assertion, defendant did not waive the privilege when he conducted the phone conversation with Ginther in a manner that allowed Sergeant Shore to overhear the conversation. The circuit court explained, "I don't think that, at this hour of the evening standing on your porch, you would expect necessarily to have a police officer that close. So, I don't think that he didn't take precautions that were necessary." The court, however, did determine that the police could testify regarding what they overheard, considering that Felber had earlier called 911 to indicate his concerns and that Felber's call was the reason the police were present at defendant's home, which presence was entirely proper. The circuit court denied defendant's motion to quash the information in light of the untainted evidence that supported the charges, including Felber's testimony.

The prosecutor appealed the circuit court's decision to exclude the evidence on the basis of privilege.

II. ANALYSIS

A. STANDARDS OF REVIEW

With respect to a trial court's ruling regarding, in general, the admissibility of evidence, our Supreme Court in *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999), observed:

> The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions

> where there is an abuse of discretion. However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. Accordingly, when such preliminary questions of law are at issue, it must be borne in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law. [Citations omitted.]

The interpretation and application of a privilege constitute legal questions that are subject to review de novo. *Meier v Awaad*, 299 Mich App 655, 663; 832 NW2d 251 (2013).

B. PRINCIPLES OF STATUTORY CONSTRUCTION

This appeal requires examination and interpretation of various statutory provisions. "When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature." *Whitman v City of Burton*, 493 Mich 303, 311; 831 NW2d 223 (2013). " 'The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of [legislative] intent.' " *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014), quoting *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). "If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted." *Whitman*, 493 Mich at 311. When an ambiguity does indeed exist, we may "go beyond the statutory text to ascertain legislative intent." *Id*. at 312. "Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as surplusage or rendered nugatory." *Id*. at 311-312.

With respect to the construction of statutory privileges, our Supreme Court in *People v Stanaway*, 446 Mich 643, 658; 521 NW2d 557 (1994), stated:

> Unlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships. While the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth. Privileges therefore are not easily found or endorsed by the courts. The existence and scope of a statutory privilege ultimately turns on the language and meaning of the statute itself. Even so, the goal of statutory construction is to ascertain and facilitate the intent of the Legislature. [Citations and quotation marks omitted.]

"[S]tatutory privileges are narrowly defined, while their exceptions are broadly construed." *People v Childs*, 243 Mich App 360, 364; 622 NW2d 90 (2000).

C. PRIVILEGE—LAW AND APPLICATION

We shall take a two-step approach in our analysis. With respect to step one, we examine whether, in general, defendant's communications constituted privileged communications. In this case we conclude that his conversation with Ginther was *generally* privileged. In regard to step two, we examine whether the privilege was effectively waived or lost in light of the nature or substance of some of his communications. On this issue, we hold that the privilege was effectively waived or lost to the extent that defendant voiced threats of physical violence against reasonably identifiable third persons with regard to whom he had the apparent intent and ability to carry out the threats in the foreseeable future.

"Privilege is governed by the common law, except as modified by statute or court rule." MRE 501. In this case, there is no dispute that the issue of privilege is governed by Michigan statutory law and not our common law. Under the Michigan Mental Health Code, MCL 330.1001 *et seq*., "[*p*]*rivileged communications* shall not be disclosed in civil, criminal, legislative, or administrative cases or proceedings, or in proceedings preliminary to such cases or proceedings, unless the patient has waived the privilege, except in the circumstances set forth in this section." MCL 330.1750(1) (emphasis added). Under MCL 330.1700(h), a "privileged communication" is "a communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient, or to another person while the other person is participating in the examination, diagnosis, or treatment or a communication made privileged under other applicable state or federal law."

We initially note that the prosecution devotes considerable time arguing that a communication is privileged only when made to a "mental health professional," as that term was defined in MCL 330.1100b(15)[5] at the time of the crisis hotline call, and that Ginther was not a "mental health professional" under the statutory definition. However, neither MCL 330.1750 (generally barring the use of "privileged communications" in court proceedings) nor MCL 330.1700(h) (defining a "privileged communication") makes any reference whatsoever to the term "mental health professional." And the prosecution's citation of

[5] See 2012 PA 500. MCL 330.1100b was subsequently amended by 2014 PA 72 and 2014 PA 200, shifting the definition of "mental health professional" to Subsection (16) of the statute with minor variations in the definition that are not relevant to our current discussion.

Dawe v Dr Reuven Bar-Levav & Assoc, PC, 485 Mich 20; 780 NW2d 272 (2010), in support of its argument lacks merit, considering that the *Dawe* Court only referred to the term "mental health professional" in the context of construing MCL 330.1946. *Dawe*, 485 Mich at 22, 25, 27-34. MCL 330.1946 creates a duty under certain circumstances for mental health professionals to warn or protect third persons with respect to dangerous patients, see *Dawe*, 485 Mich at 27-28; it does not pertain to the establishment of a privilege. Later in this opinion we shall address the effect of MCL 330.1946 on a recognized privilege, but for now we are focused on simply determining whether defendant's communications were generally privileged.

Reading MCL 330.1750(1) in conjunction with MCL 330.1700(h), there are three broad scenarios in which a communication can become privileged, providing protection from disclosure of the communication in court cases and proceedings. First, a "communication made to a psychiatrist or psychologist in connection with the examination, diagnosis, or treatment of a patient" is ordinarily privileged and cannot be disclosed unless waived by the patient. MCL 330.1700(h); MCL 330.1750(1). The prosecutor argues that Ginther was not a psychiatrist or a psychologist, which is true, and that, moreover, Ginther was not examining, diagnosing, or treating defendant during the crisis hotline call. Defendant contends that he was effectively a patient of a psychiatrist or psychologist considering his status as a patient of Crossroads and Bay Arenac Behavioral Health, which were staffed by psychiatrists and psychologists who participated in and oversaw operations. Defendant maintains that Ginther's work on the crisis hotline was simply an extension or part of defendant's treatment in relation to after-hours and emergency-type mental health care that he was in need of when he

called the hotline. For the reasons explained hereinafter, we find it unnecessary to address the parties' arguments in regard to this particular scenario contemplated by MCL 330.1750(1) and MCL 330.1700(h).

The second scenario under MCL 330.1750(1) and MCL 330.1700(h) in which a privilege typically arises and affords protection from disclosure is when a communication is made "to another person [aside from a psychiatrist or psychologist] while the other person is participating in the examination, diagnosis, or treatment" of a patient. This language envisions a patient being examined, diagnosed, or treated by a psychiatrist or psychologist, with another "person" participating in the examination, diagnosis, or treatment who then engages in communications with the patient. The parties present various arguments with respect to this language; however, we again find it unnecessary to address and resolve these arguments, given our conclusion that the third scenario contemplated by MCL 330.1750(1) and MCL 330.1700(h) was implicated in this case.[6]

The third scenario under MCL 330.1750(1) and MCL 330.1700(h) in which a privilege can arise and afford protection from disclosure is when "a communication [is] made privileged under *other applicable state or federal law*." (Emphasis added.) Accordingly, this language incorporates by reference other statutory privilege provisions, as well as common-law privilege principles, existing under either state or federal law. We begin with a fairly brief examination of federal law. First, FRE 501 provides:

---

[6] We do note that there was no evidence in the record that defendant had been directly examined, diagnosed, or treated by a psychiatrist or psychologist; the professional or licensing status of Crossroad's "Vanessa" was never explored.

> The common law--as interpreted by United States courts in the light of reason and experience--governs a claim of privilege unless any of the following provides otherwise:
>
> • the United States Constitution;
>
> • a federal statute; or
>
> • rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

HIPAA immediately comes to mind as potentially applicable, but federal courts have indicated: "We do not think HIPAA is rightly understood as an Act of Congress that creates a privilege." *Northwestern Mem Hosp v Ashcroft*, 362 F3d 923, 926 (CA 7, 2004) (noting the purely procedural character of HIPAA in regard to disclosure of information in judicial proceedings); see also *United States v Bek*, 493 F3d 790, 802 (CA 7, 2007); *Wade v Vabnick-Wener*, 922 F Supp 2d 679, 685 n 6 (WD Tenn, 2010).[7] However, the United States Supreme Court has held that, by means of federal common law, "confidential communications between a licensed psychotherapist and her patients in the course of diagnosis or treatment are protected from compelled disclosure under Rule 501 of the Federal Rules of Evidence." *Jaffee v Redmond*, 518 US 1, 15; 116 S Ct 1923; 135 L Ed 2d 337 (1996). The *Jaffee* Court further ruled:

> All agree that a psychotherapist privilege covers confidential communications made to licensed psychiatrists and psychologists. We have no hesitation in concluding in this case that the federal privilege should also extend to

[7] We have not been directed to any federal statute or constitutional provision that would create a privilege under the circumstances of this case.

> confidential communications made to licensed social workers in the course of psychotherapy. The reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker . . . . Today, social workers provide a significant amount of mental health treatment. Their clients often include the poor and those of modest means who could not afford the assistance of a psychiatrist or psychologist, but whose counseling sessions serve the same public goals. Perhaps in recognition of these circumstances, the vast majority of States explicitly extend a testimonial privilege to licensed social workers. [*Id*. at 15-17 (citations omitted).]

Here, according to Moore, Ginther only had a "limited" license, and Moore did not view crisis hotline workers as providing psychotherapy. That said, the federal common-law privilege recognized in *Jaffee*, as employed through the conduit of FRE 501, has been extended by the United States Court of Appeals for the Ninth Circuit to cover communications made by employees to work-site based counselors, even though the counselors were not licensed psychiatrists, psychologists, or social workers. *Oleszko v State Compensation Ins Fund*, 243 F3d 1154 (CA 9, 2001). The federal appellate court noted that, despite being unlicensed, the counselors all had "backgrounds in psychology or social work, including relevant clinical and/or field experience." *Id*. at 1156. In *United States v Lowe*, 948 F Supp 97, 99 (D Mass, 1996), a federal district court extended the federal common-law privilege recognized in *Jaffee* to encompass communications made to rape crisis counselors, who were specially trained but not licensed psychotherapists or social workers, but who were required to operate under the supervision of a licensed professional. An analogy could be made between the work performed by a rape crisis counselor as addressed in *Lowe* and Ginther's work on the mental health crisis hotline.

We are not aware of any precedent from the United States Supreme Court that has addressed the issue of privilege under a set of facts similar to those presented here. The opinions from lower federal courts on the subject of extending *Jaffee* to even arguably comparable facts are indeed sparse. We thus are not prepared to conclude that defendant's communications to Ginther were generally privileged under definitive federal law. On the other hand, with respect to state law and as explained hereinafter, there is clear statutory support for the conclusion that defendant's communications were, in general, confidential and privileged.

The parties and the circuit court paid no heed to Kristy Moore's testimony that Ginther, at the time of the incident, had a "[l]imited license, [b]achelor of social work." Ginther testified that he had a bachelor's degree, but had not yet earned a master's degree, in social work, but he was not directly questioned regarding any licensures. Moore discussed the nature of Ginther's limited license, agreed that the license was temporary, and explained the differences between limited and full licenses. She testified that Ginther had been working towards a "full licensure of . . . [b]achelors in social work." Under MCL 333.18509(2), the board of social work "may grant a *limited license* to engage in the 2-year postdegree experience required under subsection (1)[8] to an individual who has completed all the educational requirements for licensure

[8] Under Subsection (1) of MCL 333.18509, to become a fully "licensed bachelor's social worker," an individual "shall have been awarded a bachelor's degree in social work from a college or university social work program approved by the board and shall have completed at least 2 years of full-time postbachelor's degree experience, or the equivalent in part-time hours, in the practice of social work at the bachelor's level under the supervision of a licensed master's social worker."

as a *bachelor's social worker* or a master's social worker." (Emphasis added.) Additionally, MCL 333.18506 provides:

> An individual who is granted a limited license under section 18509(2) to engage in the 2-year postdegree experience in the practice of social work at the bachelor's or master's level shall practice under the supervision of a licensed master's social worker and confine his or her practice to an agency, a health facility, an institution, or another entity approved by the board.

Ginther practiced under Moore's supervision, and Moore was a licensed master's social worker. The relevancy of Ginther's "limited license" to our privilege issue is revealed in MCL 333.18513, which, amongst other licensed social workers, covers limited licensed bachelor's social workers, and which provides:

> (1) An individual registered or licensed under this part [Part 185 of the Public Health Code (PHC), MCL 333.1101 *et seq*.] . . . is not required to disclose a communication or a portion of a communication made by a client to the individual or advice given in the course of professional employment.
>
> (2) Except as otherwise provided in this section, a communication between a registrant or licensee or an organization with which the registrant or licensee has an agency relationship and a client is a confidential communication. A confidential communication shall not be disclosed, except under either or both of the following circumstances:
>
> (a) The disclosure is part of a required supervisory process within the organization that employs or otherwise has an agency relationship with the registrant or licensee.
>
> (b) The privilege is waived by the client or a person authorized to act in the client's behalf.

* * *

> (4) A registrant or licensee may disclose a communication or a portion of a communication made by a client pursuant to section 946 of the mental health code, 1974 PA 258, MCL 330.1946, in order to comply with the duty set forth in that section.

Given that Ginther had a limited license, bachelor's of social work, as governed by Part 185 of the PHC, that defendant was a client of Bay Arenac Behavioral Health and its "contract agency" Crossroads, as stated in Moore's testimony, and considering that the communications at issue were made in the course of Ginther's professional employment with Bay Arenac Behavioral Health, we conclude that MCL 333.18513 generally rendered defendant's communications confidential and privileged. Accordingly, it can accurately be stated that those communications, in general, were "made privileged under . . . applicable state . . . law," thereby fitting the definition of a "privileged communication," MCL 330.1700(h), and in turn ordinarily barring disclosure of the communications in a criminal case or proceeding, MCL 330.1750(1).

With respect to step two in our analysis, we must next determine whether the privilege was effectively waived or lost, allowing for disclosure in the criminal prosecution against defendant. MCL 330.1750(2) lists a variety of circumstances in which "[p]rivileged communications shall be disclosed upon request . . . ." But none of those circumstances is applicable here. However, MCL 330.1750(4) provides that "[p]rivileged communications may be disclosed under [MCL 330.1946] to comply with the duty set forth in that section." Furthermore, as already reflected in this opinion, MCL 333.18513, which gave rise to the privilege in the first place, provides in Subsection (4) that "[a] . . . licensee may disclose a communication or a portion of a com-

munication made by a client pursuant to . . . MCL 330.1946, in order to comply with the duty set forth in that section."

Accordingly, we turn our attention to MCL 330.1946, which provides, in relevant part, as follows:

> (1) If a patient communicates to a mental health professional who is treating the patient a threat of physical violence against a reasonably identifiable third person and the recipient [sic: patient] has the apparent intent and ability to carry out that threat in the foreseeable future, the mental health professional has a duty to take action as prescribed in subsection (2). Except as provided in this section, a mental health professional does not have a duty to warn a third person of a threat as described in this subsection or to protect the third person.
>
> (2) A mental health professional has discharged the duty created under subsection (1) if the mental health professional, subsequent to the threat, does 1 or more of the following in a timely manner:
>
> (a) Hospitalizes the patient or initiates proceedings to hospitalize the patient . . . .
>
> (b) Makes a reasonable attempt to communicate the threat to the third person and communicates the threat to the local police department or county sheriff for the area where the third person resides or for the area where the patient resides, or to the state police.
>
> (c) If the mental health professional has reason to believe that the third person who is threatened is a minor or is incompetent by other than age, takes the steps set forth in subdivision (b) and communicates the threat to the department of social services in the county where the minor resides and to the third person's custodial parent, noncustodial parent, or legal guardian, whoever is appropriate in the best interests of the third person.

* * *

> (4) A mental health professional who determines in good faith that a particular situation presents a duty under this section and who complies with the duty does not violate [MCL 330.1750]. . . . A certified social worker, social worker, or social worker technician who determines in good faith that a particular situation presents a duty under this section and who complies with the duty does not violate section 1610 of the occupational code, Act No. 299 of the Public Acts of 1980, being section 339.1610 of the Michigan Compiled Laws.[9]

The prosecution relies on MCL 330.1946 in support of its argument that the statute creates a "threat of physical violence" exception to any assumed privilege and that the exception extends to testimony in court and not only to the initial warning to others. MCL 330.1946 indicates that it is only a "mental health professional" who is saddled with the duty to warn or protect under the circumstances outlined in the statute. Interestingly, while the prosecutor emphatically argues that Ginther was not a "mental health professional" for purposes of determining the existence of a privilege, the prosecutor proceeds to accept without pause the applicability of MCL 330.1946 to carve out a privilege exception, absent the acknowledgement that the duty under MCL 330.1946 extends only to a "mental health professional."

At the time of the crisis hotline call, MCL 330.1100b(15), subsequently amended by 2014 PA 72 and 2014 PA 200, defined a "mental health professional" as "an individual who is trained and experienced in the area of mental illness or developmental

---

[9] We note that MCL 339.1610 was repealed by the Legislature by 2000 PA 11; however, the Legislature failed to make a contemporaneous change to MCL 330.1946(4) to reflect the repeal of MCL 339.1610. Social work is now addressed in Part 185 of the PHC, and the privilege provision, as alluded to already, is found in MCL 333.18513.

disabilities and who is . . . [a] physician . . . [a] psychologist . . . [a] registered professional nurse . . . [*a*] *licensed master's social worker licensed under . . . MCL 333.16101 to 333.18838* . . . [a] licensed professional counselor . . . [or] [a] marriage and family therapist . . . ." See 2012 PA 500 (emphasis added). Ginther was not a physician, psychologist, nurse, licensed professional counselor, or marriage and family therapist, and while he was licensed under MCL 333.18509(2) and MCL 333.18506, it was not as a master's social worker. Thus, at first blush, it would appear that there was no duty to warn or protect under MCL 330.1946, which would seem to circumvent any argument that MCL 330.1946 provided a basis to dissolve the statutory privilege. However, as touched on earlier, because Ginther only had a limited license, he was required to "practice under the supervision of a licensed master's social worker . . . ." MCL 333.18506. Moore, Ginther's supervisor, was a licensed master's social worker who was trained and experienced in the area of mental illness, and a licensed master's social worker qualifies as a "mental health professional" under the prior version of MCL 330.1100b(15)(d).[10] Because Ginther necessarily worked in tandem with and under the statutorily mandated supervision of Moore, and because Moore was obligated to review Ginther's work, as she did in this case, we conclude that whether it was Moore or Ginther, there was a duty to warn and protect under MCL 330.1946.[11]

Having ruled that MCL 330.1946 was implicated here, we must next address the circuit court's determi-

[10] Moore would also be considered a "mental health professional" under the current version of the statute. MCL 330.1100b(16)(d).

[11] The circuit court did conclude that MCL 330.1946 was implicated and that Ginther had a duty to warn and protect. We agree that defendant communicated threats of physical violence against reason-

nation that once the required warning was given and the duty was dispatched under MCL 330.1946, no further disclosures were permissible. Framed a bit differently, the question is whether a generally privileged communication can be disclosed in a court case or proceeding after the communication was properly disclosed to satisfy the duty under MCL 330.1946 or after there was a recognized failure to comply with the duty under the statute. We hold that the Legislature, in enacting MCL 330.1946, intended and envisioned the use of an otherwise privileged communication in a court case or proceeding when the duty to warn or protect was indeed implicated in a given matter.

While the statutory scheme allows for disclosure of a privileged communication to comply with the duty to warn or protect set forth in MCL 330.1946, there is ultimately no language that expressly addresses the status of such a communication postdisclosure or where MCL 330.1946 was implicated but the mental health professional failed to make the required disclosure. We cannot agree that the lack of such language means that the privilege is somehow revived or resurrected. MCL 330.1946 was clearly and indisputably enacted to protect the safety of a third person from a patient who voiced a threat of physical violence against the person to a treating mental health professional. A mental health professional can satisfy the duty under MCL 330.1946 when it arises by making a reasonable attempt to communicate a particularized threat to a threatened third person in conjunction with communicating the threat to the police. MCL 330.1946(2)(b). It would defy logic and the legislative intent to conclude

---

ably identifiable third persons and that he had the apparent intent and ability to carry out those threats in the foreseeable future. MCL 330.1946(1).

that once a disclosure is made pursuant to MCL 330.1946(2)(b), the threatening communication cannot be disclosed or used in court cases or proceedings, considering that the protection the Legislature intended to afford third persons would not be fully realized. For example, once a third person was warned of a specific threat, the third person could not effectively utilize the court system to obtain protection from the threat, e.g., procurement of a personal protection order (PPO), if the threatening communication was not subject to disclosure or admissible in a PPO proceeding, MCR 3.701 *et seq*. By way of another example, once the police were made aware of a specific threat of physical violence against a third person, they would be significantly handcuffed with respect to protecting the third person, because an arrest of the patient would not be a viable avenue of protection since supporting testimony by the mental health professional could not be obtained.

Additionally, a mental health professional can satisfy the duty under MCL 330.1946 when it arises by hospitalizing a patient or initiating "proceedings to hospitalize [a] patient" under MCL 330.1400 *et seq*. (civil admission and discharge procedures regarding the mentally ill) or MCL 330.1498a *et seq*. (civil admission and discharge procedures for emotionally disturbed minors). MCL 330.1946(2)(a). It is nonsensical to conclude that after a mental health professional hospitalizes a patient or initiates proceedings to hospitalize a patient in compliance with the statutory duty under MCL 330.1946, the mental health professional is barred from testifying about threats in subsequent and related hospitalization and commitment proceedings involving the patient. Furthermore, under MCL 330.1946(2)(c), if the threatened third person is a minor or "is incompetent by other than age," the

Department of Human Services (DHS) must be alerted, along with others, and clearly the Legislature implicitly accepted and understood that DHS would initiate protective proceedings in court in some instances in order to protect the minor or incompetent person from the patient. If the Legislature did not so intend, what conceivable purpose would there be in requiring a mental health professional to alert DHS of a dangerous patient, especially given that the mental health professional would have already been required to notify the minor or incompetent person, the police, and the parent or legal guardian of the minor or incompetent person? MCL 330.1946(2)(c).

Even more enlightening on the issue would be a situation in which MCL 330.1946 was implicated, but the mental health professional failed to comply with the duty, with the threatened third person later being injured or killed by a patient. In that circumstance, it is beyond reasonable argument that the third person or his or her estate would have a cause of action against the mental health professional. See *Dawe*, 485 Mich 20 (determining whether a common-law cause of action for malpractice by a mental health professional could be maintained or whether MCL 330.1946 now governed all such suits). But if the underlying threatening communication could not be disclosed and was inadmissible in court proceedings, the lawsuit would necessarily fall apart and would be unsustainable. The Legislature certainly did not intend or envision the exclusion of threatening communications in a civil action against a mental health professional for breach of the duty set forth in MCL 330.1946.

A privilege may be waived by operation of law. *Saur v Probes*, 190 Mich App 636, 640; 476 NW2d 496 (1991). We hold that once MCL 330.1946 was impli-

cated and the duty to warn or protect became mandatory, the privilege enjoyed by defendant was effectively and permanently waived or lost by operation of law to the extent of communications that threatened physical violence against reasonably identifiable third persons with regard to whom defendant had the apparent intent and ability to carry out the threats in the foreseeable future.[12] To rule otherwise, in our view, would reflect a wholesale failure to honor the principles that privileges should not be easily endorsed by a court, *Stanaway*, 446 Mich at 658, and that an exception to a statutory privilege must be broadly construed, *Childs*, 243 Mich App at 364.

The *Stanaway* Court observed that statutory privileges attempt to foster relationships and assure confidentiality. *Stanaway*, 446 Mich at 658. Given that threatening communications fitting within the parameters of MCL 330.1946(1) can be properly disclosed to the police, third persons, hospital personnel, social services, and parents and guardians, any confidentiality and fostered relationship existing before disclosure will be significantly fractured and nearly, if not entirely, eviscerated after disclosure. To use a colloquial expression, "the cat has been let out of the bag" following disclosure. To then simply permit testimony or evidence in court regarding a threatening communication that has already been disclosed does little if anything to further erode confidentiality. Precluding the testimony or evidence concerning a threatening communication will not magically restore

[12] We note that although the record did not show that defendant had received notice by Crossroads or Ginther that communications falling within the parameters of MCL 330.1946 could be disclosed and used in court, nothing in MCL 330.1946 indicates or remotely suggests that such notice must be given before the statute is implicated.

the lost confidentiality or rebuild the damaged relationship caused by a disclosure.

We now take a moment to address some federal caselaw cited by defendant in support of his argument that once disclosure or a warning is made in compliance with MCL 330.1946, no further disclosures are permitted in a criminal prosecution of a patient. Defendant relies on *United States v Hayes*, 227 F3d 578, 586 (CA 6, 2000), which held that the federal common-law, psychotherapist-patient privilege, while not preventing a psychotherapist from complying with a duty to warn or protect innocent third parties, serves as a bar to the psychotherapist's actually testifying against a patient in a criminal prosecution for threats made by the patient during a psychotherapy session. The prosecutor in *Hayes* unsuccessfully argued in favor of a "dangerous patient" exception to the psychotherapist-patient testimonial privilege that would have allowed for the psychotherapist to testify in court about a patient's threats made in the course of counseling. The United States Courts of Appeals for the Eighth and Ninth Circuits have joined the Sixth Circuit in rejecting a dangerous-patient exception to the federal psychotherapist-patient privilege. *United States v Ghane*, 673 F3d 771, 785-786 (CA 8, 2012); *United States v Chase*, 340 F3d 978, 985-992 (CA 9, 2003). However, the Tenth Circuit has indicated that a psychotherapist may testify against a defendant patient in a criminal case about a threat made by the patient if "the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made." *United States v Glass*, 133 F3d 1356, 1360 (CA 10, 1998). We also note the following language in *United States v Auster*, 517 F3d 312, 318-319 (CA 5, 2008), in which the Fifth Circuit

made an observation consistent with ours regarding the minimal benefit, if any, to a psychotherapist-patient relationship that would result by disallowing trial testimony when a warning was already permissible:

> The deleterious effect of a . . . warning on the "atmosphere of confidence and trust" is further reinforced by the knowledge that the intimate details of therapy will be spread to more than just the target of the threat. There is, after all, no obligation that the target keep the . . . warning confidential, and it is unrealistic to believe that he will do so . . . .
>
> Thus, knowing that anyone, or everyone, might be privy to the secret will embarrass the patient and will detrimentally affect his relationships with others. Such a . . . disclosure might also cost the patient his job. The marginal increase, therefore, in effective therapy achieved by privileging psychotherapist-patient communications at trial, but still allowing the therapist to warn threatened third parties, is *de minimis*.

We further note that the United States Supreme Court in *Jaffee*, 518 US at 18 n 19, indicated:

> Although it would be premature to speculate about most future developments in the federal psychotherapist privilege, we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist.

We have already concluded that there is no definitive federal law recognizing a privilege under the facts of this case; therefore, the dangerous-patient exception and the question regarding its applicability under federal law need not be reached. Moreover, *Hayes* does not reflect a definitive federal principle with respect to the applicability of the dangerous-patient exception, given the little, and indeed conflicting, federal caselaw on the subject. And the footnote in *Jaffee*, 518 US at 18

n 19, tends to lend support for recognizing a dangerous-patient exception to the privilege. In sum, we reject defendant's federal caselaw arguments.

D. 911 RECORDING—HEARSAY ARGUMENT

Defendant argues that assuming that we hold that the evidence is not inadmissible on the basis of privilege, as we have now ruled, the 911 recording is nevertheless inadmissible as hearsay, absent any exception. The 911 recording can be viewed as a memorialization of Ginther's effort to comply with the duty to warn and protect under MCL 330.1946. The 911 recording contained Ginther's statements that, in turn, recalled defendant's alleged statements and threats. Because the circuit court never reached this issue, and because resolution of the issue could entail examination of the exceptions to hearsay evidence, MRE 803, which may require underlying factual determinations, we leave the issue for the circuit court to address on remand.

III. CONCLUSION

We hold that although defendant's communications were generally privileged, the privilege was effectively waived or lost to the extent that defendant voiced threats of physical violence against reasonably identifiable third persons regarding whom he had the apparent intent and ability to carry out the threats in the foreseeable future, MCL 330.1946(1).[13] Testimony at trial concerning threats falling within the parameters of MCL 330.1946(1) is not excludable on the basis of

[13] To be clear, despite the preliminary determination regarding the existence of threats for purposes of resolving the privilege issue under MCL 330.1946(1), the jury remains free to find that no threats were made in rendering a verdict on the charge of making a terrorist threat. See MRE 104.

privilege. For purposes of clarity on remand, testimony regarding portions of defendant's communications that provide context to any threats are also not barred by privilege.[14] And of course, should defendant himself wish to introduce into evidence *any* part of his communications in his defense, privilege will not preclude the evidence, because defendant has full control over waiving the privilege.

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

METER and SERVITTO, JJ., concurred with MURPHY, P.J.

---

[14] We note that we reject, for the reasons given by the circuit court, the prosecution's waiver-of-privilege argument that was based on defendant's speaking on the phone to Ginther while the police were present at defendant's residence.

In re GERALD L POLLACK TRUST

Docket Nos. 309796, 310844, 310846, and 318883. Submitted January 7, 2015, at Detroit. Decided January 29, 2015, at 9:00 a.m.

Gerald L. Pollack executed a will and trust in September 2008 after he was diagnosed with brain cancer. He then executed a second will and trust in October 2008. Gerald died on June 27, 2009. Under the October documents, Gerald's children would not receive any benefit until the death of Gerald's second wife, Cheryl Pollack. Four actions related to Gerald's October will and trust were filed in the Oakland Probate Court. The court, Daniel A. O'Brien, J., granted summary disposition with regard to each petition, dismissing the actions. In Docket No. 309796, petitioner Loren Pollack, one of Gerald's sons from Gerald's first marriage, appealed as of right an order granting cotrustee Ronald M. Barron's motion for summary disposition of Loren's petition to set aside the October trust. In Docket No. 310844, Loren and petitioner Leslie Pollack, also one of Gerald's sons from his first marriage, appealed as of right an order granting Cheryl's motion for summary disposition regarding Loren and Leslie's petition to set aside the October will. In Docket No. 310846, Loren and Leslie appealed as of right an order granting Barron's motion for summary disposition regarding Leslie's petition to set aside the October trust, Loren's amended petition to modify or reform the trust, and Leslie's petition to modify or reform the trust. In Docket No. 318883, Loren and Leslie appealed as of right an order granting Barron's motion for summary disposition on Loren and Leslie's petition for removal of Barron as cotrustee of the trust. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under MCL 700.7604(1), a challenge to the validity of a trust must be brought within two years after the settlor's death or six months after the provision of a notice containing statutorily prescribed information, whichever is earlier. In this case, the trustees sent the beneficiaries a written notice containing the statutorily required information on May 6, 2010. During settlement negotiations, which ultimately proved unsuccessful, the parties twice expressly agreed to toll the six-month limitations

period, each time for a period of 30 days, moving the deadline for filing a petition challenging the validity of the trust to January 5, 2011. Loren did not file his petition challenging the validity of the trust until September 23, 2011. The statutory limitations period in MCL 700.7604(1), enacted as part of the Michigan Trust Code (MTC), MCL 700.7101 *et seq*., became effective on April 1, 2010. Because the limitations period did not begin to run until after the effective date of the MTC, Loren had the same, full six-month period set forth in the statute to file suit that all beneficiaries have after the provision of the statutory notice. Under MCL 700.8206(1), the statute of limitations applies to all trusts created before, on, or after the effective date of the MTC, which would include the October trust, and to all judicial proceedings concerning trusts commenced after that effective date, which would include Loren's petition. The statute of limitations, therefore, clearly applied. Under MCL 700.8206(2), the statutory amendments and additions enacted as part of the MTC do not impair accrued rights or affect acts done before the effective date of the MTC, and if a right is acquired, extinguished, or barred upon the expiration of a prescribed period that commenced to run under any other statute before the effective date of the MTC, that statute continues to apply even if repealed or superseded. But Loren did not have an accrued right to bring his petition challenging the trust before the effective date of the MTC because his right to challenge the trust could have been changed or forfeited. And Loren had no rights that were acquired, extinguished, or barred upon the expiration of a prescribed period that began to run before the effective date of the MTC. Moreover, application of the MTC statute of limitations did not impair Loren's right to challenge the trust; it merely required him to do so within the framework of the MTC. Because Loren had a reasonable time in which to file suit, his due process claim also lacked merit. The trial court properly granted summary disposition with regard to Loren's petition to set aside the October trust because the petition was barred by the statute of limitations.

2. A party contesting a will has the burden of establishing undue influence. A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. In this case, the petitioners contended that Barron—who was Gerald's friend and attorney, drafted the September documents, recruited the attorney who drafted the October docu-

ments, and served as cotrustee—exerted undue influence over Gerald. Petitioners presented insufficient evidence of personal substantial benefit to Barron to give rise to a presumption of undue influence. Appointment of the scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence, and the mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, does not alone establish the kind of benefit necessary to raise the presumption of undue influence. Barron received no substantial benefit from the October will that he did not receive under the September will, which petitioners conceded reflected Gerald's intent. With regard to petitioners' separate assertion that the will should be set aside on the basis of mistake, the trial court properly granted summary disposition in favor of respondents on that issue as well because petitioners failed to establish the existence of a genuine issue of material fact. The trial court properly granted summary disposition with regard to Loren and Leslie's petition to set aside the October will.

3. Standing relates to the position or situation of the plaintiff relative to the cause of action and the other parties at the time the plaintiff seeks relief from the court. The decision regarding whether a plaintiff has standing will not affect the trial court's jurisdiction over the subject matter. In this case, petitioners asserted for the first time on appeal that Barron and cotrustee JPMorgan Chase lacked standing to oppose the petition to modify or reform the trust. But the argument was moot because it was undisputed that Cheryl had standing and she concurred in Barron's motion for summary disposition. And, in any event, the cotrustees had a special right or substantial interest that could have been detrimentally affected in a manner different from the citizenry at large in opposing the petitions to set aside the trust and to modify or reform the trust. Accordingly, they possessed standing to seek summary disposition.

4. Loren's petition to modify or reform the trust was also barred by the MTC statute of limitations. Loren contended the statute of limitations did not apply because he was not challenging the validity of the trust, but that claim was belied by reading the petition as a whole. In fact, the petition alleged that the October trust was invalid because of a mistake of fact. Therefore, the MTC statute of limitations was properly applied to the petition.

5. Under MCL 700.7706, a court may remove a trustee for certain enumerated reasons. By enacting this comprehensive provision, the Legislature expressed its intent that the statute super-

sede and replace the common-law grounds for removal. Although the trial court referred to an incorrect standard of proof in analyzing petitioner's grounds for removal, the court's decision ultimately reflected its determination that petitioners presented no evidence establishing grounds for removal. In particular, the court found that petitioners did not present any facts from which an inference could be drawn that their interests as beneficiaries had been detrimentally affected and that there was no evidence of harm to the trust corpus. The court also noted that there was no evidence that any conflict of interest on Barron's part harmed petitioners as trust beneficiaries or affected trust administration. In other words, the court indicated that any bias or partiality on Barron's part did not affect the trust corpus or harm petitioners as beneficiaries. Therefore the reference to an incorrect standard of proof was harmless. Even assuming that Barron was hostile toward petitioners or partial in favor of other beneficiaries, petitioners failed to establish that such hostility or partiality made him unfit to administer the trust effectively or that removal of Barron would best serve the purposes of the trust, both of which had to be shown in order to remove Barron under the plain language of MCL 700.7706(2)(c). The trial court properly granted Barron's motion for summary disposition regarding the removal petition.

Affirmed.

O'CONNELL, J. dissenting, concluded that the trial court had erred when it granted the motion for summary disposition with regard to the petition to set aside the October will because a question of fact existed regarding whether Barron exercised undue influence on Gerald. Judge O'CONNELL would have reversed the trial court's order granting the motion for summary disposition and admitting the October will to probate and would have remanded the balance of the case—including several related appeals, see *Gerald L Pollack & Assoc, Inc v Pollack*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2015 (Docket Nos. 319180, 320917, 320918, and 320919) (O'CONNELL, J., dissenting)—for further proceedings. There was sufficient evidence of substantial benefit to Barron to support the inference of undue influence. Namely, Barron served as cotrustee and was authorized to collect compensation for his services and the will authorized Barron and his cotrustee to completely control Gerald's estate and his company. He also drafted the September will and hired the attorney who drafted the October will. The trial court erred when it determined as a matter of law that sufficient evidence was not presented to give rise to the presumption of

undue influence. Resolution of the balance of the issues presented on appeal depended on resolution of this issue and, therefore, could not be resolved on appeal at this time.

TRUSTS — REMOVAL OF A TRUSTEE — REASONS FOR REMOVAL.

Under MCL 700.7706, the settlor, a cotrustee, or a qualified trust beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative; the statute enumerates certain circumstances in which the trustee may be removed by the court; by enacting this comprehensive provision, the Legislature expressed its intent that the statute supersede and replace the common-law grounds for removal.

Docket No. 309796:

Allan Falk, PC (by *Allan Falk*), and *Mantese Honigman Rossman and Williamson, PC* (by *Gerard Mantese* and *David Hansma*), for Loren Pollack.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Andrew W. Mayoras*), for Ronald M. Barron.

Dickinson Wright PLLC (by *Judith Fertel Layne* and *Kimberly J. Ruppel*) for JPMorgan Chase.

Prince Law Firm (by *Shaheen I. Imami*, *Patricia Gormely Prince*, and *Amber N. Atkins*) for Cheryl Pollack.

Docket No. 310844:

Allan Falk, PC (by *Allan Falk*), for Loren Pollack.

Mark Granzotto, PC (by *Mark Granzotto*), for Leslie Pollack.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Andrew W. Mayoras*), for Ronald M. Barron.

Dickinson Wright PLLC (by *Judith Fertel Layne* and *Kimberly J. Ruppel*) for JPMorgan Chase.

Prince Law Firm (by *Shaheen I. Imami*, *Patricia Gormely Prince*, and *Amber N. Atkins*) for Cheryl Pollack.

Docket No. 310846:

Allan Falk, PC (by *Allan Falk*), for Loren Pollack.

Mark Granzotto, PC (by *Mark Granzotto*), for Leslie Pollack.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Andrew W. Mayoras*), for Ronald M. Barron.

Dickinson Wright PLLC (by *Judith Fertel Layne* and *Kimberly J. Ruppel*) for JPMorgan Chase.

Prince Law Firm (by *Shaheen I. Imami*, *Patricia Gormely Prince*, and *Amber N. Atkins*) for Cheryl Pollack.

Docket No. 318883:

Allan Falk, PC (by *Allan Falk*), for Loren and Leslie Pollack.

Barron, Rosenberg, Mayoras & Mayoras, PC (by *Andrew W. Mayoras*), for Ronald M. Barron.

Before: FORT HOOD, P.J., and HOEKSTRA and O'CONNELL, JJ.

FORT HOOD, P.J. In Docket No. 309796, petitioner Loren Pollack appeals as of right an order granting cotrustee Ronald M. Barron's motion for summary disposition of Loren's petition to set aside the Gerald L. Pollack Trust (the Trust or the October Trust), entered on March 15, 2012. In Docket No. 310844, Loren and petitioner Leslie Pollack appeal as of right an order

granting Cheryl Pollack's motion for summary disposition on Loren and Leslie's petition to set aside Gerald L. Pollack's will (the Will or the October Will), entered on May 29, 2012. In Docket No. 310846, Loren and Leslie appeal as of right an order granting Barron's motion for summary disposition regarding Leslie's petition to set aside the Trust, Loren's amended petition to modify or reform the Trust, and Leslie's petition to modify or reform the Trust, entered on May 29, 2012. In Docket No. 318883, Loren and Leslie appeal as of right an order granting Barron's motion for summary disposition on Loren and Leslie's petition for removal of Barron as cotrustee of the Trust, entered on October 10, 2013. The four appeals were consolidated to advance the efficient administration of the appellate process.[1] We affirm.

I. UNDERLYING FACTS

These cases involve extremely contentious probate court litigation arising out of the death of Gerald L. Pollack on June 27, 2009, following a protracted battle with brain cancer. Gerald was the owner and director of Gerald L. Pollack & Associates, Inc. (GLP), GLP Investment Services (Investment Services) and GLP Specialty Services (Specialty Services). GLP and Investment Services are investment firms that specialize in selling annuities, insurance products, and securities to public schools and school systems in Michigan. GLP and Investment Services are the primary assets of Gerald's estate. Gerald was survived by his second wife, Cheryl. Justin Pollack is the child of Gerald and Cheryl. Loren, Leslie, Lisa Chaben, and Lori Pollack are Gerald's children from his first marriage. Barron has served as

[1] *In re Gerald L Pollack Trust*, unpublished order of the Court of Appeals, entered November 6, 2013 (Docket Nos. 309796, 310844, 310846, 318883).

general legal counsel to GLP and Investment Services since the 1980s and was a personal friend of Gerald's. Barron and JPMorgan Chase (JPMC) are cotrustees of the trust at issue in this case and copersonal representatives of Gerald's estate. According to Loren, Loren and a GLP employee named Alex Kocoves were part of Gerald's succession plan for his businesses; Loren and Kocoves were each sold GLP stock by Gerald.

Gerald was diagnosed with brain cancer in the summer of 2008. Following this diagnosis, Barron wrote an August 5, 2008 letter to Gerald recognizing that Loren and Kocoves would continue to comanage GLP after Gerald's death, that Cheryl and each of Gerald's children would share in the profitability of the businesses, and that Cheryl and each of Gerald's children would receive a portion of the ownership and income from the businesses. In September 2008, Gerald executed a will (the September Will) and a trust (the September Trust). Barron drafted both of these documents at Gerald's direction and with input from Gerald. According to Loren, the September Will and the September Trust were the culmination of a lengthy and detailed process of preparation by Gerald for the continued well-being of his family and businesses following his death, and both September documents carried out Gerald's intent as set forth in numerous other documents prepared as part of his estate plan. According to Barron, however, the August 5, 2008 letter was merely a temporary "Band-Aid" until formal estate planning documents could be prepared; likewise, the September estate planning documents were merely interim documents prepared until proper and permanent documents could be put in place.

In October 2008, attorney Charles Nida was hired to prepare a second will and trust for Gerald. Accord-

ing to Loren, it was Barron who recruited Nida, and Gerald had no contact with Nida until the October Will and the October Trust were executed on October 30, 2008. Loren alleged that Nida took direction from Barron or other attorneys at Barron's law firm. Barron denied Loren's allegations, and asserted that Nida had been in contact with Gerald before the execution of the October estate planning documents. Nida had conversations not only with Barron but also with Gerald's former estate planning attorney, Don L. Rosenberg, and Gerald's personal banker and former cotrustee, David Clark. On October 30, 2008, Nida visited with Gerald at Gerald's home. The estate documents were already finalized at that point, and Nida reviewed a written summary of the documents with Gerald. Gerald executed the October Will and the October Trust on that date.

Loren alleges that the October Trust differs significantly from the September Trust; in particular, Gerald's children do not receive any immediate benefit from the October Trust until Cheryl's death; Cheryl's life expectancy is 20 years. Also, Loren contends, the October Trust does not provide for the succession planning desired by Gerald in that it does not distribute shares of GLP to Loren or provide for the continued operation of GLP by Loren and Kocoves. Rather, the October Trust directs Gerald's assets to a marital share for Cheryl's benefit up to $10 million; until this marital share is completely funded, or Cheryl dies, Gerald's children may receive nothing. Even after Cheryl dies, Loren would receive only a beneficial share of the trust corpus rather than stock in GLP.

Four actions in relation to Gerald's Will and Trust were filed in the trial court and form the basis of this appeal. The trial court ultimately granted summary

disposition in each case, and dismissed the actions. Petitioners now appeal.

II. DOCKET NO. 309796—STATUTE OF LIMITATIONS

In Docket No. 309796, Loren argues that the trial court erred by granting Barron's motion for summary disposition on the basis of the expiration of the statute of limitations. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). Summary disposition may be granted under MCR 2.116(C)(7) when a statute of limitations bars a claim. *Prins v Mich State Police*, 291 Mich App 586, 589; 805 NW2d 619 (2011). If the facts are not in dispute, the issue whether a claim is barred by the applicable statute of limitations presents a question of law that is reviewed de novo. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 386; 738 NW2d 664 (2007). Questions of statutory interpretation are likewise reviewed de novo. *Id*. "If the language in a statute is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and the statute must be enforced as written. This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Bay City v Bay Co Treasurer*, 292 Mich App 156, 166-167; 807 NW2d 892 (2011) (quotation marks and citations omitted). In addition, this Court "review[s] de novo constitutional issues and any other questions of law that are raised on appeal." *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009).

The trial court properly granted Barron's motion for summary disposition because Loren's petition to set

aside the October Trust was barred by the statute of limitations in the Michigan Trust Code (MTC).

The MTC, MCL 700.7101 *et seq.*, which concerns trusts, is Article VII of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*; the MTC became effective on April 1, 2010, which was 10 years after EPIC itself went into effect. See MCL 700.7101; MCL 700.7102; 2009 PA 46; 1998 PA 386; *Indep Bank v Hammel Assoc, LLC*, 301 Mich App 502, 509; 836 NW2d 737 (2013). MCL 700.7604(1) is a provision of the MTC that prescribes limitation periods for bringing a challenge to the validity of a trust:

> A person may commence a judicial proceeding to contest the validity of a trust that was revocable at the settlor's death within the earlier of the following:
>
> (a) Two years after the settlor's death.
>
> (b) Six months after the trustee sent the person a notice informing the person of all of the following:
>
> (*i*) The trust's existence.
>
> (*ii*) The date of the trust instrument.
>
> (*iii*) The date of any amendments known to the trustee.
>
> (*iv*) A copy of relevant portions of the terms of the trust that describe or affect the person's interest in the trust, if any.
>
> (*v*) The settlor's name.
>
> (*vi*) The trustee's name and address.
>
> (*vii*) The time allowed for commencing a proceeding.

Therefore, under the MTC, a challenge to the validity of a trust must be brought within two years after the settlor's death or six months after the provision of a notice containing statutorily prescribed information, whichever is earlier.

It is undisputed that, if the statute of limitations in MCL 700.7604(1) applies, then Loren's petition was not timely filed. The settlor, Gerald, died on June 27, 2009. On May 6, 2010, the trustees sent to Loren and the other beneficiaries a written notice containing all the statutorily prescribed information concerning the Trust. Loren concedes that the notice contained all the information required by MCL 700.7604(1)(b). The notice explicitly advised Loren: "You have six months to contest the validity of the Trust pursuant to MCL 700.7604(1)(b)(vii). Any contest filed after the six-month period will be time-barred." In the summer of 2010, during settlement negotiations that were ultimately unsuccessful, the parties twice expressly agreed to toll the six-month limitations period for bringing a challenge to the Trust, each time for a period of 30 days. In effect, then, the six-month limitations period in MCL 700.7604(1)(b) was tolled for 60 days, moving the statutory deadline for filing a petition challenging the validity of the Trust from November 6, 2010, to January 5, 2011. Loren commenced this proceeding on September 23, 2011, by filing his petition challenging the validity of the Trust. See MCL 700.1106(r) (defining a "proceeding" for purposes of EPIC to include, *inter alia*, a petition); MCR 5.101(B) ("A proceeding [in probate court] is commenced by filing an application or a petition with the court."). The proceeding was therefore commenced more than two years after Gerald died and more than eight months (the six-month statutory period and the 60-day tolling period) after the statutory notice concerning the Trust was sent to the beneficiaries. Loren concedes that his petition would be untimely under the MTC limitations period.

Loren contends, however, that the MTC statute of limitations does not apply in this case. In particular, Loren asserts that because the MTC became effective

after Loren had already acquired his right to challenge the validity of the Trust, the MTC limitations period cannot apply. It is true that statutes of limitations are generally limited to prospective application unless the Legislature clearly and unequivocally manifests a contrary intent. *Davis v State Employees' Retirement Bd*, 272 Mich App 151, 161; 725 NW2d 56 (2006). "The legislature may pass statutes of limitation and give them retroactive effect." *Evans Prod Co v State Bd of Escheats*, 307 Mich 506, 546; 12 NW2d 448 (1943). In assessing whether this case involves an improper retroactive application of a statute of limitations, it must be remembered that the six-month statutory period set forth in MCL 700.7604(1)(b) did not commence to run until *after* the MTC's effective date. That is, the six-month period was triggered when the trustees sent to Loren and the other beneficiaries the statutorily prescribed notice concerning the Trust. This notice was sent on May 6, 2010, after the April 1, 2010 effective date of the MTC, and explicitly advised Loren of the six-month statutory period. Because the limitations period did not begin to run until after the MTC's effective date, Loren had the full six-month period to file suit that all other beneficiaries have after the provision of notice under the MTC. Therefore, the statute of limitations in this case did not fail to provide a reasonable time after its passage for the commencement of suit. Cf. *Price v Hopkin*, 13 Mich 318, 324-325 (1865) ("It is of the essence of a law of limitation that it shall afford a reasonable time within which suit may be brought; and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.") (citations omitted).

Moreover, the Legislature has clearly and unequivocally manifested its intent to apply the MTC statute of limitations in the circumstances of this case, when the proceeding was commenced after the effective date of the MTC. MCL 700.8206(1) provides, in relevant part:

> Except as otherwise provided in article VII [i.e., the MTC], all of the following apply on the effective date of the amendatory act that added this section:
>
> (a) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all trusts created before, on, or after that effective date.
>
> (b) The amendments and additions to article VII enacted by the amendatory act that added this section apply to all judicial proceedings concerning trusts commenced on or after that effective date.

This provision states that the MTC applies to trusts that were created before, on, or after the effective date of the MTC, thereby encompassing all trusts, and that the MTC applies to all judicial proceedings concerning trusts that are commenced on or after the MTC's effective date. As discussed, the MTC went into effect on April 1, 2010. Loren commenced this proceeding on September 23, 2011, by filing his petition challenging the validity of the Trust. Therefore, this proceeding was commenced after the effective date of the MTC. It follows, then, that under MCL 700.8206(1), the MTC, which includes the limitations periods set forth in MCL 700.7604(1), applies to this case.[2]

---

[2] MCL 600.5869 states, "All actions and rights shall be governed and determined according to the law under which the right accrued, in respect to the limitations of such actions or right of entry." In Docket No. 310846, Leslie contends that this provision precludes application of the period of limitations set forth in MCL 700.7604(1) because his right of action accrued before the MTC's effective date. We reject Leslie's claim. "Statutes of limitations operate prospectively unless an intent to have the statute operate retrospectively clearly and unequivocally appears

Loren contends, however, that the MTC statute of limitations cannot apply in this case in light of MCL 700.8206(2), which states:

> The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right or affect an act done before that effective date. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded.

See also *Indep Bank*, 301 Mich App at 509 ("The MTC applies to trusts created before its enactment, but does not impair accrued rights or affect an act done before its effective date."), citing MCL 700.8206(1)(a) and (2). Loren argues that application of the MTC statute of limitations in this case would impair his accrued right to challenge the validity of the Trust. We disagree and hold that Loren's right to challenge the validity of the Trust did not accrue before the effective date of the MTC, and, even if the right had accrued, the application of the six-month statutory period did not impair that right.

Loren did not have an accrued right to bring his Trust challenge petition before the effective date of the MTC. Neither the MTC nor EPIC defines the term

---

from the context of the statute itself." *Pryber v Marriott Corp*, 98 Mich App 50, 55; 296 NW2d 597 (1980). In *Pryber*, this Court held that a statute of limitations enacted after the accrual of the plaintiffs' cause of action was applicable despite the language of MCL 600.5869, because the amended statute at issue in *Pryber* contained language indicating that it applied " 'to all actions hereinafter commenced and all actions heretofor [sic] commenced now pending in the trial or appellate courts' . . . ." *Id*., quoting MCL 600.5861. To the extent that the legislative directive in MCL 700.8206(1) irreconcilably conflicts with MCL 600.5869, the more recently enacted MCL 700.8206(1) must be regarded as an exception to or qualification of the directive in MCL 600.5869. *Pryber*, 98 Mich App at 56.

"accrued right." However, this Court has addressed the meaning of "accrued right" in cases concerning EPIC.

In *In re Smith Estate*, 252 Mich App 120, 124-125; 651 NW2d 153 (2002), this Court addressed the applicability of an EPIC provision allowing the admission of extrinsic evidence to prove the existence of testamentary intent with respect to a purported codicil to an existing will. The action was commenced before the effective date of EPIC, but the case remained pending when EPIC took effect. *Id*. at 127. This Court held that the EPIC provision was applicable. *Id*. at 126. This Court noted that under MCL 700.8101(2)(b), EPIC applied to a proceeding pending on the date that EPIC became effective, but that under MCL 700.8101(2)(d), EPIC " 'does not impair an accrued right or an action taken before that date in a proceeding.' " *Id*. This Court rejected the probate court's conclusion that the decedent's heirs had an accrued right to inherit disputed funds pursuant to the existing will rather than under the purported codicil. *Id*. Noting that EPIC did not define the term "accrued right," this Court looked to the Michigan Supreme Court's decision in *In re Finlay Estate*, 430 Mich 590, 600 n 10; 424 NW2d 272 (1988), which held that "accrued" was closely analogous to the term "vested" and referred to a right of which a person could not be denied without his or her assent and which a person could legally assert independent of any future condition of things or subsequent change of existing law. *Smith*, 252 Mich App at 127. This Court also noted caselaw definitions of "vested" as meaning a right so fixed that it is not dependent on any future act or contingency. *Id*. at 127-128. The *Smith* Court concluded that no accrued right existed in that case:

> Although to some extent a devise under a will is vested upon the death of the testator because the testator can no longer change the will, we conclude that it is not an

> "accrued right" under the act because it is not so fixed that it cannot be changed. Rather, it can be changed in conjunction with a showing under the EPIC that there is a more recent will, or a partial or complete revocation, or an addition or alteration of the decedent's will, or a partial or complete revival of a formerly revoked will or a formerly revoked portion of a will. In other words, in order to avoid rendering other sections of the act nugatory, including subsection 8101(2)(b) providing that the act applies in pending proceedings, an "accrued right" must mean something other than a right under a will upon the testator's death. Rather, in the context of the act, an "accrued right" is a legal right to the exclusion of any other right or claim to it. The rights outlined in a testamentary instrument involved in probate do not so definitely belong to a person that they cannot be impaired or taken away without the person's consent. In the instant case, the rights of respondents under Smith's existing will are contingent upon the pending determination of the relationship of the document at issue to the will under the act. [*Id*. at 128-129 (citations omitted).]

Likewise, in *In re Leete Estate*, 290 Mich App 647, 663-664; 803 NW2d 889 (2010), this Court upheld the applicability of an EPIC provision known as the 120-hour rule, or simultaneous-death provision, even though the property deed and the will at issue were executed before the effective date of EPIC. This Court noted that "EPIC applies to a governing instrument executed before EPIC came into effect, as long as it does not affect an accrued right and as long as the governing instrument does not contain a contrary intent." *Id*. at 663. This Court held that no accrued right would be impaired by applying EPIC. *Id*. After noting the definition of "accrued right" set forth in *Smith*, the *Leete* Court held that the appellant had obtained no fixed or accrued right by way of the will before the effective date of EPIC. *Id*. at 663-664. Further, the appellant obtained no such right when the

decedents died because the appellant's interest in the property at issue was still subject to change. *Id*. at 664. Thus, EPIC was applicable. *Id*.

Although *Smith* did not involve a statute of limitations issue, *Smith* explicated the meaning of the term "accrued right" as used in a provision of EPIC. Because the MTC is a component of EPIC, and because the term "accrued right" is also used in the MTC provision at issue here, MCL 700.8206(2), we find it useful to consider the analysis of that term in *Smith* when determining whether Loren possessed an accrued right before the effective date of the MTC.[3]

Loren contends that he had an accrued right to challenge the October Trust before the MTC became effective, so the MTC statute of limitations cannot be applied to impair that right. However, Loren did not have a right to challenge the Trust that was so fixed that it could not be changed by a future act or contingency. See *Smith*, 252 Mich App at 127-129. Loren's right to challenge the Trust could be changed or forfeited in various ways. For example, if Loren accepted a partial distribution under the Trust, he would be estopped from challenging the Trust under the doctrine of election. See *In re Beglinger Trust*, 221 Mich App 273, 276-277; 561 NW2d 130 (1997). Other contingencies such as the application of the doctrine of laches, a waiver, or a release could also have changed or taken away Loren's right to challenge the Trust. To the extent that Loren's interest as a Trust beneficiary is at issue, as opposed to his right to challenge the Trust, that interest also is not so fixed or immutable

[3] We note that Loren relies on *In re Ervin Trust*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2005 (Docket Nos. 249974, 253745, 253824). Unpublished opinions are not binding under the rule of stare decisis. MCR 7.215(C)(1).

that it excludes all other interests. Cheryl is the only current beneficiary because the Trust corpus is insufficient to fund the entire marital trust at this time, and Cheryl could deplete the corpus in her lifetime. Accordingly, Loren's interest is not so fixed or immutable that it constitutes an accrued right.

Nonetheless, even assuming that Loren's right to challenge the Trust constituted an accrued right, the application of the MTC statute of limitations did not impair that accrued right. Because the MTC and EPIC do not define the word "impair," it is permissible to consider a dictionary definition of the term. *Bedford Pub Sch v Bedford Ed Ass'n*, 305 Mich App 558, 566 n 2; 853 NW2d 452 (2014). The word "impair" means "to make or cause to become worse; weaken; damage[.]" *Random House Webster's College Dictionary* (2001). In *Finlay*, 430 Mich at 596-600, our Supreme Court upheld the application of a Revised Probate Code (RPC)[4] provision that created a presumption concerning the testator's intent regarding the effect of a divorce, even though the divorce judgment was entered before the effective date of the RPC. An RPC provision provided that "[a]n act done before the effective date [of the RPC] in any proceeding and any accrued right is not impaired by this act." Former MCL 700.992(c), repealed by 1998 PA 386. This Court held that the application of the RPC provision regarding the testator's presumed intent did "not impair any 'act' of the circuit court in decreeing the divorce of the testator, but merely alter[ed] the presumed intent of the testator following her divorce." *Finlay*, 430 Mich at 600.

Likewise, the application of the MTC statute of limitations did not impair, i.e., weaken, worsen, or damage, Loren's right to challenge the Trust. "Stat-

[4] The RPC, 1978 PA 642, was repealed and replaced by EPIC.

utes of limitation are procedural devices intended to promote judicial economy and the rights of defendants." *Stephens v Dixon*, 449 Mich 531, 534; 536 NW2d 755 (1995). "They also prevent plaintiffs from sleeping on their rights[.]" *Id*. Application of the MTC six-month statutory limitations period did not deprive Loren of his right to challenge the Trust. It merely required him to do so within the procedural framework of the MTC, i.e., within six months after receiving the statutorily prescribed notice from the trustees, with, in this case, an additional 60 days in accordance with the parties' express agreements to toll the six-month limitations period. The six-month period did not begin running until after the MTC went into effect; Loren received the benefit of the full six-month period afforded to all beneficiaries who receive the requisite notice under the MTC. Accordingly, the application of the MTC statute of limitations did not impair any accrued right in this case.

Next, Loren suggests that the application of the MTC statute of limitations is barred by the second sentence of MCL 700.8206(2); again, that provision states:

> The amendments and additions to article VII enacted by the amendatory act that added this section do not impair an accrued right or affect an act done before that effective date. *If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before that effective date, that statute continues to apply to the right even if it has been repealed or superseded*. [Emphasis added.]

Loren asserts that the "right" referred to in the second sentence does not have to be an accrued right. He contends that the trial court improperly inserted the word "accrued" into the second sentence of MCL 700.8206(2). However, statutory language "can-

not be read in a vacuum." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003). "Although a phrase or a statement may mean one thing when read in isolation, it may mean something substantially different when read in context. In seeking meaning, words and clauses will not be divorced from those which precede and those which follow." *Id*. (quotation marks and citations omitted). It appears evident that the word "right" in the second sentence of MCL 700.8206(2) is a reference to the term "accrued right" used in the immediately preceding sentence. In other words, the second sentence serves to effectuate the first sentence by providing that accrued rights acquired, extinguished, or barred upon the expiration of a prescribed period that began under another statute before the effective date of the MTC continue to be governed by the other statute.[5]

Moreover, even if the second sentence of MCL 700.8206(2) applies to rights that are not accrued, the second sentence does not apply here. Loren has no rights that were acquired, extinguished, or barred upon the expiration of a prescribed period that began to run before the MTC's effective date. Loren asserts that

[5] In Docket No. 310846, Leslie further expands on this point and relies on dictum in *Finlay*, 430 Mich at 600, which stated that a provision of the RPC similar to MCL 700.8206(2) was inapplicable in that case because neither party had acquired any "accrued or nonaccrued" rights. However, there was no analysis in *Finlay* concerning whether the second sentence was meant to create a separate exception or was merely an effectuation of the first sentence of the analogous RPC provision. The Supreme Court's isolated statement in *Finlay* regarding "accrued or nonaccrued rights" comprised mere dictum because it was unnecessary to the decision in the case, given that the Court found the analogous RPC provision inapplicable and therefore upheld the application of the new law. See *Carr v Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003) (noting that a judicial comment that is unnecessary to the decision in a case is mere dictum that is not binding). Thus, we are not persuaded that the second sentence of MCL 700.8206(2) applies to nonaccrued rights in addition to accrued rights.

before the adoption of the MTC, the general six-year period of limitations set forth in MCL 600.5813 applied to a trust challenge, and that this period began to run before the effective date of the MTC. But Loren fails to explain what rights he had that were acquired, extinguished, or barred upon the expiration of that limitations period. Loren fails to explain how his proposed interpretation takes account of the statutory phrase "upon the expiration of" and to address the fact that the supposedly applicable six-year limitations period would not have expired as of the effective date of the MTC. "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." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). Giving effect to the entire second sentence of MCL 700.8206(2) makes clear that it applies when a right is acquired, extinguished, or barred upon the expiration of a prescribed period under another statute. In other words, if a right was acquired or extinguished when a prior limitations period expired, that right has not been, respectively, lost or revived by the enactment of the MTC. Loren's right to bring this action was not acquired or extinguished by the expiration of a prior limitations period, rendering his argument premised on the second sentence of MCL 700.8206(2) devoid of merit.

Finally, Loren contends that the application of the MTC statute of limitations violates constitutional due process principles by impairing Loren's vested right to bring his Trust challenge. We disagree. Generally, "[t]he legislature may pass statutes of limitation and give them retroactive effect." *Evans Prod Co*, 307 Mich at 546. Nonetheless, the retroactive application of a statute of limitations may offend due process if a claimant is not afforded a reasonable time to file suit. See *Price*, 13 Mich at 324-325 ("It is of the essence of

a law of limitation that it shall afford a reasonable time within which suit may be brought; and a statute that fails to do this cannot possibly be sustained as a law of limitations, but would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of law.") (citations omitted); see also *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15 n 18; 299 NW2d 336 (1980) (citing *Price* for the proposition that a statute might deny due process if it fails to afford a reasonable time to bring suit). Loren received the full six-month statutory period to bring his claim after receiving the requisite notice from the trustees, and an additional 60 days under the parties' tolling agreements. The notice that triggered the six-month period was provided after the effective date of the MTC, and Loren concedes that the notice contained all the statutorily prescribed information, including the time allowed for commencing the proceeding. Loren was thereby afforded the same notice and the same time in which to file suit as all other beneficiaries under the MTC. Because the application of the MTC statute of limitations afforded Loren a reasonable time to file suit, his due process claim lacks merit.

In sum, the trial court properly granted Barron's motion for summary disposition because Loren's petition to set aside the October Trust was barred by the statute of limitations in the MTC.

III. DOCKET NO. 310844

A. UNDUE INFLUENCE

In Docket No. 310844,[6] petitioners first argue that

[6] Leslie has filed a separate appellate brief in Docket No. 310844, adopting the arguments contained in Loren's brief in that appeal. Therefore, we do not separately address the issues in Leslie's brief.

the trial court erred by finding that there was insufficient evidence of benefit to Barron to support the petition to set aside the October Will on grounds of undue influence. We disagree.

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Hackel*, 298 Mich App at 315. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The trial court properly granted Cheryl's motion for summary disposition on the petition to set aside the October Will because there was no evidence to establish the benefit element of a presumption of undue influence.

A party contesting a will has the burden of establishing undue influence. MCL 700.3407(1)(c) and (d).

> 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 the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.

> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993) (citation omitted).]

On appeal, petitioners do not assert that there was direct evidence of undue influence but contend that there was evidence establishing the elements giving rise to a presumption of undue influence. The primary element in dispute concerns whether Barron benefited from the transaction.

"Appointment of the scrivener as trustee alone does not create a substantial benefit sufficient to raise the presumption of undue influence." *In re Vollbrecht Estate*, 26 Mich App 430, 436; 182 NW2d 609 (1970). "[T]he mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, would not alone establish the kind of benefit necessary to raise the presumption [of undue influence]." *Id*. "The determination should be made in light of all the powers, privileges, and duties given the trustee and all the instruments concerned." *Id*. at 437. This Court in *Vollbrecht* found sufficient evidence for the jury to find the substantial personal benefit necessary to raise the presumption because there was "evidence that the trustees of the charitable foundation have the power to amend the articles of incorporation, determine its activities, and fix their own fees." *Id*.

In this case, there was insufficient evidence of personal substantial benefit to Barron to give rise to a presumption of undue influence. Although Barron serves as a cotrustee of the Trust along with JPMC, this

fact alone does not comprise a sufficient benefit to give rise to the presumption. *Id*. at 436. Further, Barron must make all decisions as cotrustee in conjunction with the other cotrustee, JPMC, and petitioners have not alleged that JPMC has exerted undue influence or acted improperly in connection with this matter.

In addition, Barron received no substantial benefit from the October Will that he did not already receive under the September Will, which petitioners conceded reflected Gerald's intent. Although petitioners at one point assert on appeal that there are "substantial differences" between the September Will and the October Will, petitioners do not explicate any significant differences with respect to the benefits conferred on Barron by the two wills, and petitioners later admit that the October Will reflects little if any change from the September Will in respect to the benefits conferred on Barron. Indeed, petitioners state that the terms of the September Will benefitting Barron were "mostly carried over into the October Will . . . ." Although petitioners assert on appeal that the September Will was also the product of undue influence, petitioners made no such claim in the trial court. Failure to timely raise an issue in the trial court generally waives review of that issue on appeal. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987).

Further, petitioners expressly alleged in the trial court that the September Will and the September Trust carried out Gerald's intent as set forth in a letter by Gerald and in voluminous documents prepared by Gerald in respect to his estate planning. "A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court." *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300

(2008) (citation and quotation marks omitted). Because petitioners conceded in the trial court that the September Will and the September Trust reflected Gerald's intent as demonstrated in numerous earlier estate planning documents, and because Barron did not receive a substantial benefit from the October Will that differed from that afforded under the September Will, petitioners have not established that Barron received a benefit from the October Will sufficient to give rise to a presumption of undue influence.

Given that petitioners have not established the benefit prong required to give rise to a presumption of undue influence, it is unnecessary to address the other two prongs.

B. MISTAKE

Petitioners next argue that the trial court erred by granting Cheryl's motion for summary disposition on the petition to set aside the October Will on the ground of mistake.[7] We disagree. Again, this Court reviews de novo a motion for summary disposition. *Hackel*, 298 Mich App at 315.

---

[7] Petitioners also contend that that Cheryl failed to request summary disposition with respect to the claim of mistake, and, therefore, the trial court erred by granting summary disposition on that issue. In the petition to set aside the October Will, petitioners summarily alleged that the October Will was invalid because of a mistake of fact. Cheryl's motion for summary disposition addressed the allegations of undue influence rather than the cursory mistake allegations. Nonetheless, Cheryl's motion asked that the court admit the October Will to probate. In light of this request, it was clear that Cheryl was asking for summary disposition with respect to the entire petition. Moreover, the contestant of a will has the burden of establishing mistake. MCL 700.3407(1)(c) and (d). The parties also addressed the issue of mistake in subsequent briefing. For these reasons, we hold that that Cheryl sought summary disposition with respect to the entire petition to set aside the October Will and that the parties had a fair opportunity to litigate the issue of mistake. Therefore, we address only the substantive arguments in relation to this issue.

The trial court properly granted Cheryl's motion for summary disposition on the petition to set aside the October Will because there was no genuine issue of material fact concerning petitioners' claim of mistake.

The allegation of mistake in the petition was that Nida failed to inform Gerald which trust the October Will would fund. There is no evidence in the record that Gerald was mistaken on this point. Clark testified that the operation of the October Trust and the distribution of assets were discussed with Gerald when the October estate documents were executed, that Gerald asked questions, and that the participants made sure Gerald understood what was happening. Nida testified that he asked Gerald at the time of the execution of the October estate documents if Nida had captured Gerald's wishes. The evidence does not present a question of fact concerning whether Gerald was mistaken regarding which trust would be funded by the October Will.

On appeal and in response to the summary disposition motion, petitioners changed the factual basis for the allegation of mistake from that set forth in the petition. Petitioners now contend that Gerald was mistaken regarding the value of his estate, believing it to be worth $75 million to $100 million, and that this mistake affected Gerald's decision to leave the first $10 million to Cheryl under the marital trust. The record fails to support the view that any mistake regarding the value of the estate affected Gerald's decision. On the contrary, Clark testified that, even after being asked about the possibility that the value of the estate was less than he thought, Gerald adhered to his desire to leave the first $10 million to Cheryl. Therefore, there is no genuine issue of material fact concerning whether any mistake regarding the value of the estate affected Gerald's decision to execute the October Will.

IV. DOCKET NO. 310846

A. STANDING

In Docket No. 310846,[8] Loren first argues that Barron and JPMC lack standing to oppose the petition to modify or reform the Trust. We disagree.

Initially, we note that this issue is unpreserved. To preserve for appellate review an issue regarding standing, the defendant must have raised the issue in his or her first responsive pleading or motion. MCR 2.116(C)(5); MCR 2.116(D)(2); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 528; 695 NW2d 508 (2004). Loren raises this issue for the first time on appeal. Loren argues that the issue of standing may be raised for the first time on appeal because it pertains to jurisdiction. "Subject-matter jurisdiction and standing are not the same thing. Jurisdiction of the subject matter is the right of the court to exercise judicial power over a class of cases, not the particular case before it; to exercise the abstract power to try a case of the kind or character of the one pending." *Altman v Nelson*, 197 Mich App 467, 472; 495 NW2d 826 (1992). "Standing, on the other hand, relates to the position or situation of the plaintiff relative to the cause of action and the other parties at the time the plaintiff seeks relief from the court." *Dep't of Social Servs v Baayoun*, 204 Mich App 170, 174; 514 NW2d 522 (1994). Therefore, the decision regarding

[8] We decline to address the fourth issue raised by Loren in Docket No. 310846 regarding Barron's alternate ground for summary disposition. This issue is unpreserved because it was not addressed by the trial court. *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). This Court "need not address an unpreserved issue . . . ." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 387; 803 NW2d 698 (2010). We also decline to address Leslie's claim regarding fraudulent concealment, which was also unpreserved.

whether a plaintiff has standing will not affect the trial court's jurisdiction over the subject matter. *Glen Lake*, 264 Mich App at 528. Because this issue involves standing and not jurisdiction, Loren should have raised it in the trial court. See *id*.

Whether a party has standing is a question of law that this Court reviews de novo. *Id.* at 527. "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Loren's argument that Barron and JPMC lack standing to oppose the petition to modify or reform the Trust is devoid of merit.

Initially, we note that the issue of the trustees' standing is moot because Cheryl concurred in Barron's motion for summary disposition and it is undisputed that Cheryl possesses standing to oppose Loren's petition to modify or reform the Trust. "This Court's duty is to consider and decide actual cases and controversies." *Morales v Parole Bd*, 260 Mich App 29, 32; 676 NW2d 221 (2003). This Court generally does not address moot questions or declare legal principles that have no practical effect in a case. *Id*. "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." *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (citation omitted). Given that Cheryl concurred in the motion and that Loren has not contested her standing to oppose the petition to modify or reform the Trust, the issue whether Barron or JPMC possessed standing to oppose the petition or to seek summary disposition has no practical legal

effect in this case. The court was permitted to grant summary disposition, and the issue of the trustees' standing is moot. However, we further address the merits of the issue for the sake of thoroughness.

In *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010), the Michigan Supreme Court explicated the following principles regarding standing:

> We hold that Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan's longstanding historical approach to standing. Under this approach, a litigant has standing whenever there is a legal cause of action. Further, whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment. Where a cause of action is not provided at law, then a court should, in its discretion, determine whether a litigant has standing. A litigant may have standing in this context if the litigant has a special injury or right, or substantial interest, that will be detrimentally affected in a manner different from the citizenry at large or if the statutory scheme implies that the Legislature intended to confer standing on the litigant.

It must be noted that the trustees have not asserted a cause of action; therefore, Loren's challenge to the trustees' standing is inapt. After all, it was Loren who commenced this action by filing his petition to modify the Trust. The trustees merely opposed the petition and moved for summary disposition. In any event, it is clear that the trustees have a special right or substantial interest that will be detrimentally affected in a manner different from the citizenry at large. Although Loren contends that his reformation petition does not seek to invalidate the Trust, and that the trustees therefore have no interest in a dispute between beneficiaries concerning the proper distribution of the Trust's

assets, the amended petition itself directly contradicts Loren's argument. The amended petition to modify or reform the Trust explicitly states that Gerald's "execution of the October Trust is invalid due to the 'mistake of fact' under which [Gerald] was acting when he executed the October Trust." The amended petition sought modification or reformation of the Trust to change the distribution of assets and to terminate Barron as a cotrustee. In short, the amended petition asserted the Trust was invalid and sought modification of essential provisions of the Trust concerning the distribution of assets and successor trustees.

Claiming that the Trust is the product of a mistake of fact and seeking to significantly change material provisions concerning the distribution of the Trust's assets and the successor trustees is plainly an attack on the validity of the Trust. The Trust Agreement, which created the Trust, obligated the trustees to enforce the agreement in actions challenging its validity. Under the MTC, a trustee is required to administer a trust in accordance with its terms and purposes, MCL 700.7801, and may exercise all the powers conferred by the terms of the trust, MCL 700.7816(1)(a). See also MCL 700.1105(c) (defining "interested person" to include the incumbent fiduciary); MCR 5.125(C)(32)(e) (listing the current trustee as a person interested in the modification or termination of a noncharitable irrevocable trust); MCR 5.125(C)(33)(c) (listing the current trustee as a person interested in a proceeding affecting a trust other than proceedings covered by other subrules).

In *In re Temple Marital Trust*, 278 Mich App 122, 133-134; 748 NW2d 265 (2008), this Court held that two brothers acting in their capacities as trustees were entitled to recover attorney fees from trust assets for

defending against a challenge to the validity of a trust amendment when the outcome of the litigation would determine which brother was the proper successor trustee and the terms of asset distribution. This Court explained:

> The issues and result of the litigation directly affected the trustee's administrative duties because the validity of the amendment determined the proper trust beneficiaries and asset distribution. Distribution of trust property to the proper beneficiary is a primary administrative duty of a trustee. [*Id*. at 133.]

As discussed, the amended petition to modify or reform the Trust was an attack on the validity of the Trust seeking to change the distribution of assets and the cotrustee, and the trustees had an obligation to enforce the Trust Agreement in connection with challenges to the validity of the Trust. It therefore follows that the trustees had a special right or substantial interest different from the citizenry at large in opposing Loren's amended petition. Accordingly, the trustees possessed standing to seek summary disposition of the amended petition.

B. STATUTE OF LIMITATIONS

Loren next argues that the trial court erred by granting Barron's motion for summary disposition on Loren's petition to modify or reform the trust based on the expiration of the statute of limitations. We disagree.

Loren asserts two arguments relating to the trial court's application of the MTC statute of limitations to his petition for reformation of the Trust. As discussed earlier, MCL 700.7604(1) is a provision of the MTC that prescribes limitation periods for bringing a challenge to the validity of a trust. Loren concedes that he filed his

petition to modify or reform the Trust more than two years after Gerald's death and more than six months after the statutorily prescribed notice was sent to Loren. Nonetheless, Loren contends that the period of limitations in MCL 700.7604(1) does not apply because his petition to modify or reform the Trust did not commence a judicial proceeding to contest the validity of the Trust. Rather, he argues, his petition was merely seeking to modify or reform the terms of the Trust rather than to invalidate the Trust. We disagree.

"In deciding which period of limitations controls, we must first determine the true nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710; 742 NW2d 399 (2007). "It is well settled that 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 710-711. "A plaintiff may not evade the appropriate limitation period by artful drafting. . . . The type of interest allegedly harmed is the focal point in determining which limitation period controls." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993).

The procedural label that Loren affixed to his petition is one of modification or reformation. But in reading the petition as a whole, it is evident that the true nature of his claim is to contest the validity of the Trust. Loren alleged essentially the same facts in this petition as those used to support his petition to set aside the Trust. The reformation petition alleged that the October Trust was invalid due to a mistake of fact under which Gerald was acting when he executed the document. It asserted that the Trust failed to provide for a distribution of shares of GLP to Loren, which was in contravention of statements Gerald purportedly

made after executing the Trust. The petition further alleged that the evidence showed that the October Trust was the product of a mistake of fact and that it should be reformed to conform to Gerald's intentions. The petition requested modification or reformation of the Trust to provide that Loren receive 25% of the shares in the businesses, that Loren would become a member of the Investment Services board of directors, and that Barron would be terminated as a cotrustee.

Although phrased in terms of modification or reformation, the request for relief effectively sought a wholesale rewriting of the Trust to change its essential provisions concerning distribution of assets and the successor cotrustee. This relief was sought, in part, on the basis of the petition's allegation that the Trust was invalid as it was a product of Gerald's mistake of fact when he executed the document. The petition did not seek merely to correct a drafting error or to take account of a change of circumstances that occurred after the Trust was executed. Instead, the petition sought to change the most material provisions on the ground that Gerald's execution of the document was induced by a mistake of fact; this same underlying theory was asserted in Loren's petition to set aside the Trust, which was dismissed under the statute of limitations. Overall, the true gravamen of the action is that it contests the validity of the Trust. Therefore, the period of limitations in MCL 700.7604(1) is applicable.

Loren also argues that the period of limitations in MCL 700.7604(1) does not apply retroactively because he had an accrued or vested right to seek reformation of the October Trust before the MTC became effective. Loren's arguments on this issue are duplicative of his arguments in Docket No. 309796, discussed earlier. For the reasons already stated, we hold that the trial

court properly dismissed Loren's reformation petition because it was barred by the period of limitations in MCL 700.7604(1).

Leslie also raises two arguments related to the statute of limitations issue in his brief on appeal in Docket No. 310846. Leslie's arguments were addressed earlier in this opinion, and we adhere to our stated analysis. The trial court properly granted Barron's motion for summary disposition regarding Leslie's petition to modify or reform the Trust because the petition was barred by the MTC statute of limitations.

V. DOCKET NO. 318883—SUMMARY DISPOSITION

In Docket No. 318883, petitioners argue that the trial court erred by granting Barron's motion for summary disposition on their petition for removal of Barron as cotrustee. We disagree.

Again, a trial court's decision on a motion for summary disposition is reviewed de novo. *Hackel*, 298 Mich App at 315. Questions of statutory interpretation are reviewed de novo. *Trentadue*, 479 Mich at 386. "If the language in a statute is clear and unambiguous, this Court assumes that the Legislature intended its plain meaning, and the statute must be enforced as written. This Court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Bay City*, 292 Mich App at 166-167 (quotation marks and citations omitted).

> We review de novo a probate court's construction and interpretation of the language used in a will or a trust. When construing a trust, a court's sole objective is to ascertain and give effect to the intent of the settlor. Absent ambiguity, the words of the trust document itself are the most indicative of the meaning and operation of the trust.

[*In re Stillwell Trust*, 299 Mich App 289, 294; 829 NW2d 353 (2013) (quotation marks and citations omitted).]

The trial court properly granted Barron's motion for summary disposition regarding the removal petition.

A provision of the MTC, MCL 700.7706, provides, in relevant part:

> (1) The settlor, a cotrustee, or a qualified trust beneficiary may request the court to remove a trustee, or a trustee may be removed by the court on its own initiative.
>
> (2) The court may remove a trustee if 1 or more of the following occur:
>
> (a) The trustee commits a serious breach of trust.
>
> (b) Lack of cooperation among cotrustees substantially impairs the administration of the trust.
>
> (c) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the purposes of the trust.
>
> (d) There has been a substantial change of circumstances, the court finds that removal of the trustee best serves the interests of the trust beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable cotrustee or successor trustee is available.

On appeal, petitioners first present an unpreserved argument that the grounds for removal set forth in MCL 700.7706(2) are not exclusive and that a trustee may be removed on additional grounds recognized at common law. In *Kelsey v Detroit Trust Co*, 265 Mich 358, 361-362; 251 NW 555 (1933), our Supreme Court articulated the grounds on which a trustee could be removed at common law:

> The right to remove trustees and to appoint successor trustees existed at common law. If, at common law a trustee could not effectually execute the trust; absconded; became bankrupt; misconducted himself; dealt with the

> trust fund for his own personal profit and advancement; committed a breach of trust; refused to apply the income as directed; failed to invest as directed; or acted adversely to the interests of the beneficiaries; neglected to use due care in protecting the trust estate; or was guilty of gross misconduct in the execution of the trust; or showed a lack of fidelity to the interests of the trust, or for any other good cause; a trustee could be removed and a new trustee substituted in his place by a court of competent jurisdiction. [Citations omitted.]

In the trial court, petitioners affirmatively sought removal on the basis of grounds listed in MCL 700.7706(2) and did not present the argument advanced on appeal that other grounds existing at common law provided an additional basis for removal. In any event, petitioners' unpreserved appellate contention lacks merit.

"It is axiomatic that the Legislature has the authority to abrogate the common law." *Trentadue*, 479 Mich at 389. "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." *Id*. at 390 (quotation marks and citations omitted). Further, the MTC is to "be construed and applied to promote its underlying purposes and policies." MCL 700.8201(1). Among the purposes and policies of the MTC identified by the Legislature are (1) "[t]o make more comprehensive and to clarify the law governing trusts in this state," MCL 700.8201(2)(a), and (2) "[t]o foster certainty in the law so that settlors of trusts will have confidence that their instructions will be carried out as expressed in the terms of the trust," MCL 700.8201(2)(c).

In MCL 700.7706(2), the Legislature comprehensively codified a detailed list of grounds containing specific requirements for the removal of a trustee. The statutory grounds encompass a wide range of possible reasons for removing a trustee. By enacting this comprehensive provision, the Legislature expressed its intent that the statute supersede and replace the common-law grounds for removal. See *Trentadue*, 479 Mich at 390. If myriad other grounds recognized at common law but not included in MCL 700.7706(2) were to continue to be used to remove trustees, it would undermine the Legislature's stated efforts "to make more comprehensive and to clarify the law" concerning removal of a trustee and to "foster certainty" in this area of law. MCL 700.8201(2). Further, permitting removal under the common law for "any good cause" as set forth in *Kelsey*, 265 Mich at 362, would render ineffectual and essentially nullify the detailed, specific requirements for removal listed in MCL 700.7706(2). "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." *Book-Gilbert*, 302 Mich App at 541. Therefore, MCL 700.7706(2) superseded and replaced the common-law bases for removal.

Next, petitioners argue that the trial court erred by requiring that the grounds for removal be established by clear and convincing evidence in accordance with a provision of the October Trust. Paragraph 5 of the Trust Agreement provides, in relevant part:

> The Trustee shall not be liable . . . by reason of any action or omission, whether by the Trustee or any other fiduciary, unless the Trustee has acted in bad faith, notwithstanding [EPIC] or any other law. *In the absence of proof by clear and convincing evidence to the contrary, each Trustee shall be deemed* to have acted within the scope of

> the Trustee's authority; to have exercised reasonable care, diligence, and prudence; and *to have acted impartially as to all interested persons*. [Emphasis added.]

Petitioners argue that this provision of the Trust Agreement merely absolves the trustee of liability and does not address removal. Moreover, petitioners contend, the MTC bars enforcement of this language. MCL 700.7908(1) provides:

> A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that either of the following applies:
>
> (a) The term relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the trust beneficiaries.
>
> (b) The term was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

Petitioners further cite MCL 700.7105(2)(n), which provides that the terms of a trust prevail over any provision of the MTC except, *inter alia*, "[t]he power of the court to take action and exercise jurisdiction." Petitioners also argue that the trial court improperly weighed evidence in the summary disposition context.

Petitioners' arguments on this point are ultimately unavailing. We agree with petitioners that ¶ 5 of the Trust Agreement is inapplicable. When read in context, the requirement in ¶ 5 of clear and convincing evidence to prove that the trustee failed to act impartially is in reference to a trustee's *liability* for any act or omission. The term "liable" refers to legal responsibility. *Random House Webster's College Dictionary* (2001). The issue here does not pertain to holding a trustee legally responsible but instead to *the removal of* a trustee. However, although the trial court briefly referred to the clear and

convincing evidence standard, the court's decision overall reflects that it found *no* evidence or facts to establish the necessary grounds for removal. In particular, the court found that petitioners did not present any facts from which an inference could be drawn that their interests as beneficiaries had been detrimentally affected and that there was no evidence of harm to the Trust corpus. The court also noted that there was no evidence that any conflict of interest on Barron's part harmed petitioners as Trust beneficiaries or affected Trust administration. In other words, the court indicated that any bias or partiality on Barron's part did not affect the Trust corpus or harm petitioners as beneficiaries, which, as discussed later, must be established to warrant removal. Therefore, although the court did briefly refer to the clear and convincing evidence standard, the reference was harmless given the court's finding that there was *no* evidence to support removal. And because the trial court found that there was *no* evidence supporting removal, it did not improperly weigh evidence.

Next, petitioners contend that Barron's purported partiality in favor of some beneficiaries and his hostility toward petitioners is evidence of his "unfitness," a proper ground for removal under MCL 700.7706(2)(c). We disagree. Petitioners challenge Barron's actions in defending against their petitions to modify or reform the Trust. Petitioners repeat the arguments Loren advanced in connection with whether Barron possessed standing. As we explained, the petitions to modify or reform the Trust explicitly challenged the validity of the Trust. Barron was obligated under the terms of the Trust to enforce the Trust Agreement in actions challenging the validity of the Trust Agreement, and he was required by statutory law to administer the Trust in accordance with its terms and pur-

poses and was permitted to exercise all the powers conferred by the terms of the Trust. Therefore, petitioners' argument that Barron exhibited partiality favoring some beneficiaries or hostility toward petitioners because he opposed their petitions to modify or reform the Trust is devoid of merit.

Even assuming, however, that Barron was hostile toward petitioners or partial in favor of other beneficiaries, petitioners have not established that such hostility or partiality made him unfit *to administer the Trust effectively* or that removal of Barron would best serve the purposes of the Trust, both of which must be shown in order to remove Barron under the plain language of MCL 700.7706(2)(c). Again, there is no evidence that the Trust corpus was in any way affected by Barron's alleged hostility or partiality or that petitioners' interests as Trust beneficiaries, as opposed to employees or associates of GLP or sons of Gerald, were affected.

Petitioners next argue that Barron engaged in conduct that revealed a conflict of interest; they assert that Barron's actions of (1) replacing himself on the GLP board of directors with someone subject to his control, and (2) having another attorney take over the circuit court litigation that Barron initiated on GLP's behalf against Loren did not render the conflict of interest moot. Petitioners' arguments are unconvincing. MCL 700.7706(2) does not list "conflict of interest" by itself as a ground for removal. Assuming that "unfitness" could include a conflict of interest under MCL 700.7706(2)(c), petitioners have again failed to demonstrate that any conflicts affected the administration of the Trust or that removal of Barron would best serve the purposes of the Trust. Neither conflicts of interest nor hostility provide a basis for removing a trustee or a personal representative of an estate unless the administration of the trust

or estate has been affected. See *In re Kramek Estate*, 268 Mich App 565, 576-577; 710 NW2d 753 (2005); *In re Sumpter Estate*, 166 Mich App 48, 53-57; 419 NW2d 765 (1988); *In re Gerber Trust*, 117 Mich App 1, 13-14; 323 NW2d 567 (1982). Again, there is no evidence of any mismanagement or negative effect on the administration of the Trust.

Moreover, Barron did not exhibit a conflict of interest by serving as a director of GLP for a period of time. Paragraph 6C(2)(a)(x) of the Trust Agreement authorized the cotrustees to act as entity owners, including by appointing a cotrustee as a director. The trial court expressed some concern about Barron's acting as an attorney for GLP in filing the circuit court lawsuit against Loren but ultimately concluded that Barron's resignation as attorney shortly after filing the lawsuit and the circuit court's ultimate disposition in favor of GLP's position ameliorated any concerns. The circuit court action was initiated because of what were perceived to be threats by Loren to take damaging actions against GLP. The mere existence of litigation between a trustee and a beneficiary is not a sufficient reason for removal. See *Sumpter*, 166 Mich App at 56; *Gerber*, 117 Mich App at 14. Overall, the trial court properly concluded that the alleged conflicts of interest do not require removal given the absence of evidence of any effect on Trust administration or the interests of the beneficiaries.

The trial court properly granted Barron's motion for summary disposition regarding the removal petition. For the same reasons, we further hold that the trial court did not plainly err by failing to grant summary disposition to petitioners under MCR 2.116(A) or (I)(2).

Affirmed.

HOEKSTRA, J., concurred with FORT HOOD, P.J.

O'CONNELL, J. (*dissenting*). I respectfully dissent.

In my opinion, the trial court erred when it granted the motion for summary disposition on the petition to set aside the October will because a question of fact existed regarding whether Ronald Barron exercised undue influence on Gerald Pollack. In Docket No. 310844, I would reverse the trial court's order granting the motion for summary disposition and admitting the October will to probate. I would remand the balance of this case and the related appeals for further proceedings consistent with this opinion.[1]

I. FACTS

The majority opinion ably states the facts of this case. However, the following facts are particularly pertinent to this dissent. In the summer of 2008, Gerald Pollack was diagnosed with brain cancer. In September 2008, Ronald Barron, Gerald's good friend and legal counsel, drafted the September will and the September trust. Apparently, the September documents were five years in the planning stage. In very unusual circumstances, one month later, attorney Charles Nida was employed to draft the October will and the October trust. The parties dispute who hired Nida and why he was employed to draft a second will and trust.

Petitioners claim that the October documents differ significantly from the September documents. Pertinent to this appeal, petitioners allege that attorney Ronald Barron was involved in drafting these documents and that he benefitted significantly from them. Barron ad-

[1] See *Gerald L Pollack & Assoc, Inc v Pollack*, unpublished opinion per curiam of the Court of Appeals, issued January 27, 2015 (Docket Nos. 319180, 320917, 320918, and 320919) (O'CONNELL, J., dissenting).

mits that the October will is a "pour over" will that transferred Gerald's assets to the October trust. This is significant because any resolution of the October-will issue affects the seven related appeals in this Court.[2] Needless to say, this has been a very protracted litigation.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Hackel v Macomb Co Comm*, 298 Mich App 311, 315; 826 NW2d 753 (2012). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A genuine issue of material fact exists when the record, viewed in a light favorable to the opposing party, leaves open an issue on which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

III. ANALYSIS

The central issue in this case is whether the petitioners presented sufficient evidence to create a question of fact regarding whether there was a presumption of undue influence. I conclude that petitioners did

[2] See note 1 of this opinion.

present evidence on this element.

A party contesting a will has the burden to establish undue influence. MCL 700.3407(1)(c) and (d).

> 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 the grantor's inclination and free will. Motive, opportunity, or even ability to control, in the absence of affirmative evidence that it was exercised, is not sufficient.
>
> A presumption of undue influence arises upon the introduction of evidence that would establish (1) the existence of a confidential or fiduciary relationship between the grantor and a fiduciary, (2) the fiduciary, or an interest represented by the fiduciary, benefits from a transaction, and (3) the fiduciary had an opportunity to influence the grantor's decision in that transaction. [*In re Erickson Estate*, 202 Mich App 329, 331; 508 NW2d 181 (1993) (citation omitted).]

On appeal, petitioners contend that there was evidence establishing all three of the elements giving rise to a presumption of undue influence. The trial court agreed that petitioners had established the first element (the existence of a confidential or fiduciary relationship between the grantor and a fiduciary) and the third element (the fiduciary had an opportunity to influence the grantor's decision in that transaction). The parties do not dispute the trial court's findings on these elements. At issue in this case is the second element—the fiduciary, or an interest represented by the fiduciary, benefits from the transaction. The primary dispute is whether Barron benefited from the transaction.

Appointment of the scrivener as trustee "alone, without other factors" does not create a substantial benefit. *In re Vollbrecht Estate*, 26 Mich App 430, 436; 182 NW2d

609 (1970). The mere appointment of a fiduciary as executor of the will, or even trustee of a limited testamentary trust, does not alone establish the kind of benefit necessary to raise the presumption of undue influence. *Id*. The determination should be made in light of all the powers, privileges, and duties given the trustee and all the instruments concerned. *Id*. at 437.

In *Vollbrecht*, there was sufficient evidence for the jury to find a substantial personal benefit because there was evidence that the trustees of the charitable foundation had the power to amend the articles of incorporation, determine its activities, and fix their own fees. *Id*. Other factors that might support a finding of substantial benefit include "the nature and probable duration of the trust, the amount of property involved, the amount of fees which the trustee would receive, the discretionary powers of the trustee, and the fact that the lawyer-scrivener was the sole trustee." See *id*. at 436.

In this case, there is sufficient evidence of personal substantial benefit to Barron. First, Barron serves as a cotrustee of the trust. Second, the will authorizes Barron to collect compensation for his services. Third, the will authorizes Barron and the cotrustee to completely control Gerald's estate and his company, to the exclusion of Gerald's children. This power includes the right to vote Gerald's 60% of the stock in Gerald L. Pollack & Associates, Inc. (GLP), the main asset in the estate. It also includes the power to name himself a director or officer of the company, to designate a chief operating officer of the company, to pay himself a salary, and to select himself and his law firm as legal counsel for the company. Finally, Barron was the lawyer-scrivener who drafted the September will and, viewing the record in the light most favorable to

petitioners, he hired and provided Nida, who drafted the October will.[3]

In my opinion, the record creates a factual question that was improperly resolved in a motion for summary disposition. The fact that Gerald was diagnosed with brain cancer in 2008, that Barron drafted the September documents and, in essence, selected a new attorney to draft the October documents that clearly gave Barron substantial control, creates, at minimum, a factual issue on the second element. Reasonable minds could differ concerning whether the duration of the trust, the amount of fees Barron receives, and his control over the business benefits him.

The trial court erred when it determined as a matter of law that sufficient evidence was not presented to give rise to the presumption of undue influence. Petitioners presented evidence sufficient to create a question of fact on the issue of undue influence and sustain their burden under MCL 700.3407(1)(c).

I would reverse the summary disposition decision of the trial court and remand for further proceedings consistent with this opinion. Because the balance of the issues raised in these appeals depend on the resolution of this issue, this Court cannot address them at this time.

---

[3] The similarity between the September will and trust and the October will and trust is not a mitigating factor in this case. That Barron, or his law firm, drafted the September will and trust is alone suspicious. It is well-established that if the attorney then benefits from the will or trust, a rebuttable presumption of undue influence or impropriety naturally arises. See *In re Bromley's Estate*, 113 Mich 53, 54; 71 NW 523 (1897). Attorneys who draft estate documents, or direct the drafting of estate documents, must be careful to avoid impropriety. See MRPC 1.8(c). One wonders why the will and trust had to be redrafted a month after it was initially executed. Was it an attempt to distance the obvious?

ADANALIC v HARCO NATIONAL INSURANCE COMPANY

Docket No. 317764. Submitted October 7, 2014, at Grand Rapids. Decided February 5, 2015, at 9:00 a.m.

Salko Adanalic brought an action in the Kent Circuit Court against Harco National Insurance Company and Michigan Millers Mutual Insurance Company to recover personal protection insurance (PIP) benefits for injuries he sustained in an accident involving a parked motor vehicle. Two entities that treated Adanalic following the accident, Spectrum Health Hospitals and Orthopaedic Associates of Michigan, intervened as plaintiffs. Adanalic was injured as he moved a loaded pallet from a disabled box truck onto a semi-trailer when the ramp between the two vehicles collapsed. The loaded pallet fell to the ground and pulled Adanalic down with it. Adanalic sought PIP benefits from Harco, through which he was covered by a policy issued to his wife, and from Millers, the no-fault insurer of the semi-trailer Adanalic was operating at the time of the accident. Both no-fault insurers denied Adanalic PIP benefits. Adanalic's application for workers' compensation benefits was also denied. The court, Mark A. Trusock, J., granted partial summary disposition in plaintiffs' favor, ruling that one of the parked-vehicle exceptions in MCL 500.3106 applied to the circumstances surrounding Adanalic's injuries and that Adanalic was entitled to PIP benefits and penalty interest from Millers as the highest priority insurer, but that Millers was not liable for plaintiffs' attorney fees. The court also granted Harco's request for judgment in its favor under MCR 2.116(I)(2). Millers appealed; Adanalic and Spectrum cross-appealed.

The Court of Appeals *held*:

1. The trial court correctly held that one of the parked-vehicle exceptions to the general rule against no-fault coverage for accidents involving a parked vehicle applied to Adanalic's case. Under MCL 500.3106(1)(b), injuries occurring as a direct result of lifting property onto, or lowering property from, a parked vehicle during the process of loading or unloading are covered by the appropriate no-fault insurer, except as provided by MCL 500.3106(2), which did not apply. Millers's argument that Adan-

alic's injuries resulted when he made contact with the ground, not contact with the pallet, was meritless.

2. The trial court correctly held that Millers was not excused from paying PIP benefits simply because Adanalic had a workers' compensation claim that could be pursued even after workers' compensation benefits were initially denied Adanalic. The intent of the no-fault insurance act is to assure adequate and prompt recovery of benefits for economic loss resulting from motor vehicle accidents. Millers was not permitted to withhold benefits on the basis that workers' compensation might have been wrongfully denied. Moreover, Millers's interest in recovering its payment of no-fault benefits when it is later determined that none were required is protected by the principle of equitable subrogation. Millers was entitled to bring the same claims against an opposing party that Adanalic could have brought. Millers could have recovered from a party that should have paid benefits to an insured any benefits Millers actually had paid the insured. When workers' compensation is ultimately awarded after the no-fault insurer has been paying benefits to the insured, the no-fault insurer is entitled to full reimbursement, even if the amount to be reimbursed exceeds the workers' compensation cap.

3. The trial court properly held that Millers had priority over Harco for the payment of PIP benefits to Adanalic. Harco, as the no-fault insurer of the semi-trailer through DIS, the company for which Adanalic hauled cargo, was not liable for paying no-fault benefits to Adanalic because he was not a DIS employee. Ordinarily, an employee operating a vehicle owned by his or her employer is covered by the no-fault insurance carried by the employer on the vehicle operated. However, an independent contractor is not covered by an employer's insurance, even when operating a motor vehicle covered by the employer's no-fault insurance. Applying the "economic reality test" to analyze the relationship between Adanalic and DIS, the court correctly ruled that Adanalic was an independent contractor, and not an employee, of DIS. DIS had no specific control over Adanalic's duties because he was under no obligation to accept assignments offered him by DIS. Adanalic was paid on commission for only the loads he carried, and DIS did not withhold any taxes from Adanalic's checks. The relationship between Adanalic and DIS was terminable at the will of either party, and if Adanalic had hired his own employees they would have been responsible only to him, not to DIS. Finally, Adanalic's role in DIS's business was not integral to DIS's presumptive goal of profiting from the dispatch of cargo

because Adanalic was only one of numerous contracted drivers, could terminate his status at will, and could refuse DIS's requests at any time.

4. The trial court erred by ruling that Millers was not liable for plaintiffs' attorney fees. A no-fault insurer is responsible for paying attorney fees when payment owed is overdue and when the insurer's refusal to make payment, or its delay in making payment, is unreasonable. The no-fault benefits to which Adanalic was entitled were more than three years overdue. And Millers's denial of Adanalic's claim was not reasonable because it was not based on a factual uncertainty or a legitimate question of statutory or constitutional interpretation.

Affirmed in part; reversed and remanded in part.

1. NO-FAULT INSURANCE — PERSONAL PROTECTION INSURANCE BENEFITS — PARKED-VEHICLE EXCEPTION.

An accident involving a parked vehicle that occurs when property is being lifted onto, or lowered from, the vehicle during the loading or unloading process constitutes an exception to the general rule that personal protection insurance benefits are not recoverable for accidents involving parked vehicles; under those circumstances, an injury for which benefits are recoverable must directly result from physical contact with the property being loaded or unloaded. MCL 500.3106(1)(b).

2. NO-FAULT INSURANCE — PARKED VEHICLES — WORKERS' COMPENSATION.

No-fault insurance benefits are not payable to an employee injured while loading or unloading a parked vehicle during the course of employment when workers' compensation benefits are available to the injured employee.

3. NO-FAULT INSURANCE — WORKERS' COMPENSATION — REIMBURSEMENT.

A no-fault insurer may not withhold benefits pending the outcome of a workers' compensation dispute and may file an independent claim for workers' compensation related to the injured employee; if workers' compensation is later awarded for the injury, the no-fault insurer has the right, under the principle of equitable subrogation, to full reimbursement for benefits it paid, even if the amount of those benefits exceeds the workers' compensation cap.

4. NO-FAULT INSURANCE — ATTORNEY FEES.

A no-fault insurer is responsible for paying attorney fees when benefits it owes to an insured are overdue and when the insurer's refusal to pay the benefits, or its delay in paying the benefits, is

> unreasonable; an insurer's refusal to pay, or its delay in paying, is unreasonable when it is not based on a factual uncertainty or a legitimate question of statutory or constitutional interpretation.

Gruel Mills Nims & Pylman PLLC (by *J. Paul Janes*) for Salko Adanalic.

Miller Johnson (by *Richard E. Hillary II*) for Spectrum Health Hospitals.

Miller & Tischler, PC (by *Robert E. Dice, Jr.*), for Orthopaedic Associates of Michigan.

Garan Lucow Miller, PC (by *Daniel S. Saylor*), for Harco National Insurance Company.

Jonathan Shove Damon (by *Jonathan Shove Damon*) for Michigan Millers Mutual Insurance Company.

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

SHAPIRO, J. In this no-fault action, plaintiff Salko Adanalic sought first-party benefits from defendants Harco National Insurance Company (Harco) and Michigan Millers Mutual Insurance Company (Millers). Spectrum Health Hospitals (Spectrum) and Orthopaedic Associates of Michigan (Orthopaedic), who treated Adanalic's injuries, intervened as plaintiffs. Plaintiffs and defendants filed cross-motions for summary disposition. The trial court ruled that Millers was liable to plaintiffs for no-fault personal protection insurance (PIP) benefits and, accordingly, awarded damages to plaintiffs. Millers appeals on two grounds. First, it asserts that Adanalic was not entitled to payment of first-party PIP benefits. Second, it asserts that if Adanalic was entitled to PIP benefits, Harco, rather than Millers, was the highest priority PIP insurer.

On cross-appeal, Spectrum argues that either, or both, Millers and Harco are liable for attorney fees and penalty interest because of their unlawful failure to promptly pay PIP benefits. We affirm the trial court's ruling that plaintiffs were entitled to PIP benefits and that Millers was first in priority and so responsible for payment of those benefits and penalty interest. We reverse the trial court's ruling that Millers was not liable for plaintiffs' attorney fees and so remand for the calculation and award of those statutory fees.

I. FACTS

Adanalic was seriously injured while unloading a pallet from a disabled box truck onto a semi-trailer. He had contracted with DIS Transportation (a nonparty to this action) to pick up, haul, and deliver various loads of cargo. On October 1, 2011, he was hauling an empty semi-trailer on his return to Grand Rapids from an out-of-state delivery. He accepted a DIS dispatch to a truck stop in Indiana for the purpose of removing loaded pallets from the disabled box truck and loading them into his semi-trailer.[1] Both the truck and the semi-trailer were insured by defendant Harco under a policy that included Michigan no-fault coverage. The policy was issued to DIS. Adanalic had Michigan no-fault insurance through defendant Millers under a policy issued to his wife.

Upon arriving at the Indiana truck stop, Adanalic parked his semi-trailer approximately nine feet from

[1] The semi-trailer was registered to Trailer X-Press, Inc. (a nonparty), owned by Fleet Service of West Michigan, LLC (a nonparty), and leased long-term to DIS. The truck hauling the semi-trailer was owned by Adanalic himself but also under long-term lease to DIS. Because both the truck and semi-trailer were leased long-term to DIS, DIS is considered the "owner" of both vehicles for purposes of the no-fault act. MCL 500.3101(2)(h)(*i*).

the disabled box truck, which was of a different height. A ramp was extended from the box truck to the semi-trailer and used as a path for the transfer of the loaded pallets. Adanalic and the driver of the box truck began moving the loaded pallets, one at a time, over the ramp. The other driver pushed the pallets while Adanalic pulled them. Adanalic did so by using straps attached to the pallets for that purpose. While the two men were loading the third pallet onto the truck operated by Adanalic, the loaded pallet fell and it pulled Adanalic, who was attached to the pallet by the straps, down with it, injuring him.

Adanalic sought PIP benefits from Millers and Harco, but each denied his claim. Several months later, on March 12, 2012, he filed suit against defendants, seeking first-party PIP benefits for his injuries. Plaintiffs Spectrum and Orthopaedic subsequently filed intervening complaints against both defendants. Both defendants responded with denials of coverage.

The parties filed cross-motions for summary disposition under MCR 2.116(C)(10). After a hearing, the trial court issued a written opinion ruling that (1) Adanalic was entitled to PIP benefits, (2) Millers was the insurer of highest priority and, therefore, responsible for payment of the PIP benefits, (3) Millers was responsible for penalty interest due to its delay in paying Adanalic's PIP benefits, and (4) Millers was not responsible for plaintiffs' attorney fees.

The parties then submitted stipulations of fact regarding damages. The trial court subsequently assessed damages against Millers: $110,560.83 to Adanalic, $96,243.52 to Spectrum, and $8,944.83 to Orthopaedic.[2] This appeal and cross-appeal followed.

[2] The amount of PIP benefits due is not at issue in this appeal.

II. NO-FAULT PIP BENEFITS

Millers argues that two provisions of the no-fault act, MCL 500.3101 *et seq*., relieve it of responsibility for payment of Adanalic's PIP benefits. First, it argues that the circumstances of Adanalic's injuries do not satisfy any of the "parked-vehicle exceptions" enumerated in MCL 500.3106(1). Second, it argues that workers' compensation benefits were "available" to Adanalic under MCL 500.3106(2) and, therefore, Millers is not responsible for payment of PIP benefits. We conclude that both arguments fail.

Both of these issues involve questions of statutory interpretation, which we review de novo.[3] *Radina v Wieland Sales, Inc*, 297 Mich App 369, 373; 824 NW2d 587 (2012). As our Supreme Court has instructed:

> [T]he purpose of statutory construction is to discern and give effect to the intent of the Legislature. In determining the intent of the Legislature, this Court must first look to the language of the statute. The Court must, first and foremost, interpret the language of a statute in a manner that is consistent with the intent of the Legislature. As far as possible, effect should be given to every phrase, clause, and word in the statute. The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Moreover, when considering the correct interpretation, the statute must be read as a whole. Individual words and phrases, while important, should be read in the context of the entire legislative scheme. While defining particular words in statutes, we must consider both the plain meaning of the critical word or phrase and its placement and purpose in the statutory scheme. A statute must be read in conjunction with other relevant statutes to ensure that

[3] We also review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

> the legislative intent is correctly ascertained. The statute must be interpreted in a manner that ensures that it works in harmony with the entire statutory scheme. [*Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009) (quotation marks and citations omitted).]

And, "[g]iven the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries." *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004) (citations omitted).

A. PARKED-VEHICLE EXCEPTION

At the time Adanalic was injured, the relevant vehicles were parked. Under MCL 500.3106(1), PIP coverage does not apply if the relevant vehicle is parked unless one or more of three statutory exceptions applies. For purposes of obtaining no-fault benefits, "[a]ccidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur":

> (a) The vehicle was parked in such a way as to cause unreasonable risk of the bodily injury which occurred.
>
> (b) Except as provided in subsection (2), *the injury was a direct result of physical contact with* equipment permanently mounted on the vehicle, while the equipment was being operated or used, or *property being lifted onto or lowered from the vehicle in the loading or unloading process*.
>
> (c) Except as provided in subsection (2), the injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106(1) (emphasis added).]

The parties agree that subsection (1)(a) does not apply in this case. Millers argues that neither subsection

(1)(b) nor (1)(c) was satisfied. The trial court found that plaintiffs satisfied the parked-vehicle exception of subsection (1)(b).

As described in *Arnold v Auto-Owners Ins Co*, 84 Mich App 75, 79-80; 269 NW2d 311 (1978), MCL 500.3106(1)(b) contains two independent clauses and provides coverage when the injury was the direct result of physical contact with either (1) "equipment permanently mounted on the vehicle, while the equipment was being operated or used," *or* (2) "property being lifted onto or lowered from the vehicle in the loading or unloading process."

Millers agrees that (1) Adanalic was lifting or lowering property from a parked vehicle during the loading or unloading process, and (2) Adanalic was in physical contact with that property when he was injured. Millers contends that regardless that Adanalic's fall was directly caused by the pallet's fall, his injuries are not covered because they did not actually occur until the fall ended in his impact with the ground.

The trial court found that the requirements of MCL 500.3106(1)(b) were met, stating in its opinion:

> The parties' arguments concern the exceptions found in MCL 500.3106(b) and (c). This Court finds that the second scenario under MCL 500.3106(1)(b) applies in this case, entitling Adanalic to no-fault benefits.
>
> The second scenario in MCL 500.3106(1)(b) "makes compensable injuries which are a direct result of physical contact with property being lifted onto or lowered from the parked vehicle in the loading or unloading process." It is undisputed that Adanalic was injured during the loading or unloading process. The parties dispute whether Adanalic's injuries were "a direct result of physical contact with [the] property being lifted onto [the trailer.]"

> Millers argues that the injuries did not result from contact with the pallet, but, rather, from contact with the ground when he fell. Millers seems to contend that MCL 500.3106(1)(b) requires that the injuries result from "direct physical contact" with the property. However, the statute only requires that the injuries were "a direct result of physical contact with [the] property."
>
> In this case, Adanalic was pulling the pallet with a belt wrapped around the pallet. The ramp connecting the trailer and the disabled box car collapsed, which caused the pallet to fall to the ground, which, in turn, caused Adanalic to fall to the ground. These facts establish that Adanalic's injuries were "a direct result of physical contact" with the pallet. Therefore, MCL 500.3106(1)(b) is satisfied in this case.
>
> Had the pallet landed on Adanalic or had Adanalic [fallen] on the pallet, i.e., "direct physical contact," that certainly would satisfy MCL 500.3106(1)(b). But the statute does not require that the property, itself, inflict the injuries. It only requires that the injuries directly result from physical contact with the property. Therefore, the statute is satisfied here, where Adanalic's physical contact with the pallet caused him to fall to the ground, directly resulting in his injuries.

We agree with the trial court's analysis and affirm its conclusion, which is consistent with the statute as written. Millers attempts to fundamentally rewrite the statute to state that a plaintiff's injury must occur as a result of being *struck* by the property being loaded or unloaded. However, the word "struck" is nowhere in the statute. Rather, it requires that there be "physical contact" with the property being loaded and that the physical contact "directly result" in injury. As noted, Millers concedes that Adanalic was in physical contact with the pallet he was loading when it fell and that the contact pulled him down with it. And while Millers does not explicitly concede it, there is little dispute that Adanalic's fall and injury occurred in a single, unbro-

ken, and immediate course of events that occurred because he was in contact with the pallet. The word "direct" is not defined in the no-fault act and, therefore, we may turn to a dictionary for assistance. See, e.g., *Glenn v TPI Petroleum, Inc*, 305 Mich App 698, 708; 854 NW2d 509 (2014). "Direct," when used as an adjective, is defined as "proceeding in a straight line or by the shortest course; straight, not oblique" and "proceeding in an unbroken line of descent." *Random House Webster's College Dictionary* (2001). It does not require an instantaneous occurrence, but one which *proceeds* in *direct* fashion. While hitting the ground when falling occurs at a different instant than the moment the fall begins, it begs credulity (and the law of gravity) to suggest that a fall ending in impact with the ground is not a direct process. Indeed, Adanalic's injuries were literally the result of "proceeding in an unbroken line of descent." *Id*.

None of the cases of record cited by Millers support its proposed reading of the statute. *Winter v Auto Club of Mich*, 433 Mich 446, 448-449; 446 NW2d 132 (1989), involved a situation in which the plaintiff was injured by a piece of concrete that fell from the hook of a parked tow truck. The Court held that the "loading" exception, MCL 500.3106(1)(b), did not apply, and the plaintiff was not covered under the no-fault act, because the concrete piece was not being loaded onto, or unloaded from, a vehicle. Rather, the concrete was simply being temporarily raised so that the soil beneath it could be leveled. *Id*. at 460. In fact, it was never loaded or intended to be transported.[4] *Id*. In *Frohm v American Motorists Ins Co*,

[4] The opinion states: "It is undisputed that the cement slab in the instant case was not being lifted onto or lowered from the tow truck. No such operation was attempted. . . . At no time did anyone intend to load the slab onto the tow truck." *Winter*, 433 Mich at 460.

148 Mich App 308, 310; 383 NW2d 604 (1985), the plaintiff was not loading or unloading a vehicle when he was injured; rather, he hurt his back while throwing material he found on one loading dock into a large waste container on an adjacent loading dock. Although the waste container would later be loaded onto the truck driven by the plaintiff, filling the waste container away from the vehicle was an activity preparatory to the actual loading. *Id*. at 311. The situation in *Frohm* bears no relation to the instant case; Adanalic was injured when the actual object he was directly and actively loading into the semi-trailer fell, pulled him down, and caused his injuries. The other case cited by Millers, *Dowdy v Motorland Ins Co*, 97 Mich App 242; 293 NW2d 782 (1980), is even further afield. In that case, the plaintiff was injured when a bundle of steel fell on him from a stack on a warehouse floor near a loading dock. *Id*. at 245. The plaintiff was unfastening the chains holding the load on his truck when this occurred, but it was undisputed that the steel that injured him was not being loaded or unloaded at the time. *Id*. at 247. Indeed, it had not even been transported by the plaintiff. *Id*. at 245. As this Court stated, "the injury [was not] due to contact with property which was being lifted onto or lowered from the vehicle in the loading process." *Id*. at 247.

The trial court correctly held that Adanalic satisfied the parked-vehicle exception of MCL 500.3106(1)(b).[5]

B. WORKERS' COMPENSATION EXCLUSION

Millers also argues that it has no responsibility to pay Adanalic's PIP benefits because workers' compen-

[5] In light of this conclusion, we need not address Millers's argument that Adanalic failed to satisfy the parked-vehicle exception of MCL 500.3106(1)(c).

sation benefits were "available" to him under MCL 500.3106(2), which provides in pertinent part:

> *Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if benefits under the worker's disability compensation act of 1969*[6] . . . or under a similar law of another state or under a similar federal law, *are available to an employee* who sustains the injury in the course of his or her employment while doing either of the following:
>
> (a) Loading, unloading, or doing mechanical work on a vehicle unless the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from, or secured to, as cargo or freight, a motor vehicle.
>
> (b) Entering into or alighting from the vehicle unless the injury was sustained while entering into or alighting from the vehicle immediately after the vehicle became disabled. This subdivision shall not apply if the injury arose from the use or operation of another vehicle. As used in this subdivision, "another vehicle" does not include a motor vehicle being loaded on, unloaded from or secured to, as cargo or freight, a motor vehicle. [Emphasis added.]

Following his injury, Adanalic filed an application for workers' compensation benefits from DIS, the entity that contracted with him to pick up the cargo. DIS denied the workers' compensation claim on the grounds that Adanalic was an independent contractor, not an employee. Despite this denial, Millers has refused to pay any PIP benefits to Adanalic.[7]

"The workers' compensation act and the no-fault act are complete and self-contained legislative schemes, and neither scheme should be permitted to frustrate

---

[6] MCL 418.101 *et seq*.

[7] It has been more than three years since Adanalic's injury, and he has received neither workers' compensation nor PIP benefits.

the purposes and objectives of the other scheme." *Perez v State Farm Mut Auto Ins Co*, 418 Mich 634, 649-650; 344 NW2d 773 (1984) (opinion by LEVIN, J.) (quotation marks and citation omitted).

Millers relies on the language from *Perez* mandating that the claimant—in this case, Adanalic—make "reasonable efforts" to obtain available workers' compensation benefits. *Id*. at 650. However, Millers appears to conflate the setoff provision of MCL 500.3109(1) and the exclusion provision of MCL 500.3106(2). *Perez* states that this "reasonable efforts" requirement arises specifically from the "required to be provided" clause of MCL 500.3109(1).[8] *Id*. No such language is present in MCL 500.3106(2).

It is well settled that under MCL 500.3109(1), workers' compensation benefits must be deducted, i.e., set off, from no-fault benefits. See *Specht v Citizens Ins Co of America*, 234 Mich App 292, 295; 593 NW2d 670 (1999). The issue before us in this case, however, does not involve a claim for a setoff under MCL 500.3109(1). Rather, the question in this case arises under the provision in MCL 500.3106(2) that specifically addresses the interplay between no-fault benefits and workers' compensation benefits when certain parked-vehicle exceptions are at issue. The statute provides that when "benefits under the worker's disability compensation act . . . are available to an employee who sustains the injury in the course of . . . employment," no-fault benefits are not available.

---

[8] "The 'required to be provided' clause of § 3109(1) means only that the injured person is obliged to use reasonable efforts to obtain available workers' compensation payments." *Perez*, 418 Mich at 650. Even when that requirement applies, "it does not, in light of the underlying purpose of the no-fault act, call for a potentially lengthy and costly effort . . . ." *Id*.

Unlike MCL 500.3109(1), which addresses workers' compensation benefits that are "provided or required to be provided under the laws of any state," MCL 500.3106(2) addresses only those workers' compensation benefits that are "available" to the employee. "Available" is not defined in the no-fault act, and so we may turn to the dictionary for assistance. See *Glenn*, 305 Mich App at 708. According to *Random House Webster's College Dictionary* (2001), "available" means "suitable or ready for use; at hand." When an alleged employer denies workers' compensation benefits and asserts that the injured individual is not an employee, as DIS did in Adanalic's case, those benefits cannot be said to be "ready for use" or "at hand."

Both the workers' compensation system and the no-fault system are intended to provide limited, but prompt payment of benefits to injured persons in order to assure medical care, rehabilitation, and income replacement. It is Millers's position that when the employer and the no-fault insurer disagree on which of these two systems is primarily applicable, the injured person is to receive no benefits at all until each of the two insurers is satisfied that its assertion of denial has been fully adjudicated. We reject the notion that because an individual may be covered by two broad systems of insurance, he is not entitled to any benefits whatsoever for however long it takes to adjudicate a dispute about which system is obligated to provide benefits. Indeed, requiring an employee to engage in lengthy workers' compensation litigation before being paid PIP benefits "is wholly inadequate to accomplish the no-fault act's purpose of providing assured, adequate, and prompt recovery for economic loss arising from motor vehicle accidents." *Perez*, 418 Mich at 650.

The Legislature chose the word "available" to prevent duplicative recovery to an injured person under both no-fault insurance and workers' compensation. See *North v Kolomyjec*, 199 Mich App 724, 728-729; 502 NW2d 765 (1993) ("The clear intent of the Legislature in § 3106 was to eliminate duplication of . . . benefits of workers' compensation with . . . benefits afforded by the no-fault act."). In this case, no duplicative recovery is at issue. Adanalic was denied workers' compensation benefits and so those benefits are not "available" to him under both the plain meaning of the statute and the intent of the no-fault act. The trial court did not err by so ruling.

Moreover, even if DIS's denial of Adanalic's application for workers' compensation benefits was improper, Millers has the right to fully and independently protect its interests as Adanalic's subrogee. A no-fault insurer is a "party in interest" in a workers' compensation case involving its insured because it has "a direct financial interest in any possible workers' compensation award." *Russell v Welcor, Inc*, 157 Mich App 351, 355; 403 NW2d 133 (1987). And, MCL 418.847(1) provides that "any party in interest" may file a workers' compensation application if the application submitted by the injured party is disputed. Any doubt as to the scope of this right was fully resolved by *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 59-62; 658 NW2d 460 (2003), which held that the no-fault insurer has the right to file its own petition *and* that it is entitled to be fully reimbursed by the employer for all reasonable medical expenses should the no-fault insurer prevail. As that case explained, the no-fault insurer stands in place of the insured. If an employer wrongly refuses to pay benefits and the injured worker must pay for his own medical treatment, the worker "shall be reimbursed for the reason-

able expense paid by [him]" and the reimbursement is not subject to the cost containment provisions of the workers' compensation act. MCL 418.315(1). See also *Auto-Owners*, 468 Mich at 62. "The principle of equitable subrogation allows [the no-fault insurer] to assert the right of . . . its insured, to receive full reimbursement from [the employer]." *Id*. at 62-63. See also *Dowd-List v Hagler Bailly & Hartford Ins Co*, 2006 Mich ACO 112, p 6 ("[T]he statutory language . . . provides for [a no-fault insurer's application for mediation or hearing] even without an application filed by the injured worker."); *Lingane v Community Centre/HCM Corp*, 1993 Mich ACO 29, p 74 ("[A] no-fault carrier is a 'party in interest' under [MCL 418.847(1)] of the workers' compensation act both for the purpose of intervening in a[n] existing action and for the purpose of initiating an action . . . . Section 847(1) does not distinguish between intervention and initiation.").

In sum, workers' compensation benefits were not "available" to Adanalic, and Millers was not entitled to withhold payment of PIP benefits under MCL 500.3106(2). To hold otherwise would be contrary to the purpose of the no-fault act, which is to ensure the prompt payment of PIP benefits owed. *Perez*, 418 Mich at 650. The law provides Millers with ample recourse to protect its interest in being reimbursed for benefits paid when workers' compensation is ultimately awarded. A "no-fault carrier is not entitled to delay payments in order to wait for the [workers' compensation] determination." *Specht*, 234 Mich App at 296. Accordingly, the trial court did not err by ruling that MCL 500.3106(2) did not relieve Millers of its responsibility to promptly pay Adanalic's PIP benefits.

C. SUMMARY DISPOSITION

We conclude that the trial court did not err by finding that Adanalic satisfied the parked-vehicle exception of MCL 500.3106(1)(b) and that workers' compensation benefits were not available to him under MCL 500.3106(2)(a). The actual facts of Adanalic's accident and resulting injuries are undisputed, and we have held that when "[t]he dispute is not as to what occurred, but as to whether what occurred came within the insurance coverage of loading," summary disposition may be properly granted. *Dembinski v Aetna Cas & Surety Co*, 76 Mich App 181, 183-184; 256 NW2d 69 (1977). Accordingly, we affirm the trial court's summary disposition ruling that plaintiffs are entitled to PIP benefits.

III. INSURER PRIORITY

Millers argues that Adanalic was an employee of DIS when his injuries occurred and that, therefore, Harco, as DIS's no-fault insurer, is responsible for Adanalic's PIP benefits. Under MCL 500.3114(3), "[a]n employee . . . who suffers accidental bodily injury while an occupant of a motor vehicle owned or registered by the employer, shall receive personal protection insurance benefits to which the employee is entitled from the insurer of the furnished vehicle."

It is undisputed that Harco was the no-fault insurer, under a policy issued to DIS, of both the semi-truck and semi-trailer used by Adanalic at the time of the accident. Thus, Harco was the insurer of the "furnished vehicle." The trial court ruled, however, that Adanalic was not an "employee" of DIS at the time he sustained his injuries.

For purposes of MCL 500.3114(3), whether an injured party was an "employee" is determined by apply-

ing the "economic reality test." *Parham v Preferred Risk Mut Ins Co*, 124 Mich App 618, 624-625; 335 NW2d 106 (1983). "By this test, factors to be considered include: (a) control of the worker's duties, (b) payment of wages, (c) right to hire, fire and discipline, and (d) the performance of the duties as an integral part of the employer's business towards the accomplishment of a common goal." *Id*. at 623. An independent contractor is not considered an "employee" for purposes of the no-fault act. See *Citizens Ins Co of America v Auto Club Ins Ass'n*, 179 Mich App 461, 465; 446 NW2d 482 (1989). The trial court applied the economic reality test and found that Adanalic was not an employee of DIS, but an independent contractor. The court wrote:

> To begin with, the Contractor Operator Agreement ("the Agreement") between DIS and Adanalic refers to Adanalic as "Contractor." It also specifically states at Paragraph 17 that the Agreement creates a carrier-independent contractor relationship, not an employer-employee relationship.
>
> For the first factor, Paragraph 3 of the Agreement states that Adanalic had the right to decline to haul any load offered by DIS. Deposition testimony of Adanalic and DIS' employee confirmed that this was the actual practice between the parties. Paragraph 6 of the Agreement states that it was up to Adanalic to "determine the means and methods of the performance of all transportation services . . . ." DIS' employee confirmed this, testifying that Adanalic was free to determine how a load would be delivered.
>
> For the second factor, Paragraph 4 of the Agreement states that DIS compensated Adanalic based on a percentage of the loads he delivered. However, under Paragraph 8 of the Agreement, Adanalic was responsible for withholding all taxes and for workers compensation insurance. DIS' employee confirmed this at deposition.

> For the third factor, Paragraph 12 of the Agreement states that the Agreement was terminable at will by either party. As for the fourth factor, Harco argues that the services provided by Adanalic were fungible, in that DIS had numerous other drivers that could deliver a load if Adanalic declined one. Therefore, the performance of his duties were not an integral part of DIS' business.
>
> Considering the language of the Agreement that specifically sets forth the parties' relationship, as well as the other provisions of the Agreement and the parties' actual practices under the four factors of the economic reality test, this Court finds that Adanalic was an independent contractor, not an employee.

Millers first argues that the trial court "relied exclusively upon provisions of a 'Contractor Operator Agreement.' " See *Kidder v Miller-Davis Co*, 455 Mich 25, 46; 564 NW2d 872 (1997) (when conducting the economic reality test, the contractual language used by the parties "is neither dispositive nor controlling"). This is an inaccurate characterization of the trial court's ruling. The trial court, as earlier quoted, did refer to the Contractor Operator Agreement. However, it only mentioned the agreement's definition of Adanalic as an independent contractor as a preliminary matter, and there is no indication that it relied solely on that designation. Moreover, while the court also referred to the Contractor Operator Agreement in discussing the four factors, it bolstered its conclusions as to each factor with reference to the depositions of Adanalic and DIS's operations manager. The trial court relied on the Contractor Operator Agreement as but one factor in its analysis, as expressly permitted by caselaw. See *id*. at 46.

Second, Millers takes issue with the trial court's findings regarding the four factors of the economic reality test. Notably, after having criticized the trial

court for relying on employment classifications in the Contractor Operator Agreement, Millers then relies on employment classifications in other DIS documents to argue that Adanalic was not an independent contractor. Millers also relies on tangentially related deposition testimony in which Adanalic referred to DIS as his "employer." These arguments do nothing to contradict the results of the trial court's inquiry into the legal import of the actual practices between Adanalic and DIS, all of which support the court's finding that Adanalic was an independent contractor for purposes of the no-fault act.

With regard to the first factor of the economic reality test, "control of the worker's duties," it is undisputed that it was Adanalic's contractual *right* to refuse any load offered by DIS. Whether he frequently exercised that right is immaterial. It was similarly Adanalic's right to determine the means of hauling any load he accepted, i.e., DIS had very little specific control of Adanalic and, on the exercise of his right to refuse a load, no control at all. In addition, there was no agreement that Adanalic could only drive or haul loads for DIS.

With regard to the payment of wages, the second factor of the economic reality test, Adanalic was paid on commission based solely on the loads he accepted. While DIS deducted from Adanalic's pay its advances on insurance costs, it did not withhold federal or state taxes, and Adanalic was issued 1099 forms. See *Loos v JB Installed Sales, Inc*, 485 Mich 993; 775 NW2d 139 (2009) (income tax records "are directly relevant to the question of employee status"). Adanalic was not only responsible for payment of his own taxes, but also for his own operating expenses.

As to the third factor, the "right to hire, fire and discipline," the Adanalic-DIS relationship was terminable by either party at will. Adanalic was also free to hire his own employees who would be responsible to him, not DIS; Adanalic would be required to train and supervise those employees without aid from DIS.

Finally, analysis of the fourth factor of the economic reality test, "the performance of the [job] duties as an integral part of the employer's business towards the accomplishment of a common goal," does nothing to contradict the trial court's ruling. DIS contracted with numerous drivers, of which Adanalic was merely one. Adanalic was free to terminate the relationship at any time or refuse to haul any load dispatched by DIS. Such a relationship cannot be said to be "integral" to DIS's general goal, presumably making a profit by using contracted drivers to haul cargo.

Accordingly, we hold that the trial court did not err by finding that, for purposes of the no-fault act, Adanalic was an independent contractor, not an employee, of DIS. Thus, the trial court did not err by ruling that Millers, as Adanalic's no-fault insurer, was responsible for payment of his PIP benefits.

IV. ATTORNEY FEES

On cross-appeal, Spectrum, the hospital that treated Adanalic, argues that the trial court erred by denying its request for attorney fees under MCL 500.3148(1). We agree.

> The trial court's decision to grant or deny attorney fees under the no-fault act presents a mixed question of law and fact. What constitutes reasonableness is a question of law, but whether the defendant's denial of benefits is reasonable under the particular facts of the case is a question of fact. We review de novo questions of law, but

> review the trial court's findings of fact for clear error. A finding is clearly erroneous where this Court is left with the definite and firm conviction that a mistake has been made. [*Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 693; 760 NW2d 574 (2008) (quotation marks and citations omitted).]

In this case, there is no significant factual dispute. Thus, whether Millers's actions were reasonable turns on the relationship between those actions and the settled law governing Millers's responsibilities under the no-fault act.

"MCL 500.3148 establishes two prerequisites for the award of attorney fees." *Moore v Secura Ins*, 482 Mich 507, 517; 759 NW2d 833 (2008). "First, the benefits must be overdue, meaning 'not paid within 30 days after [the] insurer receives reasonable proof of the fact and of the amount of loss sustained.' " *Id*., quoting MCL 500.3142(2). It is undisputed that Adanalic's benefits are overdue in this case. Second, the insurer must have "unreasonably refused to pay the claim or unreasonably delayed in making proper payment." MCL 500.3148(1). "[A]n insurer's refusal or delay places a burden on the insurer to justify its refusal or delay." *Ross v Auto Club Group*, 481 Mich 1, 11; 748 NW2d 552 (2008). "The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id*.

Millers argues that its failure to promptly pay Adanalic's PIP benefits was based on legitimate questions of statutory construction,[9] i.e., that Adanalic did not satisfy the parked-vehicle exception and because workers' compensation benefits were "available" to

[9] Millers does not argue that its refusal or delay was the product of a legitimate question of constitutional law or factual uncertainty.

him. Given our earlier and extensive discussion of the relevant law, we find it beyond question that Millers "unreasonably refused to pay the claim[.]" MCL 500.3148(1).

Regarding its suggested interpretation of MCL 500.3106(1)(b), the parked-vehicle exception discussed earlier, there is absolutely no caselaw supporting Millers's argument. More to the point, the argument is wholly inconsistent with the plain language of the statute. Millers is asking this Court to rewrite the statute and to ignore what was written by the Legislature. Millers does not pose a legitimate question of statutory interpretation by simply inventing an alternative reading that is inconsistent with the statute as written and the prior caselaw applying it.[10]

Millers's denial of PIP benefits on the grounds that workers' compensation benefits were available to Adanalic under MCL 500.3106(2) is similarly unreasonable. It is undisputed that Adanalic applied for workers' compensation benefits and was denied. Indeed, Millers appears to agree that Adanalic was entitled to benefits; the only question was whether the benefits were to be paid by workers' compensation or by the no-fault insurer. Yet, as discussed, it is well settled that in such a situation, the no-fault insurer is to pay the benefits and then exercise its rights as a party in interest to pursue the workers' compensation benefits. Further, under *Auto-Owners*, 468 Mich at 62, the no-fault insurer will be made completely whole if it prevails on the workers' compensation claim.

---

[10] Because Adanalic need only satisfy one parked-vehicle exception to be entitled to PIP benefits, at least with regard to MCL 500.3106(1), and we conclude that Millers's rationale for withholding benefits under MCL 500.3106(1)(b) was unreasonable, we need not address Millers's additional argument that withholding benefits under MCL 500.3106(1)(c) was reasonable.

The mechanism Millers proposes is wholly inconsistent with "the no-fault act's purpose of providing assured, adequate, and prompt recovery for economic loss arising from motor vehicle accidents." *Perez*, 418 Mich at 650. It is also inconsistent with the basic and long-settled principle that a "no-fault carrier is not entitled to delay payments in order to wait for the [workers' compensation] determination." *Specht*, 234 Mich App at 296. Where workers' compensation benefits are denied, they are not "at hand," and the no-fault insurer must pay benefits to the injured party while it litigates the priority dispute with the injured party's employer. If the no-fault insurer prevails in the workers' compensation claim, it will be made whole. If it does not prevail in the workers' compensation matter, then its entire basis for denying the no-fault claim was without merit.

The final basis for Millers's denial of Adanalic's PIP benefits was the priority dispute between Millers and Harco. And, as a matter of law, "when the only question is which of two insurers will pay, it is unreasonable for an insurer to refuse payment of benefits." *Regents of Univ of Mich v State Farm Mut Ins Co*, 250 Mich App 719, 737; 650 NW2d 129 (2002).

Accordingly, we hold that Millers's refusal to pay Adanalic's PIP benefits was unreasonable and that the trial court erred by concluding otherwise. We reverse the trial court's ruling that Millers's refusal was reasonable and remand for the calculation and award of plaintiffs' reasonable attorney fees.[11]

---

[11] Millers is liable for the full amount of assessable attorney fees. Given our conclusion that Harco is not responsible for Adanalic's no-fault benefits, Harco is not liable for the attorney fees plaintiffs incurred in obtaining the benefits from Millers. See *Moore*, 482 Mich at 526.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.

BORRELLO, P.J., and SERVITTO, J., concurred with SHAPIRO, J.

PEOPLE v BLACKMER

Docket No. 318858. Submitted February 3, 2015, at Grand Rapids. Decided February 10, 2015, at 9:00 a.m. Leave to appeal denied, 498 Mich 868.

In December 1981, defendant sexually assaulted the victim at gunpoint. The police closed the case in March 1982 because the victim did not know defendant, and the police had no leads or suspects. Defendant traveled to Indiana in June 1982, committed another sexual assault, and was arrested, convicted, and sentenced to 90 years of imprisonment. In May 2011, the police learned that defendant's DNA matched DNA taken in the closed case. Defendant, still incarcerated in Indiana, was extradited to Michigan where he was convicted by plea in the Kent Circuit Court, Mark A. Trusock, J., of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(e). Defendant had reserved the right to appeal his conviction. Arguing that the statute of limitations barred his Michigan prosecution, defendant appealed his conviction by leave granted.

The Court of Appeals *held*:

The trial court properly held that defendant's incarceration in Indiana effectively tolled the applicable statute of limitations, MCL 767.24, as it existed in 1982, beginning at the time defendant was incarcerated. Specifically, the trial court correctly concluded that, for purposes of the nonresident tolling provision of MCL 767.24, as amended by 1954 PA 100, defendant "was not usually and publicly resident within [Michigan]" during 1982 to 2013, and therefore, the period of limitations was tolled from 1982 until defendant's extradition to Michigan in 2013. Consequently, the statute of limitations did not bar defendant's 2013 prosecution for the 1981 crime.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *William A. Forsyth*, Prosecuting Attorney, and *Timothy K. McMorrow*, Chief Appellate Attorney, for the people.

Robert J. Dunn, PC (by *Robert J. Dunn*), for defendant.

Before: O'CONNELL, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM. Defendant appeals by leave granted his plea-based conviction of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(e), arguing that his prosecution was barred by the statute of limitations. We affirm.

The facts in this case are undisputed. On December 17, 1981, defendant sexually assaulted the victim at gunpoint. The victim did not know defendant. Because there were no leads or suspects, the police closed the case in March 1982. In June 1982, defendant traveled to Indiana for his employment. While there, he committed another sexual assault for which he was arrested, convicted, and sentenced to 90 years of incarceration in Indiana. In May 2011, the police in Grand Rapids learned that the Combined DNA Index System database identified a match between DNA obtained from the sexual assault kit completed in this case and defendant, who was still incarcerated in Indiana. Defendant was extradited to Michigan under the Interstate Agreement on Detainers, MCL 780.601, and on May 17, 2013, an information charging defendant with one count of CSC-I was filed in Kent Circuit Court.

Defendant's only argument on appeal is that the applicable statute of limitations barred the prosecution against him. When the crime in this case was committed, the applicable statute of limitations stated:

> An indictment[1] for the crime of murder may be found at any period after the death of the person alleged to have

[1] The term "indictment" refers also to charges brought by filing an information. *People v Russo*, 439 Mich 584, 588 n 1; 487 NW2d 698 (1992); MCL 767.2.

> been murdered; indictments for the crimes of kidnapping, extortion, assault with intent to commit murder and conspiracy to commit murder shall be found and filed within 10 years after the commission of the offense; all other indictments shall be found and filed within 6 years after the commission of the offense; but any period during which the party charged was not usually and publicly resident within this state shall not be reckoned as part of the time within which the respective indictments shall be found and filed. [MCL 767.24, as amended by 1954 PA 100.]

The extension of the period of limitations with respect to victims of CSC-I to more than six years did not occur until 2001. See 2001 PA 6. But this amendment could not revive a charge for which the limitations period had already run. See *People v Russo*, 439 Mich 584, 593-595; 487 NW2d 698 (1992). The six-year period of limitations that was applicable at the time the crime was committed in this case expired in 1987 unless the statute was tolled because defendant "was not usually and publicly resident within this state" between 1982 and 2013. Former MCL 767.24. Defendant argues that despite his incarceration in Indiana between 1982 and 2013, the nonresident tolling provision does not apply because he intended to return to Michigan.

The plain language of the former MCL 767.24 is clear and unambiguous. *People v Crear*, 242 Mich App 158, 164; 618 NW2d 91 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540, 561 n 26 (2008). The statute must be applied as written, and judicial interpretation is not required or permitted. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). Further, "all undefined 'words and phrases shall be construed and understood according to the common and approved usage of the language[.]' "

People v Laidler, 491 Mich 339, 347; 817 NW2d 517 (2012), quoting MCL 8.3a (alteration in original). To ascertain the ordinary meaning of undefined words in a statute, a court may consult a dictionary. *Laidler*, 491 Mich at 347 (citation omitted). The word "usual" means "customary or habitual"; the word "publicly" means, in this context, "open to the view of all"; and the word "resident" means "dwelling in a place." See *Random House Webster's College Dictionary* (1992). In sum, the plain and unambiguous language of the nonresident tolling provision at issue provided that the limitations period was tolled for any period in which a defendant was not customarily and openly living in Michigan. Defendant's subjective intent is irrelevant to this definition. See *People v Breidenbach*, 489 Mich 1, 10; 798 NW2d 738 (2011) ("[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.") (citation and quotation marks omitted). The facts of this case patently show that defendant did not customarily and openly live in Michigan between 1982 and 2013; therefore, the trial court properly determined that the period of limitations was tolled from the time defendant left Michigan in 1982, and the court properly denied defendant's motion to dismiss.

We affirm.

O'CONNELL, P.J., and SAWYER and MARKEY, JJ., concurred.

LOUTTS v LOUTTS (AFTER REMAND)

Docket No. 318468. Submitted February 3, 2015, at Lansing. Decided February 10, 2015, at 9:05 a.m. Leave to appeal sought.

On remand from the Court of Appeals, *Loutts v Loutts*, 298 Mich App 21; 826 NW2d 152 (2012), the Washtenaw Circuit Court, Archie C. Brown, J., recalculated defendant Irina V. Loutts's spousal support based on the imputation to her of a lower annual income, and denied her motion to modify and extend her spousal support, to award her attorney and expert witness fees, and to use the value of plaintiff Georgii B. Loutts's business for both property division and spousal support. Defendant appealed.

The Court of Appeals *held*:

1. The trial court improperly held that defendant's failure to request a modification and extension of her spousal support before termination of the initial award of rehabilitative spousal support prevented it from granting defendant's request to modify and extend her spousal support. The plain language of MCL 552.28 authorizes a trial court to modify an existing spousal support order on a showing of a change in circumstances. The trial court's error was harmless, however, because defendant failed to establish a change of circumstances sufficient to warrant modification or extension of her spousal support.

2. The trial court did not abuse its discretion by limiting use of the value of plaintiff's business to determining an equitable division of the parties' property. Noting defendant's bad behavior and her receipt of half the value of the business, the trial court was within its discretion when it refused to use the value of the business both to divide the parties' property and to calculate defendant's spousal support.

3. The trial court did not abuse its discretion by refusing to award defendant her attorney fees and expert witness fees because defendant failed to show that she was "unable to bear the expense of the action . . . ." MCR 3.206(C)(2)(a). Although defendant's annual income was less than the amount of money she owed her attorney, neither the circumstances nor the equities justified an award of attorney fees. In addition to rehabilitative spousal support for four years, defendant was awarded approxi-

mately $310,000 in cash from the divorce. The trial court's conclusion that defendant failed to demonstrate that she was without the means to pay her attorney fees was not an abuse of its discretion.

Affirmed.

1. DIVORCE — SPOUSAL SUPPORT — MODIFICATION.

MCL 552.28 authorizes a trial court to modify spousal support under appropriate circumstances even when a request for modification is made after the initial period of spousal support has terminated; on a sufficient showing of change of circumstances, the trial court may make any order it might have made originally.

2. DIVORCE — DIVISION OF PROPERTY — SPOUSAL SUPPORT — VALUE OF PROPERTY.

A trial court has discretion over whether to use the value of a party's property for purposes of determining an equitable division of property or awarding spousal support, or both; in deciding whether to use the value of property for either or both property division and spousal support, a trial court must consider the specific facts and circumstances of the case to determine what is warranted by the equities in the case.

3. DIVORCE — ATTORNEY FEES.

A trial court must consider all the circumstances and the equities involved when determining whether to award attorney fees in divorce cases; a party may not solely rely on the fact that his or her annual income is less than the amount of attorney fees owed, but the party must show that he or she is without the means to pay those expenses; it is not an abuse of a trial court's discretion to consider the cash and property a party receives in a divorce when determining whether that party can bear the expenses of the divorce, as long as the party is not required to pay the fees owed from assets that the party is relying on for support; a trial court may also properly consider a party's conduct during the divorce proceedings and whether the party engaged in conduct that unnecessarily increased the costs of the litigation.

Kline Legal Group, PLC (by *John Kenneth Kline* and *Elizabeth A. Kitchen*), for Georgii B. Loutts.

Faupel Law, PC (by *Marian L. Faupel*), for Irina V. Loutts.

AFTER REMAND

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

PER CURIAM. In this postjudgment divorce proceeding, defendant Irina Loutts appeals by leave granted[1] two orders issued by the trial court on July 17, 2013, and September 13, 2013, which, in toto, recalculated defendant's spousal support, but denied defendant's requests to modify and extend her spousal support, to award her attorney and expert witness fees, and to use the value of plaintiff's business for both property division and spousal support. For the reasons discussed below, we affirm.

I. FACTS AND PROCEDURAL HISTORY

The parties are Russian immigrants who were married in 1988 and came to the United States a few years later. They have one adult son. In 2000, plaintiff Georgii Loutts (referred to as George) started QPhotonics, a business that buys, sells, imports, and exports light emitting diodes and laser diodes. Plaintiff has a Ph.D. in Materials Science earned in 1990 from the General Physics Institute in Moscow, and he worked as a physics professor at Norfolk State University in Virginia until the parties moved to Ann Arbor in 2007.

Defendant has a Ph.D. in International Relations, earned in 2004 from Old Dominion University in Norfolk, Virginia, and a master's degree in Economics from Moscow State University in Moscow. Defendant had earned $14,000 a year as an adjunct professor at Old Dominion, and she was hired as a bookkeeper/accountant for QPhotonics at a salary of

[1] *Loutts v Loutts*, unpublished order of the Court of Appeals, entered March 26, 2014 (Docket No. 318468).

$2,000 a month after the parties moved to Ann Arbor. In 2008, near the time plaintiff filed for divorce, defendant was fired from the QPhotonics job.

Plaintiff filed for divorce in December 2008. Following a bench trial, the parties' divorce judgment was entered on March 9, 2010. The trial court ruled that permanent spousal support was not appropriate "because both parties have PhDs, are in good health, and are clearly employable." However, plaintiff was required to pay defendant rehabilitative spousal support in the amount of $1,510 a month for a period of four years. Plaintiff was awarded the marital home, and defendant was ordered to vacate the home before April 1, 2010, which she did. The trial court determined the value of QPhotonics to be $280,000 and awarded the business to plaintiff, and half of its value, $140,000, to defendant. The rest of the property was split approximately equally, and plaintiff was ordered to pay defendant $247,788 as an equalizer.

At trial, defendant indicated some intent to develop a business similar to QPhotonics. Consequently, in the divorce judgment, the trial court ordered that defendant was restrained for three years from competing in any way with QPhotonics. Because both parties requested to be awarded the company and to have a noncompete restriction issued against the other spouse, this Court upheld the restriction. *Loutts v Loutts*, 298 Mich App 21, 36; 826 NW2d 152 (2012) (*Loutts I*).

Following the judgment of divorce, defendant appealed in this Court, which remanded to the trial court to (1) "address and decide defendant's request for attorney and expert fees under MCR 3.206(C)(2)(a)," (2) "redetermine spousal support, including whether the equities in the case warrant[ed] utilizing the value

of QPhotonics for purposes of both property division and spousal support," and (3) "recalculate spousal support, imputing to defendant an income of $34,000." *Loutts I*, 298 Mich App at 25, 31, 34.

Nine months after this Court's decision to remand, defendant filed in the trial court a "Motion to Recalculate Spousal Support, Modify Spousal Support, and Extend It; and For Attorney Fees and Expert Witness Fees." Defendant requested that the trial court hold an evidentiary hearing on spousal support, attorney fees, and expert witness fees, and that it modify and extend her spousal support based on her continuing need for support and plaintiff's ability to pay. Defendant argued that her health had deteriorated substantially. Specifically, she alleged that she suffered from bleeding stomach ulcers that led to hospitalization on three occasions, the first occurring in March 2012. Nevertheless, defendant asserted that she continued to look for work. However, she alleged that she was unable to obtain suitable employment because she was overqualified for the few jobs that existed in her geographical area, and because Michigan's declining economy made it nearly impossible to find work.

Based on the extensive nature of the file, the trial court determined that an evidentiary hearing was not necessary and denied defendant's request for one. As authorized by MCR 2.119(E)(3), the trial court dispensed with oral argument and decided the matter based on the parties' written submissions. The trial court stated that rehabilitative spousal support had been ordered at $1,510 a month retroactive to April 23, 2009, and that it terminated on April 23, 2013. Despite defendant's claim that her health problems began before September 2012, the trial court noted that she waited until June 14, 2013, to request modification and

extension of her spousal support. The trial court noted that the spousal support terminated before the request to modify and extend was made, despite the fact that the alleged change of circumstance occurred approximately one year before the termination. Accordingly, the trial court held that any request for a modification or extension of spousal support must occur before termination of the duty to pay. The trial court acknowledged that MCL 552.28 authorizes the modification of alimony on a showing of changed circumstances, but noted that defendant's reading of the rule was unreasonable because it would allow a party to "come back five, ten or even 20 years later to request a modification of spousal support because of a 'change of circumstance.' " Therefore, the trial court denied defendant's request to modify and extend spousal support. The trial court did, however, recalculate the spousal support using $34,000 as defendant's imputed income. This increased defendant's monthly spousal support to $1,790, for a total of $85,920 over four years, which was $13,440 more than the original award.

The trial court took under advisement the remaining issues raised in defendant's motion, as well as this Court's remand directives, and addressed them in its September 13, 2013 order. The trial court determined "that the equities in this case [did] not warrant utilizing the value of Q-Photonics for purposes of both property division and spousal support," and that defendant's request for attorney and expert witness fees was without merit. Consequently, this appeal ensued.

II. SPOUSAL SUPPORT

Defendant first challenges the spousal support award and the trial court's denial of her motion to modify and extend spousal support. The standard of

review regarding a trial court's decision to award spousal support was adequately stated in this Court's previous opinion:

> It is within the trial court's discretion to award spousal support, and we review a spousal support award for an abuse of discretion. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010); *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). We also review for an abuse of discretion a trial court's decision whether to impute income to a party. *Carlson v Carlson*, 293 Mich App 203, 205; 809 NW2d 612 (2011). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *Woodington*, 288 Mich App at 355. "The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case." *Berger*, 277 Mich App at 726. We review for clear error the trial court's factual findings regarding spousal support. *Id*. at 727. A finding is clearly erroneous if, after reviewing the entire record, we are left with the definite and firm conviction that a mistake was made. *Woodington*, 288 Mich App at 355. If the trial court's findings are not clearly erroneous, we must determine whether the dispositional ruling was fair and equitable under the circumstances of the case. *Berger*, 277 Mich App at 727. We must affirm the trial court's dispositional ruling unless we are convinced that it was inequitable. *Id*. [*Loutts I*, 298 Mich App at 25-26.]

At the outset, we decline to address defendant's argument that because the trial court did not properly consider the spousal support factors set out in *Olson v Olson*, 256 Mich App 619, 631; 671 NW2d 64 (2003), spousal support in the amount of $1,510 a month for four years was insufficient. We are bound by the law of the case doctrine. See *Ashker ex rel Estate of Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001). This Court in *Loutts I* rejected defendant's

same argument and concluded that "[t]he record supports the trial court's factual findings regarding the spousal support factors." *Loutts I*, 298 Mich App at 31-33. This Court remanded only for the trial court to recalculate spousal support by imputing to defendant an income of $34,000, rather than $40,000, and to decide "whether the equities in this case warrant[ed] utilizing the value of QPhotonics for purposes of both property division and spousal support." *Id*. at 31.

We also decline to address defendant's argument that the trial court erred by failing to grant an evidentiary hearing on the motion to extend spousal support, because defendant abandoned this issue by failing to address the merits of her assertion of error. *Thompson v Thompson*, 261 Mich App 353, 356; 683 NW2d 250 (2004). The trial court stated that based on the extensive nature of the file, no evidentiary hearing was necessary. On appeal, defendant does not argue how this decision was error.

Defendant contends that there is no requirement that a motion to modify or extend spousal support be made within the initial term of support awarded. The trial court denied defendant's motion to modify and extend spousal support, citing the fact that the support terminated on April 23, 2013, before the request to modify and extend was made. Accordingly, the trial court held that any request to modify or extend spousal support had to be made before the support terminated.

MCL 552.28 creates a statutory right for either party to seek modification of spousal support. It provides:

> On petition of either party, after a judgment for alimony or other allowance for either party or a child, or after a judgment for the appointment of trustees to receive and hold property for the use of either party or a child, and

> subject to section 17, the court may revise and alter the judgment, respecting the amount or payment of the alimony or allowance, and also respecting the appropriation and payment of the principal and income of the property held in trust, and may make any judgment respecting any of the matters that the court might have made in the original action.

In interpreting MCL 552.28, our Supreme Court in *Rickner v Frederick*, 459 Mich 371, 379; 590 NW2d 288 (1999), determined that the plain language of the statute did not create a bright-line rule such as the one imposed by the trial court in this case. In *Rickner*, the trial court awarded the plaintiff spousal support and ordered the issue to be automatically reviewed in two years. *Id*. at 372. The judgment of divorce was later modified to state that spousal support would terminate if the plaintiff died, remarried, or cohabitated with a man. *Id*. at 373-374. The trial court cancelled the spousal support and ordered that the file be closed after learning that the plaintiff was cohabitating with a man. *Id*. at 374-375. Almost two years after the file was closed, and three years after spousal support had been cancelled, the plaintiff was no longer cohabitating and moved to reinstate her spousal support. She also claimed that her multiple sclerosis had worsened substantially, and she was unable to work. *Id*. at 375. Expressing its concern in language nearly identical to that employed by the trial court in the present case, the trial court in *Rickner* denied the motion to reinstate spousal support and stated:

> "[T]here must come a time where these matters are over with. The alimony has been terminated. To think then that person could come in in five years, ten years, 20 years later and ask again that alimony be reinstated, the Court finds to be a situation that simply would never put matters to rest. One would never know when the othe[r]

> party might decide that they want to come in and at least file a motion. Maybe they can't meet the criteria, as has been pointed out by counsel, because there are certain criteria, but these matters have to be laid to rest." [*Rickner*, 459 Mich at 376 (second alteration in original).]

This Court affirmed, but our Supreme Court reversed, stating,

> In this instance, we are faced with a statute that simply provides that "[o]n petition of either party, after a judgment for alimony . . . the court may revise and alter the judgment, respecting the amount or payment of the alimony . . . , and may make any judgment respecting any of the matters that the court might have made in the original action." MCL 552.28. This is a case in which the court originally provided alimony, and thus continuing jurisdiction is plainly provided by the statute.
>
> This conclusion is buttressed by the absence of a prior Michigan appellate decision holding that the statutory power to modify is extinguished if it is once exercised to eliminate alimony. Further, the statutory power to modify is not dependent on triggering language in the judgment.
>
> For these reasons, we are persuaded that the proper reading of the statute is that the Legislature intends, in cases in which alimony is initially ordered, that the court retain the power to make necessary modifications in appropriate circumstances. [*Rickner*, 459 Mich at 378-379 (citations omitted).]

Accordingly, based on *Rickner* and the plain language of MCL 552.28, it was error for the trial court to interpret the law to state that any request to modify or extend spousal support had to be made before the initial support terminated. However, we conclude that this error was harmless because the trial court's two orders implicitly conclude that defendant failed to show a change of circumstances sufficient to warrant modification or extension of the rehabilitative spousal support.

To modify a spousal support award, the moving party must show that there has been a change of circumstances since the judgment of divorce. *Moore v Moore*, 242 Mich App 652, 654; 619 NW2d 723 (2000). Defendant argued that her deteriorating health and her inability to find work constituted a change of circumstances. Although the trial court cited in its first order the fact that defendant's motion was untimely, it also noted that it was reviewing all the documents and testimony and had taken the modification of spousal support under advisement. The court further noted that it was very specific in ordering rehabilitative support for four years and denying permanent spousal support. In its second order, the court noted that, at the time the divorce judgment was entered, defendant was clearly employable based on her education and professional experience, and it referred to the expert testimony from the trial regarding defendant's potential job prospects. The trial court's two orders made it clear that, in addition to determining that defendant's motion was untimely, the court was also relying on the reasons initially set forth in the divorce judgment as a basis for limiting its award of support to rehabilitative spousal support for four years.

Further, as the trial court noted in its first order, despite claiming that her ulcers began in March 2012, defendant did not file her motion to modify and extend spousal support until June 2013, which certainly diminished the urgency for further spousal support to address her alleged health issues. Moreover, except for the few times she was hospitalized and prevented from working, defendant never asserted that her alleged medical issues hindered her ability to work. In fact, she stated that despite her ulcers, she continued to look for employment. Defendant's main reason for seeking continued spousal support appears to be her inability to obtain

suitable employment because she was overqualified for the jobs available in her geographical area and because Michigan's economy was declining. However, she did not identify any jobs for which she applied and was turned down based on her qualifications. In fact, defendant did not provide evidence to support any of the allegations in her motion to modify and extend spousal support. Thus, the record is clear that defendant did not sustain her burden to show that circumstances had changed since the divorce judgment, and therefore, the trial court did not abuse its discretion by denying her motion to modify and extend spousal support.

Next, defendant argues that the trial court erred by determining that the equities in this case did not warrant using the value of QPhotonics for purposes of both property division and spousal support. The trial court determined that the valuation of QPhotonics could be used for either property division or spousal support, but not both. However, in *Loutts I*, this Court held that there is no bright-line rule. *Loutts I*, 298 Mich App at 31. Rather, MCL 552.23(1), which governs spousal support, favors a case-by-case approach. *Loutts I*, 298 Mich App at 29. Further, a trial court's decision to award spousal support "should reflect what is just and reasonable under the circumstances of the case." *Id*. at 30 (quotation marks and citations omitted). Because the trial court applied a bright-line rule and did not consider the specific facts and circumstances of the case, this Court directed the trial court on remand to redetermine spousal support by deciding whether the equities in this case warranted using the value of QPhotonics for purposes of both property division and spousal support. *Id*. at 31.

On remand, the trial court thoroughly discussed its decision to use the value of QPhotonics for the purpose

of property division, but not spousal support. The trial court relied on plaintiff's expert who stated that "where a business is valued on the present value of the future income to the owner, some of the earnings/profits are considered as payment for labor (reasonable compensation) and the remaining profits (excess compensation) are reduced to present value and multiplied by a factor to yield a business value." The trial court stated, "If this excess compensation is considered in awarding spousal support, then it could be argued that the Court would be awarding the same dollars twice."

The trial court also cited defendant's extensive bad behavior during the proceedings, including her numerous unsubstantiated allegations against plaintiff, and the fact that defendant did receive half the value of the business that resulted from plaintiff's own labors. The court further noted that defendant had extensive knowledge of QPhotonics and could establish a competing business that would "create havoc for," and significantly reduce the value of, QPhotonics. Therefore, contrary to defendant's argument, the trial court did as this Court directed. It considered the equities of this case, and what was just and reasonable under the circumstances, and determined that the value of the business would only be used for the purposes of property division. We conclude that the record supports the trial court's factual findings, and its decision was within the range of reasonable and principled outcomes.

III. ATTORNEY FEES AND COSTS

Finally, defendant argues that the trial court erred by declining to award her attorney and expert witness fees. We disagree. We review for an abuse of discretion

a trial court's decision to award attorney fees in divorce proceedings. *Woodington*, 288 Mich App at 369. We review for clear error the findings of fact on which the trial court bases its decision, and any issues of law are reviewed de novo. *Id.*; see also *Myland v Myland*, 290 Mich App 691, 701-702; 804 NW2d 124 (2010).

This Court remanded for the trial court "to address and decide defendant's request for attorney and expert fees under MCR 3.206(C)(2)(a)." This rule states that "[a] party who requests attorney fees and expenses must allege facts sufficient to show that . . . the party is unable to bear the expense of the action, and that the other party is able to pay . . . ." "This Court has interpreted MCR 3.206(C)(2)(a) to require an award of attorney fees in a divorce action 'only as necessary to enable a party to prosecute or defend a suit.' " *Myland*, 290 Mich App at 702, quoting *Gates*, 256 Mich App 420, 438; 664 NW2d 231 (2003). "With respect to a party's ability to prosecute or defend a divorce action, a party 'may not be required to invade her assets to satisfy attorney fees when she is relying on the same assets for her support.' " *Myland*, 290 Mich App at 702, quoting *Maake v Maake*, 200 Mich App 184, 189; 503 NW2d 664 (1993).

The *Myland* Court further stated that "a party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees." *Myland*, 290 Mich App at 702. Although this Court in *Loutts I* seemed to imply that this is a dispositive rule, *Loutts I*, 298 Mich App at 25,[2] a fair reading of *Myland* indicates otherwise.

[2] This Court in *Loutts I* noted that defendant demonstrated her inability to pay because she alleged that her attorney fees totaled over $62,000, which was more than her imputed annual income. *Loutts I*, 298 Mich App at 25. Although not mentioned by the parties in this appeal,

Myland, 290 Mich App at 702, cited *Stallworth v Stallworth*, 275 Mich App 282, 288-289; 738 NW2d 264 (2007), in which this Court stated the following:

> Necessary and reasonable attorney fees may be awarded to enable a party to carry on or defend a divorce action. In the present case, the trial court decided that awarding plaintiff attorney fees was necessary to enable her to obtain a divorce. The parties stipulated that each attorney was owed $18,500. Plaintiff was awarded $10,000 in attorney fees. Because plaintiff's yearly income is less than the amount she owed her attorney, she sufficiently demonstrated her inability to pay her attorney fees. Furthermore, defendant earns more than double what plaintiff earns in a year, which demonstrated his ability to contribute to plaintiff's attorney fees. Under these circumstances, the trial court's ruling was within the range of reasonable and principled outcomes. [*Stallworth*, 275 Mich App at 288-289 (citations omitted).]

Therefore, it is clear that this Court in *Stallworth* was merely stating that the particular factual circumstances of that case show that the plaintiff established her inability to pay. The Court did not state that when a party's attorney fees exceed that party's yearly income, it is dispositive of the party's ability to pay in all cases. Rather, it was merely an example of one way a party may demonstrate an inability to pay, and whether a party has an inability to pay is dependent on the particular facts and circumstances of each case. As the *Myland* Court stated:

> It [i]s incumbent upon the trial court to consider whether attorney fees [a]re necessary for plaintiff to defend her

---

we note that this statement does not implicate the law of the case doctrine because this Court did not specifically decide that defendant demonstrated an inability to pay. Rather, this Court remanded for the trial court to specifically address and decide defendant's request for attorney fees under MCR 3.206(C)(2)(a), which included a determination whether defendant demonstrated an inability to pay.

> suit, including whether, under the circumstances, plaintiff would have to invade the same spousal support assets she is relying on to live in order to pay her attorney fees and whether, under the specific circumstances, defendant has the ability to pay or contribute to plaintiff's fees. [*Myland*, 290 Mich App at 703.]

This requires a trial court to give "special consideration to the specific financial situations of the parties and the equities involved." *Id*.

In this case, the trial court concluded that defendant failed to carry her burden of proving that she was unable to bear the expense of the litigation. In support of its conclusion, the trial court cited the following facts: defendant received a cash equalizer payment of $247,788, defendant would receive rehabilitative spousal support for four years, and defendant received $50,000 early in the litigation as an advance against the property settlement. These findings are not clearly erroneous, particularly where the record shows that defendant received approximately $310,000 in cash from the divorce, which included a cash equalizer payment of $247,788 and a distribution of $62,630.50 from plaintiff's retirement account, as well as $1,510 in monthly spousal support for four years. Defendant did not show that she would have to invade the spousal support assets that she is relying on to live to pay her attorney fees and costs. See *Myland*, 290 Mich App at 702-703.

Further, this Court has interpreted MCR 3.206(C)(2)(a) to require attorney fees "only as necessary to enable a party to prosecute or defend a suit." *Gates*, 256 Mich App at 438. The trial court cited the fact that to a substantial degree the fees and costs incurred by defendant were due to her own conduct in pursuing unsubstantiated claims. The trial court stated that defendant participated in a "clear fishing

expedition" that was without merit. Therefore, according to the trial court's decision, defendant clearly incurred substantial fees and costs that were not necessary to defend the divorce action. We conclude that the trial court properly gave special consideration to the equities involved in this case when declining to award defendant attorney fees and costs, and therefore, it did not abuse its discretion. See *Myland*, 290 Mich App at 703.

Affirmed.

SAAD, P.J., and OWENS and K. F. KELLY, JJ., concurred.

PEOPLE v COSTNER

Docket No. 316806. Submitted November 14, 2014, at Grand Rapids. Decided February 19, 2015, at 9:00 a.m.

Evans Costner III pleaded guilty to attempted third-degree criminal sexual conduct, MCL 750.520d(1)(a), in the Berrien Circuit Court. The conviction arose from a consensual act of sexual intercourse that occurred when defendant was 18 years old and the victim was 14 years old. Defendant was 4 years and 23 days older than the victim. After defendant violated the terms of his probation, the court ordered him to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. Defendant subsequently petitioned to be removed from the sex-offender registry under MCL 28.728c(14). The court, Charles T. LaSata, J., denied the petition. Defendant filed a delayed application for leave to appeal. The Court of Appeals granted the application.

The Court of Appeals *held*:

1. Under MCL 28.728c, an individual may petition the court for an order allowing him or her to discontinue registration under SORA. Pursuant to MCL 28.728c(14), the court shall grant a petition properly filed by an individual if the court determines that the conviction was the result of a consensual sexual act between the petitioner and the victim, the victim was 13 years of age or older but less than 16 years of age at the time of the offense, and the petitioner is not more than 4 years older than the victim. In *People v Woolfolk*, 304 Mich App 450 (2014), the Court of Appeals adopted the "birthday rule," under which a person attains a given age on the anniversary date of his or her birth. *Woolfolk* only addressed when a person attains the next age of his or her life. It has no bearing on whether a defendant is more than four years older than a victim for purposes of MCL 28.728c(14). Similarly, MCL 8.3j defines the word "year" as a calendar year, but that definition only applies if its use would not be inconsistent with the manifest intent of the Legislature. The statutory definition of "year" only applies when a statute refers to a particular year. It is not to be used for measuring time; to use the statutory definition of "year" in reading a statute that calls for a measuring time would be contrary to the manifest intent of the Legislature.

When MCL 28.728c(14)(a)(*ii*) asks whether the petitioner is more than four years older than the victim, it is using the commonly understood definition of a year as a measure of time, and a year is commonly understood as being 12 months in duration. Therefore, a petitioner who is even one day past the 4-year eligibility limit set forth in MCL 28.728c(14)(a)(*ii*) is ineligible to obtain relief under that statute, and the trial court correctly denied defendant's petition.

2. Const 1963, art 1, § 16 prohibits cruel or unusual punishment. The Court of Appeals has held that SORA's registration requirement is not punishment and, therefore, does not violate Const 1963, art 1, § 16. Nonetheless, defendant contended in an unpreserved argument that the registration requirement, as applied to him, constituted cruel or unusual punishment. But the case relied on by defendant, *People v Dipiazza*, 286 Mich App 137 (2009), was factually distinguishable, and defendant failed to establish that the trial court's denial of his petition constituted plain error affecting his substantial rights.

Affirmed.

GLEICHER, J., dissenting, would have reversed the decision of the trial court. Whether defendant was more than four years older than the complainant depended on how "years" were measured. The Legislature defined "year" as a calendar year. Because defendant was not more than four calendar years older than the complainant, the trial court erred when it denied defendant's petition. Even if the Court could ignore the statutory definition of "year," the phrase "not more than four years older" would be ambiguous. Because the statute is remedial, it should have been interpreted in favor of defendant.

CRIMINAL LAW — SEX OFFENDERS REGISTRATION ACT — PETITIONS FOR REMOVAL FROM THE REGISTRY — AGE DIFFERENCE BETWEEN THE PETITIONER AND THE VICTIM.

Under MCL 28.728c, an individual may petition the court for an order allowing him or her to discontinue registration under the Sex Offenders Registration Act, and pursuant to MCL 28.728c(14), the court shall grant a petition properly filed by an individual if the court determines that the conviction was the result of a consensual sexual act between the petitioner and the victim, the victim was 13 years of age or older but less than 16 years of age at the time of the offense, and the petitioner is not more than 4 years older than the victim; when MCL 28.728c(14)(a)(*ii*) asks whether the petitioner is more than four years older than the victim, it is using the commonly understood

> definition of a year as a measure of time, and a year is commonly understood as being 12 months in duration; a petitioner who is even one day past the 4-year eligibility limit set forth in MCL 28.728c(14)(a)(*ii*) is ineligible to obtain relief under that statute.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Michael J. Sepic*, Prosecuting Attorney, and *Elizabeth A. Wild*, Assistant Prosecuting Attorney, for the people.

Stephanie Farkas and *Cheryl Carpenter* for defendant.

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

DONOFRIO, J. Defendant appeals by leave granted an order denying his motion to be removed from Michigan's sex-offender registry. Because defendant was more than four years older than the victim in this case and because requiring him to register as a sex offender was not cruel or unusual punishment, we affirm.

Defendant pleaded guilty to attempted third-degree criminal sexual conduct (victim at least 13 but under 16 years of age), MCL 750.520d(1)(a). Defendant's conviction arises from a consensual act of sexual intercourse engaged in when he was 18 years of age and the victim was 14 years of age. With defendant having been born on February 21, 1991, and the victim having been born on March 16, 1995, the age difference between the two of them is 4 years and 23 days. Defendant was sentenced on December 14, 2009, to a probationary sentence of 36 months under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*.

On March 2, 2010, defendant pleaded guilty to violating the terms of his probation by using marijuana and possessing drug paraphernalia. The trial court

sentenced defendant to 13 days in jail for the probation violation and continued both defendant's probation and HYTA status. Defendant was also ordered to successfully participate in and complete the Kalamazoo Probation Enhancement Program (KPEP).

On March 16, 2010, defendant pleaded guilty to violating the terms of his probation by breaking his curfew and by going AWOL from the KPEP. The trial court revoked defendant's HYTA status and ordered him to comply with the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The trial court further sentenced defendant to 60 days in jail and ordered him to return to and complete KPEP once the jail term was served. Defendant's probation was continued.

On January 25, 2011, defendant, yet again, pleaded guilty to violating the terms of his probation, this time for having contact with, or attempting to have contact with, a female under the age of 17. The trial court revoked defendant's probation and sentenced him to six months in jail.

Defendant subsequently petitioned to be removed from the sex-offender registry pursuant to MCL 28.728c(14), which provides, in pertinent part, as follows:

> The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply:
>
> (a) All of the following:
>
> (*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.
>
> (*ii*) The petitioner is not more than 4 years older than the victim.

Defendant argued that because there is only a four-year difference between his age and the victim's age, he necessarily was "not more than 4 years older" than her. Defendant relied on MCL 8.3j, which defines "year" as "a calendar year."

The trial court denied defendant's petition and stated in its opinion:

> This Court is not convinced that the term "year" as defined by MCL 8.3j is the answer to the time computation in this statute, because the statute in issue requires the petitioner (i.e. defendant) to be "not more than 4 years older than the victim." The phrase "not more than" limits the definition of the word "year". Therefore, because this Defendant is 23 days older than the 4 years required under the Statute, I find that he does not meet the requirements set forth in MCL 28.728c and MCL 8.3j is not violated by this interpretation.

I. MCL 28.728c(14)

Defendant first argues on appeal that the trial court erred when it denied his petition because under Michigan law, defendant was not more than four years older than the victim. We review issues of statutory interpretation de novo. *People v Zajaczkowski*, 493 Mich 6, 12; 825 NW2d 554 (2012).

"[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes." *People v Bylsma*, 493 Mich 17, 26; 825 NW2d 543 (2012). The intent of the Legislature is expressed in the statute's plain language. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required. *Id*. In construing statutes, this Court applies a reasonable construction of the statute,

enforces clear statutory language as written, and reconciles any apparent inconsistencies if possible. *People v Bulger*, 291 Mich App 1, 5; 804 NW2d 341 (2010). If a statute specifically defines a term, the statutory definition is controlling. *People v Williams*, 298 Mich App 121, 126; 825 NW2d 671 (2012). When "terms are not expressly defined anywhere in the statute, they must be interpreted on the basis of their ordinary meaning and the context in which they are used." *Zajaczkowski*, 493 Mich at 13. However, technical words and phrases that have acquired a peculiar and appropriate meaning in law shall be construed and interpreted in accordance with that meaning. See MCL 8.3a; *Bylsma*, 493 Mich at 31. Moreover, it is presumed that the Legislature is familiar with the rules of statutory construction and that the Legislature is "aware of, and thus to have considered the effect on, all existing statutes when enacting new laws." *People v Kosik*, 303 Mich App 146, 158; 841 NW2d 906 (2013) (citation and quotation marks omitted).

A 2011 amendment of SORA allows an individual to petition the court for removal from the sex-offender registry. Among its provisions, MCL 28.728c(14) allows for an individual to be removed from the sex-offender registry if the underlying conviction involved an act of consensual sex during a so-called "Romeo and Juliet" relationship. The statute provides, in relevant part:

> The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply:
>
> (a) All of the following:
>
> (*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.

(*ii*) The petitioner is not more than 4 years older than the victim. [MCL 28.728c(14).]

The parties did not dispute that the sexual act for which defendant was convicted was consensual. It was likewise undisputed that the victim "was 13 years of age or older but less than 16 years of age at the time of the offense." Instead, the parties' arguments were focused on whether defendant satisfied MCL 28.728c(14)(a)(*ii*) by being "not more than 4 years older than the victim." Defendant argued that he was eligible for removal from the registry under that subparagraph because, with him being 18 and the victim being 14, there was only a four-year age difference. The prosecution argued that because defendant was actually four years and 23 days older than the victim, he did not meet the requirement of MCL 28.728c(14)(a)(*ii*). In denying defendant's petition, the trial court concluded that because defendant was "23 days older than the 4 years required" under MCL 28.728c(14)(a)(*ii*), he was not entitled to any relief.

There is no dispute that defendant actually is 4 years and 23 days older than the victim. Therefore, considering the issue on its face, defendant is *more* than four years older than the victim, and he cannot satisfy MCL 28.728c(14)(a)(*ii*). Defendant, however, argues that this Court's implementation of the "birthday rule" in *People v Woolfolk*, 304 Mich App 450; 848 NW2d 169 (2014), supports his position that he was only four years—and thus was not *more* than four years—older than the victim.

In *Woolfolk*, this Court was confronted with whether the defendant, who was convicted after committing a murder on the evening before his 18th birthday, should nonetheless be considered as having been 18 years old at the time of the murder. As the Court acknowledged,

contrary to common assumption or understanding, when computing a person's age, the common law provides that a person " 'reaches his next year in age at the first moment of the day *prior* to the anniversary date of his birth.' " *Id*. at 461, quoting *Nelson v Sandkamp*, 227 Minn 177, 179; 34 NW2d 640 (1948) (emphasis added). For example, under the common law, a person is considered to turn 18 years old the day *before* the 18th anniversary of his or her birth.

The Court, however, rejected the common-law method of determining when a person reaches a certain age and, instead, adopted the more commonly recognized method under the "birthday rule," under which "a person attains a given age on the anniversary date of his or her birth." *Woolfolk*, 304 Mich App at 464, 504 (citation and quotation marks omitted).

Defendant's reliance on *Woolfolk* is misplaced. *Woolfolk* only pertained to the proper method to calculate a person's age. More specifically, it addressed *when* a person attains the next age of his or her life. This concept has no application to the present issue. There is no question that in the present case, at the time of the offense, defendant and the victim had *attained* the ages of 18 and 14, respectively. Nothing in *Woolfolk* suggests that when determining whether someone is "more than 4 years older" than someone else, one simply takes the difference between both persons' "year" age, thereby ignoring their actual ages, which include not only how many years they have been alive, but also how many months and days. In fact, *Woolfolk* even relied on *Bay Trust Co v Agricultural Life Ins Co*, 279 Mich 248, 253; 271 NW 749 (1937), in which our Supreme Court, in the context of an insurance policy provision, held that a person who was 60 years, 2 months, and 10 days old was "over the age of 60 years."

Woolfolk, 304 Mich App at 498-499. The Supreme Court noted that "a year is a unit of time" and that the deceased had lived "over, beyond, above, or in excess" of 60 years. *Bay Trust Co*, 279 Mich at 252. Likewise, defendant, being 4 years and 23 days older than the victim, was indeed "more than 4 years older than the victim."

We find support for our view in other jurisdictions as well. In *State v Marcel*, 67 So 3d 1223 (Fla App, 2011), the Florida appellate court was confronted with the same issue and was presented with facts that are remarkably similar to the facts in the instant case. In *Marcel*, the defendant was 18 and the victim was 14 at the time of the offense; the defendant was designated a sexual offender and subjected to reporting requirements on the basis of his plea to a sex crime requiring lifetime registration under Florida's sex offender registration act. *Id*. at 1224. The defendant later filed a petition seeking relief under Florida's "Romeo and Juliet" law, Fla Stat 943.04354(1)(c) (2007), which provided an exception to sex-offender registration for consensual conduct by young people. *Marcel*, 67 So 3d at 1224. One of the criteria for relief under the Florida statute was that the defendant be "not more than [four] years older than the victim of th[e] violation who was [fourteen] years of age or older but not more than [seventeen] years of age at the time the person committed th[e] violation." *Id*. (quotation marks and citation omitted; alterations in original).

The *Marcel* court rejected the defendant's argument that application of the birthday rule resulted in him being no more than four years older than the victim because the difference was only four years (18 minus 14). *Id*. Instead, according to the court, the birthday rule is only used to compute a person's age—it is not

used in the calculation of time, which is what was called for in the statute. *Id*. Therefore, as long as a defendant is one day past the four-year eligibility limit prescribed by Florida statute, the defendant is ineligible to petition for relief. *Id*. at 1225.

In *State v Parmley*, 2012 Wis App 79; 325 Wis 2d 769; 785 NW2d 655 (2010), the Wisconsin Court of Appeals construed a Romeo and Juliet exception in the Wisconsin sex offenders registration act. Like *Marcel* and the instant case, the facts of *Parmley* involved a defendant who was 18 and a victim who was 14 at the time of the offense. *Id*. at ¶ 6. After his conviction for second-degree sexual assault of a child, the defendant filed a petition seeking removal from Wisconsin's sex-offender registry pursuant to Wis Stat 301.45(1m) (2007-2008), which, like the Michigan and Florida statutes, requires the defendant to be " 'not more than 4 years older' " than the victim. *Id*. at ¶ 8. The trial court granted the request because, when looking only at the "year" ages of the defendant and the victim, there was only a four-year difference. *Id*. at ¶ 6. On appeal, the *Parmley* court reversed the trial court and concluded that

> to calculate the disparity of ages required in WIS. STAT. § 301.45(1m)(a)2., to determine if an actor is exempt from registering as a sex offender, the time between the birth dates of the two parties is to be determined. Using this method we first consider [the defendant's] birthday of January 18, 1986, and then the victim's birthday of June 9, 1990. We conclude that there is a difference of four years, four months and twenty-three days. Therefore, [the defendant] is more than four years older than the victim. [*Id*. at ¶ 21.]

Defendant, on appeal, argues that these other cases are not persuasive because Michigan has a statutory definition for the term "year." MCL 8.3j provides that

the word "year" means "a calendar year; and the word 'year' alone shall be equivalent to the words 'year of our Lord'." A "calendar year" is defined, in *Black's Law Dictionary* (9th ed), p 1754, as "[t]welve calendar months beginning January 1 and ending December 31."

Defendant maintains that the definition of the word "year" as a "calendar year" should be used for both calculating a length of time and age. Because defendant's position is untenable, we reject it. First, we note that the definitions provided in MCL 8.3j are to be used "unless such construction would be inconsistent with the manifest intent of the legislature." MCL 8.3. The references in MCL 8.3j to "calendar year" and "year of our Lord" make clear that the definition of "year" set forth in the statute only applies when another statute refers to a *particular year*, not a *unit or measure of time*. Therefore, because MCL 28.728c(14)(a)(*ii*) calls for a calculation of time, use of the definition provided in MCL 8.3j would be inconsistent with the manifest intent of the Legislature, and we will not use it.[1]

To illustrate how adoption of defendant's argument would create an absurd result clearly not intended by the Legislature, consider that under defendant's view, MCL 28.728c(14)(a)(*ii*) would mean the following: "The petitioner is not more than 4 *calendar years* older than the victim." Defendant argues that this definition means that any fraction of a year is simply truncated when determining whether someone is four years older than someone else, thereby implying that a calendar year is *any* 12-month period.[2] Hence, defendant claims

[1] We note that Wisconsin, which, like Michigan, statutorily defines "year" as a calendar year, also has held that this definition does not apply when measuring time. *Parmley*, 2010 Wis App at ¶ 8 n 3.

[2] The dissent also applies this definition for "calendar year," but as discussed, this definition is not accurate.

that he is only four years older than the victim. But defendant is not using the definition from MCL 8.3j he urges this Court to adopt. A calendar year relates to a *specific* 12-month period—January through December. See *Black's Law Dictionary* (9th ed), p 1754. Going by the strict letter of the definition in MCL 8.3j, we first note that defendant was born on February 21, 1991, and the victim was born on March 16, 1995. Using the "calendar year" definition, there would be only three complete January-to-December periods between when the two were born (1992, 1993, and 1994). Accordingly, defendant would only be three "years" older than the victim. That interpretation flies in the face of common sense. It is manifestly clear that the Legislature did not intend for this extremely awkward (and entirely inaccurate) way of calculating whether someone was more than four years older than someone else.[3] Therefore, consistently with MCL 8.3, we hold that the definition of "year" in MCL 8.3j has no application in MCL 28.728c(14)(a)(*ii*). See also *McAuley v Gen Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998) ("Statutes should be construed so as to prevent absurd results . . . .").

Instead, we hold that under MCL 28.728c(14)(a)(*ii*), when it inquires into whether the petitioner "is not more than 4 years older than the victim," it is using the commonly understood definition of "year" as a measure of time, and a "year" is commonly understood as being 12 months in duration. See *Random House Webster's College Dictionary* (1997) (defining "year," in pertinent

[3] An even more absurd result occurs if one considers the age difference between a defendant born on January 2, 1990, and someone born on December 30, 1995. In reality, they are only three days shy from being six years apart in age. But using the "calendar year" definition, the defendant would only be four "years" older because there are only four calendar years between their births (1991, 1992, 1993, and 1994).

part, as "a space of 12 calendar months calculated from any point"). Therefore, one who is even one day past the 4-year or 48-month eligibility limit described in MCL 28.728c(14)(a)(*ii*) is ineligible to obtain relief under that statute. Consequently, defendant being 4 years and 23 days older than the victim in the present case is "more than 4 years older" than the victim, and the trial court was correct to deny defendant's petition.

II. CRUEL AND UNUSUAL PUNISHMENT

Defendant also argues that subjecting him to registration under SORA is cruel and unusual punishment, which violates his constitutional rights. Defendant never preserved this issue by raising it at the trial court. See *People v Hogan*, 225 Mich App 431, 438; 571 NW2d 737 (1997). Therefore, we review this unpreserved constitutional issue for plain error affecting defendant's substantial rights. *People v Sands*, 261 Mich App 158, 160; 680 NW2d 500 (2004).

The United States Constitution prohibits cruel *and* unusual punishment. US Const, Am VIII. The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16. "If a punishment 'passes muster under the state constitution, then it necessarily passes muster under the federal constitution.' " *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011), quoting *People v Nunez*, 242 Mich App 610, 618 n 2; 619 NW2d 550 (2000).

But before determining whether a punishment is cruel or unusual, a "threshold question" must be answered: does the complained-of punishment constitute "punishment" under the Constitution? *In re Ayres*, 239 Mich App 8, 14; 608 NW2d 132 (1999). SORA requires persons convicted of certain listed offenses to register as sex offenders. MCL 28.723. However, this Court has

held that this registration requirement is not "punishment." *People v Fonville*, 291 Mich App 363, 381; 804 NW2d 878 (2011), citing *People v Golba*, 273 Mich App 603, 617; 729 NW2d 916 (2007).

> Although a defendant may see registration as a penalty for a conviction of a listed offense, it is not actually a punitive measure intended to chastise, deter or discipline an offender. It is merely a "remedial regulatory scheme furthering a legitimate state interest." [*Fonville*, 291 Mich App at 381, quoting *Golba*, 273 Mich App at 617 (other quotation marks and citations omitted).]

Because the SORA registration requirement is not punishment, the requirement does not constitute cruel or unusual punishment in violation of the Michigan or the United States Constitution, *Golba*, 273 Mich App at 617-619, and defendant's unpreserved argument is therefore unavailing. See also *People v Temelkoski*, 307 Mich App 241, 270-271; 859 NW2d 743 (2014).

Although he acknowledges the controlling legal authority that registration is not a punitive measure, defendant relies on this Court's decision in *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), and argues that the registration requirement, as applied to him, still constitutes cruel or unusual punishment under the Michigan Constitution. However, *Dipiazza* is factually distinguishable from the instant case, and, even if defendant's argument was not precluded by *Fonville* and *Golba*, there is no guidance to be had from it.

In *Fonville*, 291 Mich App at 381-382, this Court aptly summarized *Dipiazza*:

> In *Dipiazza*, this Court held that requiring the defendant in that case to register as a sex offender was cruel or unusual punishment. However, in that case, after the defendant completed probation, his case was dismissed

> under the terms of [HYTA], leaving him with no conviction on his record. Despite the dismissal of his case, because he was assigned to youthful-trainee status on August 29, 2004, he continued to remain required to register as a sex offender, whereas after amendments of SORA, a defendant assigned to youthful-trainee status after October 1, 2004, was not required to register (unless the defendant's status of youthful trainee was revoked and an adjudication of guilt was entered). This Court concluded that, under those circumstances, requiring the defendant to register as a sex offender was cruel or unusual punishment. [Citations omitted.]

In the instant case, after defendant was afforded the benefit of HYTA status to induce his compliance with his probationary terms and, more importantly, to avoid a felony conviction and the obligation to register as a sex offender, defendant repeatedly violated his probation. Consequently, unlike the defendant in *Dipiazza*, defendant's HYTA status was revoked, and his conviction was never dismissed. Therefore, the reasoning in *Dipiazza* is not applicable to the instant case, and we perceive no plain error.

Affirmed.

BOONSTRA, P.J., concurred with DONOFRIO, J.

GLEICHER, J. (*dissenting*). The question presented is whether defendant was "more than four years older" than the complainant when the two engaged in consensual sexual relations. The answer depends on how "years" are measured. In my view, the Legislature solved this dilemma by enacting MCL 8.3j, which defines a year as a calendar year. While the majority maintains that application of this definition creates an "absurd result," I deem it reasonable and required. Doing so here compels us to define the disputed phrase in terms of calendar years.

Were we privileged to simply ignore MCL 8.3j, I would hold that the phrase "not more than four years older" is hopelessly ambiguous. And because the statute containing the phrase is remedial, I believe it should be interpreted in favor of defendant, one of the statute's intended beneficiaries. Accordingly, I respectfully dissent.

In relevant part, the statute at issue provides for removal from the sex-offender registry as follows:

> The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense was the result of a consensual sexual act between the petitioner and the victim and any of the following apply:
>
> (a) All of the following:
>
> (*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.
>
> (*ii*) The petitioner is *not more than 4 years older than the victim*. [MCL 28.728c(14) (emphasis added).]

Defendant and the complainant had consensual sex when the complainant was 14 years old and defendant was 18 years old. Defendant is 4 years and 23 days older than the complainant. I respectfully disagree with the majority's determination that 23 days makes all the difference.

The majority holds that "the commonly understood definition of 'year' as a measure of time" dictates that a year "is commonly understood as being 12 months in duration." Thus, the majority reasons, "one who is even one day" more than four years older is ineligible for relief. According to the majority's calculus, defendant therefore falls outside the statute's embrace. The majority pronounces the "calendar year" approach an "extremely awkward (and entirely inaccurate) way of calculating whether someone was more than four years

older than someone else." But we are not judicial lawmakers. Our role in interpreting the language is to apply the statute as written. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

"Year" is a nontechnical term. Ordinarily, we would interpret it "according to the common and approved usage of the language[.]" MCL 8.3a. From that perspective, the majority's construction is certainly reasonable, since everyone knows that 4 years and 23 days constitutes a time period longer than four years. But our Legislature has seen fit to provide a specific definition for the word "year." Michigan law dictates that if used in a statute, the word "year" means "a calendar year." MCL 8.3j. When the Legislature supplies a definitional rule, common parlance must give way. And " '[a] statutory definition supersedes the commonly-accepted, dictionary, or judicial definition.' " *Erlandson v Genesee Co Employees' Retirement Comm*, 337 Mich 195, 204; 59 NW2d 389 (1953), quoting 50 Am Jur, § 262, p 254.

I respectfully disagree with the majority's view that we may interpret the term "more than four years older" on a clean slate of "plain meaning." The general rules of statutory construction promulgated by our Legislature dictate the interpretation of the word "year." MCL 8.3. The Legislature is " 'presumed to know of and legislate in harmony with existing laws'." *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984), quoting *People v Harrison*, 194 Mich 363, 369; 160 NW 623 (1916). The "existing law," MCL 8.3, commands that "[i]n the construction of the statutes of this state, the rules stated in [MCL 8.3a to 8.3w] shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature." I discern no such inconsistency. Thus, MCL 8.3j's statutory definition of the word "year" controls. A "calendar year" is a period of 12

months of time. Defendant was born in 1991, and was 18 years old at the time of the offense. The complainant was born in 1995, and was 14 years old at the time of the offense. Between them were four calendar years, and not more than that. Accordingly, I believe that the trial court erred when it denied defendant's petition for removal from the sex-offender registry.

The majority reasons that MCL 8.3j comes into play only "when another statute refers to a *particular year*, not a *unit or measure of time*." I do not find that language in either MCL 8.3j or MCL 28.728c(14)(a)(*ii*), and cannot so readily relegate MCL 8.3j to the refuse bin. In my view, the legislative definition of "year" trumps the majority's definition. I would hold that because defendant was not more than four calendar years older than the complainant when they had sex, defendant was improperly placed on the sex-offender registry.[1]

Even assuming that we may properly overlook MCL 8.3j, I would reject the majority's holding. In everyday parlance, the term "more than four years older" is susceptible to two valid interpretations. One embraces years and days, while the other refers to whole years. Under the latter, defendant is "not more than four years" older than the complainant, and is, therefore, entitled to relief.

The majority holds that the commonly understood definition of "year" is a "measure of time" that is "12 months in duration." Therefore, the majority opines, "one who is even one day past the 4-year or 48-month eligibility limit described in MCL 28.728c(14)(a)(*ii*) is ineligible to obtain relief under that statute." But in

[1] Because our Legislature has defined the term "year," the cases cited by the majority from other jurisdictions are inapposite. The legislatures of those jurisdictions have not enacted the same definitional statute.

ordinary discourse, people refer to age as a specific number of years rather than as a number of years and months. Colloquially, I would say that my husband is not more than one year older than I am, even though technically he is 1 year, 5 months and 12 days my senior. Adults usually refer to the difference in their ages in terms of years, not years and months and days.

Speaking generally, five years is more than four years. Speaking specifically, four years and one day is more than four years. Should we interpret the term "year" loosely, as we do in real life—a year means a calendar year? Or should we construe it strictly—a year consists of months and days? Setting MCL 8.3j aside, the statutory text does not tell us.[2]

"A statutory provision is ambiguous if it is equally susceptible to more than a single meaning." *Klida v Braman*, 278 Mich App 60, 65; 748 NW2d 244 (2008). The majority's understanding of the term "more than four years" as encompassing registrants even 1 day and 4 years older than the complainant is plausible. So is the notion that the Legislature meant that "more than four years" requires subtracting the complainant's age from the defendant's, and arriving at a whole number. Viewed through the lens of common meaning, the statutory language is decidedly ambiguous.

Resolving the ambiguity requires judicial construction guided by "our duty . . . to consider the object of the statute, as well as the harm it is designed to remedy, and [to] apply a reasonable construction that best accomplishes the statute's purpose." *Id*. at 70-71.

MCL 28.728c was enacted to allow "Romeo and Juliet" offenders to petition for reprieve from the rigors

[2] It seems to me, however, that if the Legislature intended that every month count, it could easily have drafted the statute in terms of months, not years. See MCL 400.57r and MCL 18.1451a(1).

of the sex-offender registry. This Court determined that an earlier version of this remedial enactment was motivated "by concerns that 'the reporting requirements are needlessly capturing individuals who do not pose a danger to the public, and who do not pose a danger of reoffending.' " *People v Dipiazza*, 286 Mich App 137, 148; 778 NW2d 264 (2009), quoting House Legislative Analysis, HB 4920, HB 5195, and HB 5240, November 12, 2003, at 1. This Court further observed that "[t]he implied purpose of [the Sex Offenders Registration Act], public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship." *Dipiazza*, 286 Mich App at 149.

As remedial legislation designed to shield certain youthful offenders from the harsh, punitive effects of mandatory sex-offender registration, MCL 28.728c should be liberally construed in favor of its intended beneficiaries. See *Haynes v Neshewat*, 477 Mich 29, 42; 729 NW2d 488 (2007) (KELLY, J., concurring); *Spartan Asphalt Paving Co v Grand Ledge Mobile Home Park*, 400 Mich 184, 188-189; 253 NW2d 646 (1977). "A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." 3 Singer & Singer, Sutherland Statutory Construction (2008), § 60:1, p 258.

Honoring and implementing the remedial purpose of the statute, I would hold that the term "more than four years older" should be construed to mean that defendant was not more than four years older than the complainant when they engaged in consensual sex, and would reverse the trial court.

PEOPLE v PUTMAN

Docket No. 318788. Submitted February 10, 2015, at Detroit. Decided February 19, 2015. Leave to appeal sought.

Michael B. Putman was convicted by a jury in the Wayne Circuit Court of two counts of assault with intent to murder, MCL 750.83; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; armed robbery, MCL 750.529; and second-degree murder, MCL 750.317, for having shot three people, one fatally, while robbing a home. Defendant was identified as a suspect in these crimes through an anonymous tip. At trial, the court, Bruce U. Morrow, J., asked the witnesses to promise that they would testify truthfully, but did not use the phrase "[y]ou do solemnly swear or affirm" as set forth in MCL 600.1432(1). Defense counsel did not object. Defendant appealed his convictions.

The Court of Appeals *held*:

1. The trial court's failure to administer the oath to testify truthfully using the words of MCL 600.1432(1) was not a plain error affecting defendant's substantial rights. MRE 603 requires only that the oath or affirmation be administered to witnesses in a form calculated to awaken their consciences and impress their minds with the duty to testify truthfully. Under MRE 603, no particular ceremonies, observances, or formalities are required. Because the administration of oaths and affirmations is a matter of procedure that falls within the Supreme Court's authority to regulate, to the extent that MCL 600.1432(1) conflicts with MRE 603, MRE 603 controls. The trial court asked each witness to promise to testify truthfully, or some similar variation of that question, and each witness answered in the affirmative. This oath was sufficient to satisfy the requirements of MRE 603.

2. Defense counsel's failure to object to the form in which the trial court administered the oath to testify truthfully did not constitute ineffective assistance of counsel. Any objection would have been meritless because the oaths satisfied the requirements of MRE 603, and counsel is not ineffective for failing to raise a meritless objection.

3. Defendant was not denied the opportunity to be confronted

with the witnesses against him by a police officer's testimony about information that the officer had received from an anonymous source. Although the Confrontation Clause in both the Michigan and the United States Constitutions generally prohibits the admission of out-of-court statements that are testimonial in nature, it does not bar the use of such statements for purposes other than establishing the truth of the matter asserted. In this case, the testimony was admitted to explain why a police officer put a photograph of defendant in an array that was shown to several witnesses of the murder, which did not violate the Confrontation Clause. Because any objection to admitting this testimony would have been futile, counsel was not ineffective for failing to do so.

4. Defendant was not denied the effective assistance of counsel because of counsel's failure to call defendant's brother as a witness, failure to object to a police officer's testimony that he had obtained defendant's name from a specific crime-reporting system, or failure to properly cross-examine witnesses. First, the record did not indicate how defendant's brother would have testified had he been called, and defense counsel presented two other witnesses who testified that defendant was not in the area of the murder. Second, the record indicated that defense counsel thoroughly cross-examined the witnesses regarding the issues defendant raised in his brief on appeal. Finally, defendant did not advance any basis on which counsel could have objected to the testimony about the crime-reporting system or explained why the testimony was improper.

5. Defendant was not entitled to reversal of his armed-robbery conviction on the ground that the jury had rendered an inconsistent verdict by convicting him of armed robbery and second-degree murder while acquitting him of first-degree felony murder. Even assuming inconsistency, inconsistent verdicts within a single jury trial are permissible, and defendant did not establish that the jury was confused, had misunderstood the instructions, or had engaged in an impermissible compromise.

Affirmed.

1. WITNESSES — OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY — FORM OF ADMINISTRATION.

The oath or affirmation to testify truthfully must be administered to a witness in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to testify truthfully; no particular ceremonies, observances, or formalities are required (MRE 603; MCL 600.1432(1)).

2. COURTS — PRACTICE AND PROCEDURE — WITNESSES — OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY.

The administration of oaths and affirmations to witnesses is a matter of procedure that falls within the Supreme Court's authority to regulate; to the extent that MCL 600.1432(1) conflicts with MRE 603, MRE 603 controls.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, and *Timothy A. Baughman*, Chief of Research, Training and Appeals, for the people.

Jonathan B.D. Simon and Michael B. Putman, *in propria persona*, for defendant.

Before: MURRAY, P.J., and HOEKSTRA and WILDER, JJ.

PER CURIAM. Defendant Michael B. Putman appeals as of right his jury-trial convictions of two counts of assault with intent to murder, MCL 750.83; possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; armed robbery, MCL 750.529; and second-degree murder, MCL 750.317, after he shot three people, one fatally, while robbing a residence. Defendant was sentenced to 15 to 30 years' imprisonment for each of his convictions for assault with intent to murder, two years' imprisonment for his felony-firearm conviction, 15 to 30 years' imprisonment for his armed-robbery conviction, and 25 to 50 years' imprisonment for his second-degree-murder conviction. For the reasons explained in this opinion, we affirm.

Defendant first contends that the trial court erred when it did not properly administer to the witnesses the oath to testify truthfully as required by MCL 600.1432(1). Further, defendant asserts that this failure by the trial court resulted in a violation of his Sixth Amendment right of confrontation and that trial coun-

sel was ineffective for failing to object to the form of the oath.

Defendant did not object to the form of the oath given to the witnesses at trial. Therefore, the issue is unpreserved. See *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). This Court reviews unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In order for defendant to avoid forfeiture under the plain-error standard, he must show that (1) an error occurred, (2) the error was plain, meaning clear or obvious, (3) and the plain error affected substantial rights. *Id*. The third prong requires a showing of prejudice, which occurs when the error affected the outcome of the lower court proceedings. *Id*.

Under MCL 600.1432 and MCL 600.1434, witnesses in judicial proceedings must swear or affirm that their testimony will be true. *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007). The typical manner for administering oaths is set forth in MCL 600.1432(1), which provides:

> The usual mode of administering oaths now practiced in this state, by the person who swears holding up the right hand, shall be observed in all cases in which an oath may be administered by law except as otherwise provided by law. The oath shall commence, "You do solemnly swear or affirm".

There are exceptions to this general rule, including MCL 600.1434, which provides that "[e]very person conscientiously opposed to taking an oath may, instead of swearing, solemnly and sincerely affirm, under the pains and penalties of perjury." Moreover, the administration of oaths and affirmations is a purely procedural matter, and it thus falls within the authority of

our Supreme Court to promulgate rules governing the practices and procedures for administering oaths. *Donkers*, 277 Mich App at 373, citing Const 1963, art 6, § 5. To this end, MRE 603 provides:

> Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

Comparing MRE 603 to the identical language of its federal counterpart, FRE 603, this Court has concluded that "no particular form or language is necessary when swearing or affirming to testify truthfully" in accordance with MRE 603. *Donkers*, 277 Mich App at 372. "As the plain language of MRE 603 makes clear, no particular ceremonies, observances, or formalities are required of a testifying witness so long as the oath or affirmation 'awaken[s]' the witness's conscience and 'impress[es]' his or her mind with the duty to testify truthfully." *Id*. at 373 (alteration in original). See also *People v Ramos*, 430 Mich 544, 548; 424 NW2d 509 (1988). Because the administrations of oaths and affirmations is a purely procedural matter, to the extent MRE 603 conflicts with MCL 600.1432 and MCL 600.1434, MRE 603 prevails over the statutory provisions, meaning that no specific formalities are required of an oath or affirmation. *Donkers*, 277 Mich App at 373. Therefore, witnesses need not raise their right hands when taking an oath to testify truthfully, and such oaths need not be prefaced with any particular formal words. See *id*. at 372-373.

In the present case, the trial court asked each witness, including defendant's own witnesses, if they promised to testify truthfully or some similar variation

of that question.[1] Each witness answered the trial court's question in the affirmative. This oath was sufficient to awaken the witnesses' consciences and impress the witnesses' minds with the duty to testify truthfully. Therefore, no plain error occurred.[2]

On appeal, defendant also maintains that defense counsel rendered ineffective assistance by failing to object to the oath administered by the trial court. This argument lacks merit, however, because counsel is not ineffective for failing to raise meritless or futile objections. *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012). Any objection by counsel to the oaths administered would have been meritless because, as stated earlier, the oath administered to the witnesses was sufficient to awaken the witnesses' consciences and impress the witnesses' minds with the duty to testify truthfully. Thus, counsel's failure to raise a meritless objection to the oaths did not deny defendant the effective assistance of counsel. See *id*.

Defendant next argues that he was denied the opportunity to confront the witnesses against him when a police officer testified about information received from an anonymous source. Defendant failed to object to this testimony at trial, meaning defendant's Confrontation Clause claim is unpreserved and re-

[1] For example, the trial court asked one of the surviving victims, Stephen Lewis, "[C]an I get a promise that you will testify truthfully, please?" and the trial court stated to the other shooting victim, Donald Davie, "I need you to promise that the testimony that you're going to give will be accurate and truthful. So, do you promise?"

[2] Similarly, insofar as defendant claims the oaths administered to the witnesses somehow deprived him of the constitutional right to be confronted with the witnesses against him, his claim is without merit. The Constitution does not require a particular form of oath, *United States v Armijo*, 5 F3d 1229, 1235 (CA 9, 1993), and defendant had every opportunity to cross-examine the witnesses presented at trial.

viewed for plain error affecting his substantial rights. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007). In the alternative, defendant argues that trial counsel was ineffective for failing to object to the use of this alleged testimonial hearsay. Because defendant failed to move for a new trial or a *Ginther*[3] hearing, our review of this ineffective-assistance argument is limited to mistakes apparent on the record. *Id*.

"Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront the witnesses against him or her." *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009), citing US Const, Am VI; Const 1963, art 1, § 20. The Confrontation Clause prohibits the admission of out-of-court statements that are testimonial in nature, unless the declarant was unavailable at trial and the defendant had a prior opportunity to cross-examine the declarant. *Chambers*, 277 Mich App at 10, citing *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The Confrontation Clause does not, however, bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted. *People v Henry (After Remand)*, 305 Mich App 127, 153; 854 NW2d 114 (2014). "[A] statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Id*. at 153-154 (citation and quotation marks omitted). "Specifically, a statement offered to show why police offers acted as they did is not hearsay." *Chambers*, 277 Mich App at 11.

In this case, Detroit Police Officer Steven Ford testified that he received a tip through Crime Stoppers that the individual who shot the victim was named "Mike" and that he "lived on Central." Acting on this

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

information, Ford did more investigating and discovered that defendant fit the description of the tip. Ford then placed defendant's photograph in an array that was shown to several witnesses to the shooting. In this context, it is clear that the informant's statement was not elicited from Ford to prove the truth of the statement, i.e., that "Mike" committed the murder; rather, it was used to explain why Ford put a photograph of defendant in the photographic array. Because the Confrontation Clause does not prevent the use of out-of-court testimonial statements to show why a police officer acted as he did, the admission of this testimony did not violate defendant's right of confrontation and he has not shown plain error. See *id*. at 10-11. Furthermore, because the testimony in question did not violate the Confrontation Clause, any objection on this basis would have been futile, and defense counsel is not ineffective for failing to make a futile objection. *Eisen*, 296 Mich App at 329. In short, defendant was not denied his right of confrontation and he was not denied the effective assistance of counsel on this basis.

Next, in a Standard 4 brief,[4] defendant contends he was denied the effective assistance of counsel on other grounds. In particular, defendants contends that counsel rendered ineffective assistance by failing to call defendant's brother as a witness, failing to object to testimony that Officer Ford obtained defendant's name from the crime reporting system CRISNET, and failing to properly cross-examine witnesses.

Because defendant failed to move for a new trial or a *Ginther* hearing, our review of his ineffective-assistance claim is limited to mistakes apparent on the record. *Chambers*, 277 Mich App at 10. To establish

[4] See Administrative Order No. 2004-6.

ineffective assistance of counsel, a defendant must show that "(1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant." *People v Heft*, 299 Mich App 69, 80-81; 829 NW2d 266 (2012). A "defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different." *Id*. at 81. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *Eisen*, 296 Mich App at 329. Defendant also "bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Decisions regarding whether to call or question a witness are presumed to be matters of trial strategy. *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). Trial counsel's failure to a call a witness is only considered ineffective assistance if it deprived the defendant of a substantial defense. *Id*. A substantial defense is one that could have affected the outcome of the trial. See *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Likewise, decisions regarding what evidence to present, what evidence to highlight during closing argument, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). This Court will not "second-guess counsel on matters of trial strategy," nor will it "assess counsel's competence with the benefit of hindsight." *Russell*, 297 Mich App at 716.

Defendant first contends that trial counsel was ineffective for not calling defendant's brother as a witness. Defendant contends that his brother would

have testified that he was in possession of defendant's cellular telephone on the night of the shooting, which is why the phone registered at the cell tower located on Central Avenue, within close proximity to the scene of the crime and quite a distance from the house where defendant claimed to be at the time of the shooting. This argument fails, however, because the record is devoid of any indication regarding the potential testimony of defendant's brother. Particularly, nothing in the record suggests that defendant's brother would have testified that he was in possession of defendant's phone on the night of the shooting. Consequently, defendant has failed to establish the factual predicate for his claim, and he has not overcome the presumption that his counsel's decision was a matter of sound trial strategy. Further, defendant has not shown that the failure to call defendant's brother as a witness denied him a substantial defense because defense counsel in fact presented two alibi witnesses who testified that defendant was not in the area of the murder. On the record presented, defendant has not shown that the failure to call his brother as a witness constituted ineffective assistance.

Defendant next contends that trial counsel was ineffective for failing to "challenge the prosecution's witnesses for truthfulness, accuracy and contradiction concerning testimony given." In particular, defendant argues that trial counsel was ineffective for failing to "stress" to the jury that, upon viewing an earlier photographic array, Donald Davie had identified someone other than defendant as the person who had shot him. Defendant likewise contends that counsel was ineffective for failing to reveal the bias that witness Layman Giddings held against defendant, and that trial counsel was ineffective for failing to discredit Stephen Lewis's version of the events. Defendant's

arguments in this regard are factually unsupported. The record demonstrates that trial counsel thoroughly cross-examined Davie regarding his misidentification of a man named Michael Terry and discussed the issue during closing arguments, plainly bringing this issue to the jury's attention. Further, defendant's counsel questioned Giddings regarding his bias against defendant, prompting Giddings to admit that he told police he "never liked" defendant. Similarly, trial counsel thoroughly cross-examined Lewis regarding his testimony about how the shooting occurred. Particularly, defense counsel impeached Lewis's testimony with a prior inconsistent statement Lewis made to police, and highlighted those inconsistencies during closing arguments. We see nothing unreasonable in defense counsel's performance in this regard. Moreover, on the record presented, it is not probable that additional questioning on these issues would have altered the trial's outcome, given that there were ultimately several eyewitnesses who identified defendant as the shooter and that his cellular telephone placed him in close proximity to the scene. Defendant has not shown that he was denied the effective assistance of counsel.

Defendant also contends that he was denied the effective assistance of counsel by the failure to object to Officer Ford's testimony that he found defendant's information on the CRISNET reporting system. Apart from the unsubstantiated and undeveloped assertion that Ford's use of CRISNET was somehow "discriminatory" and "illegal[]," defendant has failed to specify on which ground counsel should have objected, meaning his claim in this regard may be considered abandoned. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Indeed, defendant has not advanced any basis on which counsel could have objected or explained why the testimony was improper.

Under these circumstances, defendant has not shown that trial counsel's performance fell below an objective standard of reasonableness or that, but for counsel's performance, there was a reasonable probability of a different outcome. He was not denied the effective assistance of counsel.

Defendant also asserts that he is entitled to reversal of his armed-robbery conviction because the jury verdict was inconsistent. Specifically, defendant claims that the jury rendered an inconsistent verdict by convicting defendant of armed robbery and second-degree murder while at the same time acquitting defendant of first-degree felony murder. Even assuming inconsistency, defendant is not entitled to relief because inconsistent verdicts within a single jury trial are permissible and do not require reversal. *People v Wilson*, 496 Mich 91, 100-101; 852 NW2d 134 (2014). "[J]uries are not held to any rules of logic nor are they required to explain their decisions." *Id*. at 101 (citation and quotation marks omitted). Although defendant complains of a purported inconsistency, he makes no effort to establish that the jury was confused, that they misunderstood the instructions, or that the jury engaged in an impermissible compromise. See *People v Lewis*, 415 Mich 443, 450-452; 330 NW2d 16 (1982); *People v McKinley*, 168 Mich App 496, 510-511; 425 NW2d 460 (1988). Absent such circumstances, inconsistent verdicts within a single jury are permissible, and defendant is not entitled to reversal of his convictions. See *Wilson*, 496 Mich at 100-101.

Affirmed.

MURRAY, P.J., and HOEKSTRA and WILDER, JJ., concurred.

PEOPLE v TRIPLETT

Docket No. 318051. Submitted February 10, 2015, at Grand Rapids. Decided February 19, 2015, at 9:10 a.m. Leave to appeal sought.

Jason Eric Triplett was convicted following a jury trial in the Allegan Circuit Court of domestic assault, MCL 750.81(2), and unlawfully carrying a concealed weapon (CCW), MCL 750.227(1). He was acquitted of one charge of felonious assault, MCL 750.82. The court, Kevin W. Cronin, J., had instructed the jury that it could consider self-defense and defense of others in relation to the felonious assault charge, but that self-defense is not a defense to a CCW charge. Defendant appealed.

The Court of Appeals *held*:

The *mens rea* requirement of the CCW statute does not extend to the defendant's purpose for carrying the concealed weapon. Therefore, a defendant's purpose in concealing a weapon is irrelevant and cannot be a defense against a CCW charge. Accordingly, the trial court did not err by instructing the jury that self-defense is not a defense to a CCW charge.

Affirmed.

CRIMINAL LAW — UNLAWFULLY CARRYING A CONCEALED WEAPON — DEFENSES — SELF-DEFENSE.

Self-defense is not an available defense to a charge of unlawfully carrying a concealed weapon (MCL 750.227).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Michael L. Mittlestat*) for defendant.

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

PER CURIAM. During a late-night altercation with two men who intervened after witnessing defendant's apparent assault of his wife, defendant pulled out a knife. Although defendant was acquitted of felonious assault against these Good Samaritans, a jury convicted him of domestic assault, MCL 750.81(2), and unlawfully carrying a concealed weapon (CCW), MCL 750.227(1). Defendant contends that his CCW conviction must be reversed because the trial court affirmatively instructed the jury that the law of self-defense did not apply to the CCW charge. Self-defense is not an available defense to a CCW charge. We therefore affirm.

I. BACKGROUND

On the evening of the offense, defendant and his wife had attended a party. They agree that the wife was irate when defendant forced her to return home. The wife was extremely intoxicated and left the couple's home on foot to return to the party. Shortly thereafter, defendant followed her in a vehicle. Defendant and his wife admitted that they engaged in a shoving match in the roadway when the wife refused to enter defendant's vehicle. Two men driving down the road witnessed this scuffle and, believing defendant was the aggressor, stopped to assist the wife. They offered the wife a ride and she entered their vehicle. Defendant attempted to explain the situation and remove his wife from the car, but one of the men stopped him. Defendant and the man then began to struggle. Defendant asserted that the man tried to choke him and so he pulled out a knife to protect himself. He described the weapon as a utility knife with a two-inch blade. Defendant's wife corroborated his version of events. The jury apparently accepted defendant's claim that he wielded the knife to protect

himself from the man who believed he was intervening to protect a woman from assault. But the jury clearly did not accept defendant's explanation for the domestic assault and CCW charges.

II. ANALYSIS

Defendant contends that the trial court erroneously instructed the jury that self-defense is not a defense against a CCW charge. Specifically, after instructing the jury on the elements of the CCW offense, the court described, "It does not matter if the defendant was carrying a weapon for his own protection. Self defense is not a defense to the charge of carrying a concealed weapon." This instruction was consistent with M Crim JI 11.8. The court immediately informed the jury that it could consider self-defense and defense of others in relation to the felonious assault charge.

Self-defense is an affirmative defense that admits but excuses the commission of a criminal offense. *People v Dupree*, 486 Mich 693, 704 & n 11; 788 NW2d 399 (2010). Defendant invites us to extend the holdings of two recent Michigan Supreme Court cases regarding the use of self-defense. In *Dupree*, the Supreme Court held that common-law self-defense may be relied upon to excuse a felon-in-possession-of-a-firearm offense. *Id*. at 696-697. In *People v Moreno*, 491 Mich 38; 814 NW2d 624 (2012), the Court concluded that a person may lawfully resist an illegal arrest, i.e., use self-defense against law enforcement.

However, this Court previously has ruled that self-defense is not a defense to CCW. *People v Townsel*, 13 Mich App 600, 601; 164 NW2d 776 (1968). And in *People v Hernandez-Garcia*, 477 Mich 1039, 1039-1040 (2007), the Supreme Court similarly ruled that "momentary innocent possession of a concealed weapon is

not a defense" to a CCW charge. The Court reasoned that because the *mens rea* requirement of the CCW statute "does not extend to the defendant's purpose for carrying the concealed weapon," a defendant's purpose for concealing a weapon is irrelevant and cannot be a defense against a CCW charge. *Id*. at 1040 n 1. This rationale extends to the application of self-defense to a CCW charge. Because a defendant's purpose for concealing a weapon cannot be a defense against CCW, then it would be no defense if a defendant concealed a weapon for the purpose of self-defense.

Given this Court's decision in *Townsel* and the Supreme Court's analysis in *Hernandez-Garcia*, we decline defendant's invitation to extend *Dupree* and *Moreno* in the current case. Therefore, we cannot fault the trial court for its instruction.

Defendant also contends that defense counsel was ineffective for failing to object to the trial court's instruction. Counsel cannot be deemed ineffective for failing to raise a novel legal argument, *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996), or failing to make a futile objection. *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007).

We affirm.

BECKERING, P.J., and BORRELLO and GLEICHER, JJ., concurred.

PACE v EDEL-HARRELSON

Docket No. 319223. Submitted January 9, 2015, at Lansing. Decided February 24, 2015, at 9:00 a.m. Leave to appeal sought.

Barbara Pace brought an action in the Eaton Circuit Court against Jessica Edel-Harrelson, Christy Long, and SIREN/Eaton Shelter, Inc. (SIREN), claiming that she was discharged in violation of public policy and the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. Plaintiff had worked for SIREN. Plaintiff alleged that while she was employed there, Long, who was a coworker, told her that she intended to use grant funds that SIREN had received for other purposes to purchase a stove for Long's daughter. Plaintiff claimed that she reported this conversation to her superiors at SIREN, including Edel-Harrelson, SIREN's executive director. Edel-Harrelson later fired plaintiff, claiming the termination was based on unrelated misconduct by plaintiff. Plaintiff filed suit alleging that she was terminated because she reported Long's alleged intent to misuse the grant funds. Defendants moved for summary disposition under MCR 2.116(C)(10). The court, Conrad J. Sindt, J., granted defendants' motion. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 15.362, an employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee reports or is about to report a violation or a suspected violation of a law to a public body. To establish a prima facie case under the statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action. With regard to whether plaintiff engaged in protected conduct, plaintiff allegedly reported a suspected violation of Michigan's embezzlement statute, MCL 750.174. Plaintiff's deposition testimony was sufficient to permit a jury to conclude that plaintiff reasonably suspected a violation of law, whether the violation was completed or actively planned. Defendants also contended that plaintiff could not establish a causal connection between her alleged protected activity and her

discharge. Establishing causation in a WPA claim requires application of the burden-shifting analysis articulated in *McDonnell Douglas Corp v Green*, 411 US 792 (1973). In this case, the basis for plaintiff's termination was a disputed factual issue. The weight to be given to the conflicting evidence presented a question for the finder of fact. Accordingly, the trial court erred by granting summary disposition in favor of defendants on plaintiff's WPA claim.

2. The WPA provides the exclusive remedy for retaliatory-discharge claims and consequently preempts common-law public-policy claims arising from the same activity. However, if the WPA does not apply, it provides no remedy and there is no preemption. Because plaintiff established her prima facie case under the WPA, the trial court correctly granted summary disposition in favor of defendants on plaintiff's discharge against public policy claim, albeit for the wrong reason.

Trial court's grant of summary disposition in favor of defendants on plaintiff's WPA claim reversed; trial court's grant of summary disposition in favor of defendants on plaintiff's claim of discharge against public policy affirmed.

ACTIONS — WHISTLEBLOWERS' PROTECTION ACT — PROTECTED ACTIVITY — REPORTING SUSPECTED VIOLATIONS OF LAW.

Under MCL 15.362 of the Whistleblowers' Protection Act, an employer shall not discharge, threaten, or otherwise discriminate against an employee because the employee reports or is about to report a violation or a suspected violation of a law to a public body; to establish a prima facie case under the statute, a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action; protected activity includes reporting a suspected a violation of law, whether the violation has been completed or is actively planned.

Law Offices of Lisa C. Ward, PLLC (by *Lisa C. Ward* and *Nicole J. Schmidtke*), for plaintiff.

Nemier, Mathieu & Johnson, PLLC (by *Mark R. Johnson* and *Michelle E. Mathieu*), and *Foley & Mansfield, PLLP* (by *Greg M. Meihn* and *Melinda A. Balian*), for defendants.

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

SHAPIRO, P.J. In this employment termination case, plaintiff Barbara Pace appeals by right the trial court order granting summary disposition in favor of defendants under MCR 2.116(C)(10) (no genuine issue of material fact) on plaintiff's two claims: (1) that her employment was terminated in violation of the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*., and, alternatively, (2) that her discharge was against public policy. For the reasons discussed in this opinion, we reverse the trial court's grant of summary disposition on the WPA claim, but affirm the trial court's grant of summary disposition on the claim of discharge against public policy.

I. FACTS

Defendants in this action are: SIREN/Eaton Shelter, Inc. (SIREN), an organization devoted to helping domestic violence victims and the homeless in Eaton County; Jessica Edel-Harrelson, SIREN's executive director; and Christy Long, a SIREN caseworker, who was one of plaintiff's former coworkers. In January 2012, plaintiff was terminated from her position as a domestic violence transitional supportive housing coordinator and advocate with SIREN. In this position, plaintiff was responsible for using state grant funds to assist domestic violence victims in finding permanent housing as well as providing other services. Plaintiff was allowed to use grant funds to purchase housing items for SIREN clients. Plaintiff testified that when she purchased a housing item for a client using grant funds, she wrote the client's name on the back of the receipt and submitted the receipt to Long. Plaintiff

stated that Long was in charge of tracking the expenditures related to each grant.

Plaintiff testified that, in August 2011, she became concerned about what she viewed as discrepancies in grant records; she believed that grant money was being used to make unauthorized purchases. Plaintiff claimed that she discussed her concerns with Edel-Harrelson. However, Edel-Harrelson testified that no such discussion ever took place. She did acknowledge that plaintiff asked her for "clarification" concerning alleged grant discrepancies.

Plaintiff testified that, on December 9, 2011, Long came to her and stated that she knew there was money remaining in a certain grant fund. Plaintiff stated that Long told her that Long's daughter needed a new stove but could not afford one. Plaintiff claimed that Long then told her she was going to use grant money to purchase the stove for her daughter; plaintiff felt that Long implied that plaintiff should document the transaction in an attempt to cover up the unauthorized purchase. At her deposition, Long denied ever using grant funds for this purpose, or indeed ever discussing such a purchase with plaintiff.

Plaintiff testified that, following this conversation with Long, she immediately contacted Nancy Oliver, Edel-Harrelson's predecessor as the director of SIREN, to discuss the situation. Oliver suggested that plaintiff contact her supervisors, Carol Chandler and Martha Miller. According to plaintiff, she called Chandler and spoke with her for approximately 45 minutes, after which Chandler stated that she would report the matter to Miller and take care of the situation. Plaintiff stated that this procedure observed SIREN's chain of command for reporting such issues.

Plaintiff testified that she was unsatisfied with the lack of action and so, in late December 2011 or early January 2012, she reported her suspicions directly to Edel-Harrelson. She stated that, at that time, she believed that Long had already purchased the stove with grant funds. Plaintiff claimed that Edel-Harrelson told her that she would look into the matter and discuss it with Chandler and Miller. However, in her deposition, Edel-Harrelson claimed to have no recollection of this discussion with plaintiff. Edel-Harrelson also testified that she had not been approached by Chandler or Miller regarding plaintiff's claim; indeed, she stated that she had no knowledge of the alleged conversation between plaintiff and Long. Edel-Harrelson did eventually investigate plaintiff's claim against Long and found no wrongdoing; however, that investigation occurred only after plaintiff filed her complaint in the instant action in April 2012.[1]

On January 18, 2012, plaintiff's employment with SIREN was terminated after ten years of what she characterizes as "loyal service and a spotless employment record . . . ." In this action, plaintiff alleges that her employment was illegally terminated for reporting Long's violation or planned violation of law to Edel-Harrelson. Plaintiff also claimed that her reporting resulted in harassment, which she identified as "snide comments" and "eye piercing dirty looks" from a former

[1] There is conflicting evidence regarding whether Long ever purchased the stove in question. Plaintiff cited a receipt for a washer, dated May 21, 2012, that contained a notation stating "05/23/12 — Stove picked up[.]" However, in a letter dated April 22, 2013 (after plaintiff filed the instant complaint), the president of the subject vendor asserted that the "stove" notation was a clerical error and should have referred to the washer described in the receipt; an updated receipt was provided with the correct notation. Plaintiff also asserts that because SIREN had a line of credit with this vendor, it is possible that Long purchased the stove without leaving a paper trail.

SIREN employee who had returned to volunteer, and Long being rude to her when she asked about vision insurance.

SIREN's stated reason for terminating plaintiff's employment was plaintiff's own allegedly harassing and intimidating behavior toward a fellow employee. A letter addressed to plaintiff from Edel-Harrelson, dated January 22, 2012, states in relevant part:

> I regret to inform you that you are released from employment with SIREN/Eaton Shelter effective January 21, 2012.
>
> The reason for your termination is as follows: On Thursday, January 12, 2012, you engaged in behavior that resulted in fear and intimidation in co-workers, and which was witnessed by three employees. This behavior is in direct violation of SIREN/Eaton Shelter's policy Section 13.2, 13.2 Sub-section 6, and Section 13.3.
>
> As outlined in the agency policies, Section 13.2 states that conduct which may jeopardize personal safety, security or the welfare of the agency or its employees is prohibited. Any type of workplace violence or intimidation committed by employees will not be tolerated. Subsection 6 states that employees shall refrain from aggressive or hostile behavior that frightens, distresses, or creates reasonable fear of injury to another person. Section 13.3 states that all employees are entitled to a work environment free from behavior that is disruptive or that interferes with employee ability to perform their duties.

Defendants presented evidence to support this reason for plaintiff's termination. On or about January 10, 2012, plaintiff, in the presence of witnesses, made an inappropriate comment to a coworker. Plaintiff admitted making the comment as a joke. When Carol Hatch, a coworker who witnessed the comment, told plaintiff that the remark had been inappropriate, plaintiff asked

if Hatch wished to go "toe to toe" with her.[2] The incident was reported to Miller, plaintiff's supervisor, who discussed the incident the next day with Edel-Harrelson. Edel-Harrelson testified that she originally advised Miller to proceed with a formal write-up, but upon further consideration, directed Miller to issue plaintiff a verbal warning.

According to Edel-Harrelson, Miller met with plaintiff on January 12, 2012, to deliver the verbal warning. Edel-Harrelson testified that plaintiff became angry and walked out of the meeting. After leaving the meeting, plaintiff apparently approached Hatch in the case managers' office. Hatch averred that in the presence of two other case managers, Cheryl Tisdale and Elaine Shegitz, plaintiff "came into my office space . . . toward me with clenched fists, aggressively." Hatch stated that plaintiff "said to me 'I hope you're happy, I just quit because of you.' She kicked the boxes inside the doors, twice, very hard, and I thought she was going to come toward me. I responded to her comment, 'No, I'm afraid.' " Hatch then took the rest of the day off, as well as the following day, "because I was feeling very shaken, threatened and vulnerable to attack by [plaintiff]'s rage toward me." Shegitz averred that plaintiff "stomped into the office, angry, with her hands clenched" and "glared" at Hatch, saying "something to [Hatch] along the lines of 'Thanks a lot . . . .' " However, Shegitz did not state that plaintiff kicked boxes or physically advanced on Hatch. Plaintiff categorically denied that she engaged in any physically intimidating behavior; indeed, she denied that she ever went into Hatch's work area after the meeting. After the meeting about the verbal warning,

[2] Plaintiff characterized this statement not as an invitation to physical violence, but "to go toe to toe in regards to what [Hatch] wasn't doing and what she was doing in regards to the paperwork."

plaintiff acknowledged that she was "upset" and walked back to her office and "slammed [her] door." She denied that she threw or kicked anything.

After consulting with SIREN's personnel committee, Edel-Harrelson decided to terminate plaintiff's employment for the reasons cited in the January 22, 2012 letter. Plaintiff was informed of her firing in a meeting with Edel-Harrelson and Miller on January 18, 2012, and her employment was formally terminated on January 21, 2012.

On April 12, 2012, plaintiff brought the instant action, alleging two counts: that her termination was in violation of the WPA and constituted a retaliatory discharge in violation of public policy. On August 21, 2013, defendants moved for summary disposition, arguing that plaintiff could not establish a prima facie case under the WPA because (1) no conduct had occurred that could be considered a violation or suspected violation of law and, therefore, plaintiff had not engaged in protected activity, and (2) plaintiff could not establish a causal connection between her alleged report of a suspected violation of law and her termination. Defendants further argued that there was no applicable public policy basis to support plaintiff's claim of discharge against public policy.

On November 6, 2013, the trial court granted summary disposition in favor of defendants, ruling that plaintiff failed to establish that a violation or suspected violation of law occurred and that there was no public policy basis on which to assert her claim of discharge against public policy.

II. WHISTLEBLOWERS' PROTECTION ACT

Plaintiff argues that the trial court erred by granting defendants' motion for summary disposition on her

WPA claim. We agree.[3]

"The WPA provides a remedy for an employee who suffers retaliation for reporting or planning to report a suspected violation of a law, regulation, or rule to a public body." *Anzaldua v Neogen Corp*, 292 Mich App 626, 630; 808 NW2d 804 (2011). "The underlying purpose of the WPA is protection of the public. The statute meets this objective by protecting the whistleblowing employee and by removing barriers that may interdict employee efforts to report violations or suspected violations of the law." *Id*. at 631 (quotation marks and citations omitted). Additionally, "[t]he WPA is a remedial statute and must be liberally construed to favor the persons that the Legislature intended to benefit." *Id*.

MCL 15.362 provides:

> *An employer shall not discharge*, threaten, or otherwise discriminate against *an employee* regarding the employee's compensation, terms, conditions, location, or privi-

[3] This Court reviews de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). "When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party." *Id*. at 509-510. All reasonable inferences are to be drawn in favor of the nonmoving party. *Dextrom v Wexford Co*, 287 Mich App 406, 415; 789 NW2d 211 (2010). "Summary disposition is proper under MCR 2.116(C)(10) if the documentary evidence shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Ernsting*, 274 Mich App at 509. "This Court is liberal in finding genuine issues of material fact." *Jimkoski v Shupe*, 282 Mich App 1, 5; 763 NW2d 1 (2008). "A genuine issue of material fact exists when the record, giving the benefit of any reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ." *Ernsting*, 274 Mich App at 510. Questions of statutory interpretation are also reviewed de novo. *PNC Nat'l Bank Ass'n v Treasury Dep't*, 285 Mich App 504, 505; 778 NW2d 282 (2009).

> leges of employment *because the employee*, or a person acting on behalf of the employee, *reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule* promulgated pursuant to law of this state, a political subdivision of this state, or the United States *to a public body*, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. [Emphasis added.]

" 'To establish a prima facie case under [MCL 15.362], a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action.' " *Shaw v Ecorse*, 283 Mich App 1, 8; 770 NW2d 31 (2009), quoting *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). In this case, it is undisputed that plaintiff was discharged from her employment, thus satisfying the second element.[4]

A. PROTECTED ACTIVITY

In their motion for summary disposition, defendants argued, and the trial court later agreed, that plaintiff had not engaged in protected activity because, at most, she reported a "possible future violation" of the law, not a "violation or a suspected violation" of law and that, even taking plaintiff's deposition testimony as true, Long merely announced her intention to commit a violation of law in the future, which was insufficient to constitute either the crime of embezzlement or attempted embezzlement.

---

[4] Defendants have conceded, in the trial court and on appeal, that SIREN is a "public body" for purposes of the WPA.

Contrary to the parties' contention, this case does not present an issue of first impression. In *Debano-Griffin v Lake Co*, 486 Mich 938 (2010),[5] the Supreme Court reversed this Court's opinion holding that the plaintiff had not engaged in protected activity under the WPA. See *Debano-Griffin v Lake Co*, unpublished opinion per curiam of the Court of Appeals, issued October 15, 2009 (Docket No. 282921). In that case, the plaintiff's employment was terminated after she reported what she believed were unlawful transfers of county funds from an ambulance fund into a 911 fund. *Id*. at 1-2. This Court concluded that the plaintiff had not engaged in "protected activity," writing:

> Because plaintiff had only a subjective belief that defendants' activities or suspected activities violated unspecified "governing rules" (which may indeed have just been the suggestions of 911 directors she had been in contact with on how to make sure ambulance service was efficiently provided), and because she could not identify what law, rule, or regulation had been violated by the movement of funds from the ambulance account to another county account, she failed to establish the prima facie elements of a claim under the WPA. [*Id*. at 4.]

In lieu of granting the plaintiff's application for leave to appeal, the Supreme Court reversed, writing:

> The Court of Appeals erred in holding that the plaintiff was not engaged in protected activity under the Whistleblowers Protection Act (WPA), MCL 15.361 *et seq*. Reporting a "suspected violation of a law" is protected activity. MCL 15.362. MCL 211.24f(2)(d) requires the ballot to

[5] "An order of [the Michigan Supreme] Court is binding precedent if it constitutes a final disposition of an application and contains a concise statement of the applicable facts and reasons for the decision." *DeFrain v State Farm Mut Auto Ins Co*, 491 Mich 359, 369; 817 NW2d 504 (2012). These requirements are satisfied in regard to the Supreme Court's order in *Debano-Griffin*, 486 Mich 938.

> include "[a] clear statement of the purpose for the millage." In *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 533 n 23, 534 [734 NW2d 533] (2007), this Court, relying on this statutory language, held that "funds derived from levies must be used for the purpose stated in the ballot," and that using such funds for another purpose would "violate the law." See also, MCL 750.489; MCL 750.490; MCL 141.439. Accordingly, when the plaintiff reported her concerns that the ambulance funds were being used for purposes other than those stated in the ballot, the plaintiff was reporting a "suspected violation of a law," and, thus, was engaged in protected activity. Because the plaintiff reported a suspected violation of an *actual* law, it is unnecessary to address whether the reporting of a suspected violation of a *suspected* law constitutes protected activity. [*Debano-Griffin*, 486 Mich at 938.]

As in *Debano-Griffin*, this case does not involve a suspected violation of a *suspected* law. It concerns a suspected violation of an actual law. Defendants do not argue that if Long purchased a stove for her daughter with grant funds (or took sufficient steps to constitute an attempt of such a purchase), she would not have committed the crime of embezzlement (or attempted embezzlement). See MCL 750.174. This case then turns on whether plaintiff reported a "suspected violation of a law." MCL 15.362. By protecting employees who report a "violation or a suspected violation" of a law, the Legislature did not intend that an employee must report an *actual* violation of law. See *Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009) (noting that a statute must be read as a whole and effect should be given to every phrase, clause, and word in the statute). Had the Legislature so intended, it need not have included the phrase "suspected violation" at all.

In her deposition, plaintiff stated that at the time of her report, she believed Long had purchased the stove. Therefore, defendants' argument that plaintiff only suspected that Long might do so in the future is inconsistent with the record. More broadly, we reject defendants' suggestion that, when an employee has a good faith and reasonable belief that a violation of the law has *either* already occurred *or* is being actively planned, the report of that belief is insufficient to trigger the protections of the WPA. Defendants' argument suggests that no matter how serious a violation is being planned, an employee who learns of the plan must (a) report the planned violation without the benefit of the protections the Legislature provided in the WPA, (b) remain silent until the violation occurs, or (c) undertake his or her own investigation to determine whether and when the planned violation has been completed. The first two options are inconsistent with the language of the WPA and the third option would be foolish, if not dangerous and potentially unlawful. Requiring that an employee wait until he or she is certain that the violation is complete is also inconsistent with the intent of the WPA, i.e., the *protection* of the public. *Anzaldua*, 292 Mich App at 631. The WPA meets this goal by protecting "employee efforts to report violations or suspected violations of the law." *Id*. (quotation marks and citation omitted).

Defendants argue and offer testimony that the conversation between plaintiff and Long never occurred. However, the law requires that we view plaintiff's deposition testimony in the light most favorable to her for purposes of defendants' motion under MCR 2.116(C)(10). *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007). Ultimately, a jury must make the factual determination of whether or not the conversation occurred and, if so, what was said.

However, the conversation between plaintiff and Long, *as plaintiff testified to in her deposition*, is sufficient to allow a jury to conclude that plaintiff reasonably suspected a violation of law, whether completed or actively planned. Thus, viewing the evidence in the light most favorably to plaintiff, she "reported a suspected violation of an *actual* law," which constitutes "protected activity" and is sufficient to establish the first element of a prima facie case under the WPA. *Debano-Griffin*, 486 Mich at 938. The trial court erred by ruling to the contrary.

B. CAUSAL CONNECTION

In their motion for summary disposition, defendants also argued that plaintiff could not establish the necessary causal connection between her alleged protected activity and her termination. Although the trial court did not rule on this issue, we are inclined to address it. See *Heydon v MediaOne*, 275 Mich App 267, 278; 739 NW2d 373 (2007) (holding that this Court may address an issue not ruled on by the trial court if it presents a question of law and all the facts necessary for its resolution have been presented). And we conclude that questions of fact exist regarding causation sufficient to render summary disposition under MCR 2.116(C)(10) inappropriate on this alternative basis.

Establishing causation in a WPA claim requires application of the burden-shifting analysis articulated in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Debano-Griffin v Lake Co*, 493 Mich 167, 175-176; 828 NW2d 634 (2013).

> Absent direct evidence of retaliation, a plaintiff must rely on indirect evidence of his or her employer's unlawful motivations to show that a causal link exists between the whistleblowing act and the employer's adverse employ-

> ment action. A plaintiff may present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful [retaliation]. Once a plaintiff establishes a prima facie case, a presumption of [retaliation] arises because an employer's adverse action is more likely than not based on the consideration of impermissible factors—for example, [a] plaintiff's protected activity under the WPA—if the employer cannot otherwise justify the adverse employment action.
>
> The employer, however, may be entitled to summary disposition if it offers a legitimate reason for its action and the plaintiff fails to show that a reasonable fact-finder could still conclude that the plaintiff's protected activity was a "motivating factor" for the employer's adverse action. [A] plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful retaliation]. [*Id*. at 176 (quotation marks and citations omitted; most alterations in original).]

Plaintiff appears to concede that she has not advanced direct evidence of retaliation. As discussed, plaintiff asserts that she was terminated for reporting Long's violation or planned violation of law, and defendants rebut that assertion by claiming that plaintiff was terminated for physically intimidating her coworkers. However, both of these factual assertions are far from established. Long claims that she never told plaintiff that she planned to buy her daughter a stove with grant funds, and Edel-Harrelson claims that plaintiff never reported to her such a conversation. By contrast, the allegation that plaintiff engaged in physically intimidating behavior is supported by Hatch's affidavit, but plaintiff claims that she did not engage in physically intimidating behavior toward Hatch. Shegitz's affidavit, which defendants purport corroborates Hatch's account, is unpersuasive. Shegitz only averred

that she witnessed plaintiff "glare[]" at Hatch and say something "along the lines of 'Thanks a lot,' " but could not "recall the rest." Put simply, both asserted reasons for plaintiff's termination are grounded in conflicting testimony and questions of witness credibility. The weight to be given to this conflicting evidence is a question reserved for the finder of fact. See, e.g., *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009).

These factual uncertainties must be resolved before conducting a meaningful burden-shifting analysis under *McDonnell Douglas*. Nonetheless, defendants argue that, even viewing the facts in the light most favorable to plaintiff, she cannot establish a causal connection between her alleged protected activity and her termination. Defendants assert that plaintiff has established no more than a temporal relationship between her claimed reporting of her conversation with Long and her termination and note that "a temporal relationship, standing alone, does not demonstrate a causal connection between the protected activity and any adverse employment action." *West*, 469 Mich at 186. However, viewing the evidence in the light most favorable to plaintiff, her causation argument is not simply based upon a temporal relationship. She claims, and has testified, that the events for which defendants claim she was terminated never occurred. If the jury finds her credible and concludes that defendants' asserted reason for firing her was false, then it would obviously be proper for the jury to conclude that defendants' asserted basis for the firing was pretextual. Indeed, if the jury concludes that defendants invented an untrue incident as a basis to fire plaintiff, then it is difficult to see how they could conclude that it was *not* pretextual.

In sum, the issue of causation presents a genuine factual dispute and, therefore, the trial court improperly granted summary disposition in favor of defendants on plaintiff's WPA claim. See *Auto Club Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999) ("The existence of [a] factual dispute means that summary disposition was improperly granted to defendant.").

III. DISCHARGE AGAINST PUBLIC POLICY

Before the trial court and on appeal, plaintiff acknowledged that her claim of discharge against public policy was pleaded in the alternative to her WPA claim and that we would only need to address her public policy claim if we were to affirm the trial court's grant of summary disposition in favor of defendants on her WPA claim. In other words, plaintiff concedes that her public policy claim need only be allowed to proceed if she fails to establish a prima facie case under the WPA. This position is consistent with the applicable law. See *Anzaldua*, 292 Mich App at 631 ("The WPA provides the exclusive remedy for such retaliatory discharge and consequently preempts common-law public-policy claims arising from the same activity. However, if the WPA does not apply, it provides no remedy and there is no preemption.") (citations omitted). Accordingly, we affirm the trial court's grant of summary disposition in favor of defendants on plaintiff's public policy claim and need not address the merits of that decision. See *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000) (stating that this Court need not reverse a trial court's ruling when it reached the right result, even if for the wrong reason).

We reverse the trial court's grant of summary disposition in favor of defendants on plaintiff's WPA claim

and remand for proceedings consistent with this opinion. We affirm the trial court's grant of summary disposition in favor of defendants on plaintiff's claim of discharge against public policy. We do not retain jurisdiction.

GLEICHER and RONAYNE KRAUSE, JJ., concurred with SHAPIRO, P.J.

In re KMN

Docket Nos. 322329 and 322883. Submitted January 7, 2015, at Grand Rapids. Decided February 26, 2015. Leave to appeal denied 497 Mich 1041.

Petitioners sought to adopt KMN, an infant, in the Newaygo Circuit Court, Family Division, after KMN had been removed from her mother's home in a separate proceeding on allegations of abuse and neglect. In that proceeding, which remained ongoing when the adoption petition was filed, KMN's father was identified as a member of the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians (the Tribe), and he agreed to the termination of his parental rights. The Tribe intervened in both proceedings, and KMN was placed with relatives who were members of the Tribe. Petitioners were joined by KMN's mother in filing a brief in support of their petition to adopt KMN, while the Tribe opposed the petition on the ground that, under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*., KMN should be placed with relatives who were members of the Tribe instead of petitioners, who were not related to KMN and were not members of an Indian tribe. After a hearing, the court, Terrence R. Thomas, J., entered orders terminating the parental rights of KMN's mother, reflecting the mother's consent to the petition for adoption, and transferring KMN to preadoption placement with petitioners. The Tribe filed a petition for rehearing on the grounds that the placement violated ICWA and MIFPA, that a tribal family wished to adopt KMN and had just filed a petition to do so, and that although no one in the Tribe had petitioned for adoption of KMN before the hearing, no one could have done so while the abuse and neglect case was pending. The Department of Human Services (DHS) filed a motion for reconsideration arguing that the trial court had violated MIFPA. The court denied the petition for rehearing, the motion for reconsideration, and the petition for adoption filed by the tribal family, and granted the request for the Tribe to pay the attorney fees of petitioners and KMN's mother under MCR 3.206(C)(1). The following month, the court entered

an order allowing petitioners to adopt KMN, which the Tribe appealed in Docket No. 322883. The Tribe appealed the earlier orders in Docket No. 322329.

The Court of Appeals *held*:

1. The trial court correctly found that KMN was an Indian child as defined by both ICWA and MIFPA. Although the court made somewhat inconsistent statements as to its conclusion on this factor, a court speaks through its written orders and judgments, not through its oral pronouncements, and the court's written orders demonstrated that the trial court found that KMN was an Indian child.

2. The trial court did not err by failing to either apply the adoptive placement preferences in ICWA or find good cause for disregarding those preferences. 25 USC 1915(a) provides that in any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with a member of the child's extended family, other members of the Indian child's tribe, or other Indian families. The United States Supreme Court has held that these placement preferences are inapplicable in cases where no alternative party has formally sought to adopt the child because there is no preference to apply if no alternative party that is eligible to be preferred under 25 USC 1915(a) has come forward. At the time of the hearing, petitioners were the only couple that had formally sought to adopt KMN. Although the Tribe's attorney stated on the record that there was an Indian relative ready, willing, and able to adopt KMN, that relative had not formally sought to adopt her, and the Tribe did not request an adjournment under MCL 710.25(2) to allow the relative to file a competing petition for adoption. Absent a pending adoption petition of an alternative party that was eligible to be preferred under 25 USC 1915(a), there was no ICWA preference to apply at the time of the hearing.

3. The trial court erred by failing to place KMN in one of the potential placements set forth in MIFPA, by concluding that the preference of KMN's mother constituted good cause for disregarding MIFPA's list of preferred placements, and by failing to give meaningful consideration to KMN's possible placement with her extended family as MIFPA requires. Under MCL 712B.23(2), MIFPA requires that, absent good cause, the adoptive placement must be either with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, in that order of preference. Because petitioners had no familial connection to KMN, were not connected to the Tribe, and were not an Indian family, MIFPA precluded the trial court from placing KMN

with petitioners absent a finding of good cause. MCL 712B.23(5) provides that a court's determination of good cause to not follow the order of preference must be based on a request that was made by a child of sufficient age or a circumstance involving a child with an extraordinary physical or emotional need as established by testimony of an expert witness. Because the record did not establish that KMN was of sufficient age to choose petitioners or that KMN had any extraordinary needs that petitioners could satisfy as adoptive parents, the record failed to satisfy the requirements of MCL 712B.23(2). Moreover, MCL 712B.23(4) provides that the court shall not find good cause to deviate from the placement preferences without first ensuring that all possible placements required under MCL 712B.23 have been thoroughly investigated and eliminated. Accordingly, the trial court was required to give meaningful consideration to KMN's possible placement with her extended family and make findings as to why that placement should be eliminated before making any determination that there was good cause to deviate from the statutory placement criteria. Under MIFPA, unlike ICWA, the fact that no alternate petition for adoption had yet been filed is irrelevant. Before making a placement outside of the statutorily preferred placement options, the trial court was required under MCL 712B.23(4) to address efforts to place KMN in accordance with MCL 712B.23 at each hearing until the placement met the requirements of MCL 712B.23. The trial court did nothing to ensure the possible placement with relatives had been realized, investigated, and eliminated, or to ensure that any other possible listed placements were realized, investigated, and eliminated. Therefore, the trial court orders terminating the parental rights of KMN's mother, certifying her consent to adoption of KMN by petitioners, making KMN a ward of the court for purposes of adoption, and transferring KMN to petitioners for preadoption placement, as well as the order of adoption, were vacated.

4. MIFPA was not preempted by ICWA because of the fact that ICWA does not define good cause to deviate from its placement preferences, whereas MIFPA only allows deviation from its order of preference on the basis of an Indian child's choice or extraordinary needs. Preemption occurs when a state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The purpose of ICWA is to protect an Indian child's Indian culture, and the Michigan Legislature's definition of good cause did not stand as an obstacle to the accomplishment of this purpose. Rather, by giving trial courts less discretion to deviate from a placement with a member of the child's extended family, a member of the Indian child's tribe, or an

Indian family, the Legislature endeavored to further protect the Indian child's Indian culture, and that purpose was consistent with ICWA.

5. The trial court abused its discretion by ordering the Tribe to pay attorney fees to petitioners and KMN's mother under MCR 3.206(C) for defending the petition for rehearing. An award of attorney fees and expenses under MCR 3.206(C) is for domestic relations actions, and adoption is not an action defined as a domestic relations action under MCR 3.201. Accordingly, the portion of the trial court order awarding attorney fees and costs was vacated.

6. It was not necessary to vacate the order closing the separate abuse-and-neglect case because no claim of appeal was filed regarding that order.

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

1. ADOPTION — INDIAN CHILD WELFARE ACT — PLACEMENT PREFERENCES.

The provision of the Indian Child Welfare Act stating that in any adoptive placement of an Indian child under state law, a preference shall be given, in the absence of good cause to the contrary, to a placement with a member of the child's extended family, other members of the Indian child's tribe, or other Indian families, is inapplicable if no alternative party who was eligible to be preferred has formally sought to adopt the child (25 USC 1915(a)).

2. ADOPTION — MICHIGAN INDIAN FAMILY PRESERVATION ACT — PLACEMENT PREFERENCES.

The Michigan Indian Family Preservation Act requires that, absent good cause, the adoptive placement of an Indian child must be either with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, in that order of preference; a trial court must give meaningful consideration to a possible placement with the child's extended family and make findings as to why that placement should be eliminated before making any determination that there was good cause to deviate from the statutory placement criteria, regardless of whether an alternate adoption petition has been filed (MCL 712B.23).

3. ADOPTION — MICHIGAN INDIAN FAMILY PRESERVATION ACT — PLACEMENT PREFERENCES — GOOD CAUSE FOR DISREGARDING PLACEMENT PREFERENCES.

A court's determination that there is good cause not to follow the order of preference set forth in the Michigan Indian Family

Preservation Act when considering the adoptive placement of an Indian child must be based on a request that was made by a child of sufficient age or a circumstance involving a child with an extraordinary physical or emotional need as established by testimony of an expert witness; the court shall not find good cause to deviate from these placement preferences without first ensuring that all possible required placements have been thoroughly investigated and eliminated (MCL 712B.23(2), (4), (5)).

4. CONSTITUTIONAL LAW — SUPREMACY CLAUSE — PREEMPTION — OBSTACLE PREEMPTION — INDIAN CHILD WELFARE ACT — MICHIGAN INDIAN FAMILY PRESERVATION ACT.

The Michigan Indian Family Preservation Act was not preempted by the Indian Child Welfare Act because of the fact that ICWA does not define good cause to deviate from its placement preferences, whereas MIFPA only allows deviation from its order of preference on the basis of an Indian child's choice or extraordinary needs; by giving trial courts less discretion to deviate from a placement with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, the Legislature endeavored to further protect the Indian child's Indian culture, and that purpose was consistent with ICWA (25 USC 1901 *et seq*.; MCL 712B.1 *et seq*.).

5. ADOPTION — ATTORNEY FEES AND COSTS — COURT RULES.

Attorney fees and costs may not be awarded under MCR 3.206(C) in an adoption action, which is not a domestic relations action under MCR 3.201.

Bolhouse, Baar & Lefere, PC (by *Thomas R. Vander Hulst*), for petitioners.

Rosette, LLP (by *Karrie S. Wichtman*), for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians.

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

WILDER, J. Intervenor-appellant, the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians or Gun Lake Tribe (the Tribe) appeals as of right the July 9, 2014 order allowing petitioner-appellees to adopt a child (KMN) and the trial court's earlier June 4, 2014

orders certifying the consent of KMN's mother to the adoption, terminating her parental rights after her consent, making KMN a ward of the court for purposes of adoption, and transferring KMN to the petitioners for a preadoptive placement.[1] The primary emphasis of the Tribe's claims on appeal is the assertion that the trial court violated § 1915(a) of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., and MCL 712B.23(2) of the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. ICWA establishes minimum federal standards for the placement of Indian children in foster or adoptive homes that "reflect the unique values of Indian culture." 25 USC 1902. Section 1915(a) of ICWA provides:

> In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

MCL 712B.23(2) provides, "Absent good cause to the contrary, the adoptive placement of an Indian child must be in the following order of preference: (a) A member of the child's extended family. (b) A member of the Indian child's tribe. (c) An Indian family." We find no violations of ICWA but agree that the trial court failed to follow the mandates of MCL 712B.23. Accordingly we affirm in part, vacate in part, and remand for further proceedings.

---

[1] Petitioners argue that a claim of appeal filed by the Tribe in Docket No. 322329 from the June 4 orders could not be appealed as of right because the orders were not final. We decline to address this argument, however, because there is no dispute that the July 9 order, from which the Tribe filed a claim of appeal in Docket No. 322883, was a final order under MCR 7.202(6)(a)(i), and the earlier June 4 orders in the same case can be challenged in that appeal.

I

On October 24, 2013, in a separate case (Case No. 13-008396-NA), the Department of Human Services (DHS) filed a petition for removal of KMN immediately after her birth on the basis of the mother's previous and lengthy history of abuse and neglect of her other children. The petition was supplemented the next day to include a request for termination of the mother's parental rights.

On February 19, 2014, a member of the Tribe was identified as the biological father of KMN; he voluntarily consented to the termination of his parental rights in Case No. 13-008396-NA. In that termination order, the trial court checked a box that provided, "The adoptee is an Indian child as defined in MCR 3.002(5) and the court has considered the application of the Indian Child Welfare Act in this matter."[2]

On April 2, 2014, in Case No. 13-008396-NA, the trial court ordered that efforts should be made to reunify KMN and her mother. On May 5, 2014, and again on June 4, 2014, in the instant case (Case No. 14-000805-AD), petitioners filed a petition for direct placement adoption. They had no previous relationship to KMN. The petition provided that her father's parental rights had been terminated, that KMN was an Indian child, and that her mother had consented under MCL 712B.13 and the Michigan Adoption Code. Notice of the petition was also sent on May 5, 2014, to a representative of the Tribe.

In a June 3, 2014 brief in support of adoption, petitioners and KMN's mother claimed that KMN had lived in a foster home that did not comply with ICWA

[2] We note that the current version of the court rules defines "Indian child" in MCR 3.002(12).

from about October 26, 2013 to May 29, 2014, that KMN was subsequently transferred to her father's distant relative,[3] and that the father did not approve of that transfer. They further claimed that KMN's father had abandoned her mother after she became pregnant with KMN, that he was imprisoned before KMN was born, and further, that although he is of Indian descent, he never lived with the Tribe or adopted its culture. They also argued that the United States Supreme Court's ruling in *Adoptive Couple v Baby Girl*, ___ US ___; 133 S Ct 2552, 2564; 186 L Ed 2d 729 (2013), was dispositive—preferences in 25 USC 1915(a) did not apply because KMN's father had abandoned her, and there were no other parties (Indian or non-Indian) who had formally sought to adopt her.

The trial court held a hearing on the adoption petition on June 4, 2014. Petitioners and KMN's mother argued that the mother's preference regarding KMN's adoptive placement constituted good cause to deviate from ICWA's placement preferences in 25 USC 1915(a) and that KMN's only connection to the Tribe was her father, who had abandoned her. They urged the trial court to acknowledge the mother's consent for direct placement adoption and certify a preadoptive placement with petitioners.

The Tribe opposed the adoption petition, maintaining that KMN was an Indian child under the broad definitions in ICWA and MIFPA, that there was an "Indian relative ready, willing, and able to adopt" KMN, and that the relative had not yet filed a petition to adopt only because her mother's parental rights had not yet been terminated and the abuse and neglect

[3] It appears from the record that KMN was placed with her father's cousin and the cousin's husband, both of whom are members of the Tribe.

case was still pending. The Tribe further argued that terminating the abuse and neglect case at that time could put the child in "harm's way." In response to a question by the trial court, the Tribe's attorney replied that although she was eligible for membership in the Tribe, KMN could not receive a subsidy from casino proceeds until she was an adult. The trial court made several comments about the Tribe's argument, notably that it "understood the theory behind the law . . . I disagree whether this child is an Indian child" and "I think that if there was any Indian culture to be preserved here the Court would be the first one to preserve it." Regarding the potential harm to KMN if the abuse and neglect case were terminated, the trial court commented, "I think the child is in harm's way with you, to be frank with you," and that moving KMN without its consent would put the child in "harm's way."

Petitioners and KMN's guardian ad litem argued in response to the Tribe's arguments that although KMN had lived with her cousin's family for several days before the June 4 hearing, she was not being removed from an Indian home for purposes of ICWA and MIFPA, and those provisions did not apply. DHS opposed the adoption and further argued that if the neglect case were still pending, the trial court could not allow KMN's mother to grant the direct placement adoption because she was required to have legal or physical custody.

Following arguments on the adoption petition, the trial court closed the abuse and neglect case on the record, ruling that it was "returning . . . [KMN] to her mother . . . for . . . immediate custody." The trial court then received testimony from KMN's mother indicating that she consented on the record to the direct

placement adoption.[4] She testified that she was friends with KMN's father and that she told him about the pregnancy within two months, but "he wanted nothing to do with [KMN]." She also testified that he had no connection to his Indian culture, but that he took the money he was entitled to from casino revenues. Following her testimony, the trial court entered a written order in Case No. 13-008396-NA terminating the jurisdiction of the trial court and releasing KMN to her mother. In Case No. 14-000805-AD, the trial court signed an order certifying the mother's consent to adoption of KMN by petitioners. As with the order terminating the father's parental rights, the trial court checked the box on the form order indicating that KMN was an Indian child. The trial court also entered an order terminating the mother's parental rights after her consent. That document provided that KMN was an Indian child and that "the court has considered the application of the Indian Child Welfare Act in this matter." The trial court then made KMN a ward of the court for purposes of adoption and transferred her to petitioners for preadoptive placement.

The Tribe filed an objection in the trial court to the placement with petitioners, maintaining that the placement violated ICWA and MIFPA, arguing that KMN was an Indian child, that it had repeatedly notified KMN's mother of a tribal family's desire to adopt KMN, and that although no one in the Tribe had formally petitioned for adoption of KMN before the June 4 hearing, no one could have done so while the abuse and neglect case was pending. The Tribe also

[4] The Tribe objected to the court's immediate action on the direct placement adoption, but the trial court ruled that the Tribe was "out of it . . . the tribe doesn't have any interest because this Court has . . . terminated its jurisdiction over the child."

filed a notice of intervention in the trial court and filed a claim of appeal from the order transferring KMN to petitioners in Court of Appeals Docket No. 322329.

On June 20, 2014, the Tribe filed a petition for rehearing in Case No. 14-000805-AD, arguing that the trial court had failed to adhere to the adoptive placement preferences required by ICWA and MIFPA. Further, it argued the trial court had failed to make a finding that good cause existed to deviate from the adoptive placement preferences in those acts. In its brief in support, the Tribe urged the trial court to reconsider its June 4 orders, particularly because an adoption with petitioners could not be final for six months. MCL 710.56.

On the same day, in Case No. 14-000814-AF, the relatives whom KMN had lived with before the June 4 hearing filed a petition for adoption. The petition provided that KMN was an Indian child (associated with the Tribe). A proof of the relationship between KMN and the family was attached to the petition identifying the wife as KMN's first cousin once removed on her father's side of the family.

On June 24, 2014, in lower court docket number 13-008396-NA, DHS filed a motion for reconsideration, arguing that the trial court had violated MIFPA. DHS also argued that the trial court had released KMN to her mother without considering on the record whether the mother's parental rights should be terminated according to MCL 712A.19b. DHS urged the trial court to either (1) determine that the facts in the petition were established, terminate KMN's parental rights, and follow the placement priorities under MIFPA, or (2) determine that the facts in the petition were not established and return KMN to her mother.

On July 7, 2014, petitioners and KMN's mother filed an answer to the Tribe's petition for rehearing. They urged the trial court to deny rehearing and to find that the petition for adoption brought by KMN's cousin and her husband was improperly filed and should not be considered. They requested attorney fees for each of their attorneys and costs pursuant to MCR 3.206(C)(1).

On July 9, 2014, the trial court denied the Tribe's petition for rehearing and the motion for reconsideration filed by DHS. It ruled that the cousin and her husband had not properly filed the petition for adoption and denied it. It further ruled that ICWA and MIFPA did not apply to this matter, and even if they did, parental preference would constitute good cause to deviate from any placement preferences. The trial court stated that if the Tribe successfully appealed, the mother's parental rights should be "fully reinstated and the Termination of Parental Rights Order set aside." It ordered the Tribe and its attorneys to pay the reasonable attorney fees incurred by petitioners and KMN's mother "based upon statute, court rule and law."

On the same day, the trial court entered an order of adoption, making petitioners the parents of KMN and discharging KMN as a ward of the court. In Docket No. 322833, the Tribe filed a claim of appeal from this order.

II

The Tribe maintains that KMN is an Indian child under both ICWA and MIFPA and that the trial court improperly concluded otherwise. Issues involving statutory interpretation, and the application of ICWA and MIFPA, are questions of law that this Court

reviews de novo. See *Empson-Laviolette v Crago*, 280 Mich App 620, 624; 760 NW2d 793 (2008).

> The primary goal when interpreting a statute is to ascertain and give effect to the Legislature's intent. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217-218; 801 NW2d 35 (2011). "The words contained in a statute provide us with the most reliable evidence of the Legislature's intent." *Green v Ziegelman*, 282 Mich App 292, 301; 767 NW2d 660 (2009). "[S]tatutory provisions are not to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole." *Robinson v City of Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010) (emphasis omitted). If statutory language is unambiguous, the Legislature is presumed to have intended the plain meaning of the statute. *Fleet Business Credit, LLC v Krapohl Ford Lincoln Mercury Co*, 274 Mich App 584, 591; 735 NW2d 644 (2007). An unambiguous statute must be enforced as written. *Fluor Enterprises, Inc v Dep't of Treasury*, 477 Mich 170, 174; 730 NW2d 722 (2007). [*Hoffenblum v Hoffenblum*, 308 Mich App 102, 109-110; 863 NW2d 352 (2014).]

Under ICWA, an Indian child is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]" 25 USC 1903(4). KMN was unmarried and less than one year old at the time of the June 4 hearing. Although she was not a member of the Tribe, she was eligible for membership, and her biological father was a member of the Tribe. Therefore, KMN is an Indian child under ICWA.

Under MIFPA, MCL 712B.3(k) provides:

> "Indian child" means an unmarried person who is under the age of 18 and is either of the following:
>
> (*i*) A member of an Indian tribe.

(*ii*) Eligible for membership in an Indian tribe as determined by that Indian tribe.

The definition of "Indian child" in MIFPA is similar to that in ICWA, but does not require the child who is eligible for membership to also be the biological child of a member of an Indian tribe. Therefore, KMN is also an Indian child under MIFPA.

Admittedly, the trial court made somewhat inconsistent statements about its conclusion on this critical factor; however, "a court speaks through its written orders and judgments, not through its oral pronouncements," *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). The trial court's written orders, and thus the record as a whole, demonstrate that the trial court found that KMN is an Indian child. Accordingly, we find no error requiring reversal on this issue under either ICWA or MIFPA.

III

The Tribe also argues that the trial court failed to apply ICWA's adoptive placement preferences or find good cause for disregarding that preference. We disagree.

25 USC 1915(a) provides that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."

In *Baby Girl*, 133 S Ct at 2564, our United States Supreme Court held that ICWA's adoptive placement "preferences are inapplicable in cases where no alternative party has formally sought to adopt the child. This is because there simply is no 'preference' to apply

if no alternative party that is eligible to be preferred under § 1915(a) has come forward." In *Baby Girl*, the biological father (a member of an Indian tribe), who contested the child's placement with an adopted couple and argued his parental rights should not have been terminated, did not seek to adopt the child in the lower court proceedings. *Id*. Although there was testimony in the record that the tribe had certified approximately 100 couples to be adoptive parents, none of those couples had formally sought to adopt the child in the state court. *Id*. at 2565 n 12.

In the instant case, at the time of the June 4 hearing, petitioners were the only couple that had formally sought to adopt KMN. There is no dispute that petitioners have no familial connection to KMN or relationship with any tribe. Therefore, they do not qualify for a preference under 25 USC 1915(a). Although the Tribe's attorney stated on the record that there was an "Indian relative ready, willing, and able to adopt" KMN, that unnamed relative had not formally sought to adopt her and can be likened to the 100 certified families in *Baby Girl* that had not petitioned for adoption during the state court proceedings. The Tribe did not request an adjournment to allow the relative to file a competing petition for adoption. See MCL 710.25(2). Absent a pending adoption petition of an alternative party who was eligible to be preferred under 25 USC 1915(a), there was no ICWA preference to apply at the June 4 hearing.

IV

The Tribe alternatively argues that the trial court failed to place KMN in one of MIFPA's listed potential placements or find good cause for disregarding that list. We agree.

MCL 712B.23 provides, in relevant part:

(2) Absent good cause to the contrary, the adoptive placement of an Indian child must be in the following order of preference:

(a) A member of the child's extended family.

(b) A member of the Indian child's tribe.

(c) An Indian family.

* * *

(4) *The court shall not find good cause to deviate from the placement preferences stated in this section without first ensuring that all possible placements required under this section have been thoroughly investigated and eliminated*. All efforts made under this section must be provided to the court in writing or stated on the record. The court shall address efforts to place an Indian child in accordance with this section at each hearing until the placement meets the requirements of this section.

(5) The court's determination of good cause to not follow the order of preference shall be based on 1 or more of the following conditions:

(a) A request was made by a child of sufficient age.

(b) A child has an extraordinary physical or emotional need as established by testimony of an expert witness.

* * *

(7) A record of each placement of an Indian child shall be maintained by the department or court evidencing the efforts to comply with the order of preference specified in this section. The record shall be made available at any time upon the request of the secretary or Indian child's tribe.

* * *

(10) All efforts made to identify, locate, and place a child according to this section shall be documented and, upon

> request, made available to the court, tribe, Indian child, Indian child's lawyer-guardian ad litem, parent, or Indian custodian. [Emphasis added.]

MIFPA differs from ICWA in that it does not give a preference to eligible parties over ineligible parties. Rather, MIFPA requires that, absent good cause, the adoptive placement *must* be either with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, in that "order of preference." MCL 712B.23(2). The record demonstrates that petitioners have no familial connection to KMN, they are not connected to the Tribe, and they are not an Indian family. Therefore, absent a good cause finding, MIFPA precluded the trial court from placing KMN with petitioners.

The trial court's July 9, 2014 order concludes that the preference of KMN's mother amounted to good cause. This ruling was erroneous. As noted by the Tribe, MCL 712B.23(5) provides:

> The court's determination of good cause to not follow the order of preference *shall* be based on 1 or more of the following conditions:
>
> (a) A request was made by a child of sufficient age.
>
> (b) A child has an extraordinary physical or emotional need as established by testimony of an expert witness. [Emphasis added.]

Under the doctrine of *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another), good cause is limited to the conditions articulated in MCL 712B.23(5)—a request made by a child of a sufficient age or a circumstance involving a child with an extraordinary need. Therefore, a biological parent's choice of an adoptive placement does not constitute good cause under MCL 712B.23(2). Because the record does not establish that KMN, an infant at

the time of these proceedings, was of sufficient age to choose petitioners, or that KMN has any extraordinary needs that petitioners as adoptive parents could satisfy, the record fails to satisfy the requirements of MCL 712B.23(2), and the trial court erred by placing KMN with petitioners.

Moreover, MCL 712B.23(4) provides, "The court shall not find good cause to deviate from the placement preferences stated in this section without first ensuring that all possible placements required under this section have been thoroughly investigated and eliminated." *Merriam Webster's Collegiate Dictionary* (2003) defines the word "possible" as "being within the limits of ability, capacity, or realization." Accordingly, the trial court was required to give meaningful consideration to KMN's possible placement with her cousin's family and make findings as to why that placement should be eliminated before making any determination that there was good cause to deviate from the statutory placement criteria. Therefore, unlike ICWA, under MIFPA, the fact that no alternate petition for adoption had yet been filed is irrelevant.[5] After the trial court

[5] Despite the plain language of MCL 712B.23(4), petitioners claim that parties who have not formally petitioned for adoption should not be considered for purposes of the order of preference and good cause to deviate. They rely on a provision in MCL 712B.5, requiring the "best interests of the Indian child" to be determined "in accordance with [ICWA]" and argue the order of preference and good cause to deviate should also be determined in accordance with ICWA. But the Legislature's specific mention of ICWA with regard to a best-interests determination and the absence of any reference to ICWA with regard to the order of preference and good cause to deviate are deemed to be intentional. *Hackel v Macomb Co Comm*, 298 Mich App 311, 324; 826 NW2d 753 (2012) (explaining that "the doctrine of *expressio unius est exclusio alterius*" means "inclusion by specific mention excludes what is not mentioned") (citation and quotation marks omitted); see also *In re AJR*, 300 Mich App 597, 600; 834 NW2d 904 (2013) ("[T]his Court may not ignore the omission of a term from one section of a statute when that

has been alerted that there are alternative possible placements consistent with the statute, a trial court must first ensure they have been "thoroughly investigated and eliminated." Before making a placement outside the statutorily preferred placement options, the trial court is required to "address efforts to place an Indian child in accordance with this section at each hearing until the placement meets the requirements of this section." MCL 712B.23(4).

Even though KMN's cousin and her husband had not filed a petition for adoption before the June 4 hearing, the trial court did nothing to ensure this possible placement had been realized, investigated, and eliminated. Rather, the trial court only questioned whether there was any financial motivation for KMN's membership in the Tribe. Furthermore, the trial court did nothing to ensure that any other possible listed placements were realized, investigated, and eliminated. Therefore, the trial court erred with regard to the application of MCL 712B.23(4).

At oral argument, petitioners challenged the application of MIFPA by claiming it was preempted by ICWA. Although this matter was not preserved by adequate briefing, we address and reject this contention.

The Supremacy Clause of the United States Constitution gives Congress the authority to preempt state laws. *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 139; 796 NW2d 94 (2010); US Const, art VI, cl 2. "There are three types of federal preemption: express preemption, conflict preemption, and field preemption." *Packowski*, 289 Mich

term is used in another section of the statute."). If the Legislature had intended the order of preference and good cause to be interpreted in accordance with ICWA, it would have so specified in MIFPA.

App at 140. Although not specifically articulated by petitioners, they appear to be asserting a claim of obstacle preemption, a form of conflict preemption that "occurs 'when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Ter Beek v City of Wyoming*, 297 Mich App 446, 460; 823 NW2d 864 (2012), quoting *Hillsborough Co, Fla v Automated Med Laboratories, Inc*, 471 US 707, 713; 105 S Ct 2371; 85 L Ed 2d 714 (1985).

As petitioners properly note, ICWA does not define good cause to deviate from its placement preferences, whereas MIFPA only allows deviation from its order of preference on the basis of an Indian child's choice or extraordinary needs. Based on this distinction in the two laws, petitioners claim that because trial courts have less discretion regarding the placement of Indian children under MIFPA, the children have less protection from the trial court, and this outcome interferes and conflicts with the purposes of ICWA. We disagree. The purpose of ICWA is to protect an Indian child's Indian culture. See 25 USC 1902. The Michigan Legislature's definition of good cause does not stand as an obstacle to the accomplishment of this purpose. Rather, by giving trial courts less discretion to deviate from a placement with a member of the child's extended family, a member of the Indian child's tribe, or an Indian family, the Legislature endeavored to further protect the Indian child's Indian culture—a purpose consistent with ICWA. Therefore, we reject petitioners' claim that MIFPA was preempted by ICWA.[6]

---

[6] Because the trial court's violation of MCL 712B.23 invalidates the adoption, we need not address the Tribe's alternative arguments on appeal that under the circumstances of this case, KMN's mother could not consent to the adoption in the manner required under MCL 710.23a and MCL 710.23d, that she was coerced to consent to the adoption, and

V

Next, the Tribe argues that the trial court improperly ordered the Tribe to pay attorney fees to KMN's mother and petitioners for defending the petition for rehearing. We agree.

> This Court reviews a trial court's ruling on a motion for costs and attorney fees for an abuse of discretion. An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes. A trial court's findings of fact, such as whether a party's position was frivolous, may not be set aside unless they are clearly erroneous. [*Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010) (citations omitted).]

"Under the American rule, attorney fees generally are not recoverable from the losing party as costs in the absence of an exception set forth in a statute or court rule expressly authorizing such an award." *Haliw v City of Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). MCR 3.206(C) provides:

> (1) A party may, at any time, request that the court order the other party to pay all or part of the attorney fees and expenses related to the action or a specific proceeding, including a post-judgment proceeding.
>
> (2) A party who requests attorney fees and expenses must allege facts sufficient to show that
>
> (a) the party is unable to bear the expense of the action, and that the other party is able to pay, or
>
> (b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply.

---

that the trial court abused its discretion by denying the Tribe's petition for rehearing. We similarly decline to address petitioners' argument that if neither ICWA nor MIFPA applies in this case, the Tribe lacks standing to make its remaining arguments on appeal.

MCR 3.201(A) provides:

> Subchapter 3.200 applies to
>
> (1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, family support under MCL 552.451 *et seq*.[,] the custody of minors under MCL 722.21 *et seq*.[,] and visitation with minors under MCL 722.27b and to
>
> (2) proceedings that are ancillary or subsequent to the actions listed in subrule (A)(1) and that relate to
>
> (a) the custody of minors,
>
> (b) visitation with minors, or
>
> (c) the support of minors and spouses or former spouses.

As the Tribe argues, an award of attorney fees and expenses under MCR 3.206(C) is for domestic relations actions. Adoption is not an action defined as a domestic relations action under MCR 3.201; therefore, petitioners and KMN's mother improperly requested attorney fees and costs under this court rule, and the trial court abused its discretion by authorizing an award for attorney fees. *Haliw*, 471 Mich at 707.[7]

VI

We affirm the trial court's determination that KMN is an Indian child and that the placement preferences

[7] Petitioners maintain that the trial court could have nevertheless found the petition for rehearing frivolous under MCL 600.2591, but because no request was made for costs and fees under this statute, and the trial court did not rule that the petition was frivolous, we decline to address this unpreserved claim. *Autodie, LLC v City of Grand Rapids, Dep't of Treasury*, 305 Mich App 423, 431; 852 NW2d 650 (2014) ("This Court will generally decline to address unpreserved issues unless 'a miscarriage of justice will result from a failure to pass on them, . . . the question is one of law and all the facts necessary for its resolution have been presented, or [it is] necessary for a proper determination of the case.' ") (citation omitted).

in ICWA did not apply on June 4. But in light of our analysis of MIFPA, we vacate the June 4 orders certifying the consent of KMN's mother to her adoption by petitioners, terminating her parental rights after her consent, making KMN a ward of the court for purposes of adoption, and transferring KMN to petitioners for a preadoptive placement, and the July 9 order of adoption.[8] We also vacate the portion of the trial court's July 9 order awarding attorney fees and costs.

The Tribe argues that if we vacate the June 4 orders and the July 9 order of adoption in Case No. 14-000805-AD, we should also vacate the order closing the abuse and neglect case in Case No. 13-008396-NA. But no claim of appeal was filed regarding the trial court's order closing that case; consequently, we need not address any challenge to the order closing that case. Cf. *Bonner v Chicago Title Ins Co*, 194 Mich App 462, 472; 487 NW2d 807 (1992) ("Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case.").

We remand for proceedings consistent with this opinion and do not retain jurisdiction. No costs, neither party having prevailed in full. MCR 7.219.

RIORDAN, P.J., and MARKEY, J., concurred with WILDER, J.

---

[8] Because we vacate the trial court's order of adoption, we decline to address the Tribe's alternative argument on appeal that it was entered prematurely under MCL 710.56.

OMIAN v CHRYSLER GROUP LLC

Docket No. 310743. Submitted July 16, 2014, at Lansing. Decided February 26, 2015, at 9:05 a.m. Leave to appeal sought.

Monasser Omian obtained workers' compensation benefits from Chrysler Group LLC (now known as FCA US LLC) after an injury he sustained in November 2000 while working for Chrysler. Chrysler subsequently filed a petition to stop Omian's benefits, contending that he had been incarcerated for activities that demonstrated his physical and mental abilities to earn money, contrary to his claim of an ongoing disability. Omian argued that his involvement in a criminal enterprise did not prove he was capable of performing physical labor commensurate with his previous ability or employment. At a hearing on the petition, the parties presented conflicting evidence regarding Omian's ability to work. The magistrate admitted into evidence an order of judgment reflecting Omian's guilty-plea convictions on counts of conspiracy to commit federal crimes and aiding and abetting the structuring of financial transactions to evade reporting requirements, as well as a transcript of his arraignment and guilty-plea hearing. The magistrate, however, excluded exhibits proposed by Chrysler (including Exhibit D) that contained indictments against Omian and three other individuals, concluding that they were not relevant, that many of the allegations did not apply to Omian, and that the allegations were speculative because they did not all result in convictions. In addition, the magistrate also excluded evidence of the circumstances underlying the indictment. The magistrate denied the petition to stop Omian's benefits, and the Michigan Compensation Appellate Commission (MCAC) affirmed. In particular, the MCAC concluded that because the magistrate had considered the attack on Omian's credibility through his convictions and the conduct leading to them but still found Omian's evidence credible, those factual findings could not be set aside. The MCAC concluded that the magistrate had carefully considered Chrysler's proffer of its proposed exhibit within the context of MRE 609, which relates to the use of convictions as impeachment evidence of conviction of crime, and had properly exercised her discretion to allow introduction of the convictions and the guilty-plea transcript but

exclude the charging documents, which included information related to other individuals besides Omian and counts that did not necessarily form the basis of his guilty plea. The MCAC did not address the magistrate's exclusion of evidence of the facts underlying the counts of the indictment to which Omian did not plead guilty and the expert testimony based on those facts. Chrysler appealed.

In separate opinions, the Court of Appeals *held*:

1. The MCAC did not err by affirming the magistrate's decision to exclude Exhibit D.

2. The ability to engage in illegal activity does not equate with the ability to earn wages.

3. The MCAC operated under the wrong legal framework with respect to the magistrate's exclusion of evidence of the facts underlying Omian's indictment because it did not first decide whether those facts should have been part of the whole record that MCL 418.861a(3) required the MCAC to consider before determining that the magistrate's findings of fact were conclusive.

4. Under the wrongful-conduct rule, a plaintiff's action is precluded or barred if the plaintiff suffered the injury while and as a proximate result of committing an illegal act. The issue of whether the wrongful-conduct rule barred Omian's action in this case, however, was not properly before the Court of Appeals.

Reversed and remanded for further proceedings.

WILDER, J., wrote the lead opinion and stated that indictments are generally admissible under a hearsay exception to the extent that they reflect a judgment of conviction. Given Omian's voluntary entry of a guilty plea to four counts of the indictment, those portions of the indictment were not inadmissible hearsay. Nevertheless, the magistrate did not err by finding that portions of the indictment were speculative and not relevant because the excluded evidence referred to individuals other than Omian, failed to indicate whether it applied to all or only some of the individuals, and did not specifically identify what monies Omian had actually received from his participation in the conspiracy. The indictment's allegations against others and the unproved allegations against Omian were not material to his credibility or ability to earn wages and were irrelevant under MRE 402. The MCAC's decision to affirm the magistrate's exclusion of Exhibit D was therefore not based on erroneous legal reasoning or the wrong legal framework. Unlike the aspects of the indictment that were properly considered irrelevant, however, some of the remaining

allegations, as well as testimony tending to prove those allegations, might have been relevant to Omian's credibility. Evidence of Omian's bank records could have been relevant and admissible in light of the evidence that he opened a large bank account after his injury. Chrysler could also have properly offered the testimony of Omian's coconspirators insofar as it concerned Omian's ability to earn wages or secure employment. Had Chrysler offered evidence tending to prove the facts underlying the indictment, which were prejudicial to Omian, that evidence and the facts established by his plea agreement would have served as the basis for expert testimony about his ability to work. The magistrate erred by excluding that evidence. Because the MCAC did not first decide whether the facts underlying Omian's indictment should have been part of the whole record, the MCAC operated under the wrong legal framework and it was necessary to remand the case to the MCAC for proper consideration of Chrysler's argument. Finally, Judge WILDER concluded that Chrysler had not preserved for review the issue of the wrongful-conduct rule.

STEPHENS, J., agreed with Judge WILDER that the MCAC operated under the wrong legal framework when it failed to address the magistrate's decision to exclude not only the indictment but the testimony of any witness who could testify about the facts that gave rise to that indictment. She further agreed with Judge RONAYNE KRAUSE that the ability to engage in illegal activity does not equate with the ability to earn wages. She did not, however, agree that the physical and mental efforts required in every illegal activity have no bearing on an individual's ability to earn legal wages or perform work. For example, while passively laundering funds would likely not translate into evidence of the ability to engage in legal work, managing those laundered funds by arranging for transfers, keeping records of the transactions, and delivering the funds to third parties could be relevant to the ability to earn legal income. Chrysler requested and was refused the opportunity to present witnesses to testify to the facts underlying the indictment. Judge STEPHENS could not conclude as a matter of law that the evidence had no legal relevance. Therefore, it was necessary for the MCAC to review the issue.

RONAYNE KRAUSE, P.J., agreed that Exhibit D was technically admissible, but the magistrate's decision to exclude it and the MCAC's decision to affirm that exclusion were not clearly erroneous. She further agreed with Judge WILDER that the wrongful-conduct rule was not properly before the panel. She disagreed, however, that the exclusion of additional evidence that might have supported some of the allegations in Exhibit D constituted

an error warranting reversal. A demonstrated ability to generate income from illegal activities, standing alone, does not necessarily prove anything relevant to workers' compensation benefits. A person's wage-earning capacity is defined as the wages that can be earned at a job reasonably available. As a matter of public policy, it would be dangerous to consider illegal activities as reasonably available jobs because that would dramatically increase the burden of a claimant attempting to show entitlement to compensation and benefits and could encourage illegal activity. While the specific acts a person undertakes can demonstrate that the person has the ability to perform those acts, the fact that the person managed to derive some revenue from illegal conduct does not by itself constitute evidence of a capacity for gainful employment. The fact that Omian's illegal activity was more or less profitable cast no light on his credibility regarding what he could actually perform as legitimate employment. Chrysler's argument amounted to a bare assertion that profiting from a crime equals proof of wage-earning capability. Without support for that position, there was no error warranting reversal, and Judge RONAYNE KRAUSE would have affirmed the MCAC.

Mancini, Schreuder, Kline, PC (by *Roger R. Kline*), and *Daryl Royal* for Monasser Omian.

Lacey & Jones, LLP (by *Carson J. Tucker*), for Chrysler Group LLC.

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

WILDER, J. Following remand by the Michigan Supreme Court, defendant, Chrysler Group LLC, appeals as on leave granted the order of the Michigan Compensation Appellate Commission (MCAC),[1] affirming the magistrate's denial of defendant's petition to stop the benefits of plaintiff, Monasser Omian, under the Work-

[1] The Michigan Compensation Appellate Commission serves as the successor of the Workers' Compensation Appellate Commission. Executive Order No. 2011-6, effective August 1, 2011. See also *McMurtrie v Eaton Corp*, 490 Mich 976 (2011).

er's Disability Compensation Act (WDCA), MCL 418.101 *et seq*. *Omian v Chrysler Group LLC*, 495 Mich 859 (2013). We reverse and remand.

I

Plaintiff qualified for workers' compensation benefits because of a back injury incurred while working for defendant on November 9, 2000. Defendant subsequently filed a petition to stop plaintiff's benefits, contending that he had been incarcerated for activities that demonstrated his physical and mental abilities to earn money, contrary to his claim of an ongoing disability. Plaintiff countered that his involvement in a criminal enterprise did not prove he was capable of performing physical labor commensurate with his previous ability or employment.

The parties presented conflicting evidence regarding plaintiff's ability to work. Dr. Philip J. Mayer examined plaintiff once and found symptom embellishment. Mayer opined that it was "improbable that [plaintiff] would have not shown any improvement over the past 6-8 years." Mayer asserted he "would not recommend restrictions of activity" and that "[r]est is not an appropriate treatment for back pain." On the other hand, plaintiff's treating physician, Dr. D. Bradford Barker, opined that, as a result of his back injury, plaintiff could not work on the auto line, as he had done before, or do completely sedentary work because prolonged sitting causes pain. Plaintiff's psychiatrist, Dr. Mufid Al-Najjar, opined that plaintiff's major depressive disorder contributes to his inability to tolerate pain and results in feelings of frustration and hopelessness. Further, a certified rehabilitation counselor, James Fuller, opined that plaintiff had limited English language capability and no computer skills, making

him only eligible for sedentary, unskilled employment that was not commensurate with his former earning capacity.

The magistrate admitted into evidence Exhibit C, an order of judgment reflecting plaintiff's conviction by guilty plea to Counts 1 and 4 of a federal indictment. Count 1 of the indictment alleged that plaintiff was involved in a conspiracy to commit federal crimes, whereas Count 4 alleged that plaintiff had aided and abetted the structuring of financial transactions to evade reporting requirements. Pursuant to a plea agreement, all remaining counts in the indictment were dismissed, and plaintiff was sentenced to 30 months' imprisonment. The magistrate also admitted into evidence Exhibit E, a copy of the May 11, 2006 transcript of plaintiff's arraignment and guilty-plea hearing. In pleading guilty to the felony charges, plaintiff admitted having established bank accounts in his name from which he was sending money to Yemen and Switzerland. Plaintiff also admitted that he had allowed approximately 50 deposits of less than $10,000 into his accounts by other individuals and that the dollar amount of these transactions was chosen with the intent to avoid Internal Revenue Service (IRS) reporting requirements. Plaintiff testified that, despite the sizeable deposits, he only received $10 for each transfer made, and he also claimed that the earnings occurred before he was receiving workers' compensation benefits.

The magistrate excluded defendant's proposed Exhibits B and D (the grand jury indictment and a 48-page superseding indictment[2] against plaintiff and

[2] Some of the charges overlap for the individuals charged, and some are distinctly applicable only to certain individuals or alleged coconspirators, but not to plaintiff.

three other individuals), concluding that they were not relevant, that many of the allegations did not apply to plaintiff, and that the allegations were speculative because they did not all result in convictions. The magistrate continued to refuse to admit Exhibit D, even after defendant proposed to redact it to exclude references to the three other charged individuals as well as those charges that were dismissed as a result of plaintiff's guilty plea.

In addition to excluding aspects of the indictment, the magistrate also rebuffed defendant's effort to introduce evidence of the circumstances underlying the indictment insofar as they did not directly relate to plaintiff's guilty plea, particularly during defendant's examination of plaintiff. For example, defendant was precluded from asking plaintiff whether he had five accounts at Comerica Bank, whether plaintiff and his son were the only approved signatories to the account containing $24,000, and when that account was opened.[3] In addition, the magistrate sustained objections regarding Al-Najjar's and Fuller's opinions of plaintiff's ability to work when defendant presented hypothetical questions to them that included the facts underlying the indictment. Fuller was precluded from testifying about whether various activities, including repackaging controlled substances and contraband cigarettes for sale, altering stamps, and laundering profits through hawala accounts,[4] demonstrated skills

[3] Plaintiff did not assert a Fifth Amendment right against self-incrimination when these questions were asked.

[4] "Hawala" is a widely used alternative remittance system that operates outside of or parallel to traditional banking or financial channels. It works by transferring money without actually moving it, relying on trust and extensive use of connections such as familial relationships or regional affiliations. Jost & Sandhu, *The Hawala Alternative Remittance System and Its Role in Money Laundering*,

that were transferable to other employment opportunities. Also precluded was Al-Najjar's opinion regarding whether plaintiff could have been faking a flat affect during therapy while simultaneously committing outside therapy the crimes alleged.

In an opinion denying defendant's petition to stop benefits, the magistrate rejected the testimony of Mayer and found Barker, as the treating physician since 2002, credible. The magistrate further stated:

> I find that Plaintiff has testified credibly with regard to all issues of his workers' compensation case . . . . I am cognizant of Plaintiff's guilty plea. There is no question this was a serious crime. He served a sentence of 23 months in the federal prison system. (Defendant's Exhibits C and E.) However, the question that I must answer here is whether Plaintiff has recovered from his work-related disability. I find that he has not.
>
> * * *
>
> Dr. Barker's diagnoses and restrictions are the same. Dr. Al-Najjar described the same man that I observed in this Agency on three different occasions. Plaintiff's presentation and his complaints are the same. I find that Defendant has failed to demonstrate by a preponderance of evidence that Plaintiff has recovered from his disability. The Petition to Stop is denied.

Adopting the magistrate's summary of the evidence under MCL 418.861a(10) and affirming the magistrate's ruling, the MCAC determined, in relevant part:

> We conclude that the magistrate's findings that plaintiff remains compensably disabled are supported by com-

---

Financial Crimes Enforcement Network and INTERPOL/FOPAC, p 5, available at <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FinCEN-Hawala-rpt.pdf> [https://perma.cc/2PMY-PLE6].

petent, material, and substantial evidence on the whole record, and we therefore affirm those findings. MCL 418.861a(3). Dr. Barker's credited conclusions of disability coupled with plaintiff's credited testimony consistent with the conclusion of disability referenced by Dr. Barker are by themselves adequate to insulate the magistrate's findings of continued disability from being set aside by us. Adding the testimony of the plaintiff's vocational consultant simply provides yet a further basis for concluding that the magistrate's findings of continued disability must be affirmed.

* * *

Because we conclude that the magistrate considered the attack on plaintiff's credibility through his criminal convictions and conduct leading to same, but determined that she accepted plaintiff's testimony as credible, we conclude that MCL 418.861a(3) . . . insulate[s] these findings from being set aside. Flowing from this determination that these factual findings may not be set aside, we also conclude that the overall determination to deny the petition to stop must be affirmed.

* * *

. . . The magistrate carefully considered the proffer of defendant's proposed Exhibit D within the context of MRE 609, the evidence rule relating to impeachment by evidence of conviction of crime. We conclude that the magistrate properly exercised her discretion to allow introduction of the criminal conviction and the guilty plea transcript, but excluding the charging document which included information related to other individuals besides plaintiff and counts that did not necessarily form the basis for plaintiff's guilty plea. [*Omian v Chrysler Group LLC*, 2011 ACO 98, pp 19-20.]

In its opinion, the MCAC did not address the magistrate's exclusion of evidence of the facts underlying the

counts of the indictment to which plaintiff did not plead guilty and the expert testimony based on those facts.

II

Defendant contends the MCAC erred by affirming the magistrate's decision to exclude not only proposed Exhibit D, but also the evidence, including expert testimony, that related to the facts underlying the indictment. We disagree in part, but we also agree in part.

As discussed by this Court in *Moore v Prestige Painting*, 277 Mich App 437, 447; 745 NW2d 816 (2007):

> The [commission] must review the magistrate's decision under the "substantial evidence" standard, and we review the [commission's] findings of fact under the "any evidence" standard. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702-704; 614 NW2d 607 (2000). Our review begins with the [commission's] decision, not the magistrate's. *Id*. "Findings of fact made or adopted by the [commission] are conclusive on appeal, absent fraud, if there is any competent evidence in the record to support them." *Tew v Hillsdale Tool & Mfg Co*, 268 Mich App 399, 405; 706 NW2d 883 (2005). We review de novo "questions of law involved in any final order of the [commission]." *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401; 605 NW2d 300 (2000). "[A] decision of the [commission] is subject to reversal if it is based on erroneous legal reasoning or the wrong legal framework." *Id*. at 401-402.[5]

In addition, "[t]his Court reviews a . . . decision to admit evidence for an abuse of discretion; however, when the . . . decision involves a preliminary question of law,

[5] Sixth alteration in original.

such as whether a statute precludes the admission of evidence, a de novo standard of review is employed." *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 275-276; 730 NW2d 523 (2006).

MCL 418.841(6) provides, in relevant part: "The rules of evidence as applied in a nonjury civil case in circuit court shall be followed as far as practicable, but a magistrate may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs." But see *Yakowich v Dep't of Consumer & Indus Servs*; 239 Mich App 506, 511; 608 NW2d 110 (2000) ("[H]earsay evidence is generally inadmissible, as provided in the rules of evidence.").

A

The MCAC did not err by affirming the magistrate's decision to exclude proposed Exhibit D. In *Mike's Train House, Inc v Lionel, LLC*, 472 F3d 398, 412 (CA 6, 2006),[6] the United States Court of Appeals for the Sixth Circuit determined that indictments are admissible as an exception to the hearsay rule, at least to the extent they reflect a judgment of conviction. Specifically, the federal court determined:

> The . . . court records, including the indictments, are admissible under [FRE] 803(22),[7] which excepts judgments of previous convictions from the general ban

[6] "Although the decisions of lower federal courts are not binding precedents, federal decisions interpreting Michigan law are often persuasive." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 715-716; 742 NW2d 399 (2007) (citation omitted).

[7] " 'The Michigan Rules of Evidence were based on the Federal Rules of Evidence.' As a result, Michigan courts have referred to federal cases interpreting rules of evidence when there is a dearth of related Michigan case law." *People v Katt*, 468 Mich 272, 280; 662 NW2d 12 (2003)

> against hearsay. Several courts have held that an indictment from a previous conviction is properly included within the scope of [FRE] 803(22) and is thus admissible despite being hearsay. [*Id*. (citations omitted).]

Given plaintiff's voluntary entry of a guilty plea to Counts 1 and 4 of the indictment, those portions of the indictment were not inadmissible hearsay.

Nevertheless, the magistrate did not err by finding portions of the indictment "not relevant" and "speculative" because the excluded evidence referred to individuals other than plaintiff, failed to indicate whether it was applicable to all or only some of the individuals, and did not specifically identify what monies plaintiff had actually received from his participation in the conspiracy as alleged. MRE 402 provides, "Evidence which is not relevant is not admissible." Relevant evidence must be material or "related to a fact of consequence to the action, and . . . have a tendency to make the existence of a fact of consequence to the action more probable or less probable than it would be without the evidence." *Lanigan v Huron Valley Hosp, Inc*, 282 Mich App 558, 564 n 6; 766 NW2d 896 (2009). The indictment's allegations against others and the unproved allegations against plaintiff were not material to plaintiff's credibility or his ability to earn wages. The MCAC reasoned that even without the evidence of the indictment, the magistrate had an adequate opportunity to consider the attack on plaintiff's credibility given the evidence of his actual convictions. We cannot conclude that the MCAC's decision to affirm the magistrate's exclusion of proposed Exhibit D was "based on erro-

(citation omitted). A review of FRE 803(22) reveals that the wording is substantially similar to that of MRE 803(22).

neous legal reasoning or the wrong legal framework." *DiBenedetto*, 461 Mich at 401-402.

B

However, unlike the aspects of the indictment just described, which were properly considered irrelevant, some of the remaining allegations in the indictment, as well as testimony tending to prove those allegations, might have been relevant to plaintiff's credibility. MRE 402. Thus, the magistrate erred by excluding this evidence. For example, plaintiff conceded during oral argument on appeal that evidence of plaintiff's bank records would have been relevant and admissible given that defendant had offered evidence that plaintiff opened a Comerica account with a $24,000 deposit sometime after he suffered his injury, despite plaintiff's testimony to the contrary that his participation in the charged offenses occurred before he started collecting workers' compensation benefits. In addition, plaintiff conceded that defendant could also have properly offered the testimony of plaintiff's coconspirators insofar as it concerned plaintiff's capability of earning wages or securing employment. Had defendant offered evidence tending to prove the facts underlying the indictment, which were prejudicial to plaintiff, that evidence, in addition to the facts established by his plea agreement, would have served as the basis for expert testimony about plaintiff's capability to work.

The magistrate did not address the relevance of the facts underlying the indictment, but excluded that evidence merely because it was information contained in the exhibits she had also excluded. On appeal, the MCAC affirmed the magistrate's findings of fact and the denial of the petition to stop benefits without addressing defendant's argument that the magistrate

erred by excluding from evidence the facts underlying the indictment. Under MCL 418.861a(3), the MCAC was required to consider the whole record before determining that the magistrate's findings of fact were conclusive. Because the MCAC did not first decide whether the facts underlying plaintiff's indictment should have been part of the whole record, we conclude that the MCAC operated under the wrong legal framework. *DiBenedetto*, 461 Mich at 401-402. We therefore remand this case to the MCAC for proper consideration of defendant's argument.

III

Defendant also asserts the applicability of the wrongful-conduct rule, contending that plaintiff, in light of his federal criminal convictions, was engaged in wrongdoing and should not be permitted to benefit from those crimes through the ongoing collection of workers' compensation benefits.

Workers' compensation issues raised for the first time in a pleading in this Court are not preserved for review. Defendant did not raise the issue of the applicability of the wrongful-conduct rule before the magistrate or MCAC. Because the issue is raised for the first time on appeal to this Court, it is not properly preserved, *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 65; 658 NW2d 460 (2003),[8] and this Court lacks authority to review it, *Calovecchi v Michigan*, 461 Mich 616, 626; 611 NW2d 300 (2000). See also *Bennett v Mackinac Bridge Auth*, 289 Mich App 616, 637; 808 NW2d 471 (2010).

[8] See MCL 418.861a(11) ("The commission or a panel of the commission shall review only those specific findings of fact or conclusions of law that the parties have requested be reviewed.").

Even if this Court had authority to address this issue, it would be unavailing to defendant. As discussed by our Supreme Court, for a plaintiff's action to be precluded or barred by the wrongful-conduct rule, " '[the plaintiff's] injury must have been suffered while and as a proximate result of committing an illegal act.' " *Manning v Bishop of Marquette*, 345 Mich 130, 136; 76 NW2d 75 (1956), quoting *Meador v Hotel Grover*, 193 Miss 392; 9 So 2d 782 (1942). Defendant has not argued that plaintiff's injury bears any relationship to the crimes alleged against plaintiff or the crimes of which he pleaded guilty.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. No costs under MCR 7.219 because none of the parties prevailed in full.

STEPHENS, J. I agree with the lead opinion that the Michigan Compensation Appellate Commission (MCAC) operated under the wrong legal framework by failing to address the magistrate's decision to exclude not only the indictment but the testimony of any witness who could testify about the facts that gave rise to that indictment. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 401-402; 605 NW2d 300 (2000). I agree with Judge RONAYNE KRAUSE that the ability to engage in illegal activity does not equate with the ability to earn wages within the meaning of the statute. However, I cannot say that the physical and mental efforts required in every illegal activity have no bearing on an individual's ability to earn legal wages or perform work. For example, while passively laundering funds would likely not translate into evidence of the ability to engage in legal work, managing those laundered funds by arranging for transfers, keeping records of the transactions, and delivering the funds to third parties

could be relevant to the ability to earn legal income. I agree that the argument here is laced with hyperbole, but the record does provide proof that defendant requested and was refused the opportunity to present witnesses to testify to the facts underlying the indictment. Whether upon review the MCAC will conclude that the magistrate's decision to decline to admit that evidence was in error remains to be seen. However, because I cannot conclude as a matter of law that the evidence has no legal relevance, I concur that the MCAC should review the issue.

RONAYNE KRAUSE, P.J. I respectfully disagree with certain portions of the lead opinion. I agree entirely with its reasoning and conclusions that defendant's "Proposed Exhibit D," a copy of a federal indictment against plaintiff and several other individuals, was technically admissible, but that the magistrate's decision to exclude it and the decision of the Michigan Compensation Appellate Commission (MCAC) to affirm that exclusion were not clearly erroneous. I also agree with the lead opinion that the wrongful-conduct rule is not properly before this Court and would not be of any use to defendant if it were. I respectfully disagree with the lead opinion's conclusion that the magistrate's exclusion of certain additional evidence ostensibly supporting some of the allegations in Exhibit D constituted an error warranting reversal.

As an initial matter, I am highly skeptical that a demonstrated ability to generate income from illegal activities, standing alone, necessarily proves anything relevant to workers' compensation benefits. In relevant part, "wage earning capacity" is defined as the wages that can be earned at "a job reasonably available." See MCL 418.301(4)(b), MCL 418.302, and

MCL 418.401(2)(c).[1] Neither the Legislature nor our Supreme Court has precisely defined what exactly constitutes a reasonably available job, and indeed, the word "job" is not defined at all. However, I think as a matter of public policy, it would be dangerous to consider illegal activities to be reasonably available jobs. For one thing, that would dramatically increase the burden of a claimant attempting to show entitlement to compensation and benefits. See *Stokes v Chrysler LLC*, 481 Mich 266, 281-285; 750 NW2d 129 (2008). For another, it could effectively encourage illegal activity if we were to recognize those activities as in any way reasonable. Finally, because we have functional law enforcement systems in both this state and this country, illegal conduct, however profitable it may be in the short term, is inherently unstable and ephemeral. Although the specific acts undertaken by a person might of course demonstrate that the person has the ability to perform those acts, with whatever implications come with it, the fact standing alone that the person has managed to derive some revenue from illegal conduct does not, in my opinion, itself consti-

[1] This statutory definition of "wage earning capacity" was enacted by 2011 PA 266 and applies only to injuries that occurred on or after its effective date, December 19, 2011; plaintiff's injuries would therefore not be covered. However, long before this statutory enactment, the phrase "wage earning capacity" was well established as referring to an employee's " 'capacity to earn sufficient wages *in the same or another occupation*' . . . ." *Ward v Detroit Bd of Ed*, 72 Mich App 568, 573; 250 NW2d 130 (1976), quoting *Markey v S S Peter & Paul's Parish*, 281 Mich 292, 298; 274 NW 797 (1937) (emphasis added). I think it obvious that this enactment in no way changed the prevailing law that "wage earning capacity" pertains to the ability to earn wages at a job that is in some way appropriate for the employee. See *Sington v Chrysler Corp*, 467 Mich 144, 158-159; 648 NW2d 624 (2002). I believe referring to the statutory definition is therefore appropriate. However, in any event, the same reasoning would lead me to conclude that it is utterly preposterous and unacceptably dangerous to regard illegal activities as "jobs."

tute good evidence of a capacity for gainful employment.

Credibility of a witness is generally relevant. See *People v Layher*, 464 Mich 756, 761-764; 631 NW2d 281 (2001); *In re Dearmon*, 303 Mich App 684, 696; 847 NW2d 514 (2014). As noted, the specific acts in which a benefits claimant has engaged can certainly constitute evidence of ability to engage in those acts. Here, however, the additional evidence would not show that plaintiff was able to perform physical or mental feats that he contended he could not. The medical testimony that the magistrate deemed credible showed that plaintiff was essentially limited to sedentary activities. In other words, there was no actual dispute that plaintiff could theoretically earn income through some hypothetical sedentary work. According to Exhibit D, plaintiff was merely a signatory on accounts used to funnel money out of the country illegally; evidence supporting that allegation would prove nothing of value beyond, possibly, the profitability of the operation. The fact that an illegal activity was more or less profitable does not, in my opinion, cast any light on plaintiff's credibility regarding what he could actually perform as legitimate employment.

I do agree with the lead opinion that the magistrate erred to the extent that her decision can be interpreted as a conclusion that plaintiff did not *commit* a crime purely because he did not *plead guilty of* that crime. The magistrate's exclusion of evidence pertaining to crimes to which plaintiff did not plead guilty could have had the effect of excluding potential evidence of crimes plaintiff actually perpetrated. Furthermore, I agree that excluding an exhibit, for whatever reason, does not per se necessitate exclusion of other evidence relating to the subject matter of that exhibit. I cer-

tainly agree that, in principle, *actual work* a benefits claimant performs under the table *can* be evidence that the claimant is capable of engaging in gainful employment, or evidence of "a job reasonably available." What I cannot accept is the contention that acquiring money through illegal conduct is *inherently* proof of the same. Consequently, I cannot agree that the magistrate's error warrants reversal in this matter.

Therefore, I understand defendant's argument that it should, in the abstract, have been permitted to show that plaintiff was physically performing actions that would also be performed in the course of gainful employment, therefore proving a capacity for that gainful employment. Practically, however, I can find absolutely nothing in defendant's brief beyond hyperbolic bluster and rather suspiciously pious appeals to emotion to suggest that it could have presented evidence of any such acts. Rather, defendant refers to plaintiff as some kind of criminal mastermind but provides not a scintilla of support for that characterization. Plaintiff is undisputedly a criminal, there was likely little doubt that his honesty is somewhat less than absolute, and he might very well be a "bad person," but entitlement to workers' compensation benefits is in no way based on those considerations. Our role as a court is to implement the law rather than our own whimsical personal opinions about whether any given individual deserves to be more equal under the law than anyone else.

Had defendant even submitted so much as a minimal offer of proof, or if the crimes had been at all related to plaintiff's work with defendant, I would accept that the decision to remand might make sense, depending on the nature of the proofs offered. Again, I agree that evidence of the actual conduct in which a

claimant has engaged is relevant and should be considered to the extent that conduct consists of acts that would be performed in the course of gainful employment. Nevertheless, that would be true whether the conduct was legal *or* illegal. Defendant's argument amounts to a bare assertion, with which the lead opinion seemingly agrees, that profiting from a crime somehow equals proof of wage-earning capability. Defendant simply seeks to extrapolate too much, asking me to believe that plaintiff was a "criminal mastermind" without the basic decency to offer the slightest basis for why the existence of supporting evidence for that assertion is anything but hypothetical and speculative. Without that support, I cannot perceive any basis for undermining the MCAC's result.

I understand the lead opinion's position that, in theory, the magistrate should not ignore evidence of actual conduct by a benefits claimant that tends to demonstrate an ability to engage in gainful employment. However, beyond a perverse and disturbing implication that crime in fact does pay, I do not believe the omitted evidence that the lead opinion deems significant here would possibly have done so. Consequently, I would affirm.

GENESEE COUNTY DRAIN COMMISSIONER v
GENESEE COUNTY

Docket No. 312450. Submitted April 1, 2014, at Detroit. Decided March 3, 2015, at 9:00 a.m.

The Genesee County Drain Commissioner (Drain Commissioner), Fenton Charter Township, and others brought an action in the Genesee Circuit Court against Genesee County and the Genesee County Board of Commissioners. The Drain Commissioner alleged that his office had an agreement with Genesee County for the purchase of group health insurance from Blue Cross Blue Shield of Michigan for the employees of both entities. Blue Cross determined the premiums to be paid by each entity and provided them separate invoices. The Drain Commissioner subsequently discovered that the county, in its capacity as the administrator for the group plan, had received substantial refunds from Blue Cross for premium overpayments that the county had deposited into its general fund. The Drain Commissioner requested that the county pay a portion of the refunded money to the office of the Drain Commissioner. The Drain Commissioner and other affected parties brought suit on October 24, 2011, after the Genesee County Board of Commissioners failed to grant the requested refund. Defendants moved for summary disposition. The court, Geoffrey L. Neithercut, J., granted the motion in part and denied the motion in part, holding that plaintiffs' breach of contract claim could only recover damages for actions accruing after October 24, 2005, and that defendants' status as governmental entities did not give them immunity from plaintiffs' intentional tort claims. Defendants appealed and plaintiffs cross-appealed.

The Court of Appeals *held*:

1. The governmental tort liability act, MCL 691.1401 *et seq*., provides governmental entities with strong and comprehensive immunity from tort liability, subject only to extremely limited and strictly construed exceptions. Under the act, except as otherwise provided, a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. A "governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution,

statute, local charter or ordinance, or other law. When determining whether an act is a governmental function, one examines the general activity involved rather than the specific conduct engaged in when the alleged injury occurred. County boards of commissioners have long held statutory authority to provide health insurance to county employees under MCL 46.12a. MCL 280.33(3) further states that a county may bear the cost of fringe benefits, such as health insurance, for drainage-district employees. And MCL 124.75(1)(c), enacted in in 2007, expressly permits the group-insurance arrangement at issue in this case. Providing health insurance to public employees is, therefore, a governmental function. The alleged intentional torts committed by defendants—conversion and fraud—were specific acts that occurred as part of the general activity of that governmental function. Defendants were, accordingly, immune from tort liability for any intentional torts they committed in the provision and administration of the health insurance benefits.

2. Under MCL 600.5807, the catch-all period of limitations for an action to recover damages or sums due for breach of contract is six years. In rare circumstances, courts will recognize the doctrine of equitable estoppel as a judicially created exception to the general rule that periods of limitation run without interruption. A party that seeks to invoke equitable estoppel generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. In this case, plaintiffs failed to meet their burden in attempting to invoke equitable estoppel. At no time did defendants engage in false representation or concealment of a material fact. The action about which plaintiffs complained—Genesee County's placement of the premium refunds in the county's general fund—was a matter of public record. The trial court correctly held that plaintiffs' breach of contract claim may not seek compensation for damages that accrued before October 24, 2005. On remand, plaintiffs may seek compensation for damages arising from the alleged breach of contract that accrued after that date.

Trial court decision denying defendants' motion for summary disposition with regard to plaintiffs' intentional tort claims reversed; trial court decision holding that plaintiffs' breach of contract claim may not seek compensation for damages that accrued before October 24, 2005, affirmed; case remanded to the

trial court for further proceedings including entry of an order dismissing plaintiffs' intentional tort claims.

STEPHENS, J., concurred in the result only.

TORTS — GOVERNMENTAL IMMUNITY — GOVERNMENTAL FUNCTIONS — PROVISION OF HEALTH INSURANCE.

Under the governmental tort liability act, MCL 691.1401 *et seq*., except as otherwise provided, a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function; a "governmental function" is an activity that is expressly or impliedly mandated or authorized by constitution, statute, local charter or ordinance, or other law; the provision of health insurance to public employees is a governmental function authorized by statute (MCL 124.75).

Henneke, Fraim & Dawes, PC (by *Scott R. Fraim* and *Brandon S. Fraim*), for plaintiffs.

Plunkett Cooney (by *Hilary A. Ballentine*, *H. William Reising*, and *Rhonda R. Stowers*) for defendants.

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

SAAD, J. Plaintiffs and defendants appeal the trial court's partial grant and partial denial of defendants' motion for summary disposition under MCR 2.116(C)(7) and (8). For the reasons stated below, we affirm in part and reverse in part, and remand for proceedings consistent with this opinion.

I. NATURE OF THE CASE

Cases brought under the governmental tort liability act (GTLA)[1] usually involve personal-injury or property-damage tort claims made by individuals against governmental agencies or employees. This case, however, is unusual, because it involves tort claims made by a group of governmental agencies against

[1] MCL 691.1401 *et seq*.

another group of governmental agencies. And it is even more unusual because plaintiffs' tort claims arise out of a contractual agreement. Despite the peculiar aspects of this action, our research and understanding of Michigan caselaw leads us to a conventional ruling: plaintiffs' intentional tort claims are barred by the GTLA, because the GTLA contains no exceptions from governmental immunity for intentional torts, and because defendants were engaged in a basic governmental function as they committed the alleged tortious conduct.

Specifically, plaintiffs maintain that defendants breached their contractual obligations in their administration of a group health insurance contract for employees of both plaintiffs and defendants.[2] In so doing, plaintiffs argue, defendants also committed the intentional torts of conversion and fraud by wrongfully keeping premium refunds for themselves, instead of sharing the refunds with plaintiffs, as allegedly required by the contract. Though plaintiffs acknowledge that there are no statutory exceptions for intentional torts under the GTLA, they note that the GTLA's immunity from tort liability only applies to governmental agencies engaged in the discharge of a governmental function. Defendants, plaintiffs claim, could not have been engaged in a governmental function when they committed intentional torts, because tortious conduct cannot be a "governmental function." From this, plaintiffs say defendants are not immune from tort liability for their intentional wrongdoing under the GTLA.

While plaintiffs' assertion has surface appeal, it must be rejected. Were we to accept such a theory, we

[2] Plaintiffs have also appealed a procedural issue: whether equitable estoppel may be applied to negate the statute of limitations and allow plaintiffs to seek contract damages for injuries accrued before October 24, 2005. The substantive merits of plaintiffs' breach of contract claim are not before us, and we make no findings on those matters.

would in essence rewrite the GTLA and make public policy choices that are rightly the Legislature's to make. We would create a new (and wholly unsupported) exception to the GTLA's general rule of governmental immunity from tort liability—an exception that would swallow up this general rule. To avoid dismissal of their case pursuant to the GTLA, future plaintiffs would only need to allege intentional wrongdoing by a governmental agency. Such a result contravenes the stated purpose of the GTLA, which is to *limit* governmental tort liability to specific, statutorily enumerated situations. Accordingly, we hold that plaintiffs' tort claims are barred by the GTLA, and explain our reasoning in greater detail below.

II. FACTS AND PROCEDURAL HISTORY

Plaintiff Genesee County Drain Commissioner (Drain Commissioner) alleges that he had an agreement with defendant Genesee County to purchase group health insurance from Blue Cross Blue Shield of Michigan (Blue Cross) for their respective employees. Blue Cross determined the premium rate to be paid by each entity, and they were separately invoiced for the payments. According to plaintiffs, Genesee County was to administer the group plan for the parties under the agreement.

In 2007, the Drain Commissioner began making contingency plans for alternative health insurance coverage in the event Genesee County decided to end the agreement for group health insurance coverage. After obtaining financial records and information from Blue Cross, the Drain Commissioner says that he learned that Genesee County, in its capacity as the group-plan administrator, had received substantial refunds from Blue Cross (supposedly totaling millions of

dollars) for premium overpayments made by each member of the group plan. The county—which, plaintiffs say, could or should have used the refunds to reduce premium costs for county employees and employees of the Drain Commissioner, or could or should have returned a portion of the money to each member of the group plan—instead deposited the money in its general fund. These allocations, in accordance with MCL 15.263(1), took place at public meetings and were (and remain) matters of public record. Yet the Drain Commissioner claims he was unaware of Genesee County's conduct, and ultimately demanded that the county pay his office a portion of the refunded money the county received from Blue Cross. When defendant Genesee County Board of Commissioners (Board of Commissioners) did not authorize the county to do so, the Drain Commissioner and other affected parties brought this action against defendants in Genesee Circuit Court on October 24, 2011.

Among other things, plaintiffs asserted that defendants: (1) breached the alleged agreement to purchase health insurance by placing the refunded premiums in its general fund; and, in so doing, (2) committed a number of intentional torts, including fraud and conversion. Defendants moved for summary disposition under MCR 2.116(C)(7) and (8), and asserted that: (1) any damages plaintiffs sought for breach of contract that accrued on the basis of conduct occurring before October 24, 2005 were barred by the statute of limitations; and (2) defendants were immune from plaintiffs' intentional tort claims under the GTLA.

At an August 2012 hearing, the trial court held that: (1) plaintiffs' breach of contract claim could only recover damages for actions that accrued after October 24, 2005, pursuant to the six-year period of limitations specified

in MCL 600.5807(8); and (2) defendants' status as governmental entities did not give them immunity from intentional tort claims.

On appeal, plaintiffs say that the trial court should have applied the doctrine of equitable estoppel to prevent defendants from relying on the period of limitations in MCL 600.5807(8), which would have allowed them to seek damages for breach of contract that accrued before October 24, 2005. Defendants argue that the trial court erred when it allowed plaintiffs' intentional tort claims to proceed.

III. STANDARD OF REVIEW

MCR 2.116(C)(7) provides that a party may file a motion to dismiss a case when "[e]ntry of judgment, dismissal of the action, or other relief is appropriate because of . . . immunity granted by law [or] statute of limitations . . . ." When it reviews a motion under MCR 2.116(C)(7), the court must "consider all documentary evidence and accept the complaint as factually accurate unless affidavits or other appropriate documents specifically contradict it." *Kuznar v Raksha Corp*, 481 Mich 169, 175-176; 750 NW2d 121 (2008). All well-pleaded allegations are accepted as true and construed in favor of the nonmoving party. *Johnson v Pastoriza*, 491 Mich 417, 435; 818 NW2d 279 (2012). In the context of a suit in which the defendant alleges governmental immunity, "to survive a motion for summary disposition, the plaintiff must . . . allege facts justifying application of an exception to governmental immunity." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

"A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. All well-pleaded factual allegations are accepted as true and construed in a light most favorable" to the nonmoving party. *Maiden v*

Rozwood, 461 Mich 109, 119; 597 NW2d 817 (1999). Motions under MCR 2.116(C)(8) are granted only when the claims are so unenforceable "as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted).

Statutory interpretation is a matter of law that is reviewed de novo. *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 707; 664 NW2d 193 (2003). "When ascertaining the Legislature's intent, a reviewing court should focus first on the plain language of the statute in question, and when the language of the statute is unambiguous, it must be enforced as written." *Fellows v Mich Comm for the Blind*, 305 Mich App 289, 297; 854 NW2d 482 (2014) (quotation marks and citation omitted). "A court does 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) (quotation marks and citations omitted).

IV. ANALYSIS

A. GOVERNMENTAL IMMUNITY

1. THE GTLA[3]

Though the origins of governmental immunity lie in

[3] To repeat, this appeal involves only plaintiffs' intentional tort claims, which is why the GTLA, which governs governmental liability for torts, is implicated. Our analysis does not address plaintiffs' claim for breach of contract, which is a separate claim not governed by the GTLA, insofar as it involves contractual liability and not tort liability. See *In re Bradley Estate*, 494 Mich 367, 384-387; 835 NW2d 545 (2013) for a thorough discussion of the distinction between tort liability of governmental agencies (governed by the GTLA) and other forms of liability of governmental agencies (governed by other law). Among other things, the Court held "that 'tort liability' as used in MCL 691.1407(1) means all legal

the antiquated notion that the sovereign can do no wrong,[4] the modern rationale is rooted in the more realistic assessment that the sovereign—meaning government at all levels[5]—often does wrong. But the taxpaying citizen, who already pays dearly for government employees to perform governmental functions, would pay an unacceptably high price if every wrong or alleged wrong committed by the government or its agents were regarded as compensable.[6] With this real-

---

responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Id*. at 385.

[4] See *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 596-598; 363 NW2d 641 (1984) (noting Michigan inherited its sovereign authority from the British monarch, and "[t]he first rationale [for sovereign immunity] developed from the perception that the sovereign (the king) was somehow 'divine' or above the law. As such, the king could commit no wrong and was, therefore, never properly sued"). Michigan cases also note that the state, as sovereign, created the Michigan court system, and is accordingly not subject to the court system's jurisdiction without its consent. *Pohutski v Allen Park*, 465 Mich 675, 681; 641 NW2d 219 (2002).

[5] Over time, our judiciary has applied an extension of sovereign immunity—"governmental immunity"—to "the 'inferior' divisions of government, *i.e.*, townships, school districts, villages, cities, and counties . . . ." *Pohutski*, 465 Mich at 682 (quotation marks and citation omitted). For ease of reference, we refer to the two concepts as one and the same throughout the opinion, under the term "sovereign immunity."

[6] "The purpose of sovereign immunity is to protect the State from interference with the performance of governmental functions and to preserve and to protect State funds." *Ass'n of Mid-Continent Univ v Bd of Trustees of Northeastern Ill Univ*, 308 Ill App 3d 950, 953; 242 Ill Dec 526; 721 NE2d 805 (1999) (interpreting Illinois' statutes and jurisprudence on governmental immunity). See also *Virginia Beach v Carmichael Dev Co*, 259 Va 493, 499; 527 SE2d 778 (2000) (holding, under the common law, that "[s]overeign immunity is a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities") (quotation marks and citations omitted); *Trujillo v Utah Transp Dep't*, 1999 Utah App 227, ¶ 20; 986 P2d 752 (1999) (describing Utah's governmental immunity act as serving "two

ity in mind, the Michigan Legislature adopted a public policy, codified in the GTLA, that provides governmental entities with strong and comprehensive immunity from tort liability, subject only to extremely limited and strictly construed exceptions.[7] Thus, the law of governmental immunity from tort liability is statutory, a clear public policy choice made by the people's representatives, and one that abrogates all common-law exceptions to governmental immunity from tort suit.[8]

The Legislature enacted the GTLA in 1964 after a series of court decisions began to erode the common-law rule of governmental immunity from tort liability.[9] The GTLA restores governmental immunity in two ways. First, it abolishes common-law exceptions to governmental immunity from tort law.[10] Second, the GTLA mandates that, "[e]xcept as otherwise provided in this act, a governmental agency[11] is immune from

---

policies," including "shield[ing] those governmental acts and decisions impacting on large numbers of people in a myriad of unforeseen ways from individual and class legal actions, the continual threat of which would make public administration all but impossible") (quotation marks and citation omitted). "Cases from foreign jurisdictions are not binding, but can be persuasive." *Holton v Ward*, 303 Mich App 718, 727 n 11; 847 NW2d 1 (2014).

[7] *Moraccini v Sterling Hts*, 296 Mich App 387, 391-392; 822 NW2d 799 (2012).

[8] *Martin v Michigan*, 129 Mich App 100, 105; 341 NW2d 239 (1983).

[9] See *Ross*, 420 Mich at 605-606; *Pohutski*, 465 Mich at 683.

[10] *Martin*, 129 Mich App at 105.

[11] As used in the GTLA, the term "governmental agency" means "this state or a political subdivision." MCL 691.1401(a). In turn, "political subdivision" includes "count[ies]," a "district or authority authorized by law or formed by 1 or more political subdivisions," and a "board . . . of a political subdivision." MCL 691.1401(e). Here, defendants, which are, respectively, a county and a board of a county, are "political subdivisions" under MCL 691.1401(e) and thus "governmental agencies" under MCL 691.1401(a).

tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1).

The GTLA defines "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). "[T]his definition is to be broadly applied and requires only that there be *some* constitutional, statutory or other legal basis for the activity in which the governmental agency was engaged." *Harris v Univ of Mich Bd of Regents*, 219 Mich App 679, 684; 558 NW2d 225 (1996) (quotation marks and citation omitted). Furthermore, when determining if an act is a "governmental function," "we look to the general activity involved rather than the specific conduct engaged in when the alleged injury occurred." *Ward v Mich State Univ (On Remand)*, 287 Mich App 76, 84; 782 NW2d 514 (2010).

To overcome governmental immunity for tort liability, then, plaintiffs—whether private parties, or, as here, public entities—who bring tort claims against a governmental defendant[12] must either (1) plead a tort that falls within one of the GTLA's stated exceptions,[13] or (2) demonstrate that the alleged tort occurred outside the exercise or discharge of a governmental function.[14]

---

[12] The GTLA also grants immunity from tort liability to certain individuals acting in their capacity as employees of the government. See MCL 691.1407(2) and (5).

[13] Among the GTLA's stated exceptions to governmental immunity for tort liability are tort suits that involve the following: (1) highways (MCL 691.1402); (2) government-owned vehicles (MCL 691.1405); (3) public buildings (MCL 691.1406); and (4) sewage-disposal-system events (MCL 691.1417).

[14] Stated another way, tort liability may be imposed on a government agency "only if the agency was engaged in ultra vires activity." *Herman v Detroit*, 261 Mich App 141, 144; 680 NW2d 71 (2004) (quotation marks and citation omitted).

The GTLA does not contain an "intentional tort exception to governmental immunity" from tort liability. *Harrison v Corrections Dep't Director*, 194 Mich App 446, 450; 487 NW2d 799 (1992). Accordingly, any plaintiff who seeks to assert an intentional tort claim against a governmental defendant must demonstrate that the defendant committed the alleged tort outside the exercise or discharge of a governmental function. This is a very high—and extremely difficult—burden for a plaintiff to surmount because, as noted, when courts assess whether a governmental defendant was engaged in the exercise or discharge of a governmental function, "we look to the *general activity* involved rather than the *specific conduct* engaged in when the alleged injury occurred." *Ward*, 287 Mich App at 84 (emphasis added). Therefore, "an act may be [the] exercise or discharge of a governmental function even though it results in an intentional tort." *Smith v Pub Health Dep't*, 428 Mich 540, 593; 410 NW2d 749 (1987) (opinion by BRICKLEY, J.) (alteration in original).[15] In other words, if a governmental agency commits an intentional tort during the exercise or discharge of a governmental function, the governmental agency is immune from tort liability.[16] This limitation on tort liability allows the government to function without

[15] In other words, governmental immunity "applies not only to negligence, but also to intentional torts if they are committed within the scope of a governmental function." *Jones v Williams*, 172 Mich App 167, 173; 431 NW2d 419 (1988).

[16] Lest this immunity from intentional tort liability seem unduly restrictive, it should be noted that the GTLA only provides governmental defendants immunity from *tort* liability—not contractual or criminal liability. See *In re Bradley Estate*, 494 Mich at 397. The presence of these other remedies allows parties that have been wronged by a governmental agency to seek redress. There are also nonlegal remedies: governmental agencies are staffed by actual people, who commit acts on behalf of the government on a daily basis. If these individuals engage in

fear of time-consuming and costly litigation—a cost which, eventually, would be borne by the taxpaying citizens that fund the government.[17]

2. APPLICATION

It is uncontested that defendants are "governmental agencies" within the scope of the GTLA. And plaintiffs' assertion that the administration of an interagency agreement to provide health insurance to public employees is not a "governmental function" is simply incorrect.[18] The central issue in this case is whether

---

wrongful conduct that is brought to the public's attention, these individuals, if elected, may have to face the voters, or, if unelected, appropriate workplace sanctions.

[17] This represents an acknowledgment of the reality that state and local governments are not magical entities that have unlimited amounts of money at their disposal—their money comes from taxes levied on people and businesses, and any cost to the public fisc will ultimately be borne by the private citizen. As Milton Friedman memorably put it, "there's no such thing as a free lunch." Friedman, *There's No Such Thing as a Free Lunch* (Chicago: Open Court, 1975).

[18] County boards of commissioners have long held statutory authority to provide health insurance to county employees under MCL 46.12a, and MCL 280.33(3) states that a county, as here, may bear the cost of "fringe benefits," i.e., health insurance, for drainage-district employees. Furthermore, the provision of health insurance to government employees is a longstanding governmental function of governmental agencies. See, for example, *Houghton Lake Ed Ass'n v Houghton Lake Community Sch, Bd of Ed*, 109 Mich App 1, 3-5; 310 NW2d 888 (1981) (addressing a dispute over the health insurance plan purchased by the school district for its employees); *Detroit v Mich Council 25, AFSCME*, 118 Mich App 211, 216; 324 NW2d 578 (1982) (involving city-provided health insurance to city employees).

There is also a specific provision, MCL 124.75(1)(c), that explicitly permits the exact sort of group-insurance arrangement at issue. MCL 124.75 was enacted in 2007, presumably after the parties made their group-insurance agreement. (The parties do not specify when they entered into the alleged agreement.) Nevertheless, the existence of MCL 124.75, when viewed in light of the longstanding statutory authority of governmental entities to purchase health insurance for their employees,

plaintiffs may assert intentional tort claims against a governmental-agency defendant that committed the alleged torts while engaged in the exercise of a governmental function.

Plaintiffs' reasoning is seductively simple, but ultimately circular and self-defeating. Plaintiffs assert that if a governmental agency commits an intentional tort, it cannot, by definition, be engaged in the exercise or discharge of a governmental function, as intentional torts ought not be regarded as a governmental function. Because the governmental agency committed the alleged tort *outside* the exercise or discharge of a governmental function, the GTLA's immunity no longer applies, and the victim of the tort may assert intentional tort claims against the governmental agency. Here, plaintiffs say (1) defendants committed intentional torts when they deposited refunded health insurance premiums in the Genesee County general fund; (2) these intentional torts are not a governmental function; and (3) the GTLA is thus not controlling and plaintiffs may assert these intentional tort claims against defendants.

Plaintiffs' analysis both ignores Michigan caselaw and misreads the GTLA. To repeat: the provision and administration of health insurance benefits to public employees via an interagency agreement is plainly a governmental function.[19] The alleged intentional torts committed by defendants were specific acts or decisions that occurred as part of the "general activity" of this governmental function.[20] Defendants are therefore

---

is further evidence of the fact that defendants were engaged in the discharge of a governmental function when they made and administered the group-insurance agreement with plaintiffs.

[19] See note 18 of this opinion.

[20] See *Ward*, 287 Mich App at 84.

immune from tort liability for any intentional torts they committed in the provision and administration of health insurance benefits to public employees, and plaintiffs are barred from asserting intentional tort claims based on defendants' action in this context.

More importantly, were we to adopt plaintiffs' misreading of the GTLA, we would fatally undermine the statute and, ironically, cause it to suffer the same fate as the hollowed-out common-law rule it was enacted to replace. Again, plaintiffs say that intentional torts, by definition, cannot be governmental functions. Because the GTLA states that any act committed outside the exercise or discharge of a governmental function is not subject to immunity from tort liability, future plaintiffs would only need to assert a governmental defendant committed an intentional tort to abrogate the GTLA's grant of immunity and continue their suit.[21]

Under plaintiffs' theory, then, intentional torts become a judicially created exception to the GTLA, and eviscerate the GTLA's general rule of governmental immunity from tort liability. History would thus repeat itself—just as common-law governmental immunity was substantially eroded by judge-made exceptions, so too would its statutory heir. We will not interpret the GTLA in a way that undermines the clear public policy choices of the Legislature. Again, the purpose of the GTLA is to limit governmental tort liability to specific, narrow, and enumerated categories.[22] As noted, the Legislature did not include intentional torts in the

[21] This would be incredibly easy to do, because almost any action can be reframed as an intentional tort. For example, physical violence against an individual can be framed as a tort (assault) or a crime (criminal assault). In the same fashion, plaintiffs' own suit transforms an otherwise valid contractual claim against governmental defendants into an *invalid* intentional tort claim against governmental defendants.

[22] *In re Bradley Estate*, 494 Mich at 378.

GTLA's stated exceptions.[23] It could have easily done so. Moreover, if a plaintiff's claims of wrongdoing have merit, he may use other legal avenues outside tort law—criminal and contractual law—to pursue his claim.[24]

Accordingly, plaintiffs' intentional tort claims against defendant must be dismissed, and we reverse the trial court's unsupported holding that allowed those claims to proceed to trial.

B. STATUTE OF LIMITATIONS

Again, we do not address the substantive merits of plaintiffs' claim for breach of contract, but only address the procedural question of whether equitable estoppel may be applied to negate the statute of limitations for plaintiffs' breach of contract claim. MCL 600.5807 states:

> No person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section.
>
> * * *
>
> (8) The period of limitations is 6 years for all other actions to recover damages or sums due for breach of contract.

A "statute of limitations is a procedural, not substantive, rule, which will be upheld unless a party demonstrates that it is so harsh and unreasonable in its consequences that it effectively divests plaintiffs of

---

[23] *Harrison*, 194 Mich App at 450.

[24] See *In re Bradley Estate*, 494 Mich at 388-389.

the access to the courts intended by the grant of the substantive right." *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 605-606; 712 NW2d 744 (2006) (quotation marks and citations omitted). In rare circumstances, courts will recognize the doctrine of equitable estoppel as a "judicially created exception to the general rule that statutes of limitation run without interruption." *Cincinnati Ins Co v Citizens Ins Co*, 454 Mich 263, 270; 562 NW2d 648 (1997). A party that seeks to invoke equitable estoppel has a heavy burden and therefore:

> generally must establish that there has been (1) a false representation or concealment of a material fact, (2) an expectation that the other party will rely on the misconduct, and (3) knowledge of the actual facts on the part of the representing or concealing party. [The Michigan Supreme] Court has been reluctant to recognize an estoppel absent intentional *or negligent* conduct designed to induce a plaintiff to refrain from bringing a timely action. [*Id*.]

Here, plaintiffs have not come close to making a case for equitable estoppel to negate application of the statute of limitations under MCL 600.5807. As the trial court found, dispositively, at no time did defendants engage in a "false representation or concealment of a material fact . . . ." *Id*. In fact, the action of which plaintiffs complain—Genesee County's placement of the premium refund in the county's general fund—was a matter of public record. This transparency is the exact opposite of "concealment" and reveals that plaintiffs' request for equitable estoppel is simply a transparent and unavailing attempt to circumvent straightforward law.

The trial court correctly held that plaintiffs may not seek damages that accrued before October 24, 2005. On

remand, plaintiffs may seek damages for the alleged breach of contract that accrued after that date.

V. CONCLUSION

Accordingly, we hold that the trial court erred when it denied defendants' request for summary disposition as to plaintiffs' intentional tort claims. Defendants are immune from tort liability under the GTLA, and plaintiffs' tort claims must be dismissed as a matter of law. We remand these claims to the trial court for entry of an order of dismissal.

We affirm the trial court's ruling that plaintiffs' breach of contract claim may not seek compensation for damages that accrued before October 24, 2005.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

BOONSTRA, J., concurred with SAAD, J.

STEPHENS, P.J. (*concurring*). I concur in the result only.

McLAIN v LANSING FIRE DEPARTMENT

Docket No. 318927. Submitted February 4, 2015, at Lansing. Decided March 3, 2015, at 9:05 a.m. Leave to appeal sought.

Tod McLain, personal representative of the estate of Tracy McLain, brought a medical malpractice action in the Ingham Circuit Court against the Lansing Fire Department, the city of Lansing, Jeffrey Williams, and Michael Demps. Plaintiff alleged that Tracy suffered a respiratory emergency to which Williams, a fireman and paramedic for the city, responded. Plaintiff claimed that Williams improperly intubated Tracy. Demps was later dismissed from the case by stipulation. Plaintiff moved for summary disposition or entry of a default judgment. The court denied the motion, but permitted plaintiff to file an amended complaint alleging gross negligence. Defendants then moved for summary disposition. The court, James S. Jamo, J., granted the motion, holding that defendants were entitled to immunity. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 600.2912e(1), the defendant in a medical malpractice action must file an affidavit of meritorious defense. Defendants claiming immunity under the emergency medical services act (EMSA), MCL 333.20901 *et seq*., however, do not lose the benefit of immunity merely by failing to timely file the affidavit because the affidavit of merit requirements are not relevant to a defendant entitled to immunity. In this case, defendants claimed immunity under the EMSA. Accordingly, defendants were not required to file an affidavit of meritorious defense, and the trial court correctly denied plaintiff's motion for entry of a default judgment, which was based on defendants' alleged failure to file an affidavit of meritorious defense.

2. Under MCL 333.20965(1) of the EMSA, unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a paramedic while providing services to a patient outside a hospital that are consistent with the individual's licensure do not impose liability in the treatment of a patient on the paramedic or the authoritative governmental unit or units. "Gross negligence" is conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. Evi-

dence of ordinary negligence does not create a material question of fact concerning gross negligence. "Willful misconduct" is conduct with intent to harm. In this case, plaintiff asserted there was a question of fact regarding whether Williams's conduct amounted to gross negligence or willful misconduct, which would negate defendants' immunity from suit under the EMSA. Plaintiff relied on a medical progress report recorded by an intern at the hospital where Tracy was treated that stated that the breathing tube placed by Williams was located in her esophagus rather than her trachea. Williams contended that he had not placed the breathing tube in Tracy's esophagus, that he followed proper procedure, and that the intubation had appeared successful. The medical progress notes were dictated by an intern who did not have direct knowledge of where the tube was located and who could not recall from whom he had received the information he recorded. This evidence was insufficient to create a question of fact regarding gross negligence or willful misconduct. Plaintiff did not present any evidence to rebut Williams's version of events. Accordingly, the trial court correctly granted summary disposition in favor of defendants under MCR 2.116(C)(7).

Affirmed.

TORTS — MEDICAL MALPRACTICE — EMERGENCY MEDICAL SERVICES ACT — IMMUNITY — EFFECT OF THE FAILURE TO FILE AN AFFIDAVIT OF MERITORIOUS DEFENSE.

Under MCL 600.2912e(1), the defendant in a medical malpractice action must file an affidavit of meritorious defense; defendants claiming immunity under the emergency medical services act, MCL 333.20901 *et seq*., however, do not lose the benefit of immunity merely by failing to timely file the affidavit.

Morgan & Meyers, PLC (by *Courtney E. Morgan*, *Jr.*, and *Eric J. Rosenberg*), for Tod McLain.

Plunkett Cooney (by *Robert G. Kamenec*, *Karen E. Beach*, and *David K. Otis*), for the Lansing Fire Department, the city of Lansing, and Jeffrey Williams.

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

SAAD, P.J. Plaintiff appeals the trial court's grant of summary disposition in favor of defendants. For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

This case involves the death of plaintiff's decedent, Tracy McLain. According to plaintiff's original complaint, McLain suffered a respiratory attack in February 2009. When emergency personnel arrived, they administered medication and CPR, and inserted a breathing tube into McLain. Though McLain was promptly delivered to the hospital, she was declared brain-dead several days after her admission, and died soon after. Plaintiff's complaint attributed her death to defendant Jeffrey Williams's[1] alleged placement of the breathing tube in her esophagus instead of her trachea.[2]

In deposition, Williams said that he followed proper procedure during McLain's treatment, and that he did not place the breathing tube in McLain's esophagus—nor did he see anyone else do so. He also stated that (1) the intubating procedure appeared to have been successful, (2) he and other emergency personnel continuously monitored McLain's status on the way to the hospital, and (3) he did not know how the tube could have been in her esophagus, apart from the possibility that it became dislodged. In addition to stressing Williams's statement that he did not place the breathing tube in McLain's esophagus, defendants argued that the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., and the emergency medical services act (EMSA), MCL 333.20901 *et seq*., provided them with immunity from plaintiff's suit.

---

[1] Williams works as a fireman and paramedic for defendant city of Lansing.

[2] Defendant Michael Demps also provided emergency medical services in connection with the events underlying this case, but he was dismissed from the case by stipulation.

After an initial hearing, the trial court held that the GTLA did not give defendants immunity from plaintiff's suit.[3] It further permitted plaintiff to file an amended complaint that alleged gross negligence or willful misconduct, to avoid the immunity defendants claimed under the EMSA. Plaintiff filed such an amended complaint, and defendants responded by moving for summary disposition under MCR 2.116(C)(7).

After another hearing, the trial court granted defendants' motion for summary disposition. It held that plaintiff had failed to create a question of fact that defendants treated McLain with "gross negligence" or "willful misconduct," and that defendants were therefore entitled to immunity under the EMSA. The trial court also noted that the only evidence presented by plaintiff that suggested any error by defendants in their treatment of McLain—(1) medical progress notes[4] from the hospital that stated the breathing tube was

---

[3] The trial court referred to MCL 691.1407(4), which provides:

> This act does not grant immunity to a governmental agency or an employee or agent of a governmental agency with respect to providing medical care or treatment to a patient, except medical care or treatment provided to a patient in a hospital owned or operated by the department of community health or a hospital owned or operated by the department of corrections and except care or treatment provided by an uncompensated search and rescue operation medical assistant or tactical operation medical assistant.

[4] An intern at the hospital dictated the medical progress notes. He clarified in deposition that he did not have firsthand knowledge of many of the events described in the notes: for instance, he did not discover the breathing tube's placement in McLain's esophagus, nor was he aware of *when* the breathing tube might have lodged itself in McLain's esophagus. He emphasized that his report reflected what he had been told about McLain's case by other individuals (whom he could no longer identify). The trial court therefore noted that the intern did not have "any direct information as to where the tube was located" and that the

located in McLain's esophagus (though the notes did not indicate *when* the breathing tube might have lodged itself in McLain's esophagus); and (2) plaintiff's assertion that Williams's testimony was not credible—was either of dubious admissibility and accuracy, or unsupported.[5]

On appeal, plaintiff claims that the trial court should have granted him summary disposition under MCR 2.116(C)(9), or entered a default order against defendants under MCR 2.603(A), because defendants supposedly did not file an affidavit of meritorious defense. Plaintiff also asserts that the trial court erred

---

note was a "subjective" document "of the person writing the note's best sense . . . ." For these reasons, the trial court doubted the document's admissibility.

[5] Specifically, the trial court stated:

> [I]t really does come down to . . . this medical record entry [dictated by the intern], which sort of sets in motion the suggestion that the tube was in the esophagus and not the trachea, and whether or not that . . . creates some fact question that sort of you can backtrack into what Williams did or did not do in terms of was he negligent in terms of not observing something, or was he grossly negligent . . . .
>
> And when I looked at the testimony of [the intern], . . . it's not just that he doesn't remember what he did at the time. It seems clear . . . that he was not the person who had any direct information as to where the tube was located. . . . [W]hen you review that testimony, it basically says that he doesn't know where the information came from other than . . . it's sort of a subjective note of the person writing the note's best sense, or, as he says "A note written to the best of their knowledge."
>
> In my view, that's not really evidence that's admissible in response to the . . . obligation on the part of the non-moving party to refute this motion for summary disposition.
>
> Absent that, all we are left with, really, is this argument, . . . that it's a credibility issue, and that we should submit to the jury whether or not Williams is credible in what he says he did even though there is no other testimony that really challenges that other than . . . this medical note.

when it held that, as a matter of law, plaintiff had failed to show that defendants acted with gross negligence under the EMSA. Defendants ask us to uphold the ruling of the trial court.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). When it grants a motion under MCR 2.116(C)(7), a trial court should examine all documentary evidence submitted by the parties, accept all well-pleaded allegations as true, and construe all evidence and pleadings in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Jesperson v Auto Club Ins Ass'n*, 306 Mich App 632, 640; 858 NW2d 105 (2014).

A trial court's decision on whether to enter a default in response to a defendant's failure to submit an affidavit of meritorious defense is reviewed for an abuse of discretion. See *Kowalski v Fiutowski*, 247 Mich App 156, 163-166; 635 NW2d 502 (2001). A trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

III. ANALYSIS

A. MERITORIOUS DEFENSE

MCL 600.2912e(1) specifies that:

> In an action alleging medical malpractice, within 21 days after the plaintiff has filed an affidavit in compliance with [MCL 600.2912d], the defendant shall file an answer to the complaint. Subject to subsection (2), the defendant or, if the defendant is represented by an attorney, the defen-

> dant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney serves the affidavit required under [MCL 600.2912d], an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169].[6]

However, a medical malpractice defendant who asserts governmental immunity under the GTLA is not required to file an affidavit of meritorious defense pursuant to MCL 600.2912e(1):

> Because governmental employees are immune from breaches of the standard of ordinary care, the affidavit of merit requirements of MCL 600.2912e are not relevant to a defendant otherwise entitled to governmental immunity, and we therefore conclude that such a defendant may not lose the benefit of that immunity merely by failing to timely file the affidavit of meritorious defense. [*Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 412-413; 716 NW2d 236 (2006).]

Although the EMSA is a separate statute from the GTLA, the two laws "share the common purpose of immunizing certain agents from ordinary negligence and permitting liability for gross negligence." *Jennings v Southwood*, 446 Mich 125, 136; 521 NW2d 230 (1994). As such, "the terms of the provisions should be read in pari materia." *Id*. Accordingly, a defendant who claims immunity under the EMSA may not lose the benefit of that immunity merely by failing to timely file an affidavit of meritorious defense under MCL 600.2912e.

Here, plaintiff says that the trial court erred when it denied his motion for summary disposition under MCR 2.116(C)(9) and his motion for entry of a default under

---

[6] The Legislature modified this provision, effective March 28, 2013, to begin the 91-day countdown from *service* of the plaintiff's affidavit of merit, instead of the mere filing of it. 2012 PA 609. This procedural change is not relevant to our determination of this case.

MCR 2.603(A), because defendants did not file an affidavit of meritorious defense. However, defendants argued that they were immune from plaintiff's suit under the GTLA and the EMSA. They were, therefore, not required to file an affidavit of meritorious defense, and the trial court correctly denied plaintiff's motions. See *Costa*, 475 Mich at 412-413.[7]

B. GROSS NEGLIGENCE OR WILLFUL MISCONDUCT

MCL 333.20965(1) states:

> Unless an act or omission is the result of *gross negligence* or *willful misconduct*, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee . . . while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that

[7] In any event, plaintiff is wrong that MCR 2.603(A) *mandates* an entry of default in the event a defendant fails to file an affidavit of meritorious defense. Instead, a court, in the context of a medical malpractice action, "*may* strike the answer" under MCR 2.115(B) and enter a default under MCR 2.603(A). *Kowalski*, 247 Mich App at 164 (emphasis added). Whether to enter a default or resort to lesser remedies is left to the sound discretion of the court. See *id*. at 163-166. See also *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572, 580-581; 689 NW2d 712 (2004) ("This Court has more than once rejected similar assertions that a medical malpractice defendant's failure to file an affidavit of meritorious defense pursuant to MCL 600.2912e mandates a default or other preclusion of the defendant from presenting a defense . . . ."), aff'd in part 475 Mich 403 (2006).

In this case, the trial court properly chose not to enter a default. Defendant *did* "plead or otherwise defend" against plaintiff's allegations by asserting immunity under both the GTLA and the EMSA. MCR 2.603(A)(1). Plaintiff's attempt to invalidate the trial court's order on the basis of defendant's alleged failure to properly answer its complaint is thus the exact sort of hollow proceduralism the Michigan Supreme Court cautioned against in *Costa*. See *Costa*, 475 Mich at 412-413 & n 5.

> are consistent with the individual's licensure or additional training required by the medical control authority . . . do not impose liability in the treatment of a patient on those individuals or any of the following persons:
>
> * * *
>
> (f) The authoritative governmental unit or units. [Emphasis added.]

"Gross negligence" is "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." *Jennings*, 446 Mich at 136 (quotation marks and citation omitted). "[E]vidence of ordinary negligence does not create a material question of fact concerning gross negligence." *Maiden v Rozwood*, 461 Mich 109, 122-123; 597 NW2d 817 (1999). Further, "only evidence whose content or substance is admissible can establish the existence of gross negligence . . . ." *Id*. at 123. "Willful misconduct" is conduct with "intent to harm." *Jennings*, 446 Mich at 140-141.

Here, plaintiff unconvincingly argues that his pleadings and offers of proof created a question of fact regarding whether defendants committed gross negligence or willful misconduct in their medical response to McLain's health emergency, which abrogates defendants' immunity from suit under MCL 333.20965. As the trial court noted, only two parts of the "volumes" of evidence plaintiff submitted are relevant to showing defendants were responsible for the alleged incorrect location of the breathing tube: (1) the intern's medical progress notes; and (2) plaintiff's unsupported assertions that Williams's testimony was not credible. Neither is sufficient to create a question of fact to negate defendant's immunity from suit.

Again, the medical progress notes were dictated by a medical intern, who, by his own admission, did not

have direct knowledge of where the tube was located, and did not know from whom he received the information he recorded—including his notation that the tube was located in McLain's esophagus.[8] As for plaintiff's assertions that Williams's testimony lacked credibility, plaintiff did not present any testimony to oppose Williams's version of events—he simply alleged that it was wrong. Accordingly, the trial court correctly held[9] that the medical progress notes and plaintiff's protestations against Williams's credibility were insufficient to rebut defendants' evidence that Williams did not commit any errors when he attended to McLain.[10]

Because plaintiff did not submit evidence sufficient to create a question of fact as to the "gross negligence" or "willful misconduct" of defendants' actions under the EMSA, the trial court properly granted summary disposition under MCR 2.116(C)(7).

Affirmed.

OWENS and K. F. KELLY, JJ., concurred with SAAD, P.J.

---

[8] As the trial court implied, the medical intern indicated at his deposition that the medical progress notes were hearsay and, therefore, inadmissible. Though we do not reach the issue, because adjudication of the matter is not necessary to resolve this case, it is possible that the medical progress notes are admissible under the exception to the hearsay rule contained in MRE 803(6) (stating that records of "occurrences, . . . opinions, or diagnoses . . . kept in the course of a regularly conducted business activity," and not prepared in anticipation of litigation, may be admissible).

[9] See note 5 of this opinion for the trial court's discussion of both the medical progress notes and plaintiff's assertion that Williams lacked credibility.

[10] Plaintiff is barred from using res ipsa loquitur to negate defendants' immunity under the EMSA because "[w]hile the doctrine . . . may assist in establishing ordinary negligence, [it] is not available where the requisite standard of conduct is gross negligence or wilful and wanton misconduct." *Maiden*, 461 Mich at 127.

PEOPLE v KONOPKA (ON REMAND)

Docket No. 319913. Submitted February 11, 2015, at Lansing. Decided March 3, 2015, at 9:10 a.m.

Lindsey Lynn Konopka was convicted by plea in the Ingham Circuit Court of first-degree retail fraud and conspiracy to commit first-degree retail fraud. She was sentenced on July 17, 2013. The trial court, Joyce Draganchuk, J., ordered defendant to pay court costs of $500. The Court of Appeals denied defendant's delayed application for leave to appeal in an unpublished order entered February 21, 2014 (Docket No. 319913). In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals to consider whether the trial court improperly imposed court costs under MCL 769.1k(1)(b)(*iii*), and if so, whether the imposition of costs constituted a plain error affecting defendant's substantial rights. 496 Mich 863 (2014). In her reply brief on remand, defendant suggested that the imposition of costs under MCL 769.1k(1)(b)(*iii*) could be unconstitutional. The parties were ordered to submit supplemental briefs on the constitutional issues.

On remand, the Court of Appeals *held*:

1. The trial court properly imposed costs on defendant under MCL 769.1k(1)(b)(*iii*) at sentencing because the Legislature was within its authority to enact, and to make retroactive, a curative amendment to MCL 769.1k following the Supreme Court's decision in *People v Cunningham*, 496 Mich 145; 852 NW2d 118 (2004). *Cunningham* concluded that the costs authorized in the former version of MCL 769.1k were limited to the costs independently described in the statutory language governing the criminal offense for which a defendant was being sentenced. The amended version of MCL 769.1k(1)(b)(*iii*) expressly authorizes a trial court to impose costs reasonably related to the actual costs incurred by the trial court without regard to whether the statute governing the sentencing offense authorizes such costs. The amended statute applies to defendants sentenced before the date *Cunningham* was decided, June 18, 2014, and after the effective date of the statutory amendment, October 17, 2014. The trial court properly imposed costs on defendant at sentenc-

ing because she was sentenced before *Cunningham* was decided and was, therefore, subject to the terms of MCL 769.1k(1)(b)(*iii*), as amended.

2. The Legislature's amendment of MCL 769.1k did not violate the Separation of Powers Clause because the Legislature has the authority to repeal or amend laws it perceives have been misconstrued by the judiciary. If the Legislature were prohibited from amending statutes mistakenly interpreted by the judiciary, the judiciary would effectively usurp the authority of the Legislature to make laws.

3. As applied to defendant, the amended version of MCL 769.1k did not violate the Equal Protection or Due Process Clauses of the federal or state Constitutions. A defendant's claim that a statute violates his or her substantive due process or equal protection rights is subject to rational basis review; that is, a defendant must show that the statute is unrelated to a legitimate government purpose. That similarly situated defendants were treated differently based on the date they were sentenced was rationally related to the legitimate government purpose of respecting the judiciary's judgments. Moreover, the difference between the treatment of civil litigants and criminal defendants is rationally related to the legitimate government purpose of collecting funds from individuals whose conduct causes the government and society to incur the expense of court proceedings involving those individuals.

4. As applied to defendant, the amended version of MCL 769.1k did not violate the Ex Post Facto Clause of the federal or state Constitutions, which prohibits the retroactive application of a law if the new law (1) penalizes conduct that was innocent at the time the conduct occurred, (2) increases the severity of a criminal offense, (3) increases the punishment for a crime, or (4) permits conviction of a crime on less evidence than before application of the law. The authority to impose court costs on a convicted defendant is civil in nature and is not so punitive in purpose or effect that it negates the intent of the Legislature to create a civil remedy. In addition, as with the crime victim's rights assessment, costs imposed are not determined by the number of a defendant's convictions or their severity in relation to other crimes. The amended statute authorizing the imposition of costs is nonpunitive, and although payment of costs ordered at sentencing may burden a defendant, the existence of some inequity does not, alone, render a statute invalid.

Imposition of costs affirmed, and case remanded to establish a factual basis for the award of costs.

1. SENTENCING — IMPOSITION OF COSTS — AUTHORITY.

MCL 769.1k(1)(b)(*iii*) expressly authorizes a trial court to impose costs on a defendant at sentencing when the costs are reasonably related to the actual costs incurred by the court to conduct the proceedings involving the defendant, even if the statute governing the sentencing offense does not independently authorize the imposition of court costs.

2. SENTENCING — IMPOSITION OF COSTS — CONSTITUTIONAL ISSUES — SEPARATION OF POWERS.

There is no violation of the Separation of Powers Clause when the Legislature enacts a curative and retroactive amendment to a statute after the statute was misconstrued by the judiciary; to hold otherwise would allow the judiciary to usurp the authority of the Legislature.

3. SENTENCING — IMPOSITION OF COSTS — CONSTITUTIONAL ISSUES — EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS.

The application of MCL 769.1k(1)(b)(*iii*) to criminal defendants and not to civil litigants does not violate the Equal Protection or Due Process Clauses of the federal or state Constitutions, because costs imposed under MCL 769.1k(1)(b)(*iii*) satisfy the rational-basis test; the costs are rationally related to the legitimate purpose of collecting funds from individuals whose conduct causes the government and society to incur the expense of court proceedings involving those individuals.

4. SENTENCING — IMPOSITION OF COSTS — CONSTITUTIONAL ISSUES — EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS — ARBITRARY CLASSIFICATIONS.

The retroactive application of MCL 769.1k(1)(b)(*iii*), as amended, to defendants sentenced before the Supreme Court's decision in *People v Cunningham*, 496 Mich 145 (2004), and those sentenced after the amendment to MCL 769.1k(1)(b)(*iii*) became effective, did not create an arbitrary classification of defendants; that defendants sentenced between the date *Cunningham* was decided and the amendment's effective date are not subject to the costs provision in MCL 769.1k(1)(b)(*iii*) does not violate the equal protection or due process rights of a defendant who is subject to the costs provision, because not applying the amended statute to defendants sentenced after *Cunningham* and before the amendment's effective date is rationally related to the legitimate government interest of respecting the judiciary's judgments.

5. SENTENCING — IMPOSITION OF COSTS — CONSTITUTIONAL ISSUES — EX POST FACTO LAWS.

The retroactive application of MCL 769.1k(1)(b)(*iii*) does not constitute an Ex Post Facto violation because the costs imposed do not (1) penalize conduct that was innocent at the time it was committed, (2) increase the severity of the crime, (3) increase the punishment for the crime, or (4) permit conviction on less evidence; the imposition of costs under MCL 769.1k(1)(b)(*iii*) is a civil remedy that is not determined by the number of a defendant's convictions or the severity of the sentencing offense in relation to other offenses; MCL 769.1k(1)(b)(*iii*) has the nonpunitive purpose of funding court operations, and although the costs may burden a defendant, imposition of them is not intended to punish the defendant.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Stuart J. Dunnings III*, Prosecuting Attorney, and *Joseph B. Finnerty*, Appellate Division Chief, for the people.

State Appellate Defender (by *Jeanice Dagher-Margosian*) for defendant.

ON REMAND

Before: RIORDAN, P.J., and MURPHY and BOONSTRA, JJ.

BOONSTRA, J. Defendant pleaded guilty to first-degree retail fraud, MCL 750.356c, and conspiracy to commit first-degree retail fraud, MCL 750.157a. On July 17, 2013, the trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to one and one-half to five years' imprisonment for the first-degree retail fraud conviction and two to five years' imprisonment for the conspiracy to commit first-degree retail fraud conviction. The trial court additionally ordered defendant to pay court costs in the amount of $500.

I. PROCEDURAL HISTORY

Defendant filed a delayed application for leave to appeal, arguing that her sentence was invalid because the departure and the extent of the departure were not supported by legally valid reasons and because the trial court did not correctly advise her regarding her rights of appeal. This Court denied the delayed application for leave to appeal for lack of merit in the grounds presented.[1]

Defendant then applied for leave to appeal in the Michigan Supreme Court, raising the same issues asserted in her delayed application in this Court. Defendant also filed a motion in the Supreme Court seeking to add an issue, and requesting leave to file a supplemental brief concerning the trial court's imposition of court costs. On September 19, 2014, the Supreme Court entered an order that stated:

> On order of the Court, the motion to add issue and file supplemental brief is GRANTED. The application for leave to appeal the February 21, 2014 order of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration of whether the circuit court improperly imposed court costs, in light of our decision in *People v Cunningham*, 496 Mich 145 [852 NW2d 118] (2014), and if so, whether the circuit court's assessment of $500 in "court costs" constitutes plain error affecting the defendant's substantial rights. Contrast *People v Franklin*, 491 Mich 916 (2012), with *Johnson v United States*, 520 US 461, 467-468 [117 S Ct 1544; 137 L Ed 2d 718] (1997).
>
> We direct the Court of Appeals' attention to the fact that we have also remanded *People v Holbrook* (Docket No. 149005) [Court of Appeals Docket No. 319565] to the

[1] *People v Konopka*, unpublished order of the Court of Appeals, entered February 21, 2014 (Docket No. 319913).

> Court of Appeals for consideration of similar issues.[2] In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. [*People v Konopka*, order entered September 19, 2014 (Docket No. 149047)].

On remand from our Supreme Court, defendant argued that the trial court's imposition of costs was improper in light of *Cunningham*. In response, the prosecution argued that the imposition of costs was proper in light of the Legislature's post-*Cunningham* amendment of MCL 769.1k. Defendant replied that this Court should disregard the prosecution's response because the Legislature's post-*Cunningham* amendment of MCL 769.1k was not within the scope of the Supreme Court's remand order. Defendant further suggested, without fully articulating her position, that "possible responsive arguments" could be made concerning the constitutionality of the Legislature's post-*Cunningham* amendment of MCL 769.1k. This Court subsequently ordered supplemental briefing concerning the constitutional arguments suggested in defendant's reply brief on appeal.[3] In compliance with that order, the parties filed supplemental briefs addressing those constitutional issues.

We now consider defendant's challenges to the imposition of court costs and conclude that the trial court possessed the authority under MCL 769.1k, as amended by 2014 PA 352, to order defendant to pay court costs. However, we remand to the trial court to establish whether the court costs imposed were "rea-

---

[2] *Holbrook* has since been resolved following the prosecution's confession of error in that case. See *People v Holbrook*, unpublished order of the Court of Appeals, entered January 16, 2015, amended February 13, 2015 (Docket No. 319565).

[3] See *People v Konopka*, unpublished order of the Court of Appeals, entered January 20, 2015 (Docket No. 319913).

sonably 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*), as amended by 2014 PA 352, or to adjust that amount as may be appropriate. We reject defendant's constitutional challenges to the amended version of MCL 769.1k.

II. MCL 769.1k AND *CUNNINGHAM*

We first are obliged to consider—and we reject—defendant's suggestion that we should not consider the prosecution's position regarding the effect of the Legislature's post-*Cunningham* amendment of MCL 769.1k. Certainly it is true, as defendant points out, that the legislative amendment was not within the stated scope of the Supreme Court's remand order. But it is obvious that a post-*Cunningham* legislative amendment could not have been addressed within the text of an order that was issued *before* the post-*Cunningham* legislative amendment was even enacted. It is also true—and we specifically hold—that the subject matter of the legislative amendment is so inextricably tied to the subject matter of the decision in *Cunningham* that it is appropriate for us to consider them in conjunction with each other, and in fact, it would be inappropriate for us to do otherwise.[4]

At the time of sentencing, and at the time of defendant's commission of the offenses giving rise to sentencing, MCL 769.1k provided, in relevant part:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or

[4] Although defendant initially took the position that the prosecution should have presented the issue of the legislative amendment by way of cross-appeal, defendant appears to have retracted that position in her supplemental brief.

> 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 section 1j of this chapter.
>
> (b) The court may impose any or all of the following:
>
> (*i*) Any fine.
>
> (*ii*) *Any cost* in addition to the minimum state cost set forth in subdivision (a).
>
> (*iii*) The expenses of providing legal assistance to the defendant.
>
> (*iv*) Any assessment authorized by law.
>
> (*v*) Reimbursement under section 1f of this chapter. [MCL 769.1k, before amendment by 2014 PA 352 (emphasis added).]

In *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012) (*Sanders I*), overruled in part by *People v Cunningham*, 496 Mich 145 (2014), this Court held "that a trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(*ii*) without the necessity of separately calculating the costs involved in the particular case . . . ." Because the trial court in *Sanders I* did not adequately explain the factual basis for its award of $1,000 in court costs, this Court remanded the case "in order to facilitate meaningful appellate review of the reasonableness of the costs assessed defendant." *Sanders I*, 296 Mich App at 715. In *People v Sanders (After Remand)*, 298 Mich App 105, 108; 825 NW2d 376 (2012) (*Sanders II*), this Court expressed satisfaction "that the trial court complied with our directives on remand and did establish a sufficient factual basis to conclude that $1,000 in court costs under MCL 769.1k(1)(b)(*ii*) is a reasonable amount in a felony case conducted in the Berrien Circuit Court."

In *Cunningham*, 496 Mich at 147, our Supreme Court held that MCL 769.1k(1)(b)(*ii*) did not provide courts with the "independent authority to impose costs upon criminal defendants." Rather, "MCL 769.1k(1)(b)(*ii*) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute." *Cunningham*, 496 Mich at 147, 154. The *Cunningham* Court reasoned that while MCL 769.1k allowed courts to impose "any cost in addition to the minimum state cost," the statute also specifically authorized courts to impose other costs, including the expense of providing legal assistance to the defendant and any costs incurred in compelling the defendant's appearance. *Cunningham*, 496 Mich at 154. These additional cost provisions would have been unnecessary if MCL 769.1k(1)(b)(*ii*) provided courts with the independent authority to impose "any cost." *Id*. at 154-155. Further, when the Legislature enacted MCL 769.1k, "numerous statutes provided courts with the authority to impose specific costs for certain offenses." *Cunningham*, 496 Mich at 156. Therefore, "[i]nterpreting MCL 769.1k(1)(b)(*ii*) as providing courts with the independent authority to impose 'any cost' would essentially render the cost provisions within those statutes nugatory . . . ." *Cunningham*, 496 Mich at 156. The Court noted that the Legislature has continued to enact provisions authorizing courts to impose particular costs for certain offenses, which again suggests that the Legislature did not intend for MCL 769.1k(1)(b)(*ii*) to provide courts with independent authority to impose "any cost." *Cunningham*, 496 Mich at 156-157.

The Court further noted that if it held that MCL 769.1k(1)(b)(*ii*) provided courts with the independent authority to impose "any cost," then MCL 769.1k(1)(b)(*i*) would logically provide courts with the

independent authority to impose "any fine." *Cunningham*, 496 Mich at 157. If courts could impose "any fine" without regard to the limitations set forth in other statutes, statutory provisions that fix the amount of fines would be nullified. *Id*. Thus, the conclusion that MCL 769.1k(1)(b)(*i*) did not provide independent authority to impose "any fine" supported the similar conclusion that MCL 769.1k(1)(b)(*ii*) did not provide independent authority to impose "any cost." *Cunningham*, 496 Mich at 158.

The *Cunningham* Court concluded:

> In light of the foregoing analysis, we conclude that MCL 769.1k(1)(b)(*ii*) does not provide courts with the independent authority to impose "any cost." Instead, we hold that MCL 769.1k(1)(b)(*ii*) provides courts with the authority to impose only those costs that the Legislature has separately authorized by statute. In other words, we find that MCL 769.1k(1)(b)(*ii*) seeks comprehensively to incorporate by reference the full realm of statutory costs available to Michigan courts in sentencing defendants, so that the Legislature need not compendiously list each such cost in MCL 769.1k. Our understanding of MCL 769.1k(1)(b)(*ii*), we believe, accords respect to its language, to the language of other cost provisions within MCL 769.1k, and to the language of other statutes enacted by the Legislature conferring upon courts the authority to impose specific costs for certain offenses. [*Cunningham*, 496 Mich at 158-159.]

Because *Sanders I* assumed that MCL 769.1k(1)(b)(*ii*) authorized the imposition of costs without any limitation, the *Cunningham* Court overruled *Sanders I* to the extent that it was inconsistent with the opinion in *Cunningham*. *Cunningham*, 496 Mich at 159.

After *Cunningham* was decided, the Legislature amended MCL 769.1k; the amended statute was imme-

diately effective on October 17, 2014. See 2014 PA 352. The enacting sections of 2014 PA 352 provide:

> Enacting section 1. This amendatory act applies to all fines, costs, and assessments ordered or assessed under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before June 18, 2014, and after the effective date of this amendatory act.
>
> Enacting section 2. This amendatory act is a curative measure that addresses the authority of courts to impose costs under section 1k of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, before the issuance of the supreme court opinion in People v Cunningham, 496 Mich 145 (2014).

The amended version of MCL 769.1k(1)(b) states:

> (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, 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.
>
> (*iv*) The expenses of providing legal assistance to the defendant.

(*v*) Any assessment authorized by law.

(*vi*) Reimbursement under section 1f of this chapter.

Our Supreme Court remanded the instant case to this Court after *Cunningham* was issued but before MCL 769.1k was amended. Our Supreme Court directed this Court to consider whether the trial court improperly imposed court costs, in light of *Cunningham*, and if so, whether the assessment of $500 in court costs constituted plain error affecting defendant's substantial rights. *Konopka*, 497 Mich at 863-864.

III. TRIAL COURT'S AUTHORITY TO IMPOSE COURT COSTS

Because defendant failed to object when the trial court ordered her to pay costs and attorney fees, we review her challenge to the trial court's imposition of court costs for plain error. See *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), overruled on other grounds by *People v Jackson*, 483 Mich 271 (2009). Statutory interpretation presents a question of law that we review de novo. *Cunningham*, 496 Mich at 149. Because the Legislature amended MCL 769.1k, we hold that the trial court's imposition of court costs was valid.

If the Legislature had not amended MCL 769.1k, the costs awarded in this case would have been invalid under *Cunningham*. Under *Cunningham*, 496 Mich at 147, the former version of MCL 769.1k(1)(b)(*ii*) provided courts with the authority to impose only those costs that were separately authorized by statute. Defendant was convicted of first-degree retail fraud, MCL 750.356c, and conspiracy to commit first-degree retail fraud, MCL 750.157a. The statutes for those offenses do not authorize the imposition of court costs. See MCL 750.356c(1) (authorizing imprisonment and a fine);

MCL 750.157a (authorizing imprisonment and a fine). Nor did any other statute separately authorize the imposition of the costs imposed. Therefore, the imposition of court costs was not separately authorized by statute, as determined by *Cunningham*.

However, the trial court's award of costs is authorized by the amended version of MCL 769.1k(1)(b)(*iii*). This amended version applies to all fines, costs, and assessments ordered under MCL 769.1k before June 18, 2014, the date *Cunningham* was decided, and after October 17, 2014, the effective date of the amendatory act. 2014 PA 352. The amended act was a curative measure to address the authority of courts to impose costs under MCL 769.1k before *Cunningham* was issued. 2014 PA 352, enacting § 2. " 'When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly.' " *Mayor of Detroit v Arms Technology, Inc*, 258 Mich App 48, 65; 669 NW2d 845 (2003), quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 226; 115 S Ct 1447; 131 L Ed 2d 328 (1995) (addressing Congress's authority to revise the judgments of federal courts when it enacts new laws with retroactive application). The instant case was still on appeal when the amended version of MCL 769.1k was adopted; further, the costs in this case were imposed at defendant's sentencing on July 17, 2013. Therefore, the amended statute applies to this case.

The amended version of MCL 769.1k(1)(b)(*iii*) provides for an award of certain costs that are *not* independently authorized by the statute for the sentencing offense, in contrast to the amended version of MCL 769.1k(1)(b)(*ii*), which provides that a court may im-

pose "[a]ny 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." "This Court must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory." *Cunningham*, 496 Mich at 154 (quotation marks and citation omitted). MCL 769.1k(1)(b)(*ii*) would be rendered surplusage if MCL 769.1k(1)(b)(*iii*) merely provided for the imposition of costs that were separately authorized by the statute for the underlying offense, given that MCL 769.1k(1)(b)(*ii*) *already* provides for the imposition of such costs. We therefore conclude that MCL 769.1k(1)(b)(*iii*) independently authorizes the imposition of costs in addition to those costs authorized by the statute for the sentencing offense.

At oral argument, defense counsel argued that the amended version of MCL 769.1k does not fix the problem identified in *Cunningham*. In essence, defendant interprets *Cunningham* as requiring that the separate authority for the imposition of court costs derive from a "penal" statute rather than the "procedural" provisions of MCL 769.1k. However, such an interpretation would render nugatory other provisions of MCL 769.1k. Moreover, we find such an interpretation of *Cunningham* strained in light of the Court's limited conclusion that it did "not believe that the Legislature intended MCL 769.1k(1)(b)(*ii*) to provide courts with the independent authority to impose 'any cost.' " *Cunningham*, 496 Mich at 159. Nothing in the *Cunningham* opinion leads to the conclusion that the Legislature is forbidden from granting trial courts the authority to impose reasonable court costs independent of the statute governing a sentencing offense, or

that the Legislature is forbidden to place such authority within MCL 769.1k itself.[5]

In light of the adoption of 2014 PA 352, the trial court's imposition of costs was not erroneous.[6] However, although the costs imposed in this case need not be separately calculated, MCL 769.1k(1)(b)(*iii*), the trial court did not establish a factual basis, under the subsequently amended statute, for the $500 in costs imposed. Indeed, it could not have known to do so at that time. However, without a factual basis for the costs imposed, we cannot determine whether the costs imposed were reasonably related to the actual costs

[5] To the contrary, the Court in *Cunningham* expressly stated that "[g]iven the Legislature's use of the phrase '*any* cost,' we believe that the Legislature intended MCL 769.1k(1)(b)(*ii*) to incorporate by reference not only existing statutory provisions that provide courts with the authority to impose specific costs, but also *future* provisions that the Legislature might enact providing courts with the same authority, unless the Legislature states to the contrary." *Cunningham*, 496 Mich at 159 n 12. There is nothing within *Cunningham* that precludes the Legislature from adopting such "future" provisions within the context of MCL 769.1k itself.

[6] We again note that our Supreme Court, in remanding this case to this Court, directed that we consider, in light of *Cunningham*, whether the trial court had improperly imposed court costs, and if so, whether its assessment of $500 in court costs constituted plain error affecting the defendant's substantial rights. *Konopka*, 497 Mich at 863-864. The Court further directed, in that context, that we contrast *People v Franklin*, 491 Mich 916 (2012), with *Johnson v United States*, 520 US 461, 467-468; 117 S Ct 1544; 137 L Ed 2d 718 (1997). *Konopka*, 497 Mich at 863-864. *Franklin* and *Johnson* presented the issue whether an error is "plain" when settled caselaw changes between the time of a lower court decision and its consideration on appeal. In light of the post-*Cunningham* legislative amendment of MCL 769.1k, and its effect on the applicability of *Cunningham* insofar as it relates to this defendant, and because we consequently find that the trial court did not commit plain error requiring reversal (although we remand for articulation of a factual basis for the imposition of costs under the new statute), we do not find *Franklin* and *Johnson* applicable to the instant case, and therefore deem it unnecessary to contrast those cases.

incurred by the trial court, as required by MCL 769.1k(1)(b)(*iii*). In this case, defendant specifically challenges the lack of reasoning for the costs imposed, and we find that she should be given the opportunity to challenge the reasonableness of the costs imposed. See *Sanders I*, 296 Mich App at 715. We therefore remand to the trial court for it to establish a factual basis for the $500 in costs imposed under MCL 769.1k(1)(b)(*iii*), or to alter that figure, if appropriate.

IV. CONSTITUTIONAL CHALLENGES

As noted, defendant's reply brief on appeal suggested the existence of "possible responsive arguments," of a constitutional nature, to the amended version of MCL 769.1k. This Court ordered supplemental briefing on those issues. Defendant's supplemental brief raised three constitutional issues: (1) a separation of powers problem, (2) equal protection and due process concerns, and (3) an ex post facto violation. We review constitutional issues de novo. *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011).

The party challenging the constitutionality of a statute has the burden of proving the law's invalidity. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). When evaluating the constitutionality of a statute, we presume that the statute is constitutional, we "exercise the power to declare a law unconstitutional with extreme caution, and we never exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004) (*Phillips II*). We indulge "every reasonable presumption" in favor of a statute's validity. *Id*. at 423. A statute is not unconstitutional merely because it appears "undesirable, unfair, unjust, or inhumane," and courts should not address arguments about the

wisdom of a statute or whether a statute results in bad policy. *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002). Such arguments should be addressed to the Legislature. *Id*. Rather, we will construe a statute as constitutional unless it " '*manifestly* infringe[s] some provision of the constitution . . . .' " *People v Harper*, 479 Mich 599, 621 n 43; 739 NW2d 523 (2007), quoting *Sears v Cottrell*, 5 Mich 251, 259 (1858).

A. SEPARATION OF POWERS

Defendant first argues that the amended version of MCL 769.1k violates the Separation of Powers Clause. According to defendant, the Legislature improperly dismantled the Michigan Supreme Court's decision in *Cunningham* by declaring the statutory amendment to be curative. We disagree.

Const 1963, art 3, § 2 states:

> The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

"The legislative power of the State of Michigan is vested in a senate and a house of representatives." Const 1963, art 4, § 1. "Simply put, legislative power is the power to make laws." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008). By contrast, a defining aspect of judicial power is the interpretation of law. *Id*., citing *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

> There is a distinction between legislative and judicial acts. The legislature makes the law—courts apply it. To enact laws is an exercise of legislative power; to interpret

> them is an exercise of judicial power. To declare what the law shall be is legislative; to declare what it is or has been is judicial. The legislative power prescribes rules of action. The judicial power determines whether, in a particular case, such rules of action have been transgressed. The legislature prescribes rules for the future. The judiciary ascertains existing rights. [*In re Manufacturer's Freight Forwarding Co*, 294 Mich 57, 63; 292 NW 678 (1940) (quotation marks and citation omitted).]

"[T]he legislative power of the people through their agent, the legislature, is limited only by the Constitution, which is not a grant of power, but a limitation on the exercise of power . . . ." *Oakland Co Taxpayers' League v Oakland Co Supervisors*, 355 Mich 305, 323; 94 NW2d 875 (1959), citing *Attorney General v Preston*, 56 Mich 177; 22 NW 261 (1885). See also *Young v Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934). "[T]he advisability or wisdom of statutory enactments, which are not violative of the constitutional provisions, is a matter for legislative consideration and not for this Court." *Oakland Co Taxpayers' League*, 355 Mich at 323-324, citing *Huron-Clinton Metro Auth v Bds of Supervisors of Five Cos*, 300 Mich 1; 1 NW2d 430 (1942). "In accordance with the constitution's separation of powers, this Court cannot revise, amend, deconstruct, or ignore the Legislature's product and still be true to our responsibilities that give our branch only the judicial power." *In re Rovas Complaint*, 482 Mich at 98 (quotation marks, citation, and alteration omitted).

In *Romein v Gen Motors Corp*, 436 Mich 515, 536-539; 462 NW2d 555 (1990), reh den 437 Mich 1202 (1990), aff'd 503 US 181; 112 S Ct 1105; 117 L Ed 2d 328 (1992), our Supreme Court held that the Legislature's retroactive amendment of a statute regarding coordination of workers' compensation benefits did not violate the Separation of Powers Clause. The history of

the statute at issue in *Romein* is as follows: In 1981, the Legislature enacted 1981 PA 203, which included a provision in MCL 418.354 allowing the coordination of workers' compensation benefits with employer-funded pension plan payments. *Id*. at 521. In *Franks v White Pine Copper Div*, 422 Mich 636; 375 NW2d 715 (1985), reh den by *Chambers v Gen Motors Corp*, 424 Mich 1202 (1985), superseded by statute as stated in *Romein*, 436 Mich at 523, our Supreme Court held that MCL 418.354 permitted the coordination of benefits regardless of the date of injury because the Legislature did not state an intent to limit the coordination provision to employees who were injured after the effective date of the statute. *Franks*, 422 Mich at 651. See also *Romein*, 436 Mich at 522-523. The Legislature later enacted 1987 PA 28, which indicated that the coordination of benefits provision of 1981 PA 203 was not intended to reduce benefits for employees injured before the effective date of the 1981 statute. *Id*. at 523. 1987 PA 28 "retroactively amended [MCL 418.354] and prevented any coordination of benefits for claims arising from injuries which occurred before March 31, 1982." *Romein*, 436 Mich at 523.

Our Supreme Court held in *Romein* that 1987 PA 28 did not violate the Separation of Powers Clause of the Michigan Constitution:

> The operative provisions of the statute do not encroach upon the sphere of the judiciary. Rather, they merely repeal the act that *Chambers* construed. That prior statute is superseded by 1987 PA 28 and the amendatory act expressly indicates that it is to be applied retroactively. This enactment is a valid exercise of the Legislature's authority to retroactively amend legislation perceived to have been misconstrued by the judiciary. Such retroactive amendments based on prior judicial decisions are constitutional if the statute comports with the requirements of

> the Contract and Due Process Clauses of the federal and state constitutions, and so long as the retroactive provisions of the statute do not impair final judgments.
>
> Numerous courts have recognized that the Legislature may cure the judicial misinterpretation of a statute. For instance, the federal courts have upheld statutes that retroactively abrogate statutory rights, at least where the repealing statute does not impair final judgments. In *Seese v Bethlehem Steel Co*, 168 F2d 58, 62 (CA 4, 1948), the court reasoned that the Legislature's enactment of a retroactive statute repealing the effects of a prior judicial decision is not an exercise of judicial power[.] [*Romein*, 436 Mich at 537 (emphasis omitted).]

The Court in *Romein* noted that " '[c]ourts have consistently upheld the retroactive application of "curative" legislation which corrects defects subsequently discovered in a statute and which restores what Congress had always believed the law to be.' " *Id*. at 538, quoting *Long v United States Internal Revenue Serv*, 742 F2d 1173, 1183 (CA 9, 1984), subsequent proceedings vacated on other grounds 487 US 1201; 108 S Ct 2839; 101 L Ed 2d 878 (1988). The Court also noted that "if the defendants' separation of powers claim had merit as applied to the curative statute challenged here, the power of the Legislature to enact curative and remedial legislation would be severely curtailed, even where the statute does not violate constitutional due process limits." *Romein*, 436 Mich at 538-539. Such a consequence "would represent a judicial usurpation of what is properly a legislative function." *Id*. at 539.

The Supreme Court's reasoning in *Romein* is applicable here. Our Supreme Court in *Cunningham* interpreted MCL 769.1k as it existed at the time of its decision; contrary to defendant's characterization, the Court did *not* declare the law constitutionally invalid. Following the issuance of *Cunningham*, the Legisla-

ture amended MCL 769.1k, effective October 17, 2014. See 2014 PA 352. The enacting sections of 2014 PA 352 state that the amended statute applies to all costs ordered or assessed under MCL 769.1k before June 18, 2014, i.e., the date of the *Cunningham* decision, and after the effective date of the amended act. Further, the Legislature stated that the amended act was a curative measure addressing courts' authority to impose costs under MCL 769.1k before *Cunningham* was issued. 2014 PA 352. The amended version of MCL 769.1k(1)(b)(*iii*) provides for an award of costs that is *not* independently authorized by the statute for the sentencing offense.

The Legislature's enactment of 2014 PA 352 did "not encroach upon the sphere of the judiciary." *Romein*, 436 Mich at 537. Instead, the Legislature merely amended the statute that *Cunningham* had construed. The Legislature was permitted to retroactively amend the statute that it perceived to have been misconstrued by the judiciary, as long as the statute comported with the Contract and Due Process Clauses of the federal and state constitutions. *Id*. Defendant does not claim any Contract Clause violation, and as discussed below, defendant has not established a due process violation. Accordingly, defendant has not established a violation of the Separation of Powers Clause of the Michigan Constitution.

B. DUE PROCESS AND EQUAL PROTECTION

Defendant further asserts equal protection and due process challenges to the amended version of MCL 769.1k. Defendant argues that the amended statute creates different classes of citizens because the statute allows the imposition of costs on defendants sentenced before June 18, 2014, i.e., the date of the *Cunningham*

decision, and further allows costs to be imposed on defendants sentenced after the effective date of the amended statute, i.e., October 17, 2014, but it does not authorize the imposition of costs on defendants sentenced between those dates.[7] Further, defendant argues that civil litigants, unlike criminal defendants, are not required to pay costs for court operating expenses. On the basis of these observations, defendant maintains that the amended version of MCL 769.1k "*may well violate* state and federal protections against [sic] due process of law and equal protection" (emphasis added).

Initially, we note that defendant fails to cite any pertinent authority or to address the legal standards for analyzing an equal protection or due process claim. Nor does defendant articulate whether her due process claim is one of substantive or procedural due process. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Nonetheless, we will address the issue, and because defendant identifies no procedural irregularities, deem her claim to be one of substantive due process.

The United States and Michigan Constitutions protect individuals from the deprivation of life, liberty, or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). For a

[7] Defendant was sentenced on July 17, 2013.

challenge to a statute on the grounds of a substantive due process violation, a challenger must show that the statute is unrelated to a legitimate government purpose and thus, essentially arbitrary. See *Wysocki v Felt*, 248 Mich App 346, 367; 639 NW2d 572 (2001). Further:

> Both the United States and Michigan Constitutions guarantee equal protection of the law. To determine whether a legislative classification violates equal protection, the reviewing court applies one of three tests. If the legislation creates an inherently suspect classification or affects a fundamental interest, the "strict scrutiny" test applies. Other classifications that are suspect but not inherently suspect are subject to the "substantial relationship" test. However, social and economic legislation is generally examined under the traditional "rational basis" test. [*Zdrojewski v Murphy*, 254 Mich App 50, 79; 657 NW2d 721 (2002) (citations omitted).]

In a challenge brought under the Equal Protection Clause, US Const, Am XIV, and Const 1963, art 1, § 2, a defendant must show that he or she was treated differently than other persons who were similarly situated and that there exists no rational basis for such disparate treatment. See *Wysocki*, 248 Mich App at 367.

Both substantive due process and equal protection challenges (in the absence of a highly suspect category such as race, national origin, or ethnicity, or a category receiving heightened scrutiny such as legitimacy or gender), are subject to rational-basis review, i.e., whether the legislation is rationally related to a legitimate government purpose. See *Crego v Coleman*, 463 Mich 248, 259, 260; 615 NW2d 218 (2000). Inherently suspect classifications subject to strict scrutiny include race, ethnicity, and national origin. *Phillips v Mirac, Inc*, 251 Mich App 586, 596; 651 NW2d 437 (2002) (*Phillips I*). No such classifications are implicated here,

nor are any classes implicated that are subject to the intermediate substantial-relationship test, such as gender and mental capacity. *Id*. Also, the disparate treatment of criminal offenders is generally viewed as not affecting a person's fundamental interests. *People v Haynes*, 256 Mich App 341, 345; 664 NW2d 225 (2003). We thus conclude that the rational-basis test applies in this case.

> Under the rational basis test, legislation is presumed to be constitutional and will survive review if the classification scheme is rationally related to a legitimate governmental purpose. The burden of proof is on the person attacking the legislation to show that the classification is arbitrary. Rational-basis review does not test the wisdom, need or appropriateness of the legislation, and the challenged statute is not invalid for lack of mathematical precision in its classification or because it results in some inequity. [*Zdrojewski*, 254 Mich App at 80 (quotation marks and citations omitted).]

The test to determine whether legislation violates substantive due process protections is essentially the same as the test to determine violations of the Equal Protection Clause. *Phillips I*, 251 Mich App at 598; *People v Sleet*, 193 Mich App 604, 605-606; 484 NW2d 757 (1992).

In the instant case, defendant contends that 2014 PA 352 classifies criminal defendants based on the date that the defendant was sentenced. "Classifications based upon cutoff dates . . . are not by themselves arbitrary or unreasonable." *Sleet*, 193 Mich App at 607. Defendant has not established that the classifications established by 2014 PA 352 are arbitrary. The statute is rationally related to the legitimate purpose of compensating courts for the expenses incurred in trying criminal cases because it provides for the collection of costs from criminal defendants.

MCL 769.1k(1)(b)(*iii*). See *Dawson v Secretary of State*, 274 Mich App 723, 739; 739 NW2d 339 (2007) (opinion of WILDER, J.) (concluding that a classification scheme for assessing driver responsibility fees from persons convicted of certain offenses was "rationally related to the legitimate governmental purpose of generating revenue from individuals who impose costs on the government and society"). The exclusion from this costs provision of criminal defendants sentenced between the issuance of *Cunningham* and the enactment of the amended statute is rationally related to the legitimate goal of respecting the entry of judgments not awarding costs during the period that the *Cunningham* interpretation of MCL 769.1k was in effect. The fact that the statute may result in some inequity does not, by itself, render the statute invalid. *Zdrojewski*, 254 Mich App at 80.

Further, the Legislature may rationally enact laws that treat criminal defendants differently from civil litigants. Because "the state, including its local subdivisions, is responsible for costs associated with arresting, processing, and adjudicating individuals" who commit criminal offenses, the classification scheme imposing costs on criminal defendants but not civil litigants is "rationally related to the legitimate governmental purpose of generating revenue from individuals who impose costs on the government and society." *Dawson*, 274 Mich App at 738.[8] Defendant has failed to show that any classifications created by 2014 PA 352

[8] Other jurisdictions have reached similar conclusions. "[C]ivil litigation is entirely different from criminal litigation, and there is no requirement the two systems be similar." *People v Rountree*, 56 Cal 4th 823, 863; 157 Cal Rptr 3d 1; 301 P3d 150 (2013). "Criminal defendants are also not situated similarly to civil litigants." *Id.*; see also *State v Lang*, 129 Ohio St 3d 512, 525; 2011 Ohio 4215; 954 NE2d 596 (2011). Although not binding on this Court, caselaw from other jurisdictions

are arbitrary. See *Zdrojewski*, 254 Mich App at 80. We therefore reject her equal protection and substantive due process claims.

C. EX POST FACTO VIOLATION

Defendant further argues that application of the amended statute violates the constitutional prohibition against ex post facto punishments because she committed the sentencing offenses before the effective date of the amendment of MCL 769.1k. We disagree.

> The Ex Post Facto Clauses of the United States and Michigan Constitutions[9] bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a crime; or (4) allows the prosecution to convict on less evidence. [*People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014), citing *Calder v Bull*, 3 US (3 Dall) 386, 390; 1 L Ed 648 (1798).]

In this case, defendant argues that the amendment to MCL 769.1k increases the punishment for a crime. We disagree.

The court costs imposed under MCL 769.1k(1)(b)(*iii*) are not a form of punishment. In *Earl*, 495 Mich at 34-35, the trial court imposed a crime victim's rights fund assessment of $130 based on a statutory amendment that increased the amount of the assessment after the defendant committed the sentencing offenses. Our Supreme Court held that the increase in the crime victim's rights fund assessment did not violate the bar on ex post facto laws. *Id*. at 35. The Court stated:

---

may be considered persuasive. *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 639 n 15; 732 NW2d 116 (2007).

[9] See US Const, art I, § 10; Const 1963, art 1, § 10.

> We conclude that an increase in the crime victim's rights assessment does not violate the bar on ex post facto laws because the Legislature's intent in enacting the assessment was civil in nature. Additionally, the purpose and effect of the assessment is not so punitive as to negate the Legislature's civil intent. Therefore, we affirm the judgment of the Court of Appeals that the increase in the crime victim's rights assessment does not violate the Ex Post Facto Clauses of the Michigan and United States Constitutions. [*Id*. at 49-50.]

In reaching this conclusion, the *Earl* Court explained the test to be applied in evaluating an ex post facto claim:

> Determining whether a law violates the Ex Post Facto Clause is a two-step inquiry. The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. If the Legislature's intention was to impose a criminal punishment, retroactive application of the law violates the Ex Post Facto Clause and the analysis is over. However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil. Stated another way, even if the text of the statute indicates the Legislature's intent to impose a civil remedy, we must determine whether the statute nevertheless functions as a criminal punishment in application. [*Id*. at 38 (quotation marks and citations omitted; alteration in original).]

The *Earl* Court further stated that a statute is considered penal if it imposes a disability in order to reprimand the wrongdoer or deter others. *Id*. at 38-39. By contrast, a statute reflects a legislative intent to enact a civil remedy "if it imposes a disability to further a legitimate governmental purpose." *Id*. at 39.

In *Earl*, 495 Mich at 39, our Supreme Court stated that although the crime victim's rights assessment was

imposed at the time of sentencing, the Legislature did not express an intent to make the assessment part of the sentence itself; the assessment "d[id] not have a label, function, or purpose" consistent with a criminal penalty. Whereas criminal fines are generally responsive to conduct that is being punished, "the crime victim's rights assessment levies a flat fee . . . irrespective of the number or severity of the charges."[10] *Id*. at 40-41. Also, there is only one crime victim's rights assessment for each criminal case, whereas the amount of a punitive fine "generally depends on the specific facts of the case." *Id*. at 41. Further, the crime victim's rights assessment has a nonpunitive purpose of providing funding for crime victim's services. *Id*. "Although the . . . assessment places a burden on convicted criminal defendants, the assessment's purpose is not to punish but to fund programs that support crime victims." *Id*. at 42.

We reach a similar conclusion in this case. Although defendant is correct that court costs imposed are generally reflected on the judgment of sentence and are only imposed on convicted defendants, 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. "The Legislature is aware that a fine is generally a criminal punishment." *Earl*, 495 Mich at 40. MCL 769.1k(1)(b)(*i*) permits a court to impose a fine authorized by the statute for the sentencing offense. In contrast, MCL 769.1k(1)(b)(*iii*) does *not* refer to a fine but instead provides for the imposition of costs reasonably related to the actual costs incurred in

[10] No distinction is made regarding the relative severity of a felony or misdemeanor as compared to other felonies or misdemeanors. However, note that the amount of the crime victim's rights assessment is greater for a felony ($130) than for a misdemeanor ($75). MCL 780.905(1)(a)-(b).

the operation of the court. Moreover, as with the crime victim's rights assessment, the costs are imposed without reference to the number or severity of the convictions. In particular, 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*). The costs include salaries and benefits for court personnel, goods and services necessary to operate the court, and expenses necessary to operate and maintain court buildings and facilities. MCL 769.1k(1)(b)(*iii*)(A)-(C). Again, as with the crime victim's rights assessment, MCL 769.1k(1)(b)(*iii*) provides for only one assessment of costs in a particular case, "contrary to the manner in which punitive fines are usually imposed, i.e., where the amount of the fine generally depends on the specific facts of the case." *Earl*, 495 Mich at 41. In addition, MCL 769.1k(1)(b)(*iii*) has the nonpunitive purpose of providing funding for court operations. Although the costs provision places a burden on convicted criminal defendants, the purpose is to fund the court's operation rather than to punish convicted defendants. We therefore conclude that the Legislature intended the costs provision of MCL 769.1k(1)(b)(*iii*) to be a civil remedy.

We next analyze whether the costs provision is nonetheless so punitive in purpose or effect that it negates the Legislature's civil intent. *Earl*, 495 Mich at 43. "[C]ourts will 'reject the legislature's manifest intent [to impose a civil remedy] only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect [as] to negate the . . . intention to deem it civil. ' " *Id*. at 44 (citation omitted; second alteration in original). We conclude that the costs provision of MCL 769.1k(1)(b)(*iii*) is not so punitive.

In analyzing whether a law has the purpose or effect of being punitive, a court considers the following factors:

> "[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned." [*Earl*, 495 Mich at 44, quoting *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 664 (1963).]

This list is not exhaustive. *Earl*, 495 Mich at 44.[11]

Here, the first factor weighs against finding a punitive purpose or effect because the assessment of costs does not constitute an affirmative disability or restraint. See *Earl*, 495 Mich at 44. Nor does the imposition of costs reasonably related to the actual costs incurred by the trial court constitute a physical restraint or resemble imprisonment. Although the imposition of such costs, amounting to $500 in this case, may have some consequential effect, "to hold that any governmental regulation that has indirect punitive effects constitutes a punishment would undermine the government's ability to engage in effective regulation."

---

[11] As in *Earl*, the third and fifth factors are not useful in the ex post facto analysis before this Court in the instant case. A convicted criminal defendant's underlying conduct will always constitute a crime, and the imposition of costs is not responsive to the defendant's specific conduct. A finding of scienter is also irrelevant because the statute provides for the imposition of costs without regard to criminal intent. Therefore, these factors carry no appreciable weight in the analysis. *Earl*, 495 Mich at 48.

Id. at 45, citing *Smith v Doe*, 538 US 84, 102; 123 S Ct 1140; 155 L Ed 2d 164 (2003).

The second factor also weighs against a punitive purpose or effect because there is no evidence that the imposition of court costs has been regarded in our history or traditions as a form of criminal punishment. See *Earl*, 495 Mich at 45. Although a fine has been regarded as punishment, costs under MCL 769.1k(1)(b)(*iii*) lack the characteristics of a fine because the costs are to be imposed without regard to the specific facts of the case, and the aim of the assessment of costs is to fund court operations. See *Earl*, 495 Mich at 45.

The fourth factor weighs against a punitive purpose or effect because the imposition of costs does not further the traditional punitive aims of retribution and deterrence. See *Earl*, 495 Mich at 46. There is no retributive purpose because the costs are assessed without regard to the factual nature of the crimes or the number of convictions. See *id*. Further, any deterrent effect of imposing court costs is likely minimal given the other potential consequences of criminal punishment such as incarceration and significant fines. See *id*.

The sixth factor weighs against a punitive purpose or effect because the imposition of court costs has a rational connection to the nonpunitive purpose of funding court operations. See *Earl*, 495 Mich at 46-47. Any punitive effect is incidental to this nonpunitive purpose, and the decision to place this funding burden on criminal defendants is a rational policy decision. See *id*. at 47.

Finally, the seventh factor weighs against a punitive purpose or effect because the costs provision is not excessive with respect to its purpose. See *Earl*, 495

Mich at 46-47. Each convicted criminal defendant is subject to the costs assessment, which is imposed without regard to the number of a defendant's convictions, and which must be reasonably related to the court's actual costs without separately calculating those costs involved in the particular case. MCL 769.1k(1)(b)(*iii*). By requiring a reasonable relationship to actual costs, the statute ensures adequate funding for the operation of the court without exceeding the purpose of the provision.

Overall, applying the above factors, we conclude that defendant has failed to prove that the costs provision in MCL 769.1k(1)(b)(*iii*) is so punitive in purpose or effect that it negates the Legislature's civil intent.

V. CONCLUSION

For the reasons stated, we affirm the trial court's authority to impose court costs under MCL 769.1k(1)(b)(*iii*) in the instant case, but remand for determination of the factual basis for the costs imposed. We do not retain jurisdiction.

RIORDAN, P.J., and MURPHY, J., concurred with BOONSTRA, J.

PEOPLE v McFALL

Docket No. 318830. Submitted February 3, 2015, at Lansing. Decided March 5, 2015, at 9:00 a.m.

John B. McFall was convicted following a jury trial in the Emmet Circuit Court, Charles W. Johnson, J., of failing to register as a sex offender in violation of MCL 28.729(2). Defendant was previously convicted, in 1995, of criminal sexual conduct. Before his release from prison in 2013, defendant was given notice of his obligations under the Sex Offenders Registration Act, MCL 28.721 *et seq*. Defendant registered as a sex offender at the Emmet County Sheriff's Office as required shortly after his release. Defendant failed, however, to report as required by MCL 28.725a(3)(c), as amended by 2011 PA 17, between April 1 and April 15, 2013. On the day of trial, defendant moved for a substitution of his appointed counsel. The court denied the motion. The court also denied defendant's request for a jury instruction stating that defendant's violation of the act's reporting requirements had to be willful. Defendant appealed.

The Court of Appeals *held*:

1. Substitution of counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause may exist when a legitimate difference of opinion develops between a defendant and his or her appointed counsel regarding a fundamental trial tactic, when there is a destruction of communication and a breakdown in the attorney-client relationship, or when counsel shows a lack of diligence or interest. In this case, defendant asserted that he was entitled to substitute counsel because his attorney (1) prosecuted defendant for sex offenses in 1995 (and obtained the convictions that led to his imprisonment), (2) allegedly waived the preliminary examination over defendant's objection, (3) supposedly did not communicate with defendant and provide him materials related to his trial, and (4) disagreed with defendant on what defense to pursue. None of defendant's assertions had merit. Defendant knew from the beginning of the case that his attorney had prosecuted him in 1995, but did not object until the night before the trial began and had stated that the

attorney was "a good lawyer." If defendant was uncomfortable with having the former prosecutor serve as his defense counsel, he should have requested substitute counsel at the beginning of the representation. Moreover, there was nothing in the record to demonstrate that defense counsel ignored defendant's alleged desire to have a preliminary examination; that defense counsel failed to answer defendant's calls, reply to his mail, or provide him with needed discovery materials; or that defense counsel failed to pursue the defense defendant wanted. Defendant therefore failed to show good cause for the appointment of substitute counsel, and the trial court correctly denied his request for a new attorney.

2. If a sex offender fails to comply with his or her obligations under the Sex Offenders Registration Act, under MCL 28.729 that offender is guilty of a crime. Under MCL 28.729(2), an individual who fails to comply with MCL 28.725a, other than payment of the fee required under MCL 28.725a(6), is guilty of a misdemeanor. Defendant asserted that the trial court erred when it refused to instruct the jury that his violation of MCL 28.729(2) needed to be willful. But the plain language of MCL 28.729(2) indicates that it is a strict-liability offense. Other provisions of MCL 28.729 do refer to willful violations of the Sex Offenders Registration Act, but MCL 28.729(2) does not. 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. Defendant did not fulfill his obligations under MCL 28.725a(3)(c), which required him to report to the sheriff's office between April 1 and April 15, 2013. He therefore violated MCL 28.729(2). The statute makes no mention of a requisite mental state, and the trial court correctly denied defendant's request regarding the jury instructions.

Affirmed.

CRIMINAL LAW — CRIMES — FAILURE TO COMPLY WITH THE SEX OFFENDERS REGISTRATION ACT — FAILURE TO REPORT ON SCHEDULE — STRICT LIABILITY.

Under MCL 28.729(2) of the Sex Offenders Registration Act, an individual who fails to comply with MCL 28.725a, other than payment of the fee required under MCL 28.725a(6), is guilty of a misdemeanor; MCL 28.729(2) is a strict-liability offense.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief

Legal Counsel, *David H. Goodkin*, Assistant Attorney General, and *James R. Linderman*, Prosecuting Attorney, for the people.

Madelaine P. Lyda for defendant.

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

SAAD, P.J. Defendant appeals his jury conviction of failing to register as a sex offender, pursuant to MCL 28.729(2). For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant is a convicted sex offender, and was sentenced to a lengthy prison term for his most recent crimes.[1] In January 2013, in anticipation of defendant's release from prison, a notary public met with defendant to witness his receipt of a notice explaining his obligations under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The document stated that MCL 28.725a(3)(c) required defendant, as a "tier III offender," to verify his address four times a year within four separate intervals: the first 15 days of January, April, July, and October.[2] Defendant read the form, signed it, and initialed its different provisions, save for a section instructing him to pay a $50 fee for

[1] Defendant assaulted an individual with intent to commit first-degree criminal sexual conduct (penetration), under MCL 750.520g(1), and also committed fourth-degree criminal sexual conduct, under MCL 750.520e.

[2] The Legislature subsequently amended MCL 28.725a(3)(c) to alter the reporting schedule effective April 1, 2014. 2013 PA 149. During the period relevant to this case, MCL 28.725a(3)(c) read, "A tier III offender shall report not earlier than the first day or later than the fifteenth day of each April, July, October, and January after the initial verification or registration."

registration, which he specifically rejected. According to the notary who witnessed defendant's reading and signing of the form and subsequently notarized it, defendant stated that he understood the form, and refused to pay the $50 registration fee.[3] Defendant received a copy of the form after he signed it.

After his release from prison on February 18, 2013, defendant registered as a sex offender at the Emmet County Sheriff's Office, as required by MCL 28.725a(3)(c). However, defendant did not visit the sheriff's office to verify his address between April 1 and April 15. On April 16, the Michigan State Police alerted local law enforcement that defendant did not comply with his obligations under SORA. The prosecution charged him with violating MCL 28.729(2)[4] in the Emmet Circuit Court, which empanelled a jury to hear the case.

Because defendant is indigent, the state appointed an attorney to represent him, who, by chance, had prosecuted defendant for his earlier sex offenses. Nonetheless, defendant—who was aware that the attorney had prosecuted him—did not object to the appointment, and even stated that the attorney is a "good lawyer."

Soon after the completion of jury selection, defendant's counsel, outside the presence of the jury, informed the trial court that defendant wanted substitute counsel. The attorney explained that, the night before and the morning of trial, defendant told him

[3] Defendant contested the notary's recollection of events at trial, testifying that he merely "glanced" at the form before signing and initialing it.

[4] Precisely, defendant did not fulfill his obligation to report the information required by MCL 28.725a(3)(c), which, in turn, caused him to violate MCL 28.729(2).

that he should not have waived the preliminary examination, and complained of a supposed lack of communication between counsel and defendant. Defendant then spoke with the trial court, and claimed that his attorney had discussed his defense strategy with the prosecution and the court—namely, whether defendant could claim that he did not "willfully" violate MCL 28.729(2). The court explained to defendant that both his attorney and the prosecution had submitted their proposed jury instructions, and that the court would not include an instruction on willfulness as an element of the SORA violation. It also told defendant that his lawyer had not discussed any other trial strategy with the trial court or the prosecution.

After defendant stated that he had told his attorney the night before trial that he no longer wanted the attorney to represent him, the trial court denied his request for substitute counsel. The trial court stated that defendant's effort was "an improper tactical maneuver . . . on the morning of trial to impede progress of this matter," and further stressed that (1) defendant was aware of his attorney's prior prosecution of him from the beginning of the representation, and yet did not object to the appointment, and (2) defense counsel was a skilled attorney who regularly appeared before the court, and that defendant had acknowledged his lawyer's capability. Defendant's case then proceeded to trial.

Defendant, who testified on his own behalf, argued that he did not "willfully" violate SORA—he believed he only had to verify his residency every 90 days—and that he could not be convicted under MCL 28.729(2) as a result. The trial court, holding that MCL 28.729(2) was a strict-liability offense, did not include an instruction on "willfulness" in the jury instructions, and the

jury convicted defendant of failing to register as a sex offender under the statute.

On appeal, defendant argues that the trial court abused its discretion when it (1) denied his request for substitute counsel, and (2) refused to instruct the jury on the element of "willfulness" supposedly contained in MCL 28.729(2).

II. STANDARD OF REVIEW

We review a trial court's decision denying substitution of counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court abuses its discretion when it issues a decision that falls outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010) (opinion by CAVANAGH, J.).

Jury instructions that involve questions of law are reviewed de novo. *People v Jones*, 497 Mich 155, 161; 860 NW2d 112 (2014). A trial court's determination of whether a jury instruction applies to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Again, a trial court abuses its discretion when a decision falls outside the range of principled outcomes. *Feezel*, 486 Mich at 192 (opinion by CAVANAGH, J.).

III. ANALYSIS

A. SUBSTITUTION OF COUNSEL

"An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced." *Traylor*, 245 Mich App at 462 (quotation marks and citation omitted). Substitution of counsel "is warranted only upon a

showing of good cause and where substitution will not unreasonably disrupt the judicial process." *Id*. (quotation marks and citation omitted). Good cause may exist when "a legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental trial tactic,"[5] when there is a "destruction of communication and a breakdown in the attorney-client relationship,"[6] or when counsel shows a lack of diligence or interest. *People v Ginther*, 390 Mich 436, 442; 212 NW2d 922 (1973). "A mere allegation that a defendant lacks confidence in his or her attorney, unsupported by a substantial reason, does not amount to adequate cause. Likewise, a defendant's general unhappiness with counsel's representation is insufficient." *People v Strickland*, 293 Mich App 393, 398; 810 NW2d 660 (2011) (citation omitted).

In this case, defendant argues that he should have received substitute counsel because his attorney (1) prosecuted him for sex offenses in 1995 (and obtained the convictions that led to his imprisonment), (2) allegedly waived the preliminary examination over his objection, (3) supposedly did not communicate with him and provide him materials related to his trial, and (4) disagreed with him on what defense to pursue.

None of these assertions have any merit. As noted, defendant knew that his attorney had prosecuted him from the beginning of the representation. And yet he did not voice any concerns about the issue (or any other aspects of defense counsel's representation) until the night before trial, when he supposedly requested new counsel. If defendant was uncomfortable with his attorney's representation in light of their prior history,

[5] *People v Williams*, 386 Mich 565, 574; 194 NW2d 337 (1972) (quotation marks and citation omitted).

[6] *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979).

the opportunity for him to request substitute counsel was at the beginning of the representation—not the night before trial. Defendant's protestation on this point is particularly unconvincing because of his stated satisfaction with defense counsel's services earlier in the representation—again, defendant went so far as to call his attorney "a good lawyer."

Moreover, there is nothing in the record to demonstrate that defense counsel "ignored" defendant's alleged desire to have a preliminary examination, nor is there any indication that defense counsel failed to answer defendant's calls, reply to his mail, or provide him with needed discovery materials. The record also belies defendant's contention that defense counsel did not pursue the defense he wanted—his attorney asked the court to instruct the jury that a MCL 28.729(2) violation must be willful, and defendant testified on his own behalf that he did not "willfully" disregard the statute's mandates.

Defendant therefore failed to show good cause for the appointment of substitute counsel, and the trial court correctly denied his request for a new attorney.

B. JURY INSTRUCTIONS

When a court interprets a statute, it first looks to its "plain language, which provides the most reliable evidence of intent." *People v McKinley*, 496 Mich 410, 415; 852 NW2d 770 (2014) (quotation marks and citation omitted). "If the statutory language is unambiguous, no further judicial construction is required or permitted." *Id*.

MCL 28.725a(3)(c) requires "tier III" sex offenders to report to the authorities on a specific schedule. If a sex offender fails to comply with his obligations under

MCL 28.725a(3)(c), MCL 28.729 mandates that he will face certain penalties. MCL 28.729 provides, in relevant part:

> (1) *Except as provided in subsections (2), (3), and (4)*, an individual required to be registered under this act who willfully violates this act is guilty of a felony . . . :
>
> * * *
>
> (2) An individual who fails to comply with [MCL 28.725a] other than payment of the fee required under [MCL 28.725a(6)], is guilty of a misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both. [Emphasis added.]

As such, the plain language of MCL 28.729(2) indicates that it is a strict-liability offense[7] that does not require a "willful" mental state—or any other mental state—for violation (as opposed to other provisions of the statute not exempted by MCL 28.729(1), which use the word "willfully" multiple times).[8] "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." *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011). "[C]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute,

[7] We note that the Legislature is entitled to create strict-liability offenses if it wishes. *People v Nasir*, 255 Mich App 38, 40; 662 NW2d 29 (2003). Though the courts may impose a *mens rea* requirement under certain circumstances if a statute is silent as to one, none of the factors that would allow us to do so is present in this case. See *Nasir*, 255 Mich App at 41-45.

[8] See *People v Lockett (On Rehearing)*, 253 Mich App 651, 654; 659 NW2d 681 (2002), for a discussion of the meaning of "willfully" as it applied to an earlier version of MCL 28.729(1)(a).

and then, on the basis of that assumption, apply what is not there." *Id*. (quotation marks and citation omitted).

Here, defendant unconvincingly claims that the trial court erred when it refused to instruct the jury that his violation of MCL 28.729(2) needed to be "willful." As noted, MCL 28.729(2) imposes a strict-liability penalty—it does not include the word "willful" or "willfully" and is instead silent as to mental state—in a statute that repeatedly specifies a mental state in its other subsections. Again: "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." *Peltola*, 489 Mich at 185.

Defendant did not fulfill his obligations under MCL 28.725a(3)(c), which required him to report to the sheriff's office between April 1, 2013 and April 15, 2013. He therefore violated MCL 28.729(2). The statute makes no mention of a requisite mental state, and defendant's assertions to the contrary have no merit whatsoever. Accordingly, the trial court correctly denied his request to include a "willful" mental state in the jury instructions.

Affirmed.

OWENS and K. F. KELLY, JJ., concurred with SAAD, P.J.

CLARK v AL-AMIN

Docket No. 319454. Submitted February 4, 2015, at Lansing. Decided March 5, 2015.

Carol Sue Clark brought an action against Progressive Insurance Company and others in the Washtenaw Circuit Court, alleging that in October 2011, Progressive had improperly stopped paying her personal protection insurance (PIP) benefits and underinsured motorist benefits in violation of the no-fault act, MCL 500.3101 *et seq*., for injuries she had sustained in two separate car accidents earlier in 2011. Before trial, on November 5, 2013, plaintiff and her attorney agreed by e-mail to settle all her claims against Progressive for $78,000. Three days later, plaintiff received a bill for $28,942 from the facility at which her shoulder surgery had been performed. Plaintiff's attorney contacted Progressive seeking to exclude the facility charge or void the settlement, claiming that although Progressive had been aware of this bill before the settlement, neither he nor plaintiff had been. Progressive refused to pay the bill and moved to enforce the settlement agreement. The court, Archie C. Brown, J., ruled that the $28,942 charge was not part of the settlement agreement and could be pursued through separate litigation. Progressive appealed.

The Court of Appeals *held*:

1. The trial court erred by ruling that the $28,942 charge was not part of the settlement agreement and could be pursued through separate litigation. Settlements are not set aside unless a party shows fraud, duress, or mutual mistake. A mutual mistake is an erroneous belief that is shared and relied on by both parties about a material fact that affects the substance of the transaction. Plaintiff's unilateral lack of knowledge of the bill was not a mistake in the context of the settlement, which the parties agreed to in a series of clear and unambiguous e-mails indicating that the settlement would include all PIP benefits incurred to date, and any mistake could not have been mutual because Progressive had knowledge of the charge when it made the settlement agreement.

2. Neither Progressive nor its counsel had a duty to inform plaintiff of the $28,942 charge during the settlement negotiation. It was incumbent on plaintiff's attorney, not the attorney of the adversarial party, to ensure that she had considered all possible claims before signing the settlement agreement.

Reversed and remanded for entry of an order to enforce the settlement agreement.

INSURANCE — NO-FAULT — CONTRACTS — SETTLEMENT AGREEMENTS — MISTAKES.

A settlement of claims for personal protection insurance benefits will not be set aside on the basis of a party's unilateral lack of knowledge of a charge that was incurred before the settlement date but billed after the settlement became effective (MCL 500.3101 *et seq*.).

Christensen Law (by *David E. Christensen* and *Sarah Stempky-Kime*) for Carol Sue Clark.

Garan Lucow Miller, PC (by *Caryn A. Ford* and *John W. Whitman*), for Progressive Insurance Company.

Before: SAAD, P.J., and OWENS and K. F. KELLY, JJ.

SAAD, P.J.

I. NATURE OF THE CASE

On November 5, 2013, plaintiff, who suffered injuries in two car accidents, settled her personal protection insurance ("PIP") claim in an agreement with defendant Progressive Insurance Company (Progressive), that provided that all PIP benefits incurred as of that date would be settled in exchange for a $78,000 payment from Progressive. Days after she made the agreement, plaintiff attempted to void this universal, binding settlement by asserting that she and her lawyer were unaware of a nearly $29,000 expense she had incurred several months before the settlement, and that the charge had only recently come to her

attention.[1] She claimed that because Progressive was aware of the billing (and she was not), the settlement should not include the $29,000 charge, as she would not have settled for $78,000 had she known about the $29,000 charge at the time of settlement. She did not tell the trial court (and does not tell our Court on appeal) how Progressive or Progressive's counsel could have divined what she and her lawyer may or may not have considered, or known, or risked, in making the decision to settle for $78,000. Yet the trial court agreed with plaintiff's argument, and held that the settlement did not include the $29,000 bill.

When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than *all* PIP benefits incurred to date.[2] But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light *after* the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. There are many other ways plaintiff or her lawyer could have settled her claim besides a universal settlement that wiped the

[1] As we will explain further, plaintiff incurred the $28,942 charge in May 2013, when she had shoulder surgery at a medical facility. Though she received a bill from the surgeon who performed the shoulder surgery before settlement on November 5, 2013, she says she did not receive the $28,942 *facility* bill for her May 2013 use of the medical facility until three days after the November 5, 2013 settlement.

[2] Indeed, plaintiff had compiled such an itemized list of expenses in preparation for her lawsuit. But she did not limit the settlement to this specific list, despite the fact that she had the option to do so.

slate clean of any claims incurred before the date of settlement. But they did not do so. Instead, they settled for a complete waiver of claims for $78,000, and Progressive paid this sum to buy its peace and achieve finality in this litigation.

Having failed to protect her interests,[3] and plaintiff's trial lawyer having failed to protect his client's interests,[4] plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $29,000 charge—even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge.

If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory—which she does not articulate in legal terms—then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. And, were we to credit the theory that opposing counsel had a duty to notify plaintiff of the $29,000 charge, then this case would stand for the novel theory that opposing counsel has a duty to do what is in fact, law, and professional obligation, the duty of plaintiff's lawyer. It is the obligation of plaintiff's attorney to ensure his client

[3] Of course, it is entirely possible that plaintiff *did* protect her interests—because we do not know whether, in her consideration of the November 5, 2013 settlement, plaintiff thought about the risk that the settlement would preclude claims she incurred before November 5, 2013, but of which she lacked knowledge as of the settlement date.

[4] Again, it is entirely possible that plaintiff's trial attorney *did* protect her interests—because we do not know whether, in his advice on the November 5, 2013 settlement, he explained to plaintiff the risk that the settlement would preclude claims she incurred before November 5, 2013, but of which she lacked knowledge as of the settlement date.

knows that a settlement, like the one at issue here, encompasses all claims. If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement.

Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client—and his client alone—without any conflicts.

For these reasons, which we explain below, we reject plaintiff's novel theories to avoid the agreement she freely entered into with the advice of counsel. The trial court's unwarranted rewriting of the parties' settlement agreement is reversed, and we remand for entry of an order to enforce the settlement agreement.

II. FACTS AND PROCEDURAL HISTORY

In 2011, plaintiff was involved in two car accidents in as many months. She suffered injuries in both accidents, and damaged her left shoulder and back. Though Progressive, plaintiff's insurer, initially paid for her medical treatment, it terminated her benefits in October 2011. Plaintiff filed suit against Progressive in the Washtenaw Circuit Court,[5] and alleged that Progressive improperly denied her payments of PIP benefits and underinsured/uninsured motorist benefits in violation of Michigan's no-fault act, MCL 500.3101 *et seq*. In May 2013, during the course of litigation,

[5] The other defendants include the drivers of the other cars involved in the 2011 accidents, and they are not relevant to this appeal.

plaintiff had shoulder surgery at Synergy Spine & Orthopedic Surgery Center (Synergy). She says she received a billing statement from the doctor who performed the surgery, but alleges that she did not receive a billing statement from Synergy for use of the facility.

Before trial, plaintiff and Progressive reached a settlement. In an e-mail exchange in early November 2013, the parties agreed to a $78,000 "global settlement" for plaintiff's PIP and underinsured/uninsured motorist claims. Progressive's adjuster explicitly stated, and plaintiff's trial attorney unequivocally agreed, that the PIP settlement "would be for all benefits to date." Plaintiff's trial attorney informed the trial court of the settlement on November 5, 2013.

Three days later, plaintiff asserts that her trial attorney received a $28,942 facility bill from Synergy for her May 2013 shoulder surgery. Plaintiff's lawyer contacted Progressive, claimed neither he nor plaintiff had knowledge of Synergy's charges, and said he would not have settled the suit for $78,000 had he or plaintiff known about this charge. He also alleged that Progressive was aware of the $28,942 statement, and had negotiated over this bill with Synergy at some point from May to November 2013. Plaintiff's attorney asked Progressive to confirm that the settlement agreement excluded the Synergy charges, and stated that if the agreement did not exclude the charges, the settlement was void.

Though it is unclear what response, if any, Progressive gave to plaintiff's trial attorney, Progressive notified Synergy on November 14, 2013 that plaintiff and/or her attorney were responsible for the charges, and refused payment for the bill. Soon after, Progressive moved to enforce the settlement agreed to by the parties on November 5, 2013. Progressive implicitly

argued that the settlement—which plaintiff agreed to and could not avoid—included all charges to date, which necessarily included the $28,942 Synergy invoice, because plaintiff incurred the charge well before the date of the settlement agreement.

Plaintiff responded, asserting that the settlement agreement could not include Synergy's $28,942 bill because (1) plaintiff had no knowledge of the bill before the settlement agreement, and (2) Progressive, which was aware of the charges, provided her with no notice of them.[6] Plaintiff asked the court to take defendant's motion under advisement, and conduct a settlement conference to address these issues.

After a hearing on Progressive's motion, the trial court, in a written order, stated that the $28,942 Synergy invoice "was not part of the settlement agreement" and could be pursued through separate litigation. In all other respects, the trial court ruled that the "parties' settlement agreement . . . shall remain in full force and effect and is a final agreement in this case."

On appeal, Progressive makes the same argument as it did below: namely, that the parties made a valid settlement agreement on November 5, 2013 that encompassed all of plaintiff's incurred PIP "benefits to date." As a result, it says the trial court erred when it held that plaintiff could pursue Synergy's charges—which she incurred in May 2013—through separate

[6] Notably, plaintiff does not dispute that the November 5, 2013 e-mail exchange constitutes a valid settlement agreement. Nor does plaintiff claim that her trial attorney lacked authority to settle her suit for her through this e-mail exchange. See, for example, *Nelson v Consumers Power Co*, 198 Mich App 82, 85-86; 497 NW2d 205 (1993), and *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 455 n 1; 733 NW2d 766 (2006). Accordingly, the e-mail exchange is a valid settlement agreement under MCL 450.837, and plaintiff's trial attorney had the authority to make the settlement for her.

litigation. Plaintiff again argues that the November 5, 2013 settlement agreement could not have included Synergy's charges, as plaintiff had no knowledge of them, and the agreement was intended to settle a specific set of claims of which plaintiff had knowledge.

III. ANALYSIS

A. LEGAL STANDARDS

1. CONTRACT PRINCIPLES

"The existence and interpretation of a contract are questions of law reviewed de novo." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 452; 733 NW2d 766 (2006).

"An agreement to settle a pending lawsuit is a contract, governed by the legal rules applicable to the construction and interpretation of other contracts." *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 663; 770 NW2d 902 (2009). "Before a contract can be completed, there must be an offer and acceptance. Unless an acceptance is unambiguous and in strict conformance with the offer, no contract is formed. Further, a contract requires mutual assent or a meeting of the minds on all the essential terms." *Kloian*, 273 Mich App at 452-453 (citations and quotation marks omitted).

"The goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties." *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012). "If the language of the contract is clear and unambiguous, it must be enforced as written." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 694; 818 NW2d 410 (2012). "Parties are presumed to understand and

intend what the language employed [in a contract] clearly states." *Chestonia Twp v Star Twp*, 266 Mich App 423, 432; 702 NW2d 631 (2005).

2. THE FINALITY OF SETTLEMENT AGREEMENTS

As a general rule, settlement agreements are "final and cannot be modified." *Smith v Smith*, 292 Mich App 699, 702; 823 NW2d 114 (2011). This is because settlements are favored by the law, and therefore will not be set aside, except for fraud, mutual mistake, or duress. *Streeter v Mich Consol Gas Co*, 340 Mich 510, 517; 65 NW2d 760 (1954).

"A mutual mistake is 'an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.' " *Kaftan v Kaftan*, 300 Mich App 661, 665-666; 834 NW2d 657 (2013), quoting *Ford Motor Co v City of Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). A "mutual mistake" is not a mere error or misunderstanding—it is an *extreme* mistake that must be "so material that . . . it goes to the foundation of the agreement." *Simkin v Blank*, 19 NY3d 46, 52; 945 NYS2d 222; 968 NE2d 459 (2012) (citation and quotation marks omitted).[7] And, needless to say, a mutual

[7] Cases from foreign jurisdictions are not binding, but can be persuasive. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010). See also 1 Restatement Contracts, 2d, § 154, pp 402-403:

> A party bears the risk of a mistake when
>
> (a) the risk is allocated to him by agreement of the parties, or
>
> (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
>
> (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

mistake must be *mutual*—it is not enough for one party to claim mistake, when the other party was aware of the alleged "mistake" at issue. See *Kaftan*, 300 Mich at 665-666.[8]

As such, one who signs a settlement "cannot seek to avoid it on the basis that . . . he supposed that it was different in its terms." *Nieves v Bell Indus, Inc*, 204 Mich App 459, 463; 517 NW2d 235 (1994). More specifically, a party cannot void a settlement agreement "merely because [he] has had a 'change of heart,' "[9] nor can he do so "merely because [his] assessment of the consequences [of the settlement] was incorrect." *Rose v Rose*, 289 Mich App 45, 62; 795 NW2d 611 (2010) (citation and quotation marks omitted).

3. PIP BENEFITS

PIP benefits include "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MCL 500.3107(1)(a). Under MCL 500.3107(1), a PIP claimant must show that the claimed expenses are: "(1) . . . for an injured person's care, recovery, or rehabilitation, (2) . . . reasonably necessary, (3) . . . incurred, and (4) . . . reasonable." *Douglas v Allstate Ins Co*, 492 Mich 241, 259; 821 NW2d 472 (2012).

An insured "incurs" an expense under MCL 500.3107(1) when he becomes "liable" for it, which occurs when he is "[r]esponsible or answerable in law" or "legally obligated" to pay that expense. *Bombalski v*

[8] See also *Teeter v Teeter*, 332 Mich 1, 4; 50 NW2d 716 (1952) (stating that "[m]isunderstanding by the plaintiff alone does not present a reason for the intervention of a court of equity").

[9] *Vittiglio v Vittiglio*, 297 Mich App 391, 399; 824 NW2d 591 (2012).

Auto Club Ins Ass'n, 247 Mich App 536, 543; 637 NW2d 251 (2001). An insured becomes liable for an expense when he accepts the medical treatment for which he (or his insurer) is being charged. *Shanafelt v Allstate Ins Co*, 217 Mich App 625, 638; 552 NW2d 671 (1996); see also *Harris v Auto Club Ins Ass'n*, 494 Mich 462, 468-469; 835 NW2d 356 (2013) (discussing our Court's summation of *Bombalski* and *Shanafelt*'s interpretations of when an insured "incurs" an expense under MCL 500.3107(1)).[10]

B. APPLICATION

1. THE SETTLEMENT AGREEMENT

Here, the parties agreed to a settlement in a series of clear, unambiguous e-mails exchanged on November 5, 2013, which state that the settlement included all PIP "benefits [incurred] to date." Plaintiff incurred the $28,942 expense from Synergy in May 2013, when she had shoulder surgery at Synergy's facilities. The cost of using Synergy's facilities for plaintiff's shoulder surgery is a PIP benefit. Synergy's invoice for $28,942 is thus included in the November 5, 2013 settlement, which, again, encompassed all PIP benefits incurred to date. The trial court therefore erred when it held that the $28,942 was not a part of the settlement agreement, and that plaintiff could pursue this sum through separate litigation against Progressive.

---

[10] Plaintiff's citation to the discussion of "incur" included in *Duckworth v Continental Nat'l Indemnity Co*, 268 Mich App 129; 706 NW2d 215 (2005), is inapposite. In *Duckworth*, the plaintiff, a Canadian, received treatment from a hospital in Ontario, which provided medical services "without charge." *Id*. at 135. Plaintiff therefore never became "liable" for the medical treatment he received, and did not "incur" the expenses under MCL 500.3107(1).

Plaintiff's attempts to avoid this obvious outcome must be rejected under Michigan law. As noted, settlements are not set aside unless a party shows fraud, duress, or mutual mistake. *Streeter*, 340 Mich at 517. Plaintiff does not allege fraud or duress. And though plaintiff does not speak explicitly in these terms, her suggestion that there was mutual mistake in the formation of the settlement is without merit.

Specifically, plaintiff says that the November 5, 2013 settlement agreement could not have included Synergy's $28,942 charge, as plaintiff had no knowledge of it, and the agreement was intended to settle a specific set of claims of which plaintiff had knowledge. This assertion is not a "mutual mistake" for two reasons: (1) Progressive supposedly had knowledge of the alleged "mistake," meaning that it cannot be "mutual"; and (2) plaintiff's lack of knowledge of the $28,942 Synergy billing cannot be a "mistake" in the context of the settlement agreement's plain terms. Moreover, the fact that she and her lawyer knew of the charge for the surgery undermines any claim of mistake about related charges.

Again, "[a] mutual mistake is 'an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.' " *Kaftan*, 300 Mich App at 665-666 (citation omitted). Here, plaintiff explicitly alleges that Progressive had knowledge of $28,942 charge from Synergy when it made the settlement agreement. It follows that any "mistake" involving the Synergy bill cannot be "mutual," because it was not "shared and relied on by both parties,"[11] and thus cannot serve as the basis for invalidating the settlement agreement. *Streeter*, 340 Mich at 517.

---

[11] *Kaftan*, 300 Mich App at 665 (citation omitted).

More importantly, what plaintiff alleges—her unilateral lack of knowledge of the Synergy bill—is not a "mistake" in the context of the settlement agreement.[12] Again, the settlement explicitly included all PIP benefits *incurred to date*. The presence of the phrase "to date" in the agreement obviously means that the settlement was not an itemized settlement for specific expenses—instead, it was a "global settlement" for all the PIP expenses plaintiff had incurred to that point. Plaintiff incurred the $28,942 charge from Synergy in May 2013 when she had shoulder surgery at Synergy's facility, well before the November 5, 2013 settlement.

Accordingly, it is not possible for plaintiff not to have contemplated expenses related to her May 2013 shoulder surgery when she agreed, on November 5, 2013, to a settlement that explicitly encompassed all PIP benefits incurred as of that date. Plaintiff and her attorney "are presumed to understand and intend what the language employed"[13] in the settlement agreement clearly states, and cannot now seek to avoid its plain terms because their "assessment of the consequences

---

[12] In any event, plaintiff's protestations that she had no knowledge of the Synergy bill—or the potential for a bill from Synergy—ring hollow. Plaintiff obviously knew that she had shoulder surgery in May 2013, and she and her attorney obviously knew that an agreement signed in November 2013 that covered all PIP benefits incurred "to date" would encompass the May 2013 shoulder surgery. The fact that plaintiff included the billings from the surgeon who performed the surgery in her lawsuit against Progressive is yet another reason to discredit her and her trial lawyer's claim that they had no knowledge of Synergy's $28,942 charge. It is common practice for doctors to perform operations in facilities they do not own, and for the billing on their work and the facility use to be separate charges. Plaintiff's trial attorney was undoubtedly aware of this practice, and should have noticed that plaintiff had received a bill from the doctor who performed the shoulder surgery, but not from the facility where the surgery took place (if plaintiff actually did not receive a bill from Synergy).

[13] *Chestonia Twp*, 266 Mich App at 432.

[of accepting the settlement] was incorrect." *Rose*, 289 Mich App at 62. In other words, plaintiff and her attorney may have made a mistaken judgment or an erroneous assumption, but this is not a "mistake" as defined in the law regarding mutual mistake.[14]

2. OBLIGATIONS OF PLAINTIFF'S ATTORNEY

In essence, plaintiff's attempt to invalidate the settlement agreement is a misguided effort to force Progressive or its counsel to perform a duty that should have been performed by her trial attorney. Before a plaintiff settles a case for all charges incurred to date, it is incumbent upon the plaintiff's attorney to ensure that he and his client consider all possible claims, so that the client makes an informed settlement.[15] It is the lawyer's professional duty to ensure that his client is fully advised and aware of all the ramifications of such a settlement. And here, this means that plaintiff's trial attorney should have advised her that the settlement at issue wiped the slate clean before November 5, 2013.

This professional obligation is the core duty of the plaintiff's lawyer—not the opposing party or its counsel. If the plaintiff's lawyer fails to fulfill this obligation—and does not ensure that he and his client consider all possible claims before signing a settlement agreement—the lawyer cannot shift this responsibility to the opposing party or opposing counsel. To do so

[14] To repeat: "A mutual mistake is 'an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction.' " *Kaftan*, 300 Mich App at 665-666 (citation omitted).

[15] See MRPC 1.4(b), comment ("For example, in negotiations where there is time to explain a proposal, the lawyer should review all important provisions with the client before proceeding to an agreement.").

would ignore the nature of contested litigation and the adversarial process, as well as the obligations of opposing counsel, which entail zealous representation of *his* client, not consideration of whether the plaintiff has thought of all the possible implications of a settlement agreement.[16] Furthermore, such an expectation would turn the law of the attorney-client relationship on its head. If a plaintiff or his lawyer has any concern that there might be future (and unknown) expenses not included in a settlement agreement, then the lawyer should include express language in the agreement that the settlement may be amended to provide for potential charges not included on a specific list. This obligation is the fundamental professional duty of any lawyer in such a case, and one that cannot be shifted to an opponent or its counsel when a lawyer (or his client) decides after the fact that he does not like the settlement to which he agreed.

Here, plaintiff seeks to engage in exactly this sort of obligation shifting: because her trial attorney did not consider that she might face additional (and perhaps unknown) charges[17] for PIP benefits incurred before

---

[16] See MRPC 1.3, comment ("A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.").

[17] In shifting this obligation to Progressive and its counsel, plaintiff also seeks to impose an unrealistic duty on both parties. It is not possible for Progressive or its attorney to know exactly what settlement strategy plaintiff and her attorney adopted during the settlement negotiations. Nor is plaintiff's knowledge about claims that she has already incurred relevant in a settlement agreement that encompasses *all benefits incurred to date*. Settling all claims for benefits incurred to date carries the risk that the plaintiff will sign away claims to benefits she has already incurred, but of which she is unaware.

Accordingly, one expects plaintiff and her trial counsel *did* discuss the possibility that she had incurred other, unknown PIP benefits before November 5, 2013—but decided to settle her claims anyway, because

November 5, 2013—i.e., the $28,942 Synergy billing—she argues that Progressive had a duty to inform her of this billing during the settlement negotiation. Of course, Progressive has no such duty. Progressive, as a defendant in litigation, is in an adversarial position with plaintiff, and, as such, has every right to protect its interest and to expect that courts will uphold a settlement freely entered into by the parties. Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement.[18] This we cannot and will not do.

Under Michigan law, neither Progressive nor its counsel had any duty to inform plaintiff of possible claims she might have made regarding the $28,942 Synergy billing, or to advise her to include those claims in the November 5, 2013 settlement.

IV. CONCLUSION

The trial court erred when it ruled that the Synergy invoice for $28,942 is not subject to the settlement agreement and may be the subject of separate litigation. The settlement agreement encompasses the

---

they believed $78,000 to be a favorable amount. It is contrary to both the attorney-client relationship and common sense to require Progressive and its counsel to divine the content of plaintiff's settlement negotiations, and inform plaintiff and her attorney of other claims that she might not have considered.

[18] See MRPC 1.7(a), comment ("Loyalty is an essential element in the lawyer's relationship to a client.").

$28,942 charge, and we remand to the trial court for entry of an order to enforce the settlement agreed to by the parties on November 5, 2013.

Reversed and remanded. We do not retain jurisdiction.

OWENS and K. F. KELLY, JJ., concurred with SAAD, P.J.

DEMSKI v PETLICK

Docket No. 322193. Submitted November 13, 2014, at Grand Rapids. Decided March 5, 2015, at 9:10 a.m. Leave to appeal sought.

Joseph Demski brought an action in the Berrien Circuit Court against Cassidie and Jeffrey Petlick, seeking to establish the parentage of a minor child, MP, born to Cassidie Petlick and to determine custody, child support, and parenting time. Defendants Jeffrey and Cassidie had a romantic relationship that ended in March 2010. Cassidie then began a relationship with Demski. She became pregnant shortly after her relationship with Demski began, but the relationship did not last. After her relationship with Demski ended, Cassidie resumed her relationship with Jeffrey. They were married just before MP's birth in February 2011. Demski was allowed to visit MP in the hospital just after her birth, but the relationship between the parties soured and Demski was thereafter asked to stay away from defendants and MP. The Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., became effective on June 12, 2012. Demski filed this action on July 5, 2012. DNA testing undertaken after these proceedings began confirmed that Demski was MP's biological father. Following a bench trial, the court, Mabel J. Mayfield, J., ruled that MP was born out of wedlock under the RPA. The court then entered an order of filiation stating that Demski was MP's father. The court reserved the issue of child custody and parenting time until after an expert, who had testified at the trial, could meet with Demski. Several months later, the court entered an order awarding joint legal custody of MP to Demski and Cassidie, awarding sole physical custody to Cassidie, and granting parenting time to Demski. Defendants moved for reconsideration. The court denied the motion. Defendants appealed.

The Court of Appeals *held*:

1. Under MCL 722.1433(4), a presumed father is a man who is presumed to be a child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth. The RPA governs actions to determine whether a presumed father is not the child's father. In relevant part, under MCL 722.1441(3)(c), the act permits a court to determine that a child was born out of

wedlock for the purpose of establishing paternity if the action is filed by an alleged father and (1) the mother was not married at the time of conception, and (2) the action is filed within three years after the child's birth. The court may, under MCL 722.1443(4), refuse to enter an order determining that a child was born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. On appeal, defendants challenged the trial court's assignment of the burden of persuasion and asserted that the trial court had not applied the correct legal standard in assessing whether MP's best interests would be served by determining that she was born out of wedlock. The plaintiff bears the burden of persuasion in a civil case. In this case, the trial court presumably assigned the burden of persuasion to Demski given the absence of any evidence to the contrary. While the act is silent regarding the correct legal standard to apply to the determination that a child was born out of wedlock, the trial court stated that it was applying the "clear and convincing" evidentiary standard to its best-interest determination under MCL 722.1443(4)—the same standard that defendants seem to advocate for on appeal. Consequently, defendants could not claim error in the court's use of that standard.

2. MCL 722.1443(4) lists eight best-interest factors that a trial court may consider when determining whether it should hold that a child was born out of wedlock: (a) whether the presumed father is estopped from denying parentage because of his conduct, (b) the length of time the presumed father was on notice that he might not be the child's father, (c) the facts surrounding the presumed father's discovery that he might not be the child's father, (d) the nature of the relationship between the child and the presumed or alleged father, (e) the age of the child, (f) the harm that may result to the child, (g) other factors that may affect the equities arising from the disruption of the father-child relationship, and (h) any other factor that the court determines is appropriate to consider. Defendants assert that the trial court erred by failing to address Factors (a), (b), and (c) and further erred in its application of the remaining factors. With regard to the former assertion, a trial court has discretion regarding which factors to consider, and, moreover, defendants waived appellate review of the trial court's failure to consider Factors (a), (b), and (c) when they themselves failed to address those factors in the trial court. With regard to the remaining factors, the trial court found under Factor (d) that there was a strong bond of love between Jeffrey and MP, and found under Factor (g) that there was not a significant risk of disruption of Jeffrey's relationship with MP if Demski were to be granted

parenting time. Under Factor (e), the court noted that MP was approximately 2½ years old. Regarding Factor (f), the trial court properly relied on the testimony of Robin Zollar, a psychotherapist who testified as an expert on behalf of defendants at trial, that MP could benefit from the introduction of plaintiff into her life. Regarding Factor (h), the court stated that Cassidie and Jeffrey's marriage, which occurred at the hospital while Cassidie was giving birth to MP, was intended to preclude Demski from the opportunity to be a parent to MP. The trial court's findings on the best-interest factors were not clearly erroneous, and the trial court did not clearly err by declining to conclude that an order determining that MP was born out of wedlock would not be in her best interests.

3. MCL 722.1445 of the RPA states that if an action is brought by an alleged father who proves by clear and convincing evidence that he is the child's father, the court may make a determination of paternity and enter an order of filiation as provided for in MCL 722.717 of the Paternity Act. Defendants asserted that the court incorrectly entered custody and parenting-time orders under MCL 722.1445. Neither MCL 722.717 nor MCL 722.1445 explicitly provides a trial court with the authority to enter child custody or parenting-time orders in conjunction with an order of filiation. The Child Custody Act (CCA) governs child custody disputes between parents, agencies, or third parties. Under MCL 722.27(1) of the CCA, if a child custody dispute has been submitted to the circuit court as an original action under the CCA or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court, for the best interests of the child, the court may make custody decisions, enter support orders, and provide for reasonable parenting time. In this case, even if the court incorrectly believed it had the authority to address child custody and parenting time under MCL 722.1445, reversal was not required because the court had the necessary authority under the CCA to enter child custody and parenting-time orders. Demski submitted a child custody dispute to the court as part of his original action. Once the court made its paternity determination, it had the authority under MCL 722.27(1) to enter orders regarding child custody and parenting time.

4. In *Schlender v Schlender*, 235 Mich App 230 (1999), the Court of Appeals held that a petitioner in a custody matter cannot be deprived by local court rule of an evidentiary hearing. In this case, defendants, relying on *Schlender*, asserted that the trial court was required to hold a separate evidentiary hearing before it addressed child custody and parenting time. This case was

fundamentally different from *Schlender* because it was not decided on the pleadings alone. A bench trial featuring seven witnesses and dozens of exhibits addressing the issues raised in Demski's complaint, including child custody and parenting time, was held. Defendants failed to show plain error with regard to this unpreserved issue.

5. Custody disputes are to be resolved in the child's best interests. The trial court determines the best interests of the child by weighing the statutory best-interest factors set forth in MCL 722.23. In this case, the trial court found that MP had an established custodial environment with Cassidie and placed the burden on Demski to show by clear and convincing evidence that a change was in MP's best interests. Defendants challenged the trial court's findings with respect to all the best-interest factors apart from Factor (a) (concerning the emotional ties between the parties and the child), which the court found favored Cassidie. Although the court's findings with regard to two of the best-interest factors under MCL 722.23 were against the great weight of the evidence, the trial court did not err by awarding sole physical custody to Cassidie and joint legal custody to Cassidie and Demski. The best-interest factors were relatively evenly split between Demski and Cassidie, and the trial court's award of joint legal custody was not an abuse of discretion.

6. Under MCL 722.27a(1), parenting time must be granted in accordance with the best interests of the child. The best-interest factors listed in MCL 722.23 and the factors listed in MCL 722.27a(6) are relevant to determining a child's best interests with regard to parenting time. MCL 722.27a(3) states that a child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health. The sum of defendants' arguments regarding parenting time was that MP would be placed in danger in plaintiff's home. The trial court found that plaintiff had the capacity and disposition to provide MP with love, affection, and guidance, as well as provide her with food, clothing, medical, care, other remedial care, and other material needs. The court declined to find that MP would be endangered by granting parenting time to plaintiff. The court's findings were not against the great weight of the evidence, and the court did not abuse its discretion by awarding parenting time to plaintiff.

7. On July 26, 2013, the trial court issued its bench ruling, in which it determined Demski's paternity of MP, but noted that it was not yet prepared to issue an order regarding custody and

parenting time. The paternity order entered on August 29, 2013. In rendering its July 26, 2013 bench ruling, the trial court noted that Zollar had already had an opportunity to meet with defendants individually and with defendants and MP at a joint appointment, but that Zollar had not yet met with Demski. The court required that Zollar meet with Demski for an evaluation. The August 29, 2013 order similarly directed Demski to meet with Zollar for that evaluation. The trial court received Zollar's report on November 20, 2013, apparently after she held her evaluation with Demski. Thereafter, the court issued its February 4, 2014 order concerning custody and parenting time. While it might have been better practice for the court to have received Zollar's report before the conclusion of the proofs at trial and to have included that report in the court record, the process was not so fatally flawed as to result in a denial of due process. Zollar was defendants' own witness. Accordingly, defendants did not have the right to cross-examine her regarding her evaluation with Demski, and defendants failed to demonstrate plain error with regard to this unpreserved issue.

8. Equal protection of the law for all persons is guaranteed by the Michigan and United States Constitutions. These constitutional guarantees require that all persons similarly situated be treated alike under the law. The legal effect of a court's determination that a child was born out of wedlock under MCL 722.1441 is to grant the biological father of a child standing to establish paternity. To the extent that the statute permitted Jeffrey and Demski to be treated differently, it was because Demski was MP's biological father. Because the constitutional guarantees of equal protection do not require that persons in different circumstances be treated the same, those guarantees were not implicated in this case. Although defendants argued that the RPA severed Jeffrey's fundamental liberty interest as a father, the actual effect of the RPA and the Paternity Act is to provide a mechanism for determining which man is the father of a minor child and, therefore, in possession of a fundamental liberty interest in his relationship with the child. There was no merit to defendants' constitutional challenge to MCL 722.1441.

Affirmed.

GLEICHER, J., dissenting, would have reversed the trial court's joint legal custody and parenting-time decisions, because Demski was required to produce clear and convincing evidence that declaring MP born out of wedlock would serve her best interests and Demski failed to make that showing, and the trial court's ex parte consideration of Zollar's testimony and the court's failure to

hold a separate evidentiary hearing to consider the child's best interests contravened the CCA. Under MCL 722.1443(4), only after taking into account a child's best interests is a court vested with authority to make a determination of paternity and enter an order of filiation. The statute is silent regarding the applicable standard of proof, but the United States Supreme Court has stated that the "clear and convincing" evidentiary standard should be applied to state court proceedings when the individual interests at stake are both particularly important and more substantial than mere loss of money, as was the case here. The principle that only clear and convincing evidence of a child's best interests will justify disrupting an established environment or depriving a legal father of his paternal rights is firmly fixed in family law, and there is no reason to conclude that the Legislature intended to abandon the clear and convincing evidence standard of proof in a directly analogous custodial context simply because it failed to reiterate it in the RPA. While the trial court used the clear and convincing evidence standard when determining that Demski was the child's biological father, the record was not clear regarding the standard used when the court determined MP's best interests. Regardless of what standard applied though, the evidence presented during the RPA hearing did not clearly and convincingly demonstrate that MP's best interests would be served by severing Jeffrey's paternal rights and inserting Demski in that role. Even under a preponderance standard, the trial court's best-interest findings contravened the great weight of the evidence. Zollar's testimony that MP could benefit from a sustained commitment by Demski hardly qualified as clear and convincing evidence that she would benefit from the change in paternity. Because the great weight of the evidence supported that MP's interests would not be served by disestablishing Jeffrey's paternity, the court erred when it determined that MP was born out of wedlock. With regard to the custody and parenting-time order, defendants preserved their objection to the court's failure to hold a separate evidentiary hearing in their motion for reconsideration, which was the first opportunity they had to object to the trial court's procedure, and the trial court committed two serious errors warranting reversal of the order. First, the court issued the order in the absence of an evidentiary hearing during which the parties could introduce evidence relevant to the factors set forth in the CCA and cross-examine witnesses. The trial was not sufficient because the court refused to consider and hear evidence relevant to the custody and parenting-time decisions during the trial. Second, the court considered ex parte evidence that it withheld from the parties,

violating MRE 706. The trial court clearly erred by denying defendants an opportunity to review Zollar's report and cross-examine her before issuing the custody and parenting-time order. Because the trial court denied MP and Cassidie due process, its decisions lacked integrity and should not have been affirmed.

1. PARENT AND CHILD — REVOCATION OF PATERNITY ACT — DETERMINATION THAT A CHILD WAS BORN OUT OF WEDLOCK — BEST INTERESTS OF THE CHILD.

Under MCL 722.1433(4) of the Revocation of Paternity Act (RPA), a presumed father is a man who is presumed to be a child's father by virtue of his marriage to the child's mother at the time of the child's conception or birth; the RPA governs actions to determine whether a presumed father is not the child's father; in relevant part, under MCL 722.1441(3)(c), the act permits a court to determine that a child was born out of wedlock for the purpose of establishing paternity if the action is filed by an alleged father and (1) the mother was not married at the time of conception, and (2) the action is filed within three years after the child's birth; the court may, under MCL 722.1443(4), refuse to enter an order determining that a child was born out of wedlock if the court finds evidence that the order would not be in the best interests of the child.

2. PARENT AND CHILD — REVOCATION OF PATERNITY ACT — DETERMINATION THAT A CHILD WAS BORN OUT OF WEDLOCK — BEST INTERESTS OF THE CHILD — BEST-INTEREST FACTORS.

MCL 722.1443(4) of the Revocation of Paternity Act lists eight best-interest factors that a trial court may consider when determining whether it should hold that a child was born out of wedlock: (a) whether the presumed father is estopped from denying parentage because of his conduct, (b) the length of time the presumed father was on notice that he might not be the child's father, (c) the facts surrounding the presumed father's discovery that he might not be the child's father, (d) the nature of the relationship between the child and the presumed or alleged father, (e) the age of the child, (f) the harm that may result to the child, (g) other factors that may affect the equities arising from the disruption of the father-child relationship, and (h) any other factor that the court determines is appropriate to consider; a trial court has discretion regarding which factors to consider.

3. PARENT AND CHILD — REVOCATION OF PATERNITY ACT — CONSTITUTIONAL LAW — EQUAL PROTECTION.

The Revocation of Paternity Act provides a mechanism for determining whether the presumed father or an alleged father is the

father of a minor child and, therefore, in possession of a fundamental liberty interest in his relationship with the child; the legal effect of a court's determination that a child was born out of wedlock under MCL 722.1441 of the act is to grant the biological father of a child standing to establish paternity; to the extent the act allows presumed and alleged fathers to be treated differently, it is because they are not similarly situated; the constitutional guarantees of equal protection do not require that persons in different circumstances be treated the same (US Const, Am XIV; Const 1963, art 1, § 2).

Burch & Banyon (by *Kevin P. Banyon*) for Joseph R. Demski.

Armstrong Betker and Schaeffer, PLC (by *W. Brendan Neal*), for Cassidie and Jeffrey Petlick.

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

BOONSTRA, P.J. Defendants Cassidie Petlick and Jeffrey Petlick appeal by right the February 4, 2014 order of the trial court awarding joint legal custody of a minor child to Cassidie and to plaintiff Joseph Demski, awarding sole physical custody to Cassidie, and granting parenting time to plaintiff; defendants additionally appeal the August 29, 2013 order of filiation determining plaintiff's paternity of the child. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Jeffrey began a romantic relationship with Cassidie in 2006; that relationship ended in March 2010. Shortly thereafter, in April 2010, Cassidie began a romantic relationship with plaintiff. That relationship lasted approximately 4½ months, during which time plaintiff and Cassidie engaged in sexual relations. Jeffrey and Cassidie did not have sexual relations during the period of Cassidie's relationship with plaintiff.

In May 2010, Cassidie became pregnant. Plaintiff learned of the pregnancy in June 2010. Plaintiff testified that approximately three or four weeks later, he talked with Cassidie about getting married. In July 2010, while Cassidie was still in a relationship with plaintiff, Jeffrey learned that Cassidie was pregnant. Jeffrey acknowledged at trial that he always knew that the child was not his biological child and that plaintiff was the child's biological father.

In early August 2010, Cassidie's relationship with plaintiff ended, after which Cassidie and Jeffrey resumed their previous relationship. Plaintiff testified that he offered Cassidie financial and emotional assistance at that time, but that she rejected his help. Cassidie told plaintiff that he had no idea what it took to raise a child and that there was "no way" she was "going to hand her kid over to somebody like [plaintiff]." Plaintiff testified that he felt that Cassidie was pressuring him to back away from the situation.

In September or October 2010, Cassidie went to plaintiff's house to show him ultrasound photographs of the unborn child. Jeffrey (who was not present) testified that plaintiff acted as though he did not care to see the photographs and "grope[d]" Cassidie. Cassidie testified that during the first few minutes at plaintiff's house, she discovered that he was "highly under the influence," and that plaintiff tried to put his hands on her. Plaintiff denied touching or attempting to touch Cassidie when she stopped by his house to show him the photographs.

Jeffrey testified that, in late 2010, plaintiff told him that he wanted to "sign off" in regard to raising the child. Plaintiff and Cassidie sent a series of text messages to each other discussing the possibility of plaintiff signing away his rights in exchange for not

being required to pay child support. Plaintiff acknowledged that, in November 2010, there was a brief period of time when he did not want to be involved with the child. Plaintiff testified that a few weeks later, he changed his mind. Plaintiff testified that he did not seriously consider walking out of the child's life, but that Cassidie's initial reluctance to receive his help discouraged him because he did not want the child to be raised in an environment with conflict. Jeffrey testified that, by the end of November 2010, he and Cassidie had decided that plaintiff was not going to be involved with the child.

Plaintiff obtained legal counsel who sent Cassidie a letter on January 13, 2011, indicating that plaintiff had retained counsel "in order to assist and facilitate his involvement with prenatal doctor's appointments as well as the birth of your daughter" and to assist in establishing paternity "as well as an eventual custody/parenting time arrangement." The letter also referred to plaintiff's desire to be present at the birth of the child. Cassidie did not contact plaintiff after she received the letter. Cassidie testified that she did not take the letter seriously, because five weeks earlier, plaintiff had told her that he wanted to sign away his rights.

In late January 2011, at approximately 2:30 p.m. or 3:00 p.m., Cassidie's water broke. At approximately 5:30 p.m. or 6:00 p.m. the same day, Jeffrey and Cassidie were married. At trial, Jeffrey testified that he and Cassidie had intended to get married on a date in February 2011, but altered this plan when it became apparent that the child would be born before that date. Jeffrey testified that they wanted to be married before the child was born so that the child would be born as a legitimate child into a family with a married mother

and father. Cassidie testified that it was important not to have the child out of wedlock because she wanted to ensure that the child had a family. At approximately 7:00 p.m. on the date that Jeffrey and Cassidie were married, and while they were waiting for the child to be born, plaintiff arrived at the hospital and waited in the waiting room for approximately two or three hours before leaving.

The child, MP, was born the next day. On the day after the birth, Cassidie invited plaintiff to the hospital. Jeffrey testified that at that point he and Cassidie had decided that plaintiff could be involved in MP's life. Plaintiff visited MP at that time and held her for four hours. Cassidie testified that while plaintiff was at the hospital, she told him to " '[g]ive us a few days, let us get settled and we'll get ahold of you.' " According to plaintiff, Cassidie told him when he left the hospital that she would stay in contact with him. Plaintiff asked Cassidie to inform him of how MP's first doctor visit went, but Cassidie did not contact him about the visit.

Within a day or two after MP was born, according to plaintiff, Cassidie and Jeffrey told him via text messages to " 'back off or further action would be taken.' " According to Cassidie, she told plaintiff that " 'you're driving us crazy. Give us a few days[.]' " Other than by text messages, Jeffrey and Cassidie did not hear from plaintiff between MP's birth and April or May 2011. Jeffrey and Cassidie testified that after they did not hear from plaintiff, they considered the "door closed" on plaintiff's involvement in MP's life. Plaintiff testified that he was told by Jeffrey and Cassidie that he needed to "back off" or that they would pursue a restraining order or a personal protection order (PPO) against him. Plaintiff said that when he told his

attorney of Jeffrey's and Cassidie's threats, his attorney advised him to stay away from them. Jeffrey testified to looking into obtaining a PPO, although it does not appear that one was ever issued.

Later in February 2011, Jeffrey and Cassidie went shopping with MP at Sam's Club. While at the store, MP suffered apnea and stopped breathing. Jeffrey and Cassidie took MP to a series of hospitals for treatment. Jeffrey testified that, as a result of that experience, he solidified his bond with MP.

On June 19, 2011, Jeffrey sent a Facebook message to plaintiff telling him: "Just do all of us a favor and go on with your life!!!!! We chose the best situation for [MP]!!!! And for you to say I am desperate???? You can go f--- yourself!!! Every one Has [sic] made mistakes, and the biggest one Cassidie ever made is with your dumba--!!!!!"

On July 4, 2011, Cassidie and MP went to a festival in Eau Claire, Michigan. Cassidie testified that when she first arrived, plaintiff swerved at her vehicle while he was driving an ATV. Jeffrey (who again was not present) testified that, subsequently, plaintiff came up to Cassidie while she was pushing MP in a stroller and tried to take pictures of MP with his cellular telephone. According to Jeffrey, Cassidie "smacked" plaintiff's hand away. Cassidie testified that plaintiff walked up to her in an aggressive manner and tried to take pictures of MP. Cassidie said that plaintiff appeared to be "under the influence," and testified that she asked plaintiff several times to stop taking pictures. Plaintiff acknowledged that he tried to take a photograph of MP with his cellular telephone but denied acting in a threatening or aggressive manner toward Cassidie or MP.

After the incident at the festival, Jeffrey called plaintiff on July 4, 2011, and told him to stay away from Cassidie and MP because Cassidie was afraid of plaintiff. Also, Jeffrey told plaintiff that if he went near Cassidie, he would obtain a PPO against plaintiff. On August 2, 2011, Jeffrey sent a text message to plaintiff telling him to "[l]eave us alone!!!!!" Jeffrey told plaintiff, "[h]ave you not got the clue that we don't like you and we ALL don't want anything to do with you!!!!" Jeffrey also told plaintiff, "[s]he's not your daughter!!!! Get it through your dumba-- brain!!!!!! She will never see you or come in contact with you!!!! Get over it!!!!!" On October 30, 2011, Jeffrey sent another text message to plaintiff telling him that "[y]ou will never see my daughter!!!!! Leave us alone."

On July 5, 2012, plaintiff filed his complaint in this action. Plaintiff's initial complaint, entitled "Complaint to Determine Parentage, Custody, Child Support, and Parenting Time"[1] sought a declaration that he was MP's father (although it did not cite the statutory basis for such a determination, i.e., the Paternity Act, MCL 722.711 *et seq*., or the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*.), joint physical and joint legal custody of MP, and a child support determination. Plaintiff alleged that he believed that he was MP's father, that Cassidie was denying his efforts to be involved in MP's life, and that he could provide MP with a stable living environment. Cassidie answered, denying that plaintiff was MP's father, that she had impeded plaintiff's efforts to be involved with MP, and that plaintiff could provide MP with a stable living environment. On September 19, 2012, plaintiff amended his complaint to add Jeffrey as a defendant, alleging that Jeffrey was the "presumed

[1] Capitalization altered and emphasis omitted.

father" of MP. Plaintiff also added to his requests for relief by asking the trial court, in addition to determining paternity, to enter an order of filiation[2] naming him MP's legal father.

On December 7, 2012, the parties agreed to cooperate with genetic testing. The results of the paternity test showed that there was a greater than 99.999% chance that plaintiff was MP's father. The paternity test results were later admitted at trial. Plaintiff testified that at the beginning of January 2013, he saw Jeffrey at a gas station and tried to talk to him. Jeffrey told plaintiff to " 'stay the f--- away' " and that he was a " 'f----- piece of s---.' "

The trial court commenced a bench trial on May 24, 2013. The parties testified to the events described herein, and further presented testimony regarding the fitness of the parties and MP's best interests. Throughout the trial, and from its inception, the trial court and counsel made repeated reference to the issues at trial encompassing paternity, custody, and parenting time.

Plaintiff testified that he lived in Eau Claire, Michigan with his girlfriend, Lynna Nelson. Nelson and plaintiff had been in a relationship since October 2010, and Nelson had been living with plaintiff for approxi-

[2] MCL 722.717(1)(a) provides for a trial court to "enter an order of filiation declaring paternity and providing for the support of the child" if "[t]he finding of the court or the verdict determines that the man is the father." An order of filiation is required to specify the amount of child support ordered, and upon entry of the filiation order, a written report of the order is to be transmitted to the Director of the Department of Community Health. MCL 722.717(2) and (4). In the instant case, the trial court entered an order of filiation on August 29, 2013, establishing paternity and reserving custody and parenting-time issues until further order of the court; the report of the order of filiation was sent to the Department of Community Health that same day. The trial court issued an order granting custody and parenting time, as described later in this opinion, on February 4, 2014.

mately two years. Nelson acknowledged that there was a three or four week period during which she and plaintiff had ended their relationship, but said that they were back together and that their relationship was stronger because of the temporary breakup. Nelson acknowledged that at the time of their breakup, plaintiff said that he would kill himself; however, Nelson believed that plaintiff's threat was not serious. Cassidie testified that during the time she dated plaintiff, he had threatened suicide three or four times.

Plaintiff was a foreman with a company called Ferguson Michigan, in the field of underground construction. Plaintiff made approximately $54,000 in 2012. Plaintiff also testified that he had a room for MP in his home, and that he was willing and able to provide support for MP.

Plaintiff acknowledged that he had smoked marijuana in the past, but said that he had not smoked marijuana during the year before the trial. Plaintiff had a medical marijuana card valid from May 3, 2011, to June 11, 2013. Plaintiff also admitted that he had grown marijuana for approximately two years in the past. Plaintiff testified that he quit using marijuana because MP was the most important thing to him. Nelson testified that she and plaintiff had smoked marijuana together in the past, but that it had happened "years ago." Jeffrey testified, on the basis of plaintiff's deposition testimony, that plaintiff had consumed marijuana at night before driving his truck for work the next day, and that, during the two years before trial, plaintiff had used fake urine to pass drug tests at work. Cassidie testified that while she dated plaintiff, she saw him become intoxicated with marijuana and alcohol, and that plaintiff used marijuana every day while Cassidie lived with him. Cassidie

testified that plaintiff would become mean and start fights when he was under the influence of marijuana.

Plaintiff said that his efforts to create a positive relationship with Jeffrey and Cassidie had been very negatively received. Plaintiff testified that if the trial court granted him parenting time with MP, he would encourage a relationship between MP and Jeffrey. Nelson testified that plaintiff definitely wanted to be a part of MP's life. Nelson stated that the only negativity that plaintiff demonstrated toward being involved with MP was the result of Cassidie's and Jeffrey's repeated rejections of his involvement.

Cassidie testified that she was concerned with plaintiff's long-term commitment to MP because he had gone back and forth regarding whether he wanted to sign away his rights or be involved with MP. Jeffrey said that he was concerned that MP would suffer emotional harm if plaintiff became a part of her life and then left. Cassidie said that she did not believe that plaintiff had a genuine desire to be involved in MP's life. Cassidie never heard plaintiff say that he wanted to get to know MP or to love MP, and she believed that plaintiff was only pursuing this case because he wanted to look good in front of his friends and family.

Jeffrey admitted that he had not allowed any relationship to form between plaintiff and MP. Jeffrey testified that he did not believe that plaintiff was fit to be a father and testified that this belief was in part based on his "passing" acquaintance with plaintiff "years ago in Eau Claire" although he did not elaborate further regarding his experience with plaintiff before the conception of MP. Jeffrey testified that plaintiff acknowledged at his deposition that he had been

charged with assault in 1999. Plaintiff testified that he did not have any criminal convictions in the last three years.

Jeffrey and Cassidie lived with MP in St. Joseph, Michigan. Jeffrey was an independent distributor for Little Debbie Snack Cakes. Jeffrey earned approximately $37,000 to $40,000 per year. Jeffrey testified that he had a great bond with MP, provided care for her, and spent time with her every day. Cassidie testified that both she and Jeffrey worked, and that MP had three babysitters who would watch her on three separate days of the week. Jeffrey's mother testified that MP was very close to Cassidie and Jeffrey.

Regarding MP's best interests, Jeffrey testified that he believed that plaintiff could not offer MP a "second family of love" because MP was happy with Jeffrey and Cassidie. Jeffrey believed that MP would become an emotional "wreck" if she began a relationship with plaintiff because she did not "take kind" to new people and because she suffered "mini panic attack[s]" when she was scared. Cassidie testified that MP was very scared of strangers and that it took her quite awhile to warm up to people. Cassidie was concerned for MP's emotional well-being if she spent parenting time with plaintiff because she would not feel safe with him. Jeffrey's mother also testified that MP was timid and did not take well to new situations or people, and that she was afraid that MP would be "traumatize[d]" if she was placed into an environment other than Cassidie's and Jeffrey's house. Cassidie testified that she believed that it was in MP's best interests to wait on introducing her to plaintiff until she was older and could understand the situation.

Robin Zollar, a child psychotherapist, was called as an expert witness[3] by defendants. She testified that she first met with Cassidie, Jeffrey, and MP approximately three months before trial. Zollar met with Cassidie and Jeffrey individually, and with Cassidie, Jeffrey, and MP as a group. During the time Zollar observed MP with Cassidie and Jeffrey, MP called Cassidie "mommy" and Jeffrey "daddy," and interacted with Cassidie and Jeffrey equally well. Zollar testified that MP viewed Jeffrey as her father and that MP and Jeffrey seemed to be genuinely comfortable and attached to each other.

Zollar testified that if plaintiff or any other father figure was brought into MP's life, there was a danger that she would suffer frustration and anger because of her young age and inability to understand. Zollar also said that MP could become insecure, threatened, and confused. Zollar testified that the danger to MP was especially great if Cassidie and Jeffrey did not get along with plaintiff, because children the age of MP may believe that the problems of the adults are their fault. Zollar also testified that there was a danger that if a new parental figure was introduced into MP's life, she might become alienated from Jeffrey. However, Zollar also acknowledged that introducing a new parent into MP's life could also benefit her if the parent emotionally supported her for a sustained period of time.

On July 26, 2013, the trial court issued a ruling from the bench. The trial court noted that the issue before it was whether it should determine that MP was born out of wedlock under the RPA, MCL 722.1441, despite the fact that Jeffrey, having been married to Cassidie at

[3] Zollar was admitted as an expert in the area of child development, assessment, and therapy.

the time of MP's birth, was MP's presumed father under MCL 722.1433(4).[4] The trial court recognized that MCL 722.1443(4) allowed it to refuse to determine that a child was born out of wedlock, if the determination would not be in the best interests of the child. After considering MP's best interests, the trial court found by clear and convincing evidence that plaintiff was MP's biological father and that she was born out of wedlock. On the basis of that finding, the trial court, on August 29, 2013, entered an order of filiation, determining paternity under MCL 722.1445. The trial court's order also required that plaintiff meet with Zollar for a "concluding evaluation." The trial court reserved the issues of child custody and parenting time until that evaluation could be completed.[5]

On February 4, 2014, the trial court entered an order awarding joint legal custody of MP to Cassidie and plaintiff, awarding sole physical custody to Cassidie, and granting parenting time to plaintiff. On February 18, 2014, Cassidie and Jeffrey moved the trial court for reconsideration on the ground that the trial court had entered a child custody and parenting-time order without holding a separate evidentiary hearing and without making specific findings of fact concerning child custody and parenting time. Cassidie and Jeffrey asked the trial court to set aside its February 4, 2014 order and schedule an evidentiary hearing regarding

[4] The Legislature recently enacted 2014 PA 376, which, effective March 17, 2015, will redesignate Subsection (4) of MCL 722.1433 as Subdivision (e).

[5] Cassidie and Jeffrey appealed the trial court's August 29, 2013 order in this Court. On October 1, 2013, this Court dismissed Cassidie and Jeffrey's appeal for a lack of jurisdiction under MCR 7.202(6)(a)(i) because the trial court's August 29, 2013 order was not a final order given that it did not dispose of plaintiff's child custody and parenting-time claims. *Demski v Petlick*, unpublished order of the Court of Appeals, entered October 1, 2013 (Docket No. 318176).

custody and parenting time. In an order dated May 28, 2014, the trial court denied the motion, stating that because it had conducted a trial on May 24, 2013, and June 11, 2013, in regard to plaintiff's complaint, which included claims for child custody and parenting time, it had fulfilled the requirement that an evidentiary hearing be held before the entry of an order regarding custody and parenting time. The trial court had further found that MP had an established custodial environment with Cassidie and had addressed the 12 best-interest factors for child custody under MCL 722.23. The trial court also had found that it was in MP's best interests that Cassidie and plaintiff share joint legal custody, that Cassidie have sole physical custody, and that plaintiff receive parenting time.

This appeal followed.

II. PATERNITY DETERMINATION

Defendants first argue that the trial court erred by entering an order determining paternity and an order of filiation in favor of plaintiff. Specifically, defendants argue that the trial court failed to properly assign the burden of persuasion and erred in its determination of MP's best interests. We disagree.

A. GENERAL PRINCIPLES

The trial court made its determination of paternity pursuant to the RPA, MCL 722.1431 *et seq*. "Among other things, the Revocation of Paternity Act 'governs actions to determine that a presumed father is not a child's father . . . .' " *Grimes v Van Hook-Williams*, 302 Mich App 521, 527; 839 NW2d 237 (2013), quoting *In re Daniels Estate*, 301 Mich App 450, 458-459; 837 NW2d 1 (2013). "The RPA generally provides a court with

authority to [d]etermine that a child was born out of wedlock and to [m]ake a determination of paternity and enter an order of filiation[.]" *Sprenger v Bickle*, 307 Mich App 411, 415; 861 NW2d 52 (2014) (quotation marks and citations omitted; alterations in original). MCL 722.1441 governs actions to determine if a "presumed father" under the RPA is not a child's legal father because the child was born out of wedlock for the purpose of establishing paternity. *Parks v Parks*, 304 Mich App 232, 238; 850 NW2d 595 (2014). The biological father of a child born out of wedlock under MCL 722.1441 may then establish paternity under MCL 722.717(1).[6] A "presumed father" is 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(4). In this case, Jeffrey was married to Cassidie at the time MP was born, and was therefore a presumed father under MCL 722.1433(4).

MCL 722.1441(3) provides in relevant part:

> If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by an alleged father and any of the following applies:
>
> * * *
>
> (c) Both of the following apply:
>
> (*i*) The mother was not married at the time of conception.

---

[6] MCL 722.717(1) provides in relevant part:

> In an action under [the Paternity Act], the court shall enter an order of filiation declaring paternity and providing for the support of the child under 1 or more of the following circumstances:
>
> (a) The finding of the court or the verdict determines that the man is the father.

> (*ii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.

In this case, the record showed that Cassidie was not married at the time she conceived MP, and that this action was filed both within three years of MP's birth and within one year of the effective date of the RPA. Accordingly, the elements of MCL 722.1441(3)(c) were met in this case. The parties do not dispute this on appeal. However, MCL 722.1441(3) indicates that the trial court "may" determine that the child is born out of wedlock when the elements are met; it does not state that such action is mandatory. See *Walters v Nadell*, 481 Mich 377, 383; 751 NW2d 431 (2008) (stating that the use of the word "may" generally indicates discretionary action). This Court has previously held that, "even if the requirements of MCL 722.1441(1)(a) are met, the trial court may, of course, refuse to make that . . . determination if the court finds evidence that the order would not be in the best interests of the child." *Glaubius v Glaubius*, 306 Mich App 157, 173 n 4; 855 NW2d 221 (2014) (quotation marks and citation omitted).

MCL 722.1443(4) provides:

> A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child. The court shall state its reasons for refusing to enter an order on the record. The court may consider the following factors:
>
> (a) Whether the presumed father is estopped from denying parentage because of his conduct.
>
> (b) The length of time the presumed father was on notice that he might not be the child's father.

(c) The facts surrounding the presumed father's discovery that he might not be the child's father.

(d) The nature of the relationship between the child and the presumed or alleged father.

(e) The age of the child.

(f) The harm that may result to the child.

(g) Other factors that may affect the equities arising from the disruption of the father-child relationship.

(h) Any other factor that the court determines appropriate to consider.

Accordingly, a court may properly decline to rule that a child was born out of wedlock when the court finds under MCL 722.1443(4) that the ruling would not be in the child's best interests. See *Glaubius*, 306 Mich App at 173 n 4.

B. BURDEN OF PERSUASION AND LEGAL STANDARD

Defendants first argue that the trial court failed to assign the burden of persuasion to plaintiff. Further, they argue that plaintiff's burden, as articulated in *Helton v Beaman*, 304 Mich App 97; 850 NW2d 515 (2014), was to demonstrate by clear and convincing evidence that a change in custodial environment was in the child's best interests, and that the trial court failed to apply that legal standard. We review de novo issues related to the interpretation and application of the RPA, including determination of the applicable evidentiary standard. *Parks*, 304 Mich App at 237. Although the parties argued in the trial court the issue of what legal standard should apply, defendants failed to raise in that court the issue of the assignment of the burden of persuasion; that issue is therefore unpreserved. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We review unpre-

served issues for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). " 'To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.' " *Id*., quoting *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In presenting this argument, defendants blend and thus confuse two distinct issues: (1) whether the trial court properly assigned the burden of persuasion, and (2) whether the trial court applied the correct legal standard in determining whether that burden had been satisfied. Regarding the former, defendants identify no evidence or statement of the trial court supporting their assertion that the trial court failed to assign the burden of persuasion to plaintiff. Although the record reflects that the trial court did not specifically indicate which party bore the burden of persuasion, the plaintiff in a civil case bears the burden of persuasion throughout the course of a case. *Reed v Breton*, 475 Mich 531, 548; 718 NW2d 770 (2006) (KELLY, J., dissenting); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175-176; 530 NW2d 772 (1995). "A trial judge is presumed to know the law." *Auto-Owners Ins Co v Keizer-Morris, Inc*, 284 Mich App 610, 612; 773 NW2d 267 (2009). We therefore presume, given the dearth of evidence to the contrary, that the trial court assigned the burden of persuasion to plaintiff. Defendants' argument in that respect accordingly fails.

Defendants further argue that the trial court failed to apply the proper legal standard when determining whether plaintiff had satisfied his burden of persuasion, and that it should have applied the standard

articulated in *Helton*. In *Helton*, the plaintiff brought an action under the RPA seeking to revoke the defendants' acknowledgment of parentage regarding a child the defendants had raised from birth. *Helton*, 304 Mich App at 99 (opinion by O'CONNELL, J.). The trial court in *Helton* denied the plaintiff's request to revoke the acknowledgment of parentage given its application of the best-interest factors set forth in MCL 722.1443(4). *Helton*, 304 Mich App at 102 (opinion by O'CONNELL, J.). Judge O'CONNELL, in his lead opinion in *Helton*, concluded as follows regarding the legal standard applicable in the matter before the Court:

> Second, with regard to the applicable burden of persuasion, the Revocation of Paternity Act places Helton (as biological father) and Douglas (as acknowledged father) in equivalent litigation postures. See MCL 722.1437(3). Accordingly, it is appropriate to use the burden of persuasion applicable to disputes between parents, which results in a presumption in favor of maintaining the child's established custodial environment. See [*In re AP*, 283 Mich App 574, 600-601; 770 NW2d 403 (2009).]
>
> In this case, the child has an established custodial environment with defendants. To alter the established custodial environment, Helton would have to present clear and convincing evidence that a change in the custodial environment is in the child's best interests under MCL 722.23. [*Helton*, 304 Mich App at 112-113 (opinion by O'CONNELL, J.).]

On appeal, defendants argue that this standard should apply to the trial court's determination of paternity in the instant case, requiring plaintiff, as the person challenging an established custodial environment, to present clear and convincing evidence that a change is in MP's best interests. Accordingly, they argue that the trial court erred when it did not require plaintiff to

prove by clear and convincing evidence that a change in MP's custodial environment was in her best interests.

We first note that defendants acknowledge that the trial court, in making its custody determinations in this case, in fact applied the very standard for which defendants advocate. Defendants' argument instead appears to be that the trial court should have applied that standard earlier, in the context of its initial paternity determination. Defendants base their argument on *Helton*'s application of the legal standards controlling a change in custody under the Child Custody Act. See *Helton*, 304 Mich App at 111-112 (opinion by O'CONNELL, J.), citing *In re AP*, 283 Mich App at 600-602.

We find defendants' position difficult to grasp, given that the trial court applied precisely the standard that defendants favor. Even assuming, however, that defendants' position is premised on a distinction with a difference, we find it unpersuasive.

First, *Helton* is not binding on this Court. The lead opinion was only signed by a single judge. A second judge on the *Helton* panel disagreed with the lead opinion's application of child custody law and merely concurred with its affirmation of the trial court. *Helton*, 304 Mich App at 114-115 (K. F. KELLY, J., concurring). A third judge on the panel dissented. *Helton*, 304 Mich App at 129-130 (SAWYER, P.J., dissenting). See *Burns v Olde Discount Corp*, 212 Mich App 576, 582; 538 NW2d 686 (1995) (holding that "a plurality decision in which no majority of the participating justices agree concerning the reasoning is not binding authority under the doctrine of stare decisis").

Second, the lead opinion in *Helton* looked for guidance in the child custody standards because this Court had held in *In re Moiles*, 303 Mich App 59; 840 NW2d

790 (2013), rev'd in part 495 Mich 944, 945 (2014), that a trial court is not required to make a best-interest determination under MCL 722.1443(4) when revoking an acknowledgement of parentage. *Helton*, 304 Mich App at 106-107 (opinion by O'CONNELL, J.). Because it was bound by *Moiles*,[7] and because it therefore was obliged to conclude that the trial court had mistakenly applied the best-interest factors in MCL 722.1443(4) when denying the plaintiff's request to revoke an acknowledgement of parentage, the lead opinion looked to the standards applicable to a change in custody under the Child Custody Act.

In this case, by contrast, it is undisputed that the best-interest factors in MCL 722.1443(4) do apply. By its express terms, that provision applies to a trial court's "determin[ation] that a child is born out of wedlock . . . ."[8] *Id*. Consequently, unlike as was arguably the case in *Helton* in the context of a revocation of acknowledgement of parentage, there was no need to look beyond the statutory provision itself for the applicable legal standard. *Helton* is therefore inapplicable.

---

[7] Our Supreme Court later reversed in part and vacated in part this Court's decision in *Moiles*. The Supreme Court held in part that this Court had erred, under the circumstances presented, in addressing the applicability of MCL 722.1443(4) to an action for revocation of an acknowledgement of parentage. *In re Moiles*, 495 Mich 944, 945 (2014). In granting the plaintiff's application for leave to appeal in *Helton*, the Supreme Court identified that issue as among those to be briefed by the parties to that appeal. See *Helton v Beaman*, 497 Mich 865 (2014).

[8] The RPA authorizes a trial court to (1) revoke an acknowledgment of parentage, (2) set aside an order of filiation, (3) determine that a child is born out of wedlock, and (4) make a determination of paternity and enter an order of filiation. MCL 722.1443(2). It further provides that "[a] court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child," and sets forth various factors that the court may consider. MCL 722.1443(4).

Finally, the trial court indicated that it had applied the "clear and convincing" evidentiary standard when it reached its determination regarding the best interests of the child under MCL 722.1443(4). We note that this provision does not expressly articulate a "clear and convincing" evidentiary standard. However, assuming that the "clear and convincing evidence" standard applies because it was applied in *Helton* under the Child Custody Act, that indeed was the standard that the trial court applied in this case. Consequently, defendants can claim no error in the trial court's application of that standard.[9]

For all these reasons, defendants' argument that the trial court's decision should be reversed, because it failed to properly assign the burden of persuasion and to apply the proper legal standard, lacks merit.

C. BEST-INTEREST DETERMINATION

Defendants also argue that the trial court erred by failing to find that a determination that MP was born out of wedlock would not be in her best interests under the best-interest factors set forth in MCL 722.1443(4). We disagree. We review a trial court's factual findings in proceedings under the RPA for clear error. *Parks*, 304 Mich App at 237. "The trial court has committed

[9] The dissent questions whether the trial court indeed applied the "clear and convincing" standard in its best-interest determination under MCL 722.1443(4). However, in addressing that statutory provision, the trial court expressly stated that "in light of the recent rulings of the higher court [it] was more persuaded that any review regarding 'best interest of the minor' should be by the highest standards of scrutiny, that of clear and convincing evidence." Further, in addressing the best-interest factors under that statutory provision, the trial court acknowledged that it considered MP to have an established custodial environment with defendants and that it would "require clear and convincing evidence to disrupt that custodial environment."

clear error when this Court is definitely and firmly convinced that it made a mistake." *Id*. (citation and quotation marks omitted).

The trial court addressed the best interests of MP under MCL 722.1443(4) to determine whether it should hold that MP was born out of wedlock; this analysis was proper. *Glaubius*, 306 Mich App at 173 n 4. MCL 722.1443(4) broadly[10] identifies eight factors, quoted earlier in this opinion, that a trial court may consider in making its determination. Defendants argue the trial court erred by failing to address Factor (a) (whether the presumed father is estopped from denying parentage because of his conduct), Factor (b) (the length of time the presumed father was on notice that he might not be the child's father), and Factor (c) (the facts surrounding the presumed father's discovery that he might not be the child's father), and further erred in its application of the remaining factors.

Regarding Factors (a), (b), and (c), the record reflects that defendants' counsel stated at the bench trial as follows regarding the best-interest factors:

> In this case, I believe there's more than an abundance of evidence to support the Court refusing to set aside or

[10] The breadth of the factors available to a court to consider is exemplified by the fact that Factor (h) is "[a]ny other factor that the court determines appropriate to consider." MCL 722.1443(4)(h). Given the discretion afforded to a trial court under MCL 722.1443(4) generally, and under MCL 722.1443(4)(h) specifically, the court is free to consider the best-interest factors set forth in the Child Custody Act, MCL 722.23, in its assessment under MCL 722.1443(4). Trial courts might, in fact, be wise to do so. However, the statute does not by its terms mandate the trial court's consideration of those factors in making a paternity determination. *Id*. In this case, the record reflects that, during the course of a single trial, the trial court heard evidence on all of the factors set forth in both statutes; however, the court first articulated its assessment of the MCL 722.23 factors in ordering custody and parenting time, and not in its earlier order determining paternity.

> refusing to grant the relief request essentially, Judge. The Court really needs to simply dive into the several factors that are laid out: (a) through (h). And a few of those factors, as we often find, Your Honor, don't apply. The focus of my discussion will relate to factors (d), (e), (g), (g) [sic], and (h).

Defendants' counsel went on to address the best-interest factors before the trial court, but did not address Factors (a), (b), and (c). Having failed to address these factors before the trial court, we hold that defendants have waived appellate review of the trial court's failure to consider those factors. See *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008) ("A party may not take a position in the trial court and subsequently seek redress in an appellate court that is based on a position contrary to that taken in the trial court. [And a] party cannot stipulate a matter and then argue on appeal that the resultant action was error.") (citations and quotation marks omitted). However, even if we were to consider the issue, we would find defendants' position unpersuasive.

A trial court has discretion regarding which factors to consider. MCL 722.1443(4) states, "[t]he court *may* consider . . . ." (Emphasis added.) The word "may" indicates discretionary action, not mandatory. *Walters*, 481 Mich at 383. Defendants concede on appeal that Factor (a) is inapplicable. Regarding Factor (b), defendants note that Jeffrey knew for six months before the birth that he was not MP's father; regarding Factor (c), defendants point out that Jeffrey discovered that he was not MP's father through a discussion with Cassidie before resuming their relationship six months before the birth. Defendants contend that Factors (b) and (c), given these facts, favor Jeffrey.

Factors (b) and (c) have not been addressed in our caselaw. Defendants argue that the fact that Jeffrey

was at all times aware that MP was not his child weighs in favor of them because of Jeffrey's willingness to raise a child that was not his biological offspring. Plaintiff argues that this fact instead weighs in favor of plaintiff because the presumed father was not "surprised" by discovering that MP was not his biological offspring after raising MP for a period of time. Both positions have some merit. On balance, under the facts of this case, in which it was clear that all parties were aware that plaintiff was the biological father of MP and that discussion regarding his involvement in MP's life began before her birth and continued almost immediately after her birth, we find that the factors do not clearly favor one party or another, and that the trial court did not clearly err by failing to sua sponte consider these factors.

Defendants further contend that the trial court erred in its application of the remaining factors set forth in MCL 722.1443(4). We disagree.

Regarding Factor (d) (the nature of the relationship between the child and the presumed or alleged father), the trial court held that it "is un-refuted [sic] that Jeffrey Petlick and [MP] have a strong father/daughter bond of reciprocal love evidenced by tender and affectionate interaction. There is no determined or established relationship between the minor child and the alleged father." The trial court did not specifically indicate the weight it gave to this factor. However it appears clear from context that the trial court found that this factor to weigh against a "born out of wedlock" determination; the court's findings regarding this factor were not clearly erroneous.

Regarding Factor (e) (the age of the child) the trial court merely stated that MP was almost 2½ years old, and did not hold that the factor weighed one way or

another. Defendants argue, however, that this factor weighs against a "born out of wedlock" determination because MP was healthy and progressed well while in Jeffrey's care and considered Jeffrey to be her father. But MP's health and bond with Jeffrey were addressed in other factors. Defendants have not demonstrated clear error in the trial court's decision to limit its analysis under Factor (e) to the statement of the child's age.

Regarding Factor (f) (the harm that may result to the child), the trial court stated in its order following defendants' motion for reconsideration:

> The court determined the most reliable testimony relative to determining harm was that of the expert witness, counselor Robin Zollar. Ms. Zollar, a determined expert in child development assessment and therapy, opined following her interview and assessment of Defendant(s) and observations of the minor that [MP] appeared to be okay in a non-threatening situation, suggesting that Plaintiff Joseph Demski be introduced to [MP] merely as an individual and not as a parent. Ms. Zollars [sic] concern for harm to the minor centered around the mminors [sic] possible confusion if faced with the potential of having two dads. Defendant Jeffrey Petlick's declarations of potential harm to the minor appear unreasonable and were weighed accordingly. Mr. Petlick testified, "*He [Demski] is not fit to be a parent . . . : I interacted with him years ago at a party in Eau Claire, we have some mutual friends and any contact for [MP] with Plaintiff even in a supervised setting would be harmful, on a scale of 1-10 a 20*.["]
>
> Robin Zollar conducted 3 sessions, meeting once each with Defendant's [sic] individually, and a joint session including the minor providing opportunity to observe minors [sic] interactions with Defendants[.] She confirmed that the minor is initially reticent around new people but okay in a non-threatening situation.
>
> Ms. Zollar's responses to questioning related directly to the ["]harm" factor addressed less the issue of introduction

> of Plaintiff's interaction with the minor, but rather the question of how that introduction was to be handled and what would be the adult expectations placed upon the minor. These were however factors she was not afforded the opportunity to ask the Plaintiff, but would have desired to do so as a part of her assessment. . . . The court ordered Plaintiff's participation with an interview with the counselor providing her the requisite opportunity for completion of her assessment and submission of her report with recommendations relative Custody and Parenting time. The court upon consideration of her report and recommendation then fashioned the order from which Defendants seek reconsideration.

Defendants argue that the trial court erred by failing to find that MP would be harmed by plaintiff's introduction into her life because he had no experience raising children and Jeffrey was better able to help MP develop. Zollar's expert testimony supported both a conclusion that MP could be harmed by plaintiff's introduction into her life and also that his introduction could benefit her. We are not definitely and firmly convinced that the trial court erred by relying on the portion of Zollar's testimony that indicated that MP could benefit from introducing plaintiff into her life, or by finding portions of Jeffrey's testimony incredible. We therefore find that the trial court did not commit clear error in regard to Factor (f).

Regarding Factor (g) (other factors that may affect the equities arising from the disruption of the father-child relationship), the trial court found as follows:

> The court identified potential affected equities arising from any disruption of the father-child relationship. Emotional, physical and financial were identified. The Defendants testified that they are committed to each other and each to [MP] whether or not Plaintiff Joseph Demski is determined the legal father. Mr. Petlick affirmed that because of his bond of love for [MP] he will continue his

> emotional and financial support of her and provide the protections she requires. The established father-child relationship existing between [MP] and Jeffery [sic] Petlick does not presently appear at any significant risk of disruption.

On appeal, Cassidie and Jeffrey argue that the trial court erred when it found that "[t]he established father-child relationship existing between [MP] and Jeffery [sic] Petlick does not presently appear at any significant risk of disruption." Defendants argue that the trial court's subsequent order of filiation severed Jeffrey's relationship with MP and destroyed the father-daughter relationship they possessed. However, Jeffrey testified that a strong bond existed between him and MP; when asked to rate his bond with MP, Jeffrey said that "[t]here isn't a number that high." Accordingly, the trial court did not clearly err by accepting Jeffrey's testimony as to the strength of the bond and concluding that the relationship was not at risk of disruption.

Finally, in regard to Factor (h) (any other factor that the court determines appropriate to consider), the trial court stated:

> The court noted the uniqueness of the factual scenario of a . . . mother's marriage to the presumed father occurring at the hospital, after the mother's water breaks; unbeknownst to the alleged father who appears to have demonstrated his interest in the child by arrival at the hospital following inadvertent notice of these events — arriving post-nuptials but prior to the birth of the child. From the totality of the testimony in the light most favorable to the Defendants the court was persuaded that Defendants [sic] actions were purposeful in an effort to preclude the Plaintiff of any legal opportunity of parentage for [MP].

Although defendants argue that the trial court improperly focused on their conduct and not MP, we conclude that, while the trial court's findings were

related to Cassidie's and Jeffrey's actions, the consequences of their actions related to the relationship between plaintiff and MP and were appropriate for the trial court to consider. The trial court did not clearly err in its consideration of this factor.

In sum, the trial court found under Factor (d) that there was a strong bond of love between Jeffrey and MP, and found under Factor (g) that there was not a significant risk of disruption of Jeffrey's relationship with MP if plaintiff was granted parenting time. The trial court also properly relied on Zollar's testimony that MP could benefit from the introduction of plaintiff into her life when it addressed Factor (f). The trial court's findings do not leave us with a definite and firm conviction that a mistake was made. See *Parks*, 304 Mich App at 237. Therefore, we hold that the trial court did not clearly err by declining to conclude that an order determining that MP was born out of wedlock would not be in her best interests. See *id*.

III. CUSTODY AND PARENTING TIME

Defendants next argue that the trial court erred by concluding it had the authority to enter an order determining custody and parenting time, and, if in fact the trial court had such authority, erred by failing to hold an evidentiary hearing regarding child custody and parenting time. Defendants also argue that the trial court's custody and parenting-time orders should be reversed because they are not in the best interests of MP. We disagree.

A. TRIAL COURT'S AUTHORITY TO ENTER CUSTODY AND PARENTING-TIME ORDERS

Defendants first argue the trial court erred by granting plaintiff joint legal custody of, and parenting time

with, MP under MCL 722.1445. Defendants contend that MCL 722.1445 and MCL 722.717 (which MCL 722.1445 incorporates by reference) do not refer to child custody or parenting-time orders. Defendants did not raise this issue before the trial court. This issue is therefore unpreserved and reviewed for plain error. *Kern*, 240 Mich App at 336.

In support of their claim that the trial court relied on MCL 722.1445 for its authority to issue child custody and parenting-time orders, defendants quote the following portion of the trial court's ruling that it made on the record on July 26, 2013:

> With that, an order . . . consistent with directive [sic] of MCL 722.1445 in terms of the [de]termination of paternity; again, by clear and convincing evidence that your client is indeed the biological father and the Court having made specific findings relative to the other factors of the new act, consistent with MCL 722.717 Section 7, an order for paternity would enter. As a part of the entry of an order for paternity the Court can consider and certainly enter orders related to parenting time, custody, and support.

Defendants argue that this statement suggests that "the trial court believes it has the authority to grant relief outside the RPA because MCL 722.1445 allows the court to enter an order of filiation under the Paternity Act."

The trial court's February 4, 2014 order stated as follows:

> Pursuant MCL 722.717 [sic] and prior order of the court, an Order of Filiation to issue, the court having determined Joseph Richard Demski to be the father of [MP] pursuant MCL 722.1441 sec. 11(3) [sic] and Joseph Richard Demski having acknowledged in open court paternity of the minor child[.]

> The Court enters an order awarding the parties joint legal custody, physical custody awarded to the mother, Defendant Cassadie [sic] Petlick, parenting time awarded the Plaintiff father, under the supervision of the Friend of the Court with a goal of achieving reasonable rights of parenting time.

Defendants are correct that neither MCL 722.717 nor MCL 722.1445 explicitly provides a trial court with the authority to enter child custody or parenting-time orders in conjunction with the entry of an order of filiation. However, the child custody act "governs child custody disputes between parents, agencies, or third parties." *Mauro v Mauro*, 196 Mich App 1, 4; 492 NW2d 758 (1992). A trial court's authority in a child custody dispute is governed by MCL 722.27(1). See *Kessler v Kessler*, 295 Mich App 54, 60; 811 NW2d 39 (2011). MCL 722.27(1) provides, in relevant part:

> If a *child custody dispute has been submitted to the circuit court as an original action under this act or has arisen incidentally from another action in the circuit court or an order or judgment of the circuit court*, for the best interests of the child the court may do 1 or more of the following:
>
> (a) Award the custody of the child to 1 or more of the parties involved or to others and provide for payment of support for the child, until the child reaches 18 years of age. Subject to [MCL 552.605b], the court may also order support as provided in this section for a child after he or she reaches 18 years of age. The court may require that support payments shall be made through the friend of the court, court clerk, or state disbursement unit.
>
> (b) Provide for reasonable parenting time of the child by the parties involved, by the maternal or paternal grandparents, or by others, by general or specific terms and conditions. Parenting time of the child by the parents is governed by [MCL 722.27a]. [Emphasis added.]

In this case, plaintiff filed a complaint asking the trial court to decree that he was the child's father, grant him joint physical and legal custody of the child, and establish child support and parenting time of the child. Plaintiff thus submitted a child custody dispute to the trial court as part of his original action. Once the trial court made a determination of paternity, it had authority under MCL 722.27(1) to enter orders regarding child custody and parenting time. See *Kessler*, 295 Mich App at 60.[11] Regardless whether the trial court believed that it had the authority to address the custody of the child and parenting time under MCL 722.1445, this Court will affirm when the trial court reaches the right result for the wrong reason. *Taylor v Laban*, 241 Mich App 449, 458; 616 NW2d 229 (2000). In this case, the trial court properly addressed the issues of child custody and parenting time in accordance with MCL 722.27(1) and no reversal is required. Defendants have not demonstrated plain error. See *Kern*, 240 Mich App at 336.

B. FAILURE TO HOLD AN EVIDENTIARY HEARING

Defendants next argue that the trial court was required to hold an evidentiary hearing before it addressed child custody and parenting time. Defendants did not raise this issue before the trial court initially. Although they raised this issue in their motion for reconsideration, "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*,

[11] The trial court's reference to MCL 722.1445 might reflect the fact that plaintiff had no standing to seek a child custody determination absent a judicial determination that the child was born out of wedlock. See *Aichele v Hodge*, 259 Mich App 146, 161-162; 673 NW2d 452 (2003).

284 Mich App 513, 519; 773 NW2d 758 (2009). We therefore review this issue for plain error. See *Kern*, 240 Mich App at 336.[12]

Defendants refer this Court to *Schlender v Schlender*, 235 Mich App 230; 596 NW2d 643 (1999), in support of their position. In *Schlender*, the defendant filed a motion for change of custody that included a " 'rather lengthy' " offer of proof as required by the trial court's administrative policy. *Id*. at 231. Subsequently the trial court "indicated that it had read defendant's motion and did not require further argument from defendant. Plaintiff presented argument and defendant was permitted to respond." *Id*. at 231-232. The trial court denied the defendant's motion, finding no " 'good reason' " for a change of custody. *Id*.

The defendant appealed, arguing that he was entitled to an evidentiary hearing regarding his change of custody motion and that, therefore, the administrative

[12] Our dissenting colleague maintains that defendants could not have anticipated, before the trial court's February 4, 2014 order, that the court would issue a custody and parenting-time order without holding a separate evidentiary hearing, and that defendants therefore could not have objected earlier than in their motion for reconsideration. We respectfully disagree. The record is clear, for example, that among the issues addressed at trial were issues relating to custody and parenting time. The trial court, for example, was presented with evidence on the established custodial environment and evidence related to the best-interest factors as discussed in Part III(C) of this opinion. This is also apparent from the trial court's July 26, 2013 ruling and August 29, 2013 order, in which the court deferred issuing a ruling on the custody and parenting-time issues. The court expressly noted its ability to "enter orders related to parenting time, custody, and support" as "a part of the entry of an order for paternity . . . ." Defendants could have anticipated at that time that the trial court would issue a custody and parenting-time order without holding a separate hearing. They did not, however, object. In any event, even if we were to consider this issue de novo, rather than for plain error, our basic analysis and conclusion would remain unchanged.

policy requiring him to present an offer of proof instead of witness testimony was invalid. *Id*. at 232. This Court reversed the trial court, holding that a "petitioner in a custody matter cannot be deprived by local court rule of an evidentiary hearing." *Id*. at 233. In so holding, this Court in *Schlender* reiterated that "it is improper for a trial judge to decide the issue of custody on the pleadings and the report of the friend of the court when no evidentiary hearing was held." *Id*. at 233, citing *Stringer v Vincent*, 161 Mich App 429, 432; 411 NW2d 474 (1987). This Court noted that MCR 3.210(C) recognized the "right to a hearing in custody cases." *Schlender*, 235 Mich App at 233; see also *Sprenger*, 307 Mich App at 421 n 5 (noting that a child custody dispute requires an evidentiary hearing when "contested factual issues exist that must be resolved to make an informed decision.").

In this case, the trial court held a bench trial regarding the issues raised in plaintiff's complaint. The trial featured seven witnesses providing several hundred pages worth of testimony and dozens of exhibits presented by the parties. On February 4, 2014, the trial court entered an order determining child custody and parenting time. In denying defendants' motion for reconsideration, the trial court stated that it had fulfilled the requirement that an evidentiary hearing be held before the entry of an order regarding custody and parenting time.

We agree with the trial court. This case is fundamentally different from *Schlender*, as it was not decided on the pleadings alone. As already discussed, plaintiff's complaint in part presented a child custody dispute, and upon making a determination of paternity, the trial court had authority under the Child Custody Act to enter orders regarding child custody

and parenting time. See *Kessler*, 295 Mich App at 60. Further, as discussed later in this opinion, the evidence introduced during the bench trial was applicable to determining child custody and parenting time under the Child Custody Act. MCL 722.27(1). Therefore, the premise of defendants' argument—that the bench trial only concerned issues under the RPA and was thus insufficient to fulfill the requirement that an evidentiary hearing be held to determine child custody—is not supported by the record. Defendants fail to show plain error under *Schlender*. See *Kern*, 240 Mich App at 336.

C. BEST-INTEREST DETERMINATION

Defendants also argue that the trial court's custody and parenting-time orders should be reversed because its findings regarding the best-interest factors (expressed in its order denying defendants' motion for reconsideration on May 28, 2014) were inaccurate and neglect some of the important aspects of a best-interest analysis, and because the trial court erred when it considered the factors relevant to parenting time. All orders and judgments of the circuit court regarding child custody and parenting time are to be affirmed unless the trial court made findings of fact against the great weight of the evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. MCL 722.28; *Pickering v Pickering*, 268 Mich App 1, 5; 706 NW2d 835 (2005). "Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination 'clearly preponderate[s] in the opposite direction.' " *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010), quoting *Fletcher v Fletcher*, 447 Mich 871, 879; 526 NW2d 889 (1994) (citation and quotation marks

omitted). In reviewing factual findings, this Court defers to the trial court's determination of credibility. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011).

> The trial court's discretionary rulings, such as to whom to award custody, are reviewed for an abuse of discretion. An abuse of discretion exists when the trial court's decision 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. [*Berger v Berger*, 277 Mich App 700, 705; 747 NW2d 336 (2008) (citation omitted).]

"Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding" child custody. *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000). And a determination regarding the existence of an established custodial environment must also be made when addressing parenting time. *Pierron*, 486 Mich at 86. A custodial environment is established if

> over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. The age of the child, the physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. [MCL 722.27(1)(c).]

Additionally,

> [a]n established custodial environment is one of significant duration in which a parent provides care, discipline, love, guidance, and attention that is appropriate to the age and individual needs of the child. It is both a physical and a psychological environment that fosters a relationship between custodian and child and is marked by security, stability, and permanence. [*Berger*, 277 Mich App at 706.]

"An established custodial environment may exist with both parents where a child looks to both the mother and the father for guidance, discipline, the necessities of life, and parental comfort." *Id*. at 707. "[W]hen a modification of custody would change the established custodial environment of a child, the moving party must show by clear and convincing evidence that it is in the child's best interest." *Phillips v Jordan*, 241 Mich App 17, 25; 614 NW2d 183 (2000).

"[C]ustody disputes are to be resolved in the child's best interests," and "[g]enerally, a trial court determines the best interests of the child by weighing the twelve statutory factors outlined in MCL 722.23." *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Those factors are:

> (a) The love, affection, and other emotional ties existing between the parties involved and the child.
>
> (b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.
>
> (c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.
>
> (d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.
>
> (e) The permanence, as a family unit, of the existing or proposed custodial home or homes.
>
> (f) The moral fitness of the parties involved.
>
> (g) The mental and physical health of the parties involved.
>
> (h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute. [MCL 722.23.]

In this case, the trial court found that MP had an established custodial environment with Cassidie and placed the burden on plaintiff to show by clear and convincing evidence that a change was in MP's best interests. The trial court then addressed the best-interest factors of MCL 722.23. Defendants challenge the trial court's findings with respect to all factors apart from Factor (a) (the love, affection, and other emotional ties existing between the parties involved and the child), which the trial court found favored Cassidie.

Regarding Factor (b) (the capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed), the trial court found that both plaintiff and Cassidie had demonstrated the capacity and disposition to give MP love, affection, and guidance and to continue the education and raising of MP in her religion or creed, and therefore that this factor was equal. Defendants argue that the trial court erred by failing to consider that Cassidie in fact currently cared for MP and that plaintiff had at one point expressed a desire to relinquish his rights to MP. However, this factor deals with the *capacity* and

disposition of the parties, not whether each party has in fact had the opportunity to demonstrate that capacity and disposition. The trial court's finding that plaintiff demonstrated the requisite capacity and disposition through his attempts to obtain parenting rights to MP, despite having held her for only a few hours after her birth, was not against the great weight of the evidence.

Regarding Factor (c) (capacity and disposition of the parties involved to provide the child with food, clothing, medical care, other remedial care, and other material needs), the trial court found that both parties were gainfully employed and possessed more than adequate means to support MP. The court further noted that plaintiff was providing child support pursuant to a court order.[13] Defendants argue that plaintiff lacks the knowledge or ability to care for MP's apnea. However, they provided no factual support for that assertion. The trial court's finding that this factor weighed equally was not against the great weight of the evidence.

Regarding Factor (d) (the length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity), the trial court found that it had no concerns related to Cassidie's home environment, and further found that plaintiff's testimony that he was no longer using medical marijuana and would ensure MP's safety around his dog was credible. The trial court found that this factor weighed equally. Factor (d) is properly addressed by considering the environments in which the child has

[13] The record reflects that the trial court's August 29, 2013 order included a requirement that plaintiff pay child support, effective August 1, 2013, and incorporated a uniform child support order outlining those obligations.

lived in the past and the desirability of maintaining the continuity of those environments. See *Berger*, 277 Mich App at 708. The trial court did not address the desirability of maintaining MP's continuity with Cassidie, but rather the appropriateness of plaintiff's future environment for MP. Accordingly, we hold that this finding was based on clear legal error and should have favored Cassidie. See MCL 722.28; *Pickering*, 268 Mich App at 5.

Regarding Factor (e) (the permanence, as a family unit, of the existing or proposed custodial home or homes), the trial court held that neither parent had indicated that the family unit was likely to change. Plaintiff testified that he had lived with Nelson for approximately two years. Although Nelson testified that she at one point had taken "a step back" from her relationship with plaintiff to assess her commitment to the relationship, she testified that the relationship was stronger for her having done so. Defendants had been married for approximately 2½ years. The trial court found that this factor weighed equally. Although defendants argue that the trial court erred by failing to favor Cassidie's married relationship over plaintiff's unmarried one, the trial court did not clearly err by focusing on the permanence or stability of the family environments offered by each parent rather than engaging in "an evaluation about whether one custodial home would be more acceptable than the other." See *Ireland v Smith*, 451 Mich 457, 462-465; 547 NW2d 686 (1996) (citation and quotation marks omitted). The trial court's finding under this factor is not against the great weight of the evidence or the product of clear legal error.

Regarding Factor (f) (the moral fitness of the parties involved), the trial court found no significant issues,

stating, "The Plaintiff and Defendant mother shared a past incorporating the good, bad and ugly and is non-determinative for either of them relating to their potential for future parenting of [MP]." Defendants argue that plaintiff's poor moral fitness was shown by his past use of marijuana, his unwelcomed sexual advances toward Cassidie, and his act of accosting Cassidie at the festival. However, our Supreme Court has stated that "questionable conduct is relevant to [Factor (f)] only if it is a type of conduct that necessarily has a significant influence on how one will function *as a parent*." *Fletcher*, 447 Mich at 887. Plaintiff testified that he had smoked marijuana in the past, but had ceased because MP was the most important thing to him. No evidence was presented that plaintiff presently used marijuana or planned on doing so in the future. There was no evidence that plaintiff's past marijuana use would affect his ability to function as a parent. Regarding the alleged incidents at Cassidie's home and the festival, plaintiff disputed defendants' allegations against him. Even if the trial court credited defendants' versions of both events,[14] there is no evidence that these incidents would influence how plaintiff would function as a parent. The trial court's finding that Factor (f) weighed equally was not against the great weight of the evidence or the product of clear legal error.

Regarding Factor (g) (the mental and physical health of the parties involved), the trial court found the factor to weigh equally. The trial court acknowledged plaintiff's past statements regarding suicide but noted that no evidence was presented that either parent

[14] As discussed with regard to Factor (k) later in this opinion, it appears the trial court did not in fact credit defendants' testimony regarding these events.

suffered from current mental or physical health issues. Defendants argue that the trial court erred because plaintiff's past possession of a medical marijuana card suggested that he suffered from serious pain. The record indicates that plaintiff's medical marijuana card expired on June 11, 2013, and that plaintiff had no plans to renew the card. Therefore, even assuming that the mere presence of a medical marijuana card indicated unfitness under Factor (g), there was no evidence that plaintiff would suffer from serious pain or use marijuana when he parented MP in the future. The trial court's finding that Factor (g) weighed equally was not against the great weight of the evidence.

Regarding Factor (h) (the home, school, and community record of the child), the trial court found that this factor was not relevant because of MP's age. Although defendants argue that the trial court erred by not considering MP's "home record," in supporting that assertion they rely on evidence of the strong bond between MP and Cassidie and Jeffrey's ability to give MP access to extended family. That evidence is properly addressed in other factors, and the trial court's decision to disregard this factor given MP's age is not against the great weight of the evidence or the product of clear legal error.

Regarding Factor (i) (the reasonable preference of the child), the trial court found that the factor was not relevant because of MP's age. Although defendants argue that the trial court erred because it should have considered the circumstantial evidence on the record that MP would prefer to live with them, this factor directs the trial court to consider the "reasonable preference of the child, *if the court considers the child to be of sufficient age to express preference*." MCL 722.23(i)

(emphasis added). The trial court's finding that MP was too young to express a reasonable preference is not against the great weight of the evidence. Cf. *Bowers v Bowers*, 190 Mich App 51, 55-56; 475 NW2d 394 (1991) (holding that children as young as six years old "are old enough to have their preferences given some weight").

Regarding Factor (j) (the willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents), the trial court found that defendants had "actively worked to keep the child from the Plaintiff," while plaintiff had "remained extremely complimentary regarding Defendant mother's parenting skills" and had stated to both defendants his belief that they would be good parents. The trial court found that this factor strongly favored plaintiff. Defendants argue that the trial court erred by failing to consider plaintiff's past statements that he did not want to be a part of MP's life, plaintiff's alleged bad behavior consisting of sexual advances toward Cassidie and accosting Cassidie at the festival, as well as plaintiff's attempts to interfere with MP's existing family unit through litigation. Thus, defendants do not argue that the trial court's finding that they have not allowed any sort of relationship between plaintiff and MP was erroneous. Rather, they apparently argue that their exclusion of plaintiff from MP's life was justified. However, regardless of their reasons, there is no indication in the record that the trial court's finding that Cassidie and Jeffrey prevented plaintiff from forming a relationship with MP was erroneous. The record is clear that defendants expressed an unwillingness to facilitate a close and continuing parent-child relationship between MP and

plaintiff, and the trial court's finding on this factor was not against the great weight of the evidence.

Regarding Factor (k) (domestic violence), the trial court found that "[t]he court considered Defendants [sic] assertions of assaultive conduct by the Plaintiff and found them to be at best hollow and/or obsolete." The trial court found this factor to weigh equally. Defendants again refer to their allegations against plaintiff of unwelcomed sexual advances and of accosting Cassidie at a festival. It appears that the trial court weighed the conflicting testimony from the parties and found that plaintiff's testimony that he did not make a sexual advance toward Cassidie or accost her was more credible than the testimony to the contrary. We defer to the trial court's determination of credibility. *Shann*, 293 Mich App at 305. The trial court's finding on this factor was not against the great weight of the evidence.

Regarding Factor (*l*) (any other factor considered by the court to be relevant to a particular child custody dispute), the trial court stated:

> Defendant mother testified describing [MP], "she's always been scared and timid of people, People walk by our house taking a walk and she comes running because I don't know if she thinks they're walking up towards her["]—the contrast is a significant departure from the minor observed and described by Ms. Zollar. Defendant further stated "I'm her mother, okay, so you know, I know that child more than anybody, better than anybody.. [sic]["] The Court is persuaded that the Defendant demonstrates a degree of loss of objectivity significant in determining best interest [sic] of the minor and found strongly favoring Plaintiff Father[.]

Defendants argue that the trial court erred in analyzing this factor. First, they argue that the trial court's characterization of Cassidie's testimony regarding MP's timidity as lacking objectivity suggested that

Cassidie did not know what was best for MP. They further argue that the trial court should have addressed the fact that plaintiff had not demonstrated that he was able to handle MP's medical needs, as well as their allegation that Jeffrey was more able to provide care for MP than was plaintiff's girlfriend. It appears that the trial court found that Cassidie's testimony that MP was timid and scared of people was not credible in light of conflicting expert testimony and, further, that Cassidie was unable to objectively determine MP's best interests. This Court defers to the trial court's determination of credibility. *Shann*, 293 Mich App at 305. However, this Court is unable to determine from the trial court's ruling precisely why this factor "strongly favor[ed]" plaintiff, and we are unable to glean from the record support for the trial court's conclusion that Cassidie was unable to accurately assess MP's best interests because of a loss of objectivity. We thus conclude that the trial court's finding here was against the great weight of the evidence, and that this factor should have been weighed equally between the parents or found not to be relevant. Defendants' further arguments concerning MP's medical needs were addressed in Factor (c).

In sum, in assessing the best-interest factors, the trial court found that Factor (a) favored Cassidie, Factor (j) and Factor (*l*) strongly favored plaintiff, Factor (h) and Factor (i) were not relevant to this case, and the other seven factors weighed equally. Our review of the trial court's findings leads us to conclude that Factor (d) should have favored Cassidie and that Factor (*l*) weighed equally or was not relevant to this case. Accordingly, two factors favored Cassidie, while one factor strongly favored plaintiff, and the majority of the remaining factors weighed equally.

The trial court held as follows concerning child custody:

> While the court determined the parties predominately equal in review of the factors applicable and two to 1 in factors favoring the Plaintiff father, primary is the best interest of the minor who is too young to appreciate the uniqueness of her family dynamic or to process the same. Truthfully the adults involved have demonstrated less than a stellar capacity in processing the dynamics of the relevant facts of this case. The court is fully persuaded that review of the facts in this case are clear and convincing that it is in the best interest of [MP] that Plaintiff and Defendant Mother shall share joint legal [sic] and sole physical custody is awarded to Defendant Mother with Reasonable Rights of Parenting Time to be achieved for Plaintiff Father.

Based on our review of the best-interest factors, and despite our different assessment of two of those factors, the trial court did not err by awarding sole physical custody to Cassidie and joint legal custody to both parents. The factors were relatively evenly split between the parents, and the trial court's award of joint legal custody was not "grossly violative of fact and logic" as required to show an abuse of discretion. *Berger*, 277 Mich App at 705.[15]

---

[15] Our dissenting colleague maintains that the trial court "refused to consider" a "full exposition of evidence relevant to MP's best interests" under the Child Custody Act. We respectfully disagree. The dissent relies on two excerpts from the trial transcript in support of this position. The dissent characterizes the first excerpt as reflecting an effort by defendants' counsel to elicit opinion testimony from their expert "regarding parenting time." In fact, however, that excerpt reflects that defendants' counsel inquired of defendants' expert whether, in the event the trial court ordered that plaintiff receive parenting time, she would agree "to act and to assist in any bridging." Plaintiff's counsel objected that a question relating to "bridging" was not relevant when parenting time had not yet been decided, and defendant's counsel withdrew the question. This excerpt from the trial transcript thus

D. PARENTING TIME

Defendants also argue that the trial court erred by granting plaintiff parenting time. MCL 722.27a(1) provides that "[p]arenting time shall be granted in accordance with the best interests of the child." The best-interest factors in MCL 722.23 and the factors listed in MCL 722.27a(6) are relevant to determining a child's best interests. *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). The best-interest factors in MCL 722.23 have already been discussed in this opinion. The factors in MCL 722.27a(6) are:

---

evidences that (1) defendants' counsel knew and understood that the issue of parenting time was before the court, and (2) the trial court did not limit the evidence in any respect. The dissent characterizes the second excerpt from the trial transcript as reflecting that the trial court sustained plaintiff's relevance objection to defendants' inquiring of their expert witness regarding her experience in custodial disputes not involving abuse or neglect. In fact, the trial transcript evidences that it was *defendants'* counsel who objected to plaintiff's counsel's inquiry as not relevant at that point in the proceeding. While the trial court sustained defendants' objection, the record thus reflects, even assuming error in this particular ruling, that defendants contributed to the error. See *In re Utrera*, 281 Mich App 1, 11-12; 761 NW2d 253 (2008) (" '[I]t is settled that error requiring reversal may only be predicated on the trial court's actions and not upon alleged error to which the aggrieved party contributed by plan or negligence.' "), quoting *Lewis v LeGrow*, 258 Mich App 175, 210; 670 NW2d 675 (2003). In any event, when this excerpt is viewed in the context of the entire trial proceeding, it is evident that the trial court did not limit the proofs as the dissent suggests, that the trial did encompass a full hearing regarding custody and parenting-time issues, and that a subsequent hearing on such matters was not contemplated. For example, both parties at the end of the trial discussed plaintiff's request for joint legal custody and reasonable parenting time. Additionally, the trial court noted that it had already been a "lengthy journey" from MP's birth to the trial, and that the court would "not seek to elongate it any more than necessary[.]" The trial court concluded the bench trial by indicating it would review all the evidence and issue an oral opinion. The record of the bench trial does not support the inference that any further proceedings were contemplated by any party at that time.

(a) The existence of any special circumstances or needs of the child.

(b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.

(c) The reasonable likelihood of abuse or neglect of the child during parenting time.

(d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.

(e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.

(f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.

(g) Whether a parent has frequently failed to exercise reasonable parenting time.

(h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.

(i) Any other relevant factors.

While a trial court must make findings under all of the MCL 722.23 factors for a custody decision, "parenting time decisions may be made with findings on only the contested issues." *Shade*, 291 Mich App at 31-32. MCL 722.27a(3) provides that "[a] child has a right to parenting time with a parent unless it is shown on the record by clear and convincing evidence that it would endanger the child's physical, mental, or emotional health."

In this case, the trial court granted plaintiff supervised parenting time in a therapeutic environment.

Defendants argue that the trial court erred by granting plaintiff parenting time, citing Factors (a) and (i) of MCL 722.27a(6), because MP was timid around strangers, she had a history of serious illness, it was dangerous to put her in an environment where Cassidie was not present, and plaintiff's home environment was not suitable given his history of drug use and his failure to demonstrate that he was capable of taking care of MP. The sum of defendants' arguments regarding parenting time is that MP would be placed in danger in plaintiff's home. However, as previously discussed, the trial court did not err by finding that plaintiff had the capacity and disposition to provide MP with love, affection, and guidance, as well as provide her with food, clothing, medical care, other remedial care, and other material needs. And, as also discussed earlier, there was no evidence that plaintiff's past marijuana use would affect his performance as a parent going forward. The trial court explicitly declined to find that MP would be endangered physically, mentally, or emotionally by granting parenting time to plaintiff. The trial court's findings were not against the great weight of the evidence, and the trial court's grant of supervised parenting time to plaintiff was not a palpable abuse of discretion.

E. ZOLLAR REPORT

Defendants also present the cursory argument that the trial court violated their rights under the Confrontation Clause, US Const, Am VI, by consulting a report by Zollar that was prepared and submitted after the close of proofs, and by not allowing defendants to cross-examine Zollar regarding that report. "The Confrontation Clause does not apply to civil proceedings."

Hinky Dinky Supermarket, Inc v Dep't of Community Health, 261 Mich App 604, 607; 683 NW2d 759 (2004).

Nonetheless, we acknowledge, in response to the dissent, the importance of the right to cross-examine adverse witnesses. We disagree, however, with the suggestion that that right was violated in this case.

To properly address this issue, a brief recap of the trial court proceedings is in order. As noted, the trial court conducted a trial (on May 24, 2013, and June 11, 2013) on RPA and custody and parenting-time issues. During the course of trial, defendants called Zollar as their expert witness, and Zollar testified regarding her opinions concerning MP's best interests and related custody and parenting-time issues. Defendants and the dissent therefore initially ignore the fact that Zollar was defendants' own expert witness at trial. "A party may not impeach his own witness by cross-examination . . . ." *Thelen v Mut Benefit Health & Accident Ass'n*, 304 Mich 17, 22; 7 NW2d 128 (1942).

On July 26, 2013, the trial court rendered its bench ruling, in which it determined plaintiff's paternity of MP, but noted that it was not yet prepared to issue an order regarding custody and parenting time. The paternity order entered on August 29, 2013.

In rendering its July 26, 2013 bench ruling, the trial court noted that Zollar had already had an opportunity to meet with defendants individually and with defendants and MP at a joint appointment, but that Zollar had not yet met with plaintiff. The court therefore required that Zollar meet with plaintiff for what it termed a "continuing concluding evaluation as it would relate to the welfare of [MP] . . . ." The August 29, 2013 order similarly directed plaintiff to meet with Zollar for that "concluding evaluation" and for the parties to participate in "Cooperative Parenting" classes as di-

rected by the Friend of the Court. The court additionally ordered plaintiff to begin paying child support in accordance with an existing Friend of the Court recommendation.

The trial court received Zollar's report on November 20, 2013, apparently after Zollar held her "concluding evaluation" with plaintiff. Thereafter, the court issued its February 4, 2014 Order for Custody, Parenting Time and Support. The court awarded sole physical custody to defendant mother, joint legal custody, and parenting time to plaintiff "under the supervision of the Friend of the Court with a goal of achieving reasonable rights of parenting time."

The trial court did not determine at that time, however, what plaintiff's "reasonable rights" of parenting time might look like. Rather, the court provided that the "Friend of the Court, consistent with the proofs at trial, shall establish a bridging schedule for the exercise of initial parenting time to be held in a therapeutic setting with prior evaluating counselor, Robin Zollar, who shall provide parenting guidance for such contact to avoid any psychological difficulties as determined in the best interest of the minor." The court further ordered that Zollar "shall provide reports upon request of the Friend of the Court for establishment of a graduated parenting schedule towards reasonable rights of parenting time consistent with the development and age of the minor." In other words, parenting time—even initial parenting time during a bridging period—was not yet established. Rather, the trial court put in place a process for carefully evaluating appropriate parenting time, including both during the initial bridging period and continuing thereafter, that incorporated the continuing guidance and recommenda-

tions of defendants' own expert—Zollar—working in conjunction with the Friend of the Court.

The dissent seizes on the fact that Zollar had not yet completed her "concluding evaluation" with plaintiff at the time of trial, and that the trial court considered her subsequent report—along with all of the trial proofs, including Zollar's testimony—in issuing its February 4, 2014 order. But while we agree that it may have been better practice to have received that report before the conclusion of proofs at trial, and to have included that report in the trial court record, we do not agree that the process was so fatally flawed as to effect a denial of due process requiring reversal.

We reiterate that Zollar was defendants' own expert witness, whose testimony defendants presented at trial. She simply was not, as is suggested, an "adverse" witness, whom defendants had a right to "cross-examine." Nor was she a court-appointed witness, so as to implicate MRE 706 and give rise to a requirement of "notice" to the parties and a right of cross-examination. As Zollar was defendants' own expert witness, defendants required no notice, and did not have a right of cross-examination. Further, defendants knew at the time of the trial court's July 26, 2013 bench ruling, and the succeeding August 29, 2013 order, that the trial proofs were closed, that Zollar was yet to meet with plaintiff for a "concluding evaluation," and that "before any further orders from the Court will issue regarding contact of any form, Ms. Zollar needs to complete that and report to the Court." Defendants thus were fully aware of the procedure being employed, and did not object. Such conduct could be held to constitute a waiver of objection to this procedure on appeal. See *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725,

733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (defining waiver as the intentional relinquishment of a known right).

In its May 28, 2014 order denying defendants' motion for reconsideration, the trial court noted that "Ms. Zollar stated [in her trial testimony] 'I think if someone is willing to make a very serious ongoing workable commitment where they are willing to work with the other caretakers, all the other caretakers, without being adversarial, then it can be a very good thing for children. It means, as we'd like to think, yeah, somebody else loves that child . . . .' In that situation [MP] could benefit." The court then stated that "parenting time shall[,] consistent with Robin Zollar's recommendation[,] be supervised by her in a therapeutic environment achieving Reasonable Rights of Parenting Time as swiftly as possible in the best interest of the minor[.]" Yet again, therefore, the trial court required and highlighted the continuing role that Zollar—defendants' own expert—would play.

If we were to accept the position of the dissent—that due process was offended and error requiring reversal occurred as a result of defendants' inability to cross-examine their own expert witness after she reported to the court following her "concluding evaluation" with plaintiff—then we similarly would be obliged to conclude that due process will continue to be offended. Appropriate parenting-time parameters are continually evaluated going forward; therefore, under the dissent's position, whenever Zollar issues future court-directed reports to the Friend of the Court, a due process violation would occur—unless defendants are afforded, each and every time, a further opportunity to cross-examine Zollar. We decline to reach that conclusion.

We further note that, at a July 21, 2014 hearing, the trial court observed, in denying defendants' motion to stay the proceedings relative to parenting time pending appeal, that it had "addressed that pretty specifically as to why it moved forward with an Order, you know, when it did, *inconsistent again with the statements of Miss Zollar*." (Emphasis added.) The record thus is clear that, in issuing its custody and parenting-time order, the trial court did not follow the recommendation of defense expert Zollar. Defendants and the dissent do not explain how, given that fact, defendants were denied due process by not being allowed to further "cross-examine" their own expert.

Defendants have failed to demonstrate plain error in this regard.

IV. EQUAL PROTECTION CHALLENGE

Finally, defendants argue that MCL 722.1441 violates the Equal Protection Clauses of both the Michigan and United States Constitutions. US Const, Am XIV; Const 1963, art 1, § 2. This argument was not presented to the trial court and is unpreserved. See *Polkton Charter Twp*, 265 Mich App at 95. We review this unpreserved constitutional challenge for plain error. See *Kern*, 240 Mich App at 336.

Equal protection of the law for all persons is guaranteed by the Michigan and United States Constitutions. US Const, Am XIV; Const 1963, art 1, § 2; *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010). Both guarantees afford similar protection. *Shepherd Montessori*, 486 Mich at 318. The constitutional guarantees of equal protection require that "all persons similarly situated be treated alike under the law." *Id*. However, they do not require that people in different circum-

stances be treated the same. *In re Parole of Hill*, 298 Mich App 404, 420; 827 NW2d 407 (2012). "To be considered similarly situated, the challenger and his comparators must be *prima facie* identical in all relevant respects or directly comparable . . . in all material respects." *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013) (citations and quotation marks omitted).

In this case, defendants challenge MCL 722.1441, which is a part of the legal framework that the Michigan Legislature has chosen to implement to determine the paternity of a minor child. The legal effect of a court's determination that a "child is born out of wedlock" under MCL 722.1441 is to grant the biological father of a child standing to establish paternity pursuant to the Paternity Act. MCL 722.717(1); *In re MKK*, 286 Mich App 546, 557; 781 NW2d 132 (2009). Therefore, to the extent that MCL 722.1441 permitted Jeffrey and plaintiff to be treated differently in this case, it is only because plaintiff was MP's biological father, and Jeffrey was not. Because the constitutional guarantees of equal protection do not require that persons in different circumstances be treated the same, we conclude that those guarantees were not implicated in this case. See *Parole of Hill*, 298 Mich App at 420. Although defendants argue that the RPA severs a fundamental liberty interest in the presumed father, the actual effect of the RPA, combined with the Paternity Act, is to provide a mechanism for determining *which* man is the father of a minor child, and therefore in possession of a fundamental liberty interest in his relationship with the child. See *Grimes*, 302 Mich App at 531-532. We find no merit to defendants' constitutional challenge to MCL 722.1441.

Affirmed.

DONOFRIO, J., concurred with BOONSTRA, P.J.

GLEICHER, J. (*dissenting*). During the first 2½ years of her life, MP lived solely with her married parents, Cassidie and Jeffrey Petlick. Jeffrey's awareness that he was not MP's biological father did nothing to dim his devotion to his daughter.

Joseph Demski, MP's biological father, sought to establish a role for himself in MP's life. The trial court considered Demski's paternity claim under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., and convened a two-day evidentiary hearing. The trial court ruled that MP was born out of wedlock and entered an order of filiation in Demski's favor, thereby disestablishing Jeffrey's paternity and extinguishing his parental rights, despite that Jeffrey continues to live with his wife and MP. Six months later, without holding an additional hearing, the trial court awarded Demski joint legal custody of MP and parenting time.

The majority detects no errors in the trial court's rulings or procedure. I respectfully dissent. I believe that Demski was obligated to produce clear and convincing evidence that declaring MP born out of wedlock would serve the child's best interests, and that this showing was not made. Moreover, the trial court's ex parte consideration of expert testimony and its failure to hold a separate evidentiary hearing to consider the child's best interests contravened the Child Custody Act (CCA), MCL 722.21 *et seq*., mandating reversal of its joint legal custody and parenting-time decisions.

I. THE PATERNITY PROCEEDINGS

The RPA permits a court to determine that a child born to married parents was "born out of wedlock" when certain circumstances are shown. MCL 722.1441. That

Cassidie was not married at the time of MP's conception and that Demski filed his revocation of paternity action within three years of MP's birth supplied the predicate grounds for Demski's claim. MCL 722.1441(3)(c). Once established, those facts empowered the trial court to gather evidence of MP's best interests in deciding whether to declare MP a child "born out of wedlock."

The primacy of a child's best interests is enshrined within the act: "A court may refuse to enter an order setting aside a paternity determination or determining that a child is born out of wedlock if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4). Notably, the Legislature placed the best-interest inquiry ahead of a determination that a child was born out of wedlock. Only after taking into account a child's best interests is a court vested with authority to "[m]ake a determination of paternity and enter an order of filiation as provided under . . . MCL 722.717." MCL 722.1443(2)(d).

DNA testing revealed that Demski fathered MP. MCL 722.1445 specifies that the "clear and convincing" standard of proof applies regarding the evidence that an alleged father "is the child's father[.]"[1] DNA proof of paternity easily satisfies that standard. However, the RPA endorses that genetics alone do not a father make. "The results of blood or tissue typing or DNA identification profiling are not binding on a court in making a determination under this act." MCL 722.1443(5). Furthermore, the Legislature explicitly authorized a trial court to "*refuse* to enter an order setting aside a paternity determination or determining that a child is

[1] "If an action is brought by an alleged father who proves by clear and convincing evidence that he is the child's father, the court may make a determination of paternity and enter an order of filiation as provided for under . . . MCL 722.717." MCL 722.1445.

born out of wedlock if the court finds evidence that the order would not be in the best interests of the child." MCL 722.1443(4) (emphasis added).[2] The act makes no mention of the standard of proof applicable to the court's best-interest determination under the RPA. The majority assumes that the preponderance standard applies. In my view, the appropriate standard is that of clear and convincing evidence.

This issue comes to us by way of the Petlicks' argument that the trial court failed to assign to Demski "the burden of persuasion." I agree with the majority that the record generally refutes that proposition. The Petlicks further contend that based on "the presumption in favor of maintaining the child's established custodial environment," Demski was required to

---

[2] MCL 722.1443(4) further dictates that "[t]he court may consider the following factors" when determining whether a child is born out of wedlock:

> (a) Whether the presumed father is estopped from denying parentage because of his conduct.
>
> (b) The length of time the presumed father was on notice that he might not be the child's father.
>
> (c) The facts surrounding the presumed father's discovery that he might not be the child's father.
>
> (d) The nature of the relationship between the child and the presumed or alleged father.
>
> (e) The age of the child.
>
> (f) The harm that may result to the child.
>
> (g) Other factors that may affect the equities arising from the disruption of the father-child relationship.
>
> (h) Any other factor that the court determines appropriate to consider.

The parties agreed that Factors (a), (b), and (c) were not applicable to this case.

present "clear and convincing evidence" that MP's best interests would be served by revoking Jeffrey's presumed paternity. The majority observes that "the trial court indicated that it had applied the 'clear and convincing' evidentiary standard when it reached its determination regarding the best interests of the child under MCL 722.1443(4)." The record is not nearly so straightforward. And in this case, Demski's evidence concerning MP's best interests fell well short of even an evidentiary preponderance.

Indisputably, the trial court used the clear and convincing evidence standard when ruling that Demski had demonstrated "that he is the child's [biological] father . . . ." The Legislature plainly prescribed in MCL 722.1445 that "clear and convincing" evidence must control a court's paternity determination. The DNA evidence supporting Demski's parentage went unchallenged. Hence, the trial court's distinct articulation that clear and convincing evidence dictated its paternity finding is unsurprising. Whether the trial court employed a clear and convincing standard when it evaluated the child's best interests under the RPA represents an entirely different question.

The trial court prefaced its discussion of the statutory factors involving a child's "best interests" as follows:

> The plaintiff has timely filed a complaint to determine parentage, custody, child support, and parenting time. Accordingly MCL 722.1443(13)4 [sic: MCL 722.1443(4)] directs that the Court may refuse to enter an order determining that a child is born out of wedlock if the Court finds evidence that the order would not be in the best interest [of] the child.

The court proceeded to discuss best-interest Factors (d), (f), and (g). After reviewing the evidence related to

these factors, the court reiterated that it had found "by clear and convincing evidence" that Demski was MP's "biological father," but made no specific comment as to the standard of proof it had applied when analyzing the statutory factors. Rather, the court appeared to separate its "clear and convincing" biology finding from its best-interest determinations:

> The Court is fully persuaded, having placed as indicated, the determination of what weight's to be given to the testimony of witnesses, all exhibits, all testimony, and clearly that of the expert witness. In light of the direction and the new direction and law for the State of Michigan, the Court is going to grant the petition of the plaintiff.
>
> With that, an order, Mr. [Kevin] Banyon, consistent with [the] directive of MCL 722.1445 in terms of the termination of paternity; again, by clear and convincing evidence that your client [Demski] is indeed the biological father and the Court having made specific findings relative to the other factors of the new act, consistent with MCL 722.717 Section 7, an order for paternity would enter.

A fair reading of this ruling leaves open to question whether the trial court determined that clear and convincing evidence, rather than an evidentiary preponderance, supported its best-interest finding under the RPA.

Regardless of which standard of proof applies, I agree with the majority that Demski bore the burden of persuading the court that determining MP to have been born out of wedlock would serve her best interests. During his case-in-chief, Demski presented virtually *no* evidence addressing MP's best interests. His testimony focused on himself and the historical events surrounding MP's conception and birth, and his justifications for having had no contact with the child for most of her life. The testimony of his girlfriend, Lynna

Nelson, centered on the couple's pit bull and the reasons that it would pose no danger to MP. She also assured the court that the couple had discontinued using marijuana. Demski's mother testified that he had never harmed a child, and that she was available to assist Demski "in whatever his needs may be."

Had the trial ended with Demski's proofs, the record would not have supported a best-interest finding in Demski's favor. Demski presented precious little evidence concerning MP's needs or interests. Only a minuscule quantum of testimony related to Demski's plan for dealing with MP's cognitive and emotional responses to the insertion of a new father in her young life. Aside from his cellular contribution to MP's conception, Demski offered no evidence that disestablishing Jeffrey's paternity would advance the child's best interests.

The Petlicks' evidence more directly addressed the RPA's best-interest factors, primarily through the testimony of psychotherapist Robin Zollar. No discussion ensued during the trial, however, regarding the standard of proof applicable to the trial court's evaluation of Zollar's testimony, or that of any other witnesses, regarding MP's best interests. To the extent the majority endorses a preponderance standard, I disagree.

Given that RPA proceedings implicate weighty interests for both parents and children, I believe that the clear and convincing evidence standard must govern the best-interest determination. When a statute is silent as to the applicable standard of proof, the issue has "traditionally been left to the judiciary to resolve . . . ." *Woodby v Immigration & Naturalization Serv*, 385 US 276, 284; 87 S Ct 483; 17 L Ed 2d 362 (1966). The standard of proof utilized by a court "reflects not only the weight of the private and public

interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." *Santosky v Kramer*, 455 US 745, 755; 102 S Ct 1388; 71 L Ed 2d 599 (1982). "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington v Texas*, 441 US 418, 423; 99 S Ct 1804; 60 L Ed 2d 323 (1979) (citation omitted). "[W]hile private parties may be interested intensely in a civil dispute over money damages, application of a 'fair preponderance of the evidence' standard indicates both society's 'minimal concern with the outcome,' and a conclusion that the litigants should 'share the risk of error in roughly equal fashion.' " *Santosky*, 455 US at 755 (citation omitted).

I readily acknowledge that when a statute is silent regarding the applicable standard of proof, the default position is an evidentiary preponderance. However, the United States Supreme Court has "mandated an intermediate standard of proof—'clear and convincing evidence'—when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.' " *Id*. at 756, quoting *Addington*, 441 US at 424. The interests at stake here implicate the very essence of being a parent: the right to make decisions regarding a child's care, control, health, education, and association and the ability to maintain inviolate a family's integrity. "A paternity suit, by its very nature, threatens the stability of the child's world." *McDaniels v Carlson*, 108 Wash 2d 299, 310; 738 P2d 254 (1987). Permanently stripping Jeffrey of his fatherhood of MP deprives both MP and Jeffrey of their mutual liberty interests in a

continuing parent-child relationship. In my view, the parties' competing rights and interests qualify as "particularly important" and "more substantial than mere loss of money," necessitating application of a standard of proof more demanding than a mere preponderance. And I agree with the Washington Supreme Court in *McDaniels*: "Where these rights come into conflict, the rights of the child should prevail." *Id*. at 311.

I acknowledge that in cases involving the termination of parental rights, the preponderance of the evidence standard applies to a court's best-interest determination. *In re Moss*, 301 Mich App 76, 83; 836 NW2d 182 (2013). In so holding, this Court stressed that the clear and convincing evidence standard applies to the first stage of termination proceedings, in which a court determines whether the moving party has demonstrated a statutory ground supporting termination of a parent's constitutional rights to the care and custody of a child. *Id*. at 86. Applying the due process analysis set forth in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed 2d 18 (1976), the *Moss* Court explained that during the termination stage, "the use of error-reducing procedures, such as the heightened standard of proof of clear and convincing evidence," favors the constitutional interests at stake. *Moss*, 301 Mich App at 87. Once a finding of statutory grounds for termination has been made, however, "the interests of the child and the parent no longer coincide, and the need for a heightened standard of proof is not present at the best-interest stage." *Id*. at 88.

The procedure set forth in the RPA meaningfully differs from that of a termination case. Under the RPA, a trial court must consider a child's best interests when considering whether to declare a child born out of wedlock. MCL 722.1443(4). This initial stage of RPA

proceedings corresponds to the termination stage in an action brought under MCL 712A.19b. As in an action seeking the termination of parental rights, a presumed father under the RPA maintains a liberty interest in the custody of a child—and the child in the custody of her parent—until clear and convincing grounds justify severing that relationship. And the RPA clearly contemplates that a judge may find that despite clear and convincing DNA evidence of paternity, a child's best interests would be jeopardized by the interruption of her stable and intact family life.

Although the CCA, MCL 722.21 *et seq*., applies in a different setting, it guides my reasoning regarding the appropriate standard of "best interests" proof in a revocation of paternity case.[3] MCL 722.25(1) directs, "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." The Supreme Court elaborated in *Hunter v Hunter*, 484 Mich 247, 265; 771 NW2d 694 (2009): "A third party seeking custody must meet a higher threshold. He or she must establish by clear and convincing evidence that it is not in the child's best interests under the factors specified in MCL 722.23 for the parent to have custody." Similarly, a court may not

[3] Our Supreme Court similarly drew upon other statutes when it determined the standard of proof for actions brought under the Whistleblowers Protection Act, MCL 15.361 *et seq*.: "Because whistleblower claims are analogous to other antiretaliation employment claims brought under employment discrimination statutes prohibiting various discriminatory animuses, they 'should receive treatment under the standards of proof of those analogous [claims].' " *Debano-Griffin v Lake Co*, 493 Mich 167, 175-176; 828 NW2d 634 (2013) (citation omitted; alteration in original).

"issue a new order so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c). Our state's jurisprudence has "consistently recognized" that the presumption of legitimacy arising from a child's birth to a married mother may be overcome only by a showing predicated on clear and convincing evidence. *In re KH*, 469 Mich 621, 634-635; 677 NW2d 800 (2004). As MP's legal father, Jeffrey was entitled to a presumption that MP's best interests would be served by his continuation in that role. See MCL 722.25(1).

In enacting the RPA, the Legislature left the statutory presumptions intact. Despite that the RPA expands the right of putative fathers to challenge the paternity of a child born within a marriage, the law rebuttably presumes that a child's best interests are served by maintaining that relationship, regardless of biological "truth." Our Supreme Court has never hesitated to assign a clear and convincing standard of proof to the evidentiary task of rebutting a statutory presumption. See *Reed v Breton*, 475 Mich 531, 540-541; 718 NW2d 770 (2006).

At the outset of these proceedings, Demski was not MP's parent. Thus, until the trial court entered its order of filiation, Demski remained a "third person." See MCL 722.22(j). Even armed with the DNA results confirming his biological connection, Demski had no inherent right to a declaration of his paternity. Subsections (4) and (5) of MCL 722.1443 underscore that DNA is not determinative in an action brought under the RPA. By commanding consideration of a child's best interests as part and parcel of the RPA inquiry, the Legislature placed the child's interests on a footing at least equal to that of DNA. Moreover, the statute's

structure establishes that the best-interest determination must *precede* entry of an order declaring that a child was born out of wedlock. The parental rights and concomitant rights of an alleged father (such as Demski) emerge only after a court has conducted a best-interest inquiry.

The RPA's ordering of priorities compels dual conclusions: (1) during the RPA proceedings, Demski's interest in establishing his paternity was subordinate to MP's best interests, and (2) as MP's legal father, Jeffrey enjoyed a presumption that MP's best interests would be served by maintaining the status quo. In structuring the RPA in this fashion, the Legislature implicitly declared that a child's best interests may outweigh a genetic link between a child and a stranger. And although the Legislature did not specify the standard of proof applicable to best-interest determinations under the RPA, it did not enact the statute in a vacuum. The principle that only clear and convincing evidence of a child's best interests will justify disrupting an established environment or depriving a legal father of his paternal rights are firmly fixed in family law. I cannot conclude that the Legislature intended to abandon the heightened standard of proof in a directly analogous custodial context simply because it failed to reiterate it in the RPA.

Orders entered under the RPA have grave and far-reaching consequences. Disestablishing Jeffrey's paternity renders him a legal stranger to MP, despite that Jeffrey and Cassidie will continue to raise her as parental partners and will appear to the world (such as MP's school and friends) as her parents. As Judge KIRSTEN FRANK KELLY pointed out in *Helton v Beaman*, 304 Mich App 97, 126; 850 NW2d 515 (2014) (K. F. KELLY, J., concurring), if Cassidie were to die, Jeffrey

"would . . . have to seek custody as a third party and there is no guarantee that he would succeed or even have standing." Regardless of subsequent custody or parenting-time decisions, inserting a new father into a child's life is inherently destabilizing. MP looked to Jeffrey for fulfillment of her needs. She understood that he, and only he, was her dad. Disconnecting and thereby forever altering that relationship risks incalculable damage to a child's development. In my view, the Legislature recognized as much by explicitly permitting a court to disregard biology and to enforce the presumption favoring stability and marriage.

Thus, I distill from the RPA's framework and its statutory background that the reciprocal rights of a married father and his child may not be disrupted absent clear and convincing proof that such infringement serves a child's best interests. Adoption of this higher standard of proof ensures that the evidence supporting a revocation of paternity decision meets "the degree of confidence our society thinks [a factfinder] should have in the correctness of factual conclusions" for this type of adjudication. *Santosky*, 455 US at 755 (quotation marks and citations omitted).

Furthermore, the evidence presented during the RPA hearing did not clearly and convincingly demonstrate that MP's best interests would be served by severing Jeffrey's paternal rights and inserting Demski in that role. Even under a preponderance standard, the trial court's best-interest findings contravened the great weight of the evidence.

The court recognized that under Factor (d), MCL 722.1443(4)(d), Jeffrey and his daughter "have a strong father/daughter bond of reciprocal love evidenced by tender and affectionate interaction," and that Demski had no established relationship with the child. This

factor militated against revoking Jeffrey's paternity. Factor (e), MCL 722.1443(4)(e), requires consideration of "[t]he age of the child." The trial court observed, "There is no contest to the date of birth, and almost two and a half year old age for [MP]." This "finding" omits mention of the testimony of psychologist Robin Zollar regarding the cognitive abilities and emotional capacities of two-year-old children. In my view, Zollar's unchallenged testimony supports that affiliating Demski would not serve MP's best interests.

Zollar explained that at MP's age, "children are still very dependent physically and emotionally on a parental caretaker." Further, Zollar stressed, "it is also an age that is influenced by the ability to communicate and the ability to receive information." Although MP could speak using three-word sentences, "her receptive language skills and her expressive language skills are at a point where she can't always express herself or always understand," as is "normal" at her age. Zollar explained that at 2½ years of age, a child's receptive language skills do not encompass the idea of a new parent, and the child lacks "the ability to resolve conflicts or feelings . . . ." Accordingly, a 2½ year old is "less likely" to understand the role of a new parent. "[T]hey can't talk about it," Zollar explained, because they have not yet developed the required language skills. A child's inability to articulate confusion and distress may precipitate very real trauma. Zollar highlighted that "change in the parental family structure" may produce "mental anxiety. It can cause some acting out behaviors, such as problems with sleep, different things for different children. Frustration and anger." Zollar continued:

> Two and a half can be a pretty frustrating anger age anyway, because they're starting to, what we call "indi-

> viduate," they're beginning to separate and see themselves as a little being, as opposed to just a part of the parents. . . . And so there's a lot going on at . . . that particular developmental age, with not the ability to be able to utilize language to resolve it or to understand it . . . .

In my view, the great weight of the evidence supported Zollar's testimony that because of her age, MP's best interests would not be served by opening the door to a situation she lacked the ability to understand or discuss. Furthermore, the trial court's failure to consider the age-specific evidence addressing MP's best interests constitutes legal error.

Zollar also provided the most useful evidence regarding Factor (f), "[t]he harm that may result to the child." MCL 722.1443(4)(f). On direct examination, Zollar admitted that she had not met Demski, and could not offer opinions regarding him in particular. Generally, she offered, introducing a new person "as an individual" would be "less confusing" than introducing the new person as a parent. Zollar's testimony continued as follows:

> They have a mom and they have a dad, and I think it can be very difficult for kids when somebody says, "Oh, I'm your other dad" or "I'm your real dad" or "I'm your dad too." I think that's very confusing, particularly when you're fairly young. I think it's pretty hard to put that into any perspective. I think that different issues happen when you're older and that happens, but I think it's pretty basic when you're two and [a] half years old that that's going to be pretty confusing.
>
> * * *
>
> *Q*. So let's get back to the factor. Do you have an opinion in this case, again based on observation, experience and

all that, whether introducing a new father figure, be that Mr. Demski or anyone else, would cause harm to [MP]?

A. It could.

Q. . . . . And . . . what type of harm could result?

A. . . . I think given her age, I think, and her reticence around new people, I think that could cause her to feel pretty insecure and fairly threatened and pretty confused. And the confusion may cause the feeling threatened, but I think it's still going to leave her feeling pretty vulnerable.

Zollar elaborated that adding a new "parental figure when a parental figure already exists . . . can sometimes create some alienation between the child" and the original parenting figure. The concomitant confusion "can lead to some anger" or "pulling back" from the original father. Additionally, Zollar emphasized, introducing a new parent can cause "some real anxiety, particularly dependent on how that introduction is made, how that relationship is expected or requested to proceed." She concluded: "And sadly, there are many times that the child isn't taken into consideration, the parents are."

On cross-examination, Zollar reiterated that introducing a new parent could harm a child, while admitting that it could also benefit the child. She clarified that if the new parent supports the child emotionally "[f]or a sustained period of time," the child could benefit. As Zollar's testimony concluded, the Petlicks' attorney (Kurt Armstrong) returned to the issue of harm to MP:

Q. Is it more likely that harm would result to [MP] by introducing any new parent figure at this time in her life?

Mr. Banyon: Objection. I don't believe she can form an opinion on that.

Mr. Armstrong: Well, I think she can.

The Court: Now, I -- the Court thinks she can, based on the foundation that's there and then her expert -- we'll overrule the objection.

Now, if you can't, we've got a problem. Can you answer the question?

[*Zollar*]: I'll try. I think it depends on the things that I talked about earlier: the commitment, the way it is done, and the sustainability and the willingness of all the parties to work towards this happening in a healthy way. I have some cases that I'm working with right now with preschool-age children where there are very similar issues. And those are not new issues, I've had those issues for years that I've had to work with. But so much is dependent on that commitment. The motive of the adults involved, the commitment, the ability to listen and learn when suggestions are given by someone whose primary interest is the child.

Grownups can take care of themselves, little kids can't. And so they need somebody that can act as an advocate for that relationship going in a healthy direction. And I think if that is available, I think it can be a very good thing for a child. I think if somebody says, "Oh, well, yeah, we'll just her [sic] for an hour or so and she'll be with . . . Uncle Bob and Aunt Suzie and dad and she'll be fine," I think that is not taking into account the child's needs. I think that is only focusing on the adult needs and I think that is wrong; because she has no way to say, "No, I'm not going to do it." She has no way to ask questions at this point. She has no way to understand.

So it's nothing personal about any individual. It's what's going to be best for this child. And I -- I strongly believe that, because I've seen really awful things happen when that doesn't happen.

Based on this testimony, the trial court found:

The testimony found to be most reliable relative to determining harm is that of the expert witness. . . .

Robin Zollar conducted three sessions, meeting one each with the defendants individually and a joint session includ-

> ing the minor, providing opportunity to observe the minor's interactions with defendants. She confirmed that the minor is initially reticent around new people. Her responses however to the questioning related direct[ly] to the harm factor address less the issue of introduction of plaintiff's interaction with the minor, but rather the question of how that would occur and expectations upon the minor. These are factors she was not afforded the opportunity to ask the plaintiff but would have desired to do so.
>
> Her essential concerns articulated are first the limited verbal skills of the minor, and secondly, the willingness of adults to get along; their commitment. She did finally opine that [MP] could benefit from sustained commitment from the alleged father.

That MP "could benefit from sustained commitment from the alleged father" hardly qualifies as clear and convincing evidence that MP *would* benefit from a change in her paternity, or that she would not be harmed by the profound disruption of her life occasioned by the introduction of a new parent. In my estimation, the trial court's resolution of the harm inquiry rested on speculation, not proof. Stated alternatively, the evidence was in equipoise. Substituting Demski as MP's new father could hurt MP, or it might benefit her.

It bears emphasis that Demski bore the burden of proving that it was in MP's best interests to revoke Jeffrey's paternity and to substitute Demski as her new father. Demski brought forward no evidence regarding MP or her interests. And Demski offered no evidence that the very real harms Zollar described could be avoided or mitigated. Indeed, Demski never even acknowledged awareness of any emotional dangers *for MP* attendant to his parenthood quest.

The majority correctly observes that "Zollar's expert testimony supported both a conclusion that MP could

be harmed by [Demski's] introduction into her life and also that his introduction could benefit her." In other words, the majority, too, views the evidence on this score as equally balanced. I believe the majority overlooks the obvious: Demski failed to carry his burden of proof on this factor.

Factor (g) requires a court to consider "[o]ther factors that may affect the equities arising from the disruption of the father-child relationship." MCL 722.1443(4)(g). The court acknowledged that this factor required it to consider "identifiable emotional, physical, and financial" equities. The court's discussion of this factor was limited to the following paragraph:

> Consistent with the testimony of the defendants, they are committed to each other, and each to [MP], whether Jeffrey Petlick is the identified legal father because of his bond of love for her and he will continue to support emotionally, financially, and provide the protections she requires. Equitably for the minor by law, the plaintiff would be required to provide for [MP]'s financial support.

While Jeffrey's multifaceted commitment to MP is both admirable and relevant, the court avoided discussion of the evidence actually submitted on this score. Zollar expressed that if a new parent "is willing to make a very serious ongoing workable commitment where they are willing to work with the other caretakers, all the other caretakers, without being adversarial, then it can be a very good thing for children." Unrebutted evidence established that Demski's desire to parent MP had been inconsistent, at best. Text messages sent by Demski demonstrate that on more than one occasion, he expressed interest in "signing over" his parental rights to avoid paying child support. One message states: "[I] was told to plan on selling my house to afford this." Demski answered affirmatively when asked on cross-examination:

> You acknowledge that . . . your actions went from starting out, "I'm involved, I went to the doctor's office," to "I don't want to be involved" in November. "I want to have my rights terminated" or "I don't want to have any rights, I don't want to pay any child support"; correct?

The record simply does not substantiate a clear or convincing likelihood, or an evidentiary preponderance, that Demski would commit himself and his resources over the long term. His track record of commitment to MP is hardly consistent or reassuring.

While the trial court's exercise of its discretion in considering the RPA's best-interest factors should be afforded deference, I believe that the evidence clearly preponderates against the trial court's factual findings under Factors (e), (f), and (g). Because the great weight of the evidence supported that MP's best interests would not be served by disestablishing Jeffrey's paternity and inserting Demski as her new father, I would reverse the trial court's orders finding MP a child born out of wedlock and affiliating Demski.

II. THE CUSTODY AND PARENTING-TIME ORDER

The trial court issued its bench ruling under the RPA on July 26, 2013. In that ruling, the court ordered that Demski meet with Zollar for a "continuing concluding evaluation as it would relate to the welfare of [MP] . . . ." The court continued, "And before any further orders from the Court will issue regarding contact of any form, Ms. Zollar needs to complete that and report to the Court. I think that is related to both custody and parenting time."

On August 29, 2013, the trial court entered an order memorializing its bench ruling. That order stated in relevant part: "Child custody and parenting time issues are reserved until further Order from this

Court[.]" On February 4, 2014, without holding an evidentiary hearing or any record proceedings substantively addressing MP's custody, the trial court entered an order awarding Cassidie and Demski joint legal custody of MP, with Cassidie retaining physical custody. The order stated that Demski would have parenting time "under the supervision of the Friend of the Court with a goal of achieving reasonable rights of parenting time." Two weeks later, the Petlicks moved for reconsideration of the custody and parenting-time order, arguing that the trial court should not have entered it without holding a hearing under the CCA. The trial court responded on May 28, 2014, by denying the motion, and entering a seven-page written order reviewing the court's findings under the best-interest factors of the RPA. For the first time, the court detailed its findings regarding MP's established custodial environment and the best-interest factors stated in the CCA.

The majority holds that the Petlicks failed to preserve their objection to the procedure utilized by the trial court, specifically, the trial court's failure to hold a custody hearing. The majority has either misapprehended the chronology of events or has disregarded basic preservation principles.

No record evidence supports that the Petlicks could or should have anticipated that the trial court would issue a custody and parenting-time order without holding a separate evidentiary hearing. Accordingly, the Petlicks could not have raised an objection to the trial court's procedure until the trial court sua sponte entered its February 4, 2014 order.

The Petlicks objected to the trial court's custody order in a timely fashion, 14 days after that order entered. They had no basis for objecting earlier, as they

had no awareness that the trial court planned to enter a final custody order without holding a hearing as required under the CCA. They challenged the trial court's custody and parenting-time order with a motion for reconsideration because reconsideration was the only vehicle available to them. I know of no precedent requiring litigants to read tea leaves or judicial hints to foresee a ruling not yet made. In my view, the issue raised in the Petlicks' motion for reconsideration is fully preserved. See *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). As such, it should be reviewed de novo. See *Schlender v Schlender*, 235 Mich App 230, 232; 596 NW2d 643 (1999) (stating, in the context of a trial court's failure to conduct an evidentiary hearing, that "[t]his Court reviews a claim of legal error de novo").

The trial court committed two serious errors warranting reversal of its custody and parenting-time order. First, it rendered its order in the absence of an evidentiary hearing during which the parties could introduce evidence relevant to the factors set forth in the CCA and cross-examine witnesses. Second, in crafting its ruling, the trial court considered ex parte evidence that it deliberately withheld from the parties. Both errors should fundamentally undermine a reviewing court's confidence in the trial court's custody and parenting-time rulings.

The CCA "is intended to erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders." *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995). Here, the trial court correctly recognized that MP's established custodial environment was with Cassidie.

A court may not issue a new order changing a child's established custodial environment absent "clear and convincing evidence that it is in the best interest of the child." MCL 722.27(1)(c).[4] The court rules contemplate that a court will conduct an evidentiary hearing in contested custody cases. MCR 3.210(C)(1) provides that

---

[4] I use the term "custody" in this dissenting opinion to also encompass parenting time. A child's best interests govern parenting-time determinations. *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). "Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Shade v Wright*, 291 Mich App 17, 31; 805 NW2d 1 (2010). Parenting-time determinations are governed by their own list of best-interest factors:

> (a) The existence of any special circumstances or needs of the child.
>
> (b) Whether the child is a nursing child less than 6 months of age, or less than 1 year of age if the child receives substantial nutrition through nursing.
>
> (c) The reasonable likelihood of abuse or neglect of the child during parenting time.
>
> (d) The reasonable likelihood of abuse of a parent resulting from the exercise of parenting time.
>
> (e) The inconvenience to, and burdensome impact or effect on, the child of traveling for purposes of parenting time.
>
> (f) Whether a parent can reasonably be expected to exercise parenting time in accordance with the court order.
>
> (g) Whether a parent has frequently failed to exercise reasonable parenting time.
>
> (h) The threatened or actual detention of the child with the intent to retain or conceal the child from the other parent or from a third person who has legal custody. A custodial parent's temporary residence with the child in a domestic violence shelter shall not be construed as evidence of the custodial parent's intent to retain or conceal the child from the other parent.
>
> (i) Any other relevant factors. [MCL 722.27a(6).]

> [w]hen the custody of a minor is contested, a hearing on the matter must be held within 56 days
>
> (a) after the court orders, or
>
> (b) after the filing of notice that a custody hearing is requested[.]

Ample caselaw supports that a court cannot order a custodial change without first holding a hearing. See *Mann v Mann*, 190 Mich App 526, 531-532; 476 NW2d 439 (1991) ("Permitting a court to even temporarily change custody solely on the basis of a Friend of the Court referee's recommendation and without holding a hearing would circumvent and frustrate one of the purposes of the Child Custody Act—to minimize the prospect of unwarranted and disruptive changes of custody."), and *Pluta v Pluta*, 165 Mich App 55, 60; 418 NW2d 400 (1987) ("We do not believe that the trial court should be allowed to circumvent and frustrate the purpose of the law by issuing an ex parte order changing custody without any notice to the custodial parent or a hearing on the issue whether clear and convincing evidence was presented that a change of custody was in the child's best interest.").

The majority dispenses with the need for a hearing by holding that the bench trial under the RPA sufficed. The majority observes, "The trial featured seven witnesses providing several hundred pages worth of testimony and dozens of exhibits presented by the parties." While that may be true, the trial did *not* "feature" a full exposition of evidence relevant to MP's best interests under the CCA because the trial court refused to consider that evidence. Equally important, the trial court denied the parties an opportunity to cross-examine Zollar regarding the custody and parenting-time recommendations that ultimately guided the trial court's decisions.

During Zollar's testimony at the RPA trial, the Petlicks' counsel attempted to elicit her opinion regarding parenting time in the event the court ordered it. Demski's counsel objected, arguing that that Zollar's opinion was not relevant "to these proceedings":

> *Q*. The -- the -- the Court may ultimately determine that at -- that Mr. Demski does have some parenting time; could happen. If -- if -- if that occurs, would -- would you be willing to -- to act and to assist in any bridging --
>
> *Mr. Banyon*: I'm -- I'm going to object to this question, Your Honor. It's certainly not relevant to these proceedings.
>
> *Mr. Armstrong*: I'll withdraw it. I'm just trying to help, Judge. I'll withdraw the question. I'm done with the witness.
>
> *The Court*: All right, it's withdraw[n].

Shortly thereafter, Demski's attorney tried to question Zollar regarding her experience in "custodial dispute[s]" not involving abuse or neglect. The trial court sustained the Petlicks' relevance objection:

> *Q*. And how many children have you assessed under the age of two and a half not related to sexual abuse?
>
> *A*. Well, probably out of the several hundred, probably 150 or so, given the fact that I frequently get referrals regarding other -- other issues that involve kids -- or children under the age of two and a half.
>
> *Q*. And how many of that hundred or so have you --
>
> *Mr. Armstrong*: Your Honor, I believe she said 150.
>
> *Q*. -- 150 or so have you assessed with respect to a custodial dispute not involving abuse or neglect?
>
> *Mr. Armstrong*: Your Honor, I'll object. This isn't a custodial dispute.
>
> *Mr. Banyon*: It involves custody, --
>
> *Mr. Armstrong*: Well, --
>
> *Mr. Banyon*: -- parenting time.

Mr. Armstrong: -- it may become one, but it's not at this point, Your Honor.

The Court: I'm -- and your objection is?

Mr. Armstrong: My objection is it's not relevant. I attempted to go into that particular area and he cut me off, and so apparently he doesn't want to go into that area; and, therefore, it's not relevant today. We could deal with that later apparently. If -- if the Court --

The Court: All right. I'm going to -- I'm going to sustain the objection as to where we are now.

These excerpts illustrate that neither the parties nor the trial court intended that the RPA hearing would encompass a best-interest hearing under the CCA. Zollar's views regarding the CCA best-interest factors were not aired or subjected to scrutiny through cross-examination. Not a word was spoken by the parties or the trial court regarding most of the best-interest factors under the CCA.[5] Nor does the record

[5] The best-interest factors set forth in MCL 722.23 are:

(a) The love, affection, and other emotional ties existing between the parties involved and the child.

(b) The capacity and disposition of the parties involved to give the child love, affection, and guidance and to continue the education and raising of the child in his or her religion or creed, if any.

(c) The capacity and disposition of the parties involved to provide the child with food, clothing, medical care or other remedial care recognized and permitted under the laws of this state in place of medical care, and other material needs.

(d) The length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity.

(e) The permanence, as a family unit, of the existing or proposed custodial home or homes.

(f) The moral fitness of the parties involved.

(g) The mental and physical health of the parties involved.

substantiate that the parties agreed to forgo a separate best-interest hearing in the interest of conducting an omnibus proceeding. In my view, the trial court clearly and substantially erred by relying on a limited record to decide the issues of custody and parenting time. See *Crampton v Crampton*, 178 Mich App 362, 363; 443 NW2d 419 (1989) ("It was not sufficient for the court to rely on the testimony and evidence from the referee's hearing and to limit the taking of further testimony as was done here.").

Moreover, a child custody hearing demands the presentation of admissible evidence subject to cross-examination. The trial court requested and entertained "a report with recommendations relative to Custody and Parenting time," authored by Zollar. According to the trial court's written opinion denying the Petlicks' motion for reconsideration, the report was "received by the court [on] November 20, 2013." Zollar's report is not in the record and apparently was not provided to counsel. Yet according to the trial court's opinion on reconsideration, the substance of the report formed the basis for the trial court's parenting-time order.[6]

(h) The home, school, and community record of the child.

(i) The reasonable preference of the child, if the court considers the child to be of sufficient age to express preference.

(j) The willingness and ability of each of the parties to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent or the child and the parents.

(k) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

(*l*) Any other factor considered by the court to be relevant to a particular child custody dispute.

[6] That the trial court relied on Zollar's report is supported by many comments within its opinion on reconsideration: "The court reviewed

MRE 706 allowed the trial court to appoint Zollar as an expert witness. However,

> [a] witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness. [MRE 706(a).]

The court did not advise the parties that Zollar had made any findings until issuing its opinion on reconsideration and never informed the parties of their substance and content. Zollar was not subject to cross-examination before the trial court (apparently) incorporated Zollar's opinions into its custody and parenting-time decision. Ultimately, it is unknown whether the trial court actually adopted Zollar's recommendations as she expressed them. This possibility buttresses my belief that the trial court's procedure violated MRE 706.

The Code of Judicial Conduct does not preclude all ex parte communications with witnesses. However, it requires that a judge who elects to "obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge" provide "notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond." Code of Judicial Conduct, Canon 3(A)(4)(b). This exception to the general rule barring ex

---

the recommendation in light of all proofs preserved"; "The Friend of the [C]ourt was required to establish a bridging schedule for the exercise of the initial parenting time to be held in a 'therapeutic setting' under the direction of counselor Robin Zollar"; "The court upon consideration of her report and recommendation then fashioned the order from which Defendants seek reconsideration"; Demski's "parenting time shall consistent with Robin Zollar's recommendation be supervised by her in a therapeutic environment . . . ."

parte communications comes closest to addressing what occurred in this case. Here, the trial court consulted Zollar regarding expert opinion rather than "the law." And the trial court failed to afford advance notice of Zollar's participation in this stage of the proceedings, or the substance of her recommendations, to the parties. The report's absence from the record precludes this Court's review of the trial court's interpretation of Zollar's recommendations. I find the trial court's procedure in this highly contested custody case deeply troubling.

The majority, however, shrugs off any claim that the Petlicks suffered a violation of their rights, summarily stating that " '[t]he Confrontation Clause does not apply to civil proceedings.' " (Citation omitted.) I am not reassured. The right to confront and cross-examine witnesses "is implicit in our historical concepts of due process and of fair trial[.]" *Durant v Stahlin*, 375 Mich 628, 649; 135 NW2d 392 (1965) (opinion by SOURIS, J.). In *Hayes v Coleman*, 338 Mich 371, 380-381; 61 NW2d 634 (1953), our Supreme Court favorably quoted the following language from a Missouri case, *Gurley v St Louis Transit Co*, 259 SW 895, 898 (Mo App, 1924):

> "The right of a litigant to cross-examine an adverse witness within proper bounds is an absolute right, and it is not within the discretion of the court to say whether or not the right will be accorded. The right of cross-examination is regarded of such consequence that it is made one of the chief grounds for the exclusion of hearsay evidence. If the right to cross-examine an adverse witness be denied or unduly limited or restrained, the testimony given by the witness would, in a very marked degree, partake of the character of hearsay testimony. It is always permissible upon the cross-examination of an adverse witness to draw from him any fact or circumstance that may tend to show his relations with, feelings toward, bias or prejudice for or against, either party, or that may

> disclose a motive to injure the one party or to befriend or favor the other. The party producing a witness may not shield him from such proper cross-examination for the reason that the facts thus elicited may not be competent upon the merits of the cause."

The majority concedes that it would have been "better practice to have received [Zollar's] report before the conclusion of proofs at trial, and to have included that report in the trial court record . . . ." Yes, it would. But the majority's casual observation misses the point. "Cross-examination is a critical element in the truth-determining process." *Brock v Roadway Express, Inc*, 481 US 252, 276; 107 S Ct 1740; 95 L Ed 2d 239 (1987) (Stevens, J., dissenting in part). It enhances the quality and the reliability of the decision-making process. The Petlicks had no opportunity to challenge and to test Zollar's opinions in a manner that would potentially influence the trial court's decision-making process. Whether Zollar once served as the Petlicks' expert witness is of no moment, given that she later provided crucial information to the trial court in a manner that can only be described as secret. Her opinions and recommendations may have been incomplete or misleading or based on improper criteria. The majority is satisfied with remaining in the dark. In my view, MP's best interests demand an airing.

Zollar's opinions and recommendations are not matters of national security. They guided the Friend of the Court's parenting-time recommendations and the trial court's orders, and the majority has proposed no logical basis for excluding those opinions from effective and adversarial dissection. I would hold that the trial court clearly erred by denying the Petlicks an opportunity to review Zollar's report and to cross-examine her before issuing its custody and parenting-time decisions.

In urging remand to the trial court, I concede that proceeding according to the well-established rules governing custody and parenting-time determinations risks once again destabilizing MP. But in my view, the trial court's failure to hold an evidentiary hearing and its consideration of ex parte evidence contaminated its best-interest findings relevant to custody and parenting time. I have no confidence that MP's best interests have been served by the court's order, because I have no means of understanding its evidentiary foundations. Because the trial court denied MP and Cassidie the most rudimentary form of due process, its decisions lack inherent integrity and must not stand affirmed.

FULLER v GEICO INDEMNITY CO

Docket No. 319665. Submitted March 3, 2015, at Detroit. Decided March 5, 2015, at 9:15 a.m.

Siblings Gregory M. and Patrice Fuller (the Fullers) brought an action in Wayne Circuit Court to recover first-party personal protection insurance (PIP) benefits from GEICO Indemnity Company (GEICO) after they were injured in a car accident while Gregory was driving, with permission, a car rented by nonparty Saundra House (House). The rental agreement between House and the rental agency, Lakeside Car Rental (Lakeside), stated that GEICO, the no-fault insurance carrier for House's personal vehicle, was the primary insurer in case of an accident involving the rental car. GEICO denied the Fullers' claim on the basis that Lakeside was the owner of the rental car for no-fault insurance purposes, and therefore, Lakeside's insurer was responsible for paying any no-fault benefits owed as a result of the accident. The trial court, Robert J. Colombo, Jr., ultimately agreed with GEICO and granted GEICO's motion for summary disposition. The Fullers appealed.

The Court of Appeals *held*:

1. The trial court properly held that Lakeside remained the owner and insurer of the rental vehicle even though House had signed a short-term rental agreement purporting to make GEICO, the insurer of House's personal vehicle, the primary insurer for any liabilities arising from an accident involving the rental vehicle.

2. Lakeside was prohibited from shifting to a short-term car renter the burden of maintaining mandatory no-fault insurance on a rented vehicle. Unless a car rental agreement extends beyond 30 days, the rental agency remains the owner of the rental car for no-fault insurance purposes, and the rental agency's no-fault insurer is first in priority for payment of no-fault claims arising from an accident involving the rental car.

3. An individual who rents a car from a rental car agency becomes the car's owner for purposes of the no-fault act when that individual rents the vehicle for a period in excess of 30 days. MCL 500.3101(2)(h), as amended by 2008 PA 241.

Affirmed.

The Joseph Dedvukaj Firm, PC (by *Joseph Dedvukaj*), for Gregory M. Fuller and Patrice Fuller.

Drew W. Broaddus and *Sarah L. Walburn* for GEICO Indemnity Company.

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

GLEICHER, P.J. Nonparty Saundra House rented a vehicle from Lakeside Car Rental while her own vehicle was undergoing routine repairs. She allowed a family friend, plaintiff Gregory Fuller, to drive the rented car, and he was involved in an accident. Gregory and his passenger, plaintiff Patrice Fuller, were both injured and believed they were entitled to first-party personal protection insurance (PIP) benefits. As neither owned a vehicle or was covered under a relative's policy, the Fullers sought PIP benefits from the GEICO insurance policy that House had purchased to cover her personal vehicle. Defendant GEICO Indemnity Company determined that Lakeside owned the rental car, and therefore, that Lakeside's insurer was responsible for coverage.

The circuit court agreed with GEICO's position and dismissed the Fullers' first-party no-fault action. MCL 500.3101(1) demands that a vehicle's owner or registrant maintain the insurance coverage required by the no-fault act. And our Supreme Court has ruled that a rental agency, as the owner of the vehicle, cannot shift the burden of maintaining mandatory no-fault insurance onto a short-term renter. Accordingly, we affirm.

I. BACKGROUND

As noted, while House's GEICO-covered personal vehicle was in the shop for repairs, she entered a

one-week rental contract for a 2008 Chevy Impala with Lakeside. The rental agreement provided that House's GEICO policy would "be first in priority in payment of any and all personal injury and property damage claims that arise from the [use] of this vehicle." After the Fullers' accident, they filed a claim for first-party no-fault benefits with GEICO. GEICO rejected the Fullers' claim, and they filed suit seeking a declaration of coverage and a ruling that GEICO had violated the no-fault statute.

GEICO sought summary dismissal of the Fullers' claims. The circuit court, based on the incorrect assumption that House had entered a long-term rental contract, initially determined that House was required to insure the rental vehicle and that the Fullers were eligible for coverage under the GEICO policy. After further clarification by the parties, however, the court determined that Lakeside remained liable to insure the Impala and its policy was the proper source of PIP benefits for the injured Fullers. The court therefore dismissed the Fullers' action and they filed this appeal.

II. STANDARD OF REVIEW

> We review de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We must review a "motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "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).
>
> We also review de novo matters of statutory interpretation. *Stanton v Battle Creek*, 466 Mich 611, 614; 647 NW2d 508 (2002). The goal of statutory interpretation is to discern and give effect to the intent of the Legislature. *Odom v Wayne Co*, 482 Mich 459, 467; 760 NW2d 217 (2008). To that end, the first step in determining legislative intent is the language of the statute. *Id*. If the statutory language is unambiguous, then the Legislature's intent is clear and judicial construction is neither necessary nor permitted. *Id*. [*Barclae v Zarb*, 300 Mich App 455, 466-467; 834 NW2d 100 (2013).]

We review de novo questions of contract interpretation and considerations regarding the legal effect of a contractual provision. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010). Because a no-fault insurance policy is a contract, the general rules of contract interpretation apply. *Rory v Continental Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). When considering the meaning of policy terms, we must read the whole instrument with the goal of enforcing the parties' intent. *Fresard v Mich Millers Mut Ins Co*, 414 Mich 686, 694; 327 NW2d 286 (1982) (opinion by FITZGERALD, C.J.). Clear and unambiguous provisions of an insurance policy must be enforced according to their plain meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

III. ANALYSIS

Pursuant to MCL 500.3101(1), Lakeside was required to maintain PIP insurance over the Impala as the vehicle's owner and registrant. Lakeside was prohibited from shifting that burden onto a short-term renter by *State Farm Mut Auto Ins Co v Enterprise*

Leasing Co, 452 Mich 25, 27; 549 NW2d 345 (1996). Accordingly, Lakeside's insurer was liable to pay the Fullers' PIP benefits, not GEICO as the insurer of House's personal vehicle, and the circuit court properly dismissed plaintiffs' claims.

The Fullers based their claims for PIP benefits on Section I of House's GEICO policy. Section I of the policy pertains to "Liability Coverages," and protects the insured against tort claims raised by third parties. It does not govern entitlement to PIP benefits.[1] Section II of the GEICO policy applies to PIP coverage and provides different coverage and definitions than Section I. Section II starts with a general statement of coverage:

> We will pay for personal injury protection benefits to or on behalf of each *eligible injured person* for *allowable expenses, work loss and survivors' benefits* incurred as a result of *bodily injury* caused by an accident arising out of the *ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.*

"Eligible injured person" includes "[a]ny other person who suffers *bodily injury* while *occupying* an *insured auto*[.]" The definition of an "insured auto" in Section II is different from the definition of an "owned auto" in Section I and is key to the resolution of this matter:

> *Insured auto* means an auto with respect to which *you* are required to maintain security under Chapter 31 of the Michigan Insurance Code and to which the *Bodily Injury* liability coverage of this policy applies and for which a specific premium is charged.

---

[1] The GEICO tort liability coverage provides protection for an "owned auto," which includes a "temporary substitute auto," defined as "an automobile . . . , not owned by *you*, temporarily used with the permission of the owner." A "temporary substitute auto" "must be used as a substitute for the *owned auto* . . . when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction."

The words "you" and "your" are also defined in the policy and include only the named policyholder and, under certain conditions, his or her spouse.

As correctly noted by GEICO, Section I of the policy, upon which the Fullers rely, applies only to liability, not PIP, coverage. Had Gregory Fuller been sued by a person in the other car involved in the accident, coverage would be determined by an analysis of Section I.[2] This case involves only a claim for first-party PIP benefits. Eligibility for PIP coverage is governed by Section II.

When analyzing coverage under Section II, two things are important: (1) the Fullers were not the named insureds—House was, and (2) the Fullers were not in the vehicle covered by the GEICO policy—that vehicle was in the shop.

Part 1 of Section II of the GEICO policy begins by declaring that GEICO will pay PIP benefits to "each eligible injured person." An injured person is deemed eligible if he or she "suffers bodily injury while occupying an insured auto." The Fullers want to apply the definition of "owned auto" from Section I of the policy. However, GEICO gave "insured auto" a particular definition for purposes of Section II. It is an auto (1) "with respect to which **you** are required to maintain" no-fault coverage, and (2) "to which the Bodily Injury liability coverage policy applies," and (3) "for which a specific premium is charged." (Bold added.) "You" is defined in the policy as only the named insured—House—and, under specific circumstances, her spouse, if any.

---

[2] In fact, it appears that coverage would be available to Gregory had he been sued. Under *State Farm*, 452 Mich at 27, discussed below, Lakeside would not be permitted to foist its priority status onto the renter's insurer. However, if Lakeside's policy fell short, Gregory could have relied upon the GEICO policy to cover the remainder.

The Fullers' request for PIP benefits fails under the first prong of the "insured auto" definition. House was not required to maintain no-fault coverage for the Impala and therefore it is not an insured auto under the PIP benefits section of the GEICO policy. MCL 500.3101(1) demands that: "The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." The circuit court correctly determined that House was not the "owner or registrant" of the Chevy Impala, Lakeside was.

At the time of the Fullers' accident, MCL 500.3101(2) defined "owner" as follows:

> (h) "Owner" means any of the following:
>
> (*i*) A person renting a motor vehicle or having the use thereof, under a lease or otherwise, for a period that is greater than 30 days.
>
> (*ii*) A person who holds the legal title to a vehicle, other than a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days.
>
> (*iii*) A person who has the immediate right of possession of a motor vehicle under an installment sale contract. [MCL 500.3101(2)(h), as amended by 2008 PA 241.]

"Registrant," at the time of the accident, was defined as follows:

> (i) "Registrant" does not include a person engaged in the business of leasing motor vehicles who is the lessor of a motor vehicle pursuant to a lease providing for the use of the motor vehicle by the lessee for a period that is greater than 30 days. [MCL 500.3101(2)(i), as amended by 2008 PA 241.]

A person renting a vehicle becomes the owner or registrant of the vehicle if the rental term is more than 30 days. See MCL 500.3101(2)(h)-(i), as amended by 2008 PA 241. House's rental agreement was for one week. Accordingly, Lakeside remained the owner and registrant of the vehicle at all relevant times.

In its rental agreement, Lakeside attempted to shift the burden of paying PIP benefits onto its renters' insurance providers. This is not permitted under Michigan law. In *State Farm*, 452 Mich 25, the Supreme Court considered whether a car rental agency could shift the burden of providing residual liability insurance, which is also mandated by MCL 500.3101(1), onto the renter's insurance provider. The Court declared that such provisions in rental agreements violate the no-fault act and are void.

State Farm involved three consolidated appeals. The rental agreements underlying all three cases included provisions placing the renter's insurance policy in the position of highest priority in relation to residual liability. *Id*. at 28-30. The Court first analyzed its earlier decision in *Citizens Ins Co v Federated Mut Ins Co*, 448 Mich 225; 531 NW2d 138 (1995). In *Citizens*, a car dealership provided the driver a "loaner vehicle" while the driver's personally owned vehicle was being repaired. *State Farm*, 452 Mich at 31. The driver was involved in an accident while using the loaner vehicle and a third party successfully sought compensation against the driver for his or her damages. *Id*. Relying on MCL 500.3101(1), the *Citizens* Court "stressed that it is the '*owner* or *registrant* of a motor vehicle' who must provide residual liability insurance under the act." *State Farm*, 452 Mich at 31-32, quoting *Citizens*, 448 Mich at 228. The car dealership's insurance policy in *Citizens* "purported to deny coverage to the driver of

the car[.]" *State Farm*, 452 Mich at 32. That provision was void, the *Citizens* Court held, because the no-fault act requires the vehicle owner to provide such coverage. *Id*.

The *State Farm* Court noted that it was "no longer convinced that a distinction between a 'loaner' car and a rental car can be sustained[.]" *Id*. at 32-33.

> In *Citizens*, Federated attempted to deny coverage, thus forcing the driver's insurers to provide coverage. The car rental companies in this case similarly force a choice. A driver can either sign an agreement stating that the driver's insurance will be primary, or the driver can agree to pay an extra fee to the car rental company for insurance coverage. The driver is not informed that the car rental company, as the owner, is required by law to carry insurance on the vehicle that covers any permissive user. The owner cannot shift that responsibility to another party. Just as Federated was required to provide insurance coverage for permissive users in *Citizens*, we now hold that a car rental company, like any other car owner, must obtain insurance coverage for permissive users of its vehicles. [*State Farm*, 452 Mich at 33-34.]

"The gravamen" of this holding, the *State Farm* Court emphasized, "is that the no-fault act requires car owners to be primarily responsible for insurance coverage on their vehicles." *Id*. at 34. And a rental driver "cannot defeat the provisions of the no-fault act" by excusing the vehicle's actual owner (the rental company) from providing insurance. *Id*. at 35.

MCL 500.3101(1) mandates a vehicle's owner or registrant to maintain three types of coverage under his or her no-fault policy: "security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." *Citizens*, *State Farm*, and their progeny have all considered whether the owner/registrant can shift the

burden of maintaining residual liability insurance. The answer has been a resounding "No." There is no reason to treat residual liability any differently than the other two types of coverage mandated in the same sentence of MCL 500.3101(1). The Legislature has decided that the vehicle's owner or registrant must maintain the required coverage, and the Supreme Court has interpreted the provision to prohibit shifting that duty. Lakeside could not avoid its insurance obligations, and its contractual attempt to do so is void.

The Fullers sued the wrong insurance company, without providing written notice to Lakeside's insurer, and it is now too late for them to seek PIP benefits from any other provider. See MCL 500.3145 (notice must be given to insurer within one year of accident). They claim that GEICO lulled them into sitting on their rights by implying that benefits would be provided. As a result, the Fullers contend that GEICO should be equitably estopped from denying coverage now.

> For equitable estoppel to apply, plaintiff must establish that (1) defendant's acts or representations induced plaintiff to believe that the limitations period clause would not be enforced, (2) plaintiff justifiably relied on this belief, and (3) she was prejudiced as a result of her reliance on her belief that the clause would not be enforced. [*McDonald v Farm Bureau Ins Co*, 480 Mich 191, 204-205; 747 NW2d 811 (2008).]

Courts are to apply equitable estoppel sparingly and only in the most extreme cases, for example, when a defendant intentionally or negligently deceives a plaintiff. See *Klass v Detroit*, 129 Mich 35, 39-40; 88 NW 204 (1901).

The letter cited by the Fullers in no way represents a deception. In the letter, a GEICO claims adjuster posits, "We previously advised that we have now re-

ceived documents requested to support that Gregory and Patrice Fuller will be eligible for coverage under the GEICO policy." This does not imply that the Fullers actually are eligible. It implies that GEICO asked for certain documents to ascertain whether the Fullers "will be eligible," and those documents had arrived at the GEICO office. The letter goes on to explain that the Fullers had not been cooperative in attending their scheduled independent medical exams, which were required "to assist in [GEICO's] investigation." An ongoing investigation suggests that coverage had not yet been determined.

Moreover, as aptly noted by GEICO, the accident occurred on November 11, 2011. The Fullers had until November 11, 2012, to notify the correct insurance provider of their injuries. They obviously realized by October 24, 2012, that GEICO would not voluntarily pay the claim given that they filed suit on that date. The next rational choice in selecting an insurer would be the company that insured the rental company's vehicles. Nothing prevented the Fullers from notifying that insurance provider of the accident and beginning the process of requesting PIP benefits. This could have been done contemporaneously with the Fullers' suit against GEICO. The Fullers did not justifiably forgo their other remedies in response to GEICO's letter.

Ultimately, the circuit court properly dismissed the Fullers' claims against GEICO. Lakeside, as the statutorily defined owner and registrant of the subject vehicle, was required by statute to maintain PIP coverage on the car. Lakeside was precluded by caselaw from shifting the burden of coverage onto the renter of the vehicle. Accordingly, GEICO, the company insuring the renter's personal vehicle, was not respon-

sible for paying PIP benefits to a permissive user injured while driving or riding in the rental car.

We affirm.

CAVANAGH and FORT HOOD, JJ., concurred with GLEICHER, P.J.

BAUMGARTNER v PERRY PUBLIC SCHOOLS

AUBERT v REED CITY AREA SCHOOLS BOARD OF EDUCATION

WRIGHT v FLINT COMMUNITY SCHOOLS BOARD OF EDUCATION

Docket Nos. 313945, 314158, and 314696. Submitted March 4, 2014, at Lansing. Decided March 12, 2015, at 9:00 a.m. Leave to appeal denied at 498 Mich 864.

Numerous teachers who were laid off by public-school-district employers petitioned the Michigan Department of Education for review of the layoff decisions. The employers were Perry Public Schools, the Reed City Area Schools Board of Education, and the Flint Community Schools Board of Education. The layoffs were done under MCL 380.1248 and MCL 380.1249 (sections of the Revised School Code, MCL 380.1 *et seq*.) on the basis of merit rather than seniority. In each case, the administrative law judge (ALJ) assigned rejected the petitioner's claim and granted the respondent summary disposition, ruling that amendments of the teacher tenure act, MCL 38.71 *et seq*., the public employee relations act (PERA), MCL 423.201 *et seq*., and the school code in 2011 clarified that the State Tenure Commission (STC) lacked jurisdiction over teacher-layoff claims, which could only be heard in a court of competent jurisdiction. Petitioners nonetheless appealed to the STC, which rejected the ALJs' rulings and held that *Freiberg v Big Bay de Noc Sch Dist Bd of Ed*, 61 Mich App 404 (1975), gave it jurisdiction over layoff claims that asserted subterfuge and that the 2011 amendments did not revoke this jurisdiction. The STC remanded the cases to the ALJs in a series of interlocutory orders. Respondents appealed, and the Court of Appeals consolidated the cases.

The Court of Appeals *held*:

1. MCL 24.301, part of the Administrative Procedures Act, MCL 24.201 *et seq*., generally does not allow the Court of Appeals to review an interlocutory judgment of an administrative agency unless the agency's final decision or order will not provide an adequate remedy. Because the STC clearly lacks jurisdiction over teacher layoffs, its orders were void and could not address the jurisdictional issue at the heart of these appeals. The Court of

Appeals accordingly had jurisdiction over the cases under MCL 24.301 despite their interlocutory nature.

2. The STC's jurisdiction and administrative expertise is limited to questions traditionally arising under the tenure act, and it does not have jurisdiction over disputes that arise under and are governed by separate legislative acts. The tenure act neither mentions layoffs nor gives the STC jurisdiction over them. Before the 2011 amendments, layoffs and the methods for conducting them were exclusively the subject of collective-bargaining agreements. Accordingly, before the amendments, improper layoff decisions were regarded as unfair labor practices, which were violations of PERA and adjudicated by the Michigan Employment Relations Commission (MERC). *Freiberg* asserted that the STC had jurisdiction over a small number of layoff-related claims under the judicially created subterfuge doctrine, which allowed the STC to hear claims asserting that the stated reason for a layoff (economic hardship, for instance) was a mere pretext to terminate the teacher in bad faith. *Freiberg*, however, was not binding under MCR 7.215(J)(1) and was rendered void by the 2011 amendments at issue in this case.

3. The STC improperly exercised jurisdiction over petitioners' suits. 2011 PAs 100, 101, 102, and 103 enacted a series of amendments of the tenure act, the school code, and PERA. 2011 PA 103 amended MCL 423.215(3)(k), which is part of PERA, to provide that any layoff decisions made under MCL 380.1248 and MCL 380.1249 of the school code cannot be the subject of collective bargaining. This removal of layoffs from the collective-bargaining process also bars MERC from adjudicating layoff disputes as unfair labor practices under PERA. The school code, not PERA or the tenure act, therefore governs teacher layoffs. MCL 380.1248 and MCL 380.1249 were sections added to the school code by 2011 PA 102. In addition to specifying that a court of competent jurisdiction is the only forum in which a laid-off teacher may seek redress, those sections also detail specific methods by which school districts must select those teachers to be laid off. MCL 380.1249(1) requires a school to adopt performance evaluation systems and rate its teachers on the basis of their effectiveness. MCL 380.1248(1)(b)(*i*) through (*iii*) mandate that all policies regarding personnel decisions when conducting a staffing or program reduction, i.e., layoffs, must be conducted on the basis of the performance evaluation system and other specific factors. Length of service or tenure status cannot be a factor in making layoff decisions except in a tiebreaker context. MCL 380.1248(3) provides that if a teacher brings an action against a

district under that section, the teacher's sole and exclusive remedy is an order of reinstatement commencing 30 days after a decision by a court of competent jurisdiction, and the remedy does not include lost wages, lost benefits, or any other economic damages. Amendments to the tenure act by 2011 PA 100 further made it clear that even if the STC ever had jurisdiction over layoff-related claims, it no longer had any. In particular, a school that lays off a teacher does not demote that teacher within the context of the tenure act, and the STC is barred from using MCL 38.74 as a jurisdictional reason to hear layoff-related cases. 2011 PA 101 repealed MCL 38.105, a part of the tenure act that governed reductions in personnel, again indicating that the STC lacked any jurisdiction over cases involving layoff-related issues. Rather, the Court of Appeals had jurisdiction over respondents' appeals of the STC's interlocutory orders.

STC orders vacated and petitioners' claims dismissed.

EDUCATION — TEACHERS — LAYOFFS — JURISDICTION — STATE TENURE COMMISSION — REVISED SCHOOL CODE.

The jurisdiction and administrative expertise of the State Tenure Commission is limited to questions traditionally arising under the teacher tenure act, MCL 38.71 *et seq*., and the commission does not have jurisdiction over disputes that arise under and are governed by separate legislative acts such as the Revised School Code, MCL 380.1 *et seq*., and the public employee relations act, MCL 423.201 *et seq*.; in particular, the commission does not have jurisdiction over teacher layoffs, which are instead governed by MCL 380.1248 and MCL 380.1249 of the school code, which specify procedures for teacher layoffs and provide that a court of competent jurisdiction is the only forum in which a laid-off teacher may seek redress.

White, Schneider, Young & Chiodini, PC (by *Jeffrey S. Donahue*), for Shelby Baumgartner, Loretta Cole, and Margaret Sible.

Kalniz, Iorio & Feldstein Co., LPA (by *Fillipe S. Iorio* and *Kurt Kline*), for Sara Aubert, Philip David, Paula Justin, Kellee Beilfuss, Lisa Beilfuss, and Karen Knapp.

White, Schneider, Young & Chiodini, PC (by *William F. Young*), for Carmen A. Wright.

Thrun Law Firm, PC (by *Roy H. Henley*), for Perry Public Schools.

Varnum LLP (by *John Patrick Wright* and *Joseph J. Vogan*) for the Reed City Area Schools Board of Education.

Plunkett Cooney (by *Philip A. Erickson*) for the Flint Community Schools Board of Education.

Amici Curiae:

Mark H. Cousens for AFT Michigan.

Brad A. Banasik for the Michigan Association of School Boards.

Douglas V. Wilcox for the Michigan Education Association.

Before: DONOFRIO, P.J., and SAAD and METER, JJ.

SAAD, J. In these consolidated appeals, respondent school districts ask us to reverse a series of orders entered by the State Tenure Commission, which instructed administrative law judges to hear petitioners' suits. For the reasons stated below, we hold that the State Tenure Commission does not have jurisdiction to hear petitioners' claims, and accordingly, we reverse its administrative orders and dismiss petitioners' actions.

I. NATURE OF THE CASE

A. THE LAW OF TEACHER LAYOFFS

This case is about governmental power and authority, and who gets to make and review decisions about teacher layoffs in the public schools. Before the historic

enactment of the four pieces of tie-barred[1] legislation at issue,[2] teacher unions, for all practical purposes, decided what factors governed teacher layoffs. Though the Legislature could have decided, pursuant to its constitutional role in public education,[3] to make this important public-policy choice, it did not do so until 2011. Instead, by virtue of making teacher layoffs a mandatory subject of collective bargaining, the Legislature left the regulation of layoffs to the collective-bargaining process. Virtually all collective-bargaining agreements used seniority—described as "last in, first out" (LIFO)—as the method for laying off teachers.[4]

Because length of service, not merit, governed who would be laid off and who would be retained, a simple application of LIFO meant that few disputes arose in the implementation of layoff decisions. But if disputes occurred, the governmental agency that had (and has) exclusive authority over the enforcement of

---

[1] When the 2011 Amendments were bills, each 2011 Amendment was linked with the others so that none could become law unless the others became law. This linking is referred to as a "tie-bar."

[2] The 2011 legislative amendments are contained in Public Acts 100, 101, 102, and 103 of that year. Each amendment is discussed in greater detail later in the opinion. Throughout the opinion, we refer to these amendments collectively as "the 2011 Amendments."

[3] See Const 1963, art 8, § 2 ("The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.").

[4] LIFO means that "in the event of downsizing, the most recently hired teachers are the first to be dismissed (regardless of their effectiveness), while the most veteran teachers are retained (also regardless of their effectiveness)." House Legislative Analysis, HB 4625, 4626, 4627, and 4628, June 15, 2011, p 13 (analysis of arguments for the legislation). Because the LIFO rule made layoff decisions fairly automatic, layoff-related disputes were far less common than those involving demotion and discharge of public school teachers, which, as we discuss *infra*, were governed by multiple statutes, including the teacher tenure act, MCL 38.71 *et seq*.

union-related public-sector labor laws,[5] the Michigan Employment Relations Commission (MERC), adjudicated any legal challenge.[6] The Legislature did not grant authority to any other administrative agency to deal with or review the subject of teacher layoffs. Seniority-based layoffs, being solely a matter of collective bargaining, made the answer to the question above—who gets to make and review decisions about teacher layoffs in the public schools—relatively simple and straightforward.

In 2011, this all changed when, for the first time in Michigan history, the Legislature exercised its constitutional role and decided that the Legislature and local school boards, not the unions or administrative agencies, would decide which teachers should be retained and which should be laid off in the event of a reduction in force. The key to this historic change was to remove the subject of teacher layoffs from the realm of collective bargaining. Doing so had the twofold effect of (1) removing the unions as decision-makers on layoff-related issues and (2) by definition, making it unnecessary for MERC to review layoff-related cases because they no longer implicated public-sector labor laws.

To implement this dramatic shift in the law of teacher layoffs, the Legislature also mandated that Michigan's several hundred school boards make layoff decisions on the basis of merit, through the development of a mandated, comprehensive evaluation system for public school teachers. To make it perfectly clear

---

[5] Specifically, the public employee relations act (PERA), MCL 423.201 *et seq*.

[6] The union of a laid-off teacher could also claim a breach of the collective-bargaining agreement, which, as a violation of the labor agreement, would be heard by a private arbitrator, as the last step in the grievance-arbitration process under the terms of the collective-bargaining agreement.

that these decisions would be made by the local school boards, and not be sidetracked by administrative agencies, the Legislature took the additional and somewhat unusual precaution of explicitly saying how and by whom the layoff decisions could be reviewed.

As stated, MERC obviously would no longer have any reason to address this subject, and thus assert jurisdiction. And because the State Tenure Commission (STC) had, before the 2011 Amendments, asserted jurisdiction over a few teacher-layoff suits—wrongfully, in our view, and on the basis of a now nonbinding 1975 decision of our Court—the Legislature again took the unusual, but prudent, precaution of amending the teacher tenure act (TTA)[7] to remove the slim statutory basis that the STC claimed gave it jurisdiction over layoff-related actions. Finally, to make it absolutely clear that no administrative agency may review a school board's layoff decisions, the Legislature provided that a teacher's "sole and exclusive remedy" is to appeal the decision to the courts.[8]

In sum, the 2011 Amendments effected a massive redistribution of power in the realm of teacher layoffs—from teacher unions to the local school districts as decision-makers, and from administrative agencies to the courts as the only recourse to review challenged layoff decisions.

B. THE INSTANT CASE

In these appeals, petitioners essentially seek to unmake the 2011 Amendments through a seldom used and nonbinding 1975 decision of our Court[9] that before

---

[7] MCL 38.71 *et seq*.

[8] MCL 380.1248(3).

[9] *Freiberg v Big Bay de Noc Sch Dist Bd of Ed*, 61 Mich App 404; 232 NW2d 718 (1975).

the 2011 Amendments gave the STC a minor and narrow role in reviewing teacher layoffs.

Under the TTA, the STC had no legal authority to adjudicate layoff-related disputes because, as an administrative agency, the STC's powers are limited to those expressly granted by the Legislature.[10] And in the TTA, the Legislature granted the STC jurisdiction only over the discharge and demotion of teachers—not the layoff of teachers. Nonetheless, citing *Freiberg*, the STC, in a few rare instances, improperly exercised jurisdiction over cases that involved the layoff of teachers by essentially characterizing a layoff as a discharge. As we said above, because the Legislature wished the 2011 Amendments to be implemented without this sort of administrative agency interference, it amended the TTA to underscore that the subject of layoffs is no longer within the STC's limited reach of jurisdiction.

The seasoned lawyers who act as administrative law judges (ALJs) for the state Department of Education adjudicated these cases, correctly, by holding what is obvious: the STC no longer has any warrant to address layoff-related disputes. However, the political appointees who made up the STC when it heard these appeals[11] could not bring themselves to comply with this clear legislative fact. Instead, the STC inexplicably ruled that it had jurisdiction over teacher layoffs, using the 1975 decision of our Court that the 2011 Amendments rendered null and void.

---

[10] "[T]he powers of administrative agencies . . . are limited to those expressly granted by the Legislature." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 574; 810 NW2d 110 (2011).

[11] The commissioners who wrote the deciding opinion were appointed by the prior gubernatorial administration and are no longer members of the STC.

By the simple expedient of claiming jurisdiction to adjudicate hundreds of layoff cases under a specious theory, the STC, if upheld, would surely preclude any school district from making the merit-based layoffs required under the 2011 Amendments. By this "legal" sleight of hand, the STC also attempted to ensure that it, not the courts, would review layoff-related cases, in direct contravention of the legislative mandate to remove jurisdiction over these matters from administrative agencies, and give courts exclusive appellate jurisdiction. Indeed, to do this, the STC had to brazenly ignore the clear legislative mandate that a teacher's only appeal is to the judiciary.

We reject this unseemly power grab by the STC, and by doing so, reject its practical effect of overturning major, historic public-policy changes made by the people's representatives in the Legislature.

II. FACTS AND PROCEDURAL HISTORY

Petitioners, who initially numbered in the hundreds, are teachers who were laid off by respondents, their public-school-district employers. Respondents faced budgetary restrictions during 2011 and 2012, and accordingly reduced their staff sizes using the layoff method mandated by two sections of the Revised School Code[12] enacted as part of the 2011 Amendments: MCL 380.1248[13] and MCL 380.1249.[14] No longer having the protection of LIFO in labor agreements (and therefore losing MERC as an option to adjudicate their objections), petitioners' lawyers cited our Court's 1975 decision in *Freiberg* and initiated these suits before the

[12] MCL 380.1 *et seq*.

[13] As added by 2011 PA 102.

[14] As amended by 2011 PA 102.

Michigan Department of Education in 2012. In each case, the ALJs—seasoned and experienced lawyers—rejected petitioners' claims and granted respondents summary disposition. Specifically, each ALJ correctly ruled that the 2011 Amendments to the TTA and the Revised School Code made very clear that the STC lacked jurisdiction, and that those claims could only be heard in the court system.

The petitioners in each case appealed the ALJs' decisions to the STC, and its political appointees (again, from a prior administration) rejected the ALJs' holdings in a series of orders entered in late 2012 and early 2013. The STC asserted that Michigan caselaw, which predated the 2011 Amendments, gave it jurisdiction over layoff claims that asserted "subterfuge" and that the 2011 Amendments did not revoke this jurisdiction. One commission member dissented and agreed with the conclusion of the ALJs that the STC did not possess jurisdiction over layoff cases.[15] Each STC order is interlocutory—it remands the case to the ALJ that first heard it.

Respondents appealed the STC orders in our Court in early 2013, and ask us to reverse the orders because the STC does not have jurisdiction over layoff-related cases. Petitioners assert that the STC has jurisdiction over layoff-related cases, and that our Court does not have jurisdiction to review these interlocutory orders of the STC. We consolidated petitioners' and respondents' appeals in April and May 2013 for administrative reasons.[16]

---

[15] Again, the other commissioners, who authored the majority's incorrect analysis, are no longer members of the STC.

[16] *Aubert v Reed City Area Pub Sch Bd of Ed*, unpublished order of the Court of Appeals, entered April 23, 2013 (Docket No. 314158); *Wright v*

These appeals therefore present two issues, both of which involve jurisdiction: (1) Does our Court have jurisdiction to review interlocutory orders of the STC and (2) did the STC wrongly assert that it has jurisdiction over layoff-related matters? The answer to both questions is clearly yes.

III. ANALYSIS

A. JURISDICTION OVER INTERLOCUTORY STC ORDERS[17]

MCL 24.301, which, as part of the state Administrative Procedures Act, governs the judicial review of agency adjudications, states:

> When a person has exhausted all administrative remedies available within an agency, and is aggrieved by a final decision or order in a contested case, whether such decision or order is affirmative or negative in form, the decision or order is subject to direct review by the courts as provided by law. Exhaustion of administrative remedies does not require the filing of a motion or application for rehearing or reconsideration unless the agency rules require the filing before judicial review is sought. A preliminary, procedural or intermediate agency action or ruling is not immediately reviewable, except that the court may grant leave for review of such action if review of the agency's final decision or order would not provide an adequate remedy.

Accordingly, a Michigan court cannot review an interlocutory judgment of an administrative agency unless the agency's "final decision or order" will not "provide an adequate remedy." This exception to MCL

Flint Community Sch Bd of Ed, unpublished order of the Court of Appeals, entered May 22, 2013 (Docket No. 314696).

[17] The question of whether a court has subject-matter jurisdiction is reviewed de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 278; 831 NW2d 204 (2013).

24.301's general prohibition on court review of interlocutory orders of administrative agencies is narrow.[18] But in rare circumstances, our Court has taken jurisdiction over appeals from interlocutory administrative orders if the appeal possesses the following two qualities.[19] First, a party's claim must rest entirely on jurisdictional grounds—i.e., it must challenge the right of the administrative agency to hear the case at all.[20] Second, our Court's review of the party's case must not undermine the policies behind the rule requiring exhaustion of administrative remedies.[21]

---

[18] For examples of the generally strict application of this general prohibition, see *74th Judicial Dist Judges v Bay Co*, 385 Mich 710, 727-728; 190 NW2d 219 (1971), and *Bennett v Royal Oak Sch Dist*, 10 Mich App 265, 268; 159 NW2d 245 (1968) ("The fact that administrative action may be erroneous does not create any exception to the rule that the statutory administrative procedures must be exhausted before judicial relief is sought.").

[19] See *Turner v Lansing Twp*, 108 Mich App 103, 109; 310 NW2d 287 (1981) (" 'Exhaustion of administrative remedies is not an inflexible condition precedent to judicial consideration, however, and will not be required if review of the agency's final decision would not provide an adequate remedy . . . .' "), quoting *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977) (*IBM*).

[20] See *IBM*, 75 Mich App at 610 ("Plaintiff's suit seeks to avoid the expenses of litigation and disclosure which would be incurred by submitting to the agency's procedures for redetermination. The very harm that plaintiff seeks to avoid would inevitably occur if plaintiff were required to exhaust administrative remedies before access to judicial review."), and *Huggett v Dep't of Natural Resources*, 232 Mich App 188, 192-193; 590 NW2d 747 (1998) (reviewing an interlocutory order of an ongoing administrative proceeding when "[p]laintiffs' argument is that the Legislature exempted the proposed activity from defendant's regulation"), aff'd 464 Mich 711 (2001).

[21] See *IBM*, 75 Mich App at 610, which stated:

> Exhaustion of administrative remedies serves several policies: (1) an untimely resort to the courts may result in delay and disruption of an otherwise cohesive administrative scheme; (2) judicial review is best made upon a full factual record developed before the agency; (3) resolution of the issues may require the

Because the STC[22] clearly has no jurisdiction over teacher layoffs, its orders are void. And our exercise of jurisdiction over respondents' cases does not and will not undermine the policies behind the rule on exhaustion of administrative remedies. Hearing the cases now will make the administrative process more efficient by eliminating the need for further ALJ proceedings, and by expediting the appeal of the hypothetical ALJ holdings that would inevitably follow. No further administrative proceedings are necessary to develop the factual record on the sole issue in this case: the jurisdiction of the STC. This issue is a solely legal one—statutory interpretation—an area in which our Court has a certain expertise. And from a judicial-economy perspective, the number of appeals involved in these consolidated cases indicates that this issue will reappear in the administrative and judicial systems until our Court has issued a binding opinion on the matter.

These appeals therefore present a textbook illustration of the rare circumstance when our Court may hear an interlocutory appeal from the judgment of an administrative agency. Petitioners' assertion that we lack jurisdiction over these cases is simply wrong—it is a practiced effort to subvert legislative amendments that remove (very questionable) jurisdiction from an agency

---

accumulated technical competence of the agency or may have been entrusted by the Legislature to the agency's discretion; and (4) a successful agency settlement of the dispute may render a judicial resolution unnecessary.

See also *Huggett*, 232 Mich App at 192, and *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 52-53; 620 NW2d 546 (2000).

[22] The STC is an administrative body for purposes of MCL 24.301. See *Beebee v Haslett Pub Sch*, 40 Mich App 296, 298-299; 198 NW2d 860 (1972) (interpreting a predecessor statute).

they prefer (the STC) and transfer power to a system they find less amenable (the Michigan judiciary).

The Court of Appeals unquestionably has jurisdiction over these cases pursuant to MCL 24.301 because a "final decision or order" from the STC will not "provide [respondents] an adequate remedy"—such an order is incapable of addressing the jurisdictional issue at the heart of these appeals.

B. STC JURISDICTION

1. PRINCIPLES OF STATUTORY INTERPRETATION

Matters of statutory interpretation are reviewed de novo. *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013). When it interprets a statute, a reviewing court seeks to ascertain and implement the intent of the Legislature. *Huron Mountain Club v Marquette Co Rd Comm*, 303 Mich App 312, 323; 845 NW2d 523 (2013). The Legislature's intent is best expressed through the plain meaning of the statute's language. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). Although courts may consider legislative history to discern legislative intent, "not all legislative history is of equal value," and those types of legislative history that "do not necessarily reflect the intent of the Legislature as a body" are "significantly less useful" than those that do. *People v Gardner*, 482 Mich 41, 57-58; 753 NW2d 78 (2008) (quotation marks and citation omitted).

Though an administrative agency's interpretation of a statute is entitled to "respectful consideration" and, if persuasive, "should not be overruled without cogent reasons," the agency's interpretation is not binding and "cannot conflict with the plain meaning of the statute." *In re Complaint of Rovas Against SBC Mich*,

482 Mich 90, 108; 754 NW2d 259 (2008). Importantly, in the specific context of the TTA, the Michigan Supreme Court has "indicated its belief that the coverage of the tenure act was not determined by the administrative or judicial perception of the spirit of the act but by the language of the act itself." *LeGalley v Bronson Community Sch*, 127 Mich App 482, 486; 339 NW2d 223 (1983), citing *Street v Ferndale Bd of Ed*, 361 Mich 82, 87; 104 NW2d 748 (1960).

"Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). Statutes enacted by the Legislature on a later date take precedence over those enacted on an earlier date. *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011). "When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute." *Id*. at 27-28 (quotation marks and citation omitted).

2. THE STC HAS JURISDICTION OVER DISCHARGES, NOT LAYOFFS

The STC's "jurisdiction and administrative expertise is limited to questions traditionally arising under the [TTA]," and it does not possess jurisdiction over disputes that arise under and are governed by separate legislative acts. *Ranta v Eaton Rapids Pub Sch Bd of Ed*, 271 Mich App 261, 273; 721 NW2d 806 (2006) (quotation marks and citation omitted).[23]

[23] See also *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 630; 227 NW2d 736 (1975) ("[The STC's] jurisdiction and administrative expertise is limited to questions traditionally arising under the [TTA].").

Though the TTA specifically mentions "discharge" and "demotion"[24] as matters that fall within the remit of the STC, it says nothing about "layoffs"—nor does it provide the STC with jurisdiction over these matters.[25] Moreover, as noted, layoffs—and the method of how layoffs were conducted—were exclusively the subject of collective-bargaining agreements.[26] As such, chal-

[24] MCL 38.121 authorizes tenured teachers to "appeal to the [STC] any decision of a controlling board under this act, other than a decision governed by article IV on discharge or demotion of a teacher . . . ." "Article IV" is MCL 38.101 *et seq*., which is another part of the TTA that outlines specific rules and procedures for the "discharge" and "demotion" of tenured teachers. MCL 38.104(5)(j) provides the STC with jurisdiction over cases that involve discharge and demotion of tenured teachers, under the rules specified in MCL 38.101 *et seq*. As explained in footnote 25, the terms "discharge" and "demotion" do not encompass, and have never encompassed, "layoffs," the employment action complained of in this case.

[25] The only phrase in the TTA that could conceivably have anything to do with "layoffs" was "necessary reduction in personnel," mentioned in MCL 38.105:

> For a period of 3 years after the effective date of the termination of the teacher's services, a teacher on continuing tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which the teacher is certificated and qualified.

For all intents and purposes, it appears that the phrase "necessary reduction in personnel" in MCL 38.105 meant "layoff." See *Tomiak v Hamtramck Sch Dist*, 426 Mich 678, 688; 397 NW2d 770 (1986) (holding that a "necessary reduction in personnel" as used in MCL 38.105 is not a "discharge" or "demotion," and explicitly using the term "layoff" as a placeholder for "necessary reduction in personnel"). But again, this provision did not give the STC jurisdiction to adjudicate layoff-related disputes. And in any event, MCL 38.105 was repealed by 2011 PA 101, so it is of no relevance to these appeals.

[26] As noted in footnote 4, see House Legislative Analysis, HB 4625, 4626, 4627, and 4628, June 15, 2011, p 13 (describing in an analysis of arguments for the legislation how collectively bargained work rules removed control over layoff decisions from local school boards, because many collective-bargaining agreements followed the "so-called LIFO rule:

lenges to layoff decisions were regarded as unfair labor practices, which would be a violation of PERA adjudicated by MERC.

Nonetheless—in violation of this statutory distinction between "layoffs" and "discharges" and "demotions"—one appellate decision, *Freiberg v Big Bay de Noc Sch Dist Bd of Ed*,[27] asserted that the STC had jurisdiction over a small number of layoff-related claims. It did so under the judicially created "subterfuge" doctrine, which allowed the STC to hear claims that asserted that the stated reason for a layoff—for instance, economic hardship—was a mere pretext to terminate the teacher in bad faith.[28] Yet, dispositively, *Freiberg* is no longer binding and has been rendered void by the 2011 Amendments at issue.[29]

Last In, First Out. That is, in the event of downsizing, the most recently hired teachers are the first to be dismissed (regardless of their effectiveness), while the most veteran teachers are retained (also regardless of their effectiveness)").

[27] *Freiberg*, 61 Mich App 404. *Freiberg* involved a single teacher—not, as here, a large group of teachers—who alleged that his layoff was in effect a termination. *Id*. at 406-407.

[28] *Id*. at 413-414. By its own admission, the *Freiberg* Court could point to no specific statutory language in the TTA that justified its holding. Instead, the Court asserted that it found reasons to conclude that the STC had jurisdiction over layoff-related cases in "the general purpose of the tenure act, the statutory provision giving teachers the right to appeal any adverse decision by the local board of education," and supposedly "analogous" Michigan Supreme Court decisions that expressed "a willingness to look behind an employer's statement of economic need to be sure that the layoff was not a subterfuge." *Id*. at 412-413. *Freiberg* also mentioned MCL 38.105 and suggested that it too gave the STC jurisdiction over "subterfuge" claims. *Id*. at 412.

[29] MCR 7.215(J)(1) states that

> [a] panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule. Our Court issued *Freiberg* in 1975, and it is thus not binding on our panel.

In sum, the STC's jurisdiction is limited to issues that arise under the TTA. *Ranta*, 271 Mich App at 273. It does not possess jurisdiction over issues that do not arise under the TTA. *Id*. As of 2011, the STC's dubious and rarely exercised jurisdiction over layoff-related claims was based on a single appellate case—which is now nonbinding and void under the 2011 Amendments—not any plain statutory language contained in the TTA.

3. THE 2011 AMENDMENTS

During the economic crisis that befell Michigan in the last decade, Michigan schools had new, significant budgetary constraints and faced declining enrollments, and were accordingly forced to lay off teachers. In 2011, the Michigan Legislature enacted a package of tie-barred amendments to the TTA, the Revised School Code, and PERA that clearly outlined a teacher's rights and a school district's responsibilities in the event that a layoff became necessary. 2011 PAs 100, 101, 102, and 103 work in tandem to (1) bar teacher layoffs from being a subject of collective-bargaining agreements, thus preventing teachers from challenging layoff decisions before MERC as an unfair labor practice under PERA, (2) require that layoff decisions be based on teacher effectiveness, not seniority,[30] and (3) make clear that only the courts—not any administrative agency, including the STC—have jurisdiction over layoff-related claims. We address each in turn.

a. PERA AND COLLECTIVE BARGAINING: 2011 PA 103

Among other things, 2011 PA 103 amended part of PERA to read:

---

[30] Under 2011 PA 102, seniority is relevant, but only in a tiebreaker context, which we discuss in detail later in the opinion.

> (3) Collective bargaining between a public school employer and a bargaining representative of its employees shall not include any of the following subjects:
>
> * * *
>
> (k) Decisions about the development, content, standards, procedures, adoption, and implementation of the public school employer's policies regarding personnel decisions when conducting a reduction in force or any other personnel determination resulting in the elimination of a position or a recall from a reduction in force or any other personnel determination resulting in the elimination of a position or in hiring after a reduction in force or any other personnel determination resulting in the elimination of a position, *as provided under section 1248 of the revised school code, 1976 PA 451, MCL 380.1248, any decision made by the public school employer pursuant to those policies, or the impact of those decisions on an individual employee or the bargaining unit*. [MCL 423.215 (emphasis added).][31]

As a result, any layoff decision made under MCL 380.1248 and MCL 380.1249 cannot be the subject of a collective-bargaining agreement. The removal of layoffs from the collective-bargaining process by 2011 PA 103 thus also bars MERC from adjudicating layoff disputes as an unfair labor practice under PERA. 2011 PA 103 clearly closes these adjudicative paths by removing layoff-related matters from the collective-bargaining process, and emphasizing that the Revised School Code—not PERA or the TTA—governs teacher layoffs.

Instead, an aggrieved teacher laid off pursuant to MCL 380.1248 and MCL 380.1249 must look to those

---

[31] MCL 423.215(3)(k) was subsequently modified by 2011 PA 260, which essentially replaced the phrase "reduction in force" with "staffing or program reduction" throughout. Needless to say, this modification has no bearing on this case.

specific sections of the Revised School Code for the proper forum in which to bring a claim. In addition to specifying that the Michigan judiciary is the only forum in which a laid-off teacher may seek redress, MCL 380.1248 and MCL 380.1249 also detail a specific method by which local school districts must select teachers to be laid off.

b. MERIT, NOT TENURE: 2011 PA 102 AND MCL 380.1248 AND 380.1249[32]

2011 PA 102 amended the Revised School Code, which is a separate and distinct body of law from the TTA. Among other things, it governs "the regulation of school teachers and certain other school employees"[33] and emphasizes that *local authorities—not state officials*—are primarily responsible for the governance of school districts.[34] As noted, and in keeping with this spirit of local control, the STC has no jurisdiction over matters that arise under the Revised School Code.

2011 PA 102 is part of this broader legal framework and enacted a comprehensive revision of the Revised School Code's treatment of teacher layoffs through the

[32] For further discussion of MCL 380.1248 and 380.1249, see *Garden City Ed Ass'n v Garden City Sch Dist*, 975 F Supp 2d 780 (ED Mich, 2013). *Garden City* involved a group of teachers who claimed that MCL 380.1248 and MCL 380.1249 violated their right to due process because their tenured positions supposedly were property rights worthy of protection. *Id*. at 789-790. The court rejected their federal constitutional claim. *Id*. at 790. It also held that the teacher plaintiffs failed to state a claim under § 1248, as the "sole and exclusive remedy" in the statute was reinstatement, and that "economic damages . . . are expressly precluded" by the statute. *Id*. at 788.

[33] 1976 PA 451, title, as amended by 1995 PA 289.

[34] See MCL 380.11a(3) (stating that "[a] general powers school district" is permitted, except as provided by law, to "exercise a power incidental or appropriate to the performance of a function related to operation of [a] school district").

addition of two new sections, MCL 380.1248 and MCL 380.1249. Section 1249 requires all Michigan school districts and intermediate school districts and the boards of directors of public school academies to adopt a "performance evaluation system" that assesses teacher effectiveness and performance and provides a detailed set of factors that any school district's performance evaluation system must include. Specifically, § 1249 requires that any performance evaluation system must rate its teachers in four classes, on the basis of their performance as a teacher: (1) "highly effective"; (2) "effective"; (3) "minimally effective"; or (4) "ineffective." MCL 380.1249(1)(c).

Section 1248 then mandates that all "policies regarding personnel decisions when conducting a *staffing or program reduction*"—i.e., *layoffs*—must be conducted on (1) the basis of the performance evaluation system the school district developed in compliance with § 1249; and (2) other specific factors listed in § 1248. See MCL 380.1248(1)(b)(*i*) through (*iii*) (emphasis added). "[L]ength of service or tenure status" cannot be a factor in making layoff decisions except in a tiebreaker context—i.e., when "all other factors distinguishing [two] employees from each other are equal, then length of service or tenure status may be considered as a tiebreaker." MCL 380.1248(1)(c).

In other words, if layoffs become necessary, § 1248 requires school districts to base their decision of which teachers to lay off on the effectiveness of each teacher. So, after conducting a performance evaluation using the criteria outlined in § 1249, a school district must rank its teachers in order, based on their success (or lack thereof) in the performance evaluation. The teachers who received the lowest performance ranking ("ineffective") will be laid off before those who received higher performance rankings. The statutory mandate

anticipates that talented and more effective teachers will be retained, while mediocre and ineffective teachers will be laid off.

If a teacher challenges his employer's decision to lay him off, § 1248 provides him with a "sole and exclusive" remedy:

> If a teacher brings an action against a school district or intermediate school district based on this section, the teacher's *sole and exclusive remedy shall be* an order of reinstatement commencing 30 days after a *decision by a court of competent jurisdiction*. The remedy in an action brought by a teacher based on this section shall not include lost wages, lost benefits, or any other economic damages. [MCL 380.1248(3) (emphasis added).]

The use of the terms "sole and exclusive remedy" and "court" makes it clear beyond peradventure that administrative agencies, be it MERC or the STC, no longer have any role in reviewing layoff decisions made by school boards.

c. THE STC DOES NOT HAVE JURISDICTION OVER LAYOFFS: 2011 PA 100 AND 101

As noted, the STC only possesses jurisdiction over matters that arise under the TTA. *Ranta*, 271 Mich App at 273. It does not have jurisdiction over matters that arise under any other statute. *Id*. Accordingly, if a subject matter is not contained in the TTA, the STC does not have jurisdiction over that subject matter. Recall that even before the 2011 Amendments, the STC rarely exercised jurisdiction over cases involving layoffs, and had little statutory basis to do so. Whatever jurisdictional authority it had to address layoff-related claims came from the "subterfuge" doctrine, mentioned nowhere in the TTA, and advanced by a single appellate decision.

2011 PA 100 made it clear that if the STC ever had jurisdiction over layoffs, it no longer has jurisdiction over layoff-related claims. It is not possible to equate the "discharge" action mentioned in MCL 38.101 with a "layoff," as the two terms are separate and distinct. See *Tomiak*, 426 Mich at 688. And to dispel any lingering suggestion that the word "demote" could include "layoffs," 2011 PA 100 revised the TTA's definition of "demote" to read as follows:

> The word "demote" means to suspend without pay for 15 or more consecutive days or reduce compensation for a particular school year by more than an amount equivalent to 30 days' compensation or to transfer to a position carrying a lower salary. However, demote does not include discontinuance of salary pursuant to section 3 of article IV [MCL 38.103], the discontinuance or reduction of performance-based compensation pursuant to section 1250 of the revised school code, . . . MCL 380.1250, *or a reduction in personnel, including, but not limited to, a reduction in workweeks or workdays*. [MCL 38.74 (emphasis added).]

Thus, by definition, a school that lays off a teacher does not "demote" that teacher in the context of the TTA. The STC is therefore barred from using MCL 38.74 as a jurisdictional hook to hear layoff-related cases.

With MCL 38.74 accordingly modified, 2011 PA 101 repealed MCL 38.105, which governed "reductions in personnel"—the last remaining statutory section of the TTA that could conceivably (but wrongly) be seen as having anything to do with teacher layoffs. The TTA—which, again, never contained the word "layoff"—is now devoid of any reference to "reductions in personnel," meaning that it is beyond doubt that the STC lacks jurisdiction over cases that involve such issues.

The 2011 Amendments also revoked any jurisdictional basis that *Freiberg* provided the STC in so-called "subterfuge" cases. As noted, *Freiberg* based its dubious grant of jurisdiction to the STC on the following: (1) "the general purpose of the tenure act"; (2) MCL 38.121; (3) supposedly "analogous" decisions of the Michigan Supreme Court in cases involving layoffs of private-sector employees; and (4) MCL 38.105. See *Freiberg*, 61 Mich App at 412-414.

Collectively, the 2011 Amendments invalidate each of these alleged bases for STC jurisdiction over layoff-related cases that involve "subterfuge." The "general purpose" of the TTA no longer includes teacher layoffs, which are now governed by the Revised School Code.[35] MCL 38.121 is thus irrelevant to these cases, as it only allows tenured teachers to seek redress on issues governed by the TTA. The TTA does not govern the layoff of teachers, nor, with the repeal of MCL 38.105, does it even mention any employment status that could conceivably be interpreted as having anything to do with layoffs. And Michigan caselaw that interprets other, unrelated statutes is not binding on or apposite to these cases, because teacher layoffs are regulated by their own statutory scheme.[36]

Accordingly, the statutory framework that *Freiberg* purported to interpret has been significantly modified, rendering that decision moot and void. See *Detroit Trust Co v Allinger*, 271 Mich 600, 610; 261 NW 90 (1935) ("The repeal of a statute divests all inchoate rights which have arisen under the statute which it

---

[35] See MCL 380.1248 and MCL 380.1249. See also *LeGalley*, 127 Mich App at 486 ("[T]he coverage of the tenure act was not determined by the administrative or judicial perception of the spirit of the act but by the language of the act itself.").

[36] See MCL 380.1248 and MCL 380.1249.

destroys.").[37] If a teacher plaintiff claims that a school-district defendant violated §§ 1248 and 1249, he must bring suit in a "court of competent jurisdiction," i.e., a court in the Michigan judiciary, not the STC, and seek the "sole and exclusive remedy" under § 1248: reinstatement. MCL 380.1248(3).

The effect of 2011 PA 100 and 101, then, is to make clear that the STC does not have jurisdiction over layoff-related claims, including those alleged to be a "subterfuge," because layoffs of teachers are explicitly governed by §§ 1248 and 1249 of the Revised School Code—not the TTA. Accordingly, a laid-off teacher must seek redress for violations of MCL 380.1248 and MCL 380.1249 with the judiciary, not administrative agencies.

4. APPLICATION

Here, petitioners argue that the STC has jurisdiction over layoff-related claims. Their reasoning is as follows: the STC has exercised jurisdiction over a small number of layoff cases under the "subterfuge" doctrine created by *Freiberg*. Thus, whenever a teacher alleges

[37] It is important to note that legislative modification of an existing statute does not always give our Court a free hand to disregard older cases that interpreted the older version of the statute. For instance, if the Legislature amended a statute that the Michigan Supreme Court had previously interpreted, vertical stare decisis would require our Court to follow the Michigan Supreme Court's precedent—even if the statutory amendments had rendered that precedent irrelevant. See *People v Mitchell*, 428 Mich 364, 369-370; 408 NW2d 798 (1987), and *In re Nestorovski Estate*, 283 Mich App 177, 205-208; 769 NW2d 720 (2009) (SAAD, C.J., dissenting).

Here, however, the Michigan precedent interpreting the old version of the statute at issue (*Freiberg*) was issued by our Court—not the Michigan Supreme Court. Vertical stare decisis is thus not implicated. Accordingly, we may disregard *Freiberg*'s holding because (1) the statutory framework that it purported to interpret has been completely altered and (2) it is no longer binding on our panel.

that his layoff was a bad-faith attempt to terminate him without an administrative hearing, the STC can claim jurisdiction over the suit. The statutory basis for the STC's jurisdiction over these sorts of actions, as explained by *Freiberg*, is MCL 38.121, which permits teachers to "appeal to the [STC] any decision of a controlling board under this act, other than a decision governed by article IV[38] on the discharge or demotion of a teacher . . . ." The 2011 Amendments did not repeal MCL 38.121, so the STC thus has jurisdiction over any layoff-related claim that asserts "subterfuge."

This argument is without merit because it fails to read MCL 38.121 in its post-2011 Amendments context. Again, MCL 38.121 states that tenured teachers may "appeal to the [STC] any decision of a controlling board *under this act* . . . ." (Emphasis added.) As noted, layoffs are not (and never were) "under" the TTA—the 2011 Amendments systematically purged the act of references to any terms that could conceivably have had anything to do with layoffs, and created two new sections of the Revised School Code (a statute wholly separate from the TTA) to govern layoff decisions. See MCL 380.1248 and 380.1249. MCL 380.1248 explicitly specifies a *single remedy* for laid-off teachers who contest their layoffs:

> If a teacher brings an action against a school district or intermediate school district based on this section, *the teacher's sole and exclusive remedy* shall be an order of reinstatement commencing 30 days after a decision *by a court of competent jurisdiction*. The remedy in an action brought by a teacher based on this section shall not include lost wages, lost benefits, or any other economic damages. [MCL 380.1248(3) (emphasis added).]

The STC cannot be such a "court of competent jurisdiction" because it only possesses jurisdiction over

[38] MCL 38.101 *et seq*.

matters that arise under the TTA, which does not govern teacher layoffs—and, more importantly, most assuredly is not a court. *Ranta*, 271 Mich App at 273. Thus, the continued existence of MCL 38.121 does nothing to advance petitioners' argument. It states a truism—the STC has jurisdiction over decisions made by a "controlling board" on subjects that are governed by the TTA—that is inconsequential to this case.

As we pointed out earlier, petitioners' invocation of *Freiberg* is equally irrelevant, because *Freiberg*'s interpretation of the TTA rested on statutory provisions that have since been repealed or modified. As noted, the 2011 Amendments repealed MCL 38.105, the slim statutory authority on which *Freiberg* based its holding. The "general purpose of the tenure act" that *Freiberg* cited has been radically altered because that act now makes clear that it does not govern teacher layoffs. MCL 38.121 is of no relevance to our case, as explained above, and *Freiberg*'s reference to supposedly "analogous" Michigan Supreme Court cases is of equal irrelevance, because teacher layoffs are now governed by their own statutory framework, not unrelated Michigan statutes or common law.

In sum, the 2011 Amendments have rendered *Freiberg*'s holding void. There is no better illustration of the Michigan Supreme Court's holding in *Detroit Trust*, 271 Mich at 610: "The repeal of a statute divests all inchoate rights which have arisen under the statute which it destroys."[39]

The STC thus improperly exercised jurisdiction over petitioners' suits. In so doing, it blatantly ignored the

[39] Despite petitioners' claims to the contrary, the Legislature's clarification of the lack of STC jurisdiction over layoff-related cases will have little effect on the substantive rights of tenured teachers. For example, if a school district uses MCL 380.1248 to terminate a teacher on the basis of his race, ethnicity, or sex, he may seek redress in state court for violation of state civil-rights laws.

2011 Amendments and contravened the will of the Legislature. The STC is not above the law and may not change "the laws enacted by the Legislature"[40] to suit its policy preferences. Its orders, based on an illegitimate assumption of jurisdictional authority, cannot stand.

IV. CONCLUSION

For the first time in Michigan's history, the Legislature decided to exercise its constitutional authority[41] in the field of teacher layoffs. The Legislature made merit, not seniority, the controlling factor in layoff decision-making to retain the best teachers in the classroom. It did so by removing teacher layoffs as a subject of collective bargaining, and this in turn removed unions and administrative agencies from the dispute-resolution process in this specific realm of public-sector labor law. To underscore that school boards, and not unions or administrative agencies, would make these decisions, the Legislature gave school boards the power to make layoff decisions, and gave the courts the sole and exclusive power to review the school boards' decisions.

Accordingly, we reject the STC's attempt to undo this landmark legislation and hold that (1) our Court has jurisdiction over respondents' appeals of the STC's interlocutory orders and (2) the STC does not have jurisdiction over claims related to the layoff of tenured teachers. We therefore reverse the orders of the STC and dismiss petitioners' suits.

DONOFRIO, P.J., and METER, J., concurred with SAAD, J.

---

[40] *Complaint of Rovas*, 482 Mich at 98.

[41] Again, see Const 1963, art 8, § 2 ("The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law.").

ANTON, SOWERBY & ASSOCIATES, INC v MR. C'S LAKE ORION, LLC

Docket Nos. 317935 and 321827. Submitted March 3, 2015, at Detroit. Decided March 12, 2015, at 9:05 a.m.

Plaintiff Anton, Sowerby & Associates, Inc., a commercial real estate brokerage firm, brought an action in the Oakland Circuit Court against Mr. C's Lake Orion, LLC (Mr. C's), and Flagstar Bank, FSB, to foreclose its broker's lien on property purchased by Mr. C's with a mortgage from Flagstar Bank. MCL 570.584(1) of the Commercial Real Estate Broker's Lien Act (CREBLA) protects a commercial real estate broker's right to receive its commission for the sale of property if (1) there is a written agreement that entitles the broker to the commission, and (2) a lien for the commission is recorded before the property is actually conveyed. Plaintiff had entered into an exclusive listing agreement with GAM Properties, LLC (GAM), to sell GAM's property. Plaintiff found a buyer, Mr. C's, and GAM and Mr. C's surreptitiously negotiated the sale of the property. GAM defaulted on its mortgage before the sale, and a receiver was appointed to complete the sale. After the sale, plaintiff filed its lien. Mr. C's and the receiver set up an escrow account under the CREBLA with an amount of money sufficient to cover plaintiff's commission based on the property's selling price and the percentage of commission plaintiff was entitled to receive under the listing agreement. Plaintiff, however, claimed that it was unaware of the escrow account, refused to release its lien on Mr. C's property, and brought this action. Mr. C's filed a counterclaim to quiet title, alleging that plaintiff's refusal to release the lien constituted slander of title. Mr. C's moved for summary disposition of plaintiff's foreclosure claim, asserting that setting up the escrow account had extinguished the lien. Mr. C's also sought judgment on its counterclaim and an award of special damages. The court, Martha D. Anderson, J., granted Mr. C's motion for summary disposition and agreed with Mr. C's that plaintiff's refusal to release the lien constituted slander of title. The court awarded Mr. C's the full amount of its litigation costs as special damages, including costs for which Mr. C's had indemnified Flagstar Bank. The court further ruled that plaintiff could not recover its commission in the

present case. Finally, the court denied plaintiff's motion to amend its complaint to add GAM's receiver as a party. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court correctly concluded that plaintiff was required to release the lien it held on Mr. C's property and that plaintiff could not recover its commission through the present action. According to MCL 570.585(3), once a proper escrow account is established by the parties to the transaction, the lien is extinguished and the lienholder is obligated to release its lien on the property. The parties to the sale of the property, Mr. C's and the receiver for the original seller, escrowed an amount of money sufficient to cover the amount of plaintiff's lien, and this extinguished the lien and triggered plaintiff's obligation to release the lien. The parties to the sale were not required to negotiate with plaintiff, who was not a party to the sale, the amount held in escrow. Rather, plaintiff's claim to its commission arose from a separate contractual relationship between plaintiff and the seller of the property. To recover its commission, plaintiff would need to file an action against the party named in the initial exclusive listing agreement.

2. The trial court properly granted Mr. C's motion for summary disposition because plaintiff's refusal to release the lien on Mr. C's property resulted in a cloud on the title and substantiated the elements of slander of title. Slander of title, under either the common law or MCL 565.108, requires a claimant to show falsity, malice, and special damages. Mr. C's succeeded in showing that plaintiff's lien was false—the basis for the lien was extinguished with the creation of the escrow account. Plaintiff's refusal to comply with the trial court's orders and release the invalid lien demonstrated malice. Special damages, including litigation costs and attorney fees, may be awarded under MCL 565.108 in an action for slander of title. Accordingly, Mr. C's sustained special damages as a result of plaintiff's conduct.

3. The trial court did not abuse its discretion when it refused to permit plaintiff to amend its complaint to add the receiver as a party defendant. MCR 2.118(A)(2) provides that a party may amend a pleading only by leave of the court or by the written consent of the adverse party and that leave shall be freely given when justice so requires. Under MCR 2.118(A)(4), amendments must be submitted in writing. The court may deny a motion to amend because of (1) undue delay, (2) bad faith or a dilatory motive by the moving party, (3) repeated failures to cure deficiencies in previously allowed amendments, (4) undue prejudice to the opposing party, or (5) futility. Plaintiff cursorily claimed that the

amount of money held in escrow had not been properly calculated, but plaintiff did not articulate its claim against the receiver with adequate specificity. Moreover, plaintiff failed to submit the proposed amendment in writing.

4. The trial court properly awarded Mr. C's special damages for attorney fees and costs expended both before and after the court's order granting summary disposition to Mr. C's and removing the lien from Mr. C's property. MCL 565.108 provides that a person who filed a notice of claim for the sole purpose of slandering title to land must pay the injured party all the costs of that action, including attorney fees as the court allows. The statute does not limit the award of attorney fees to the expenses incurred before the cloud on the title was removed. The statute also contemplates the award of attorney fees for the expenses incurred in litigating a slander-of-title claim. Although Mr. C's failed to indicate whether its claim for damages was based on the common law or statutory law, it clearly requested costs and attorney fees. Therefore, plaintiff was on notice that Mr. C's requested special damages even though Mr. C's did not directly cite the applicable statute. The trial court also properly awarded Mr. C's the costs for which it had indemnified Flagstar.

Affirmed.

1. PROPERTY — COMMERCIAL REAL ESTATE — COMMERCIAL REAL ESTATE BROKER'S LIEN ACT — COLLECTING COMMISSIONS.

A commercial real estate broker is entitled to collect its commission under the Commercial Real Estate Broker's Lien Act, MCL 570.581 *et seq*., when it sells property and (1) the broker has a written agreement that entitles the broker to the commission and (2) the broker records a lien on the property before the property is actually conveyed to the buyer; if a lien is filed against property and the existence of the lien would prevent the sale of that property, the parties to the sale must establish an escrow account funded with an amount of money sufficient to pay the broker's commission; when a properly funded escrow account is established, the broker's lien is extinguished, and the broker must record a release of the lien.

2. PROPERTY — SLANDER OF TITLE.

Both the common law and MCL 565.108, the slander-of-title statute, prohibit an individual from filing a lien for the purpose of clouding title to property; a plaintiff must show falsity, malice, and special damages to establish slander of title; special damages are not damages that are implied by law or that presumably

accrue when a party is injured; special damages are those damages that actually occur, and they may be recovered if they are specifically pleaded and proved; an offending party cannot be liable for slander of title when the party's conduct is based on a rational interpretation of law, even if that interpretation is incorrect.

3. PLEADING — AMENDMENT OF COMPLAINT.

Under MCR 2.118(A)(2), a party may amend a pleading only by leave of the court or written consent of the adverse party, and leave should be freely given when justice requires it; a proposed amendment must be submitted in writing; a party's motion to amend may be denied when (1) an amendment would result in undue delay, (2) the party's motive for an amendment was in bad faith or for dilatory purposes, (3) the party repeatedly failed to cure deficiencies in amendments previously allowed, (4) an amendment would cause undue prejudice to the opposing party, or (5) an amendment would be futile.

Schienke, Staugaard & Hearsch (by *Francis J. Hearsch, Jr.*) for Anton, Sowerby & Associates, Inc.

The Zalewski Law Firm (by *Paul J. Zalewski*) for Mr. C's Lake Orion, LLC.

Richard E. Segal & Associates, PC (by *Richard E. Segal* and *Todd W. Grant*), for Flagstar Bank, FSB.

Before: GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM. The Commercial Real Estate Broker's Lien Act, MCL 570.581 *et seq.*, was enacted to protect the right of commercial real estate brokers to collect their contractually negotiated commissions. The plaintiff commercial real estate broker complied with the act by placing a lien against property over which it had entered an exclusive listing agreement, which had been sold surreptitiously. Plaintiff subsequently violated the act's clear directive to release its lien once the

buyer and seller had funded an escrow account with an amount sufficient to cover the broker's claim. Plaintiff's continued refusal to release the lien created an invalid cloud on the buyer's title.

Plaintiff sought relief under the act but failed to name as a party defendant the seller who agreed to the listing agreement. As a result, plaintiff's challenges to the commission amount (and thereby the escrow account) could not be resolved by the circuit court. And plaintiff never clearly stated any objection that could be raised against the seller. Accordingly, the circuit court's summary dismissal of plaintiff's claims under the act and the denial of its motion to amend the complaint are supported by the record. The circuit court also properly granted summary disposition in the buyer's favor on its slander-of-title action. Moreover, plaintiff's legal challenges to the special damages awarded to the buyer lack merit. We therefore affirm.

I. BACKGROUND

Plaintiff, Anton, Sowerby & Associates, Inc., is a licensed commercial real estate brokerage firm. Plaintiff entered a listing agreement with nonparty GAM Properties, L.L.C., providing plaintiff the exclusive rights to "sell, lease or exchange" the property at 720 S. Lapeer Road in Lake Orion. The contract promised plaintiff 5% to 6% of the ultimate sale or lease price depending on certain factors. Plaintiff located a potential buyer for the property—defendant Mr. C's Lake Orion, LLC—and introduced Mr. C's agent to GAM. Plaintiff alleges that Mr. C's and GAM thereafter engaged in secret negotiations in an attempt to avoid paying plaintiff's commission.

During this period of secret negotiations, GAM defaulted on its mortgage and its lender secured the

appointment of a receiver to continue the sale of the subject property. Mr. C's ultimately agreed to lease the property for $5,000 monthly with an option to buy. Mr. C's exercised its purchase option almost immediately and promised to pay $1.2 million for the property with a mortgage loan through defendant Flagstar Bank, and the receiver offered to settle plaintiff's commission dispute. A resolution was not reached, however, and plaintiff recorded a broker's lien of $60,000 (5% of the purchase price) against the property pursuant to the Michigan Commercial Real Estate Broker's Lien Act (CREBLA), MCL 570.581 *et seq*. Specifically, MCL 570.584(1) permits a commercial real estate broker to record a lien against property if the broker is entitled to a commission under a written agreement and the claim of lien is recorded before the property is actually conveyed. The receiver and Mr. C's proceeded with the sale, created an escrow account funded with $75,000 to satisfy plaintiff's claim, and requested that plaintiff release its lien in accordance with MCL 570.585. Subsection (3) of that statute mandates a broker's release of a lien if the parties to a sale escrow "an amount sufficient to satisfy" the lien. Plaintiff contends that neither Mr. C's nor the receiver informed it of the escrow account until after it filed suit. Accordingly, plaintiff refused to release its lien.

In its complaint, plaintiff asserted that it had "requested documentation concerning the purchase price for the Property paid by Mr. C's . . . . That information has not been forthcoming. Therefore, the exact amount of the Lien will abide discovery of that information in this litigation." Plaintiff contended that it wanted to foreclose upon its lien. Notably, plaintiff filed suit against Mr. C's and Flagstar, but not GAM or its

receiver. Mr. C's, in turn, filed a counterclaim to quiet title in the property and accusing plaintiff of slandering its title.

Mr. C's subsequently sought summary dismissal of plaintiff's action and judgment in its favor on the counterclaim, and requested special damages. Mr. C's contended that the plain language of the CREBLA required plaintiff to release its lien upon the creation of the escrow account and that no exception existed. Plaintiff retorted that its claim actually sounded in breach of contract regarding the underlying exclusive listing agreement and therefore the CREBLA did not control its duty to release the lien. In response, Mr. C's emphasized that plaintiff had not joined the proper parties for a breach-of-contract action; plaintiff's contract was with GAM alone and yet plaintiff did not name that entity as a defendant. Plaintiff pointed to GAM's financial difficulties and the receivership to support its decision to not include GAM as a party defendant.

Ultimately, based on the plain language of the CREBLA, the circuit court summarily extinguished plaintiff's lien over the property. See MCL 570.585(3). The court ordered that Mr. C's funds remain in escrow as the account was required under the statute to protect the commercial real estate broker. However, the court ruled that plaintiff had to file suit against GAM in order to collect the escrowed funds. The court thereafter rejected plaintiff's reconsideration motions and requests to amend its complaint to add claims against GAM's receiver.

II. SUMMARY DISPOSITION IN RELATION TO THE ESCROW ACCOUNT

Plaintiff contends that the circuit court erred in concluding that the escrow agreement between Mr. C's

and the receiver discharged plaintiff's lien. Accordingly, plaintiff continues, the court erred in summarily dismissing plaintiff's claim for recovery. We review de novo a lower court's summary disposition ruling. *Rambin v Allstate Ins Co*, 495 Mich 316, 325; 852 NW2d 34 (2014). The propriety of the circuit court's ruling centers on its interpretation and application of the CREBLA, a question of law that we review de novo. *Tomecek v Bavas*, 482 Mich 484, 490; 759 NW2d 178 (2008). When interpreting a statute, a court's objective is to discern and give effect to the Legislature's intent based on the statute's plain and unambiguous language. *Wurtz v Beecher Metro Dist*, 495 Mich 242, 250; 848 NW2d 121 (2014).

Historically, real estate brokers had no guarantee of payment of their commissions. Brokers attempting to secure payment by encumbering the property were informed "that equities of those who furnished the money [for the purchase] are far superior to those of the broker." *Biddle v Biddle*, 202 Mich 160, 166; 168 NW 92 (1918). This was true until the enactment of the CREBLA by 2010 PA 201.

A commercial real estate broker licensed in accordance with Article 25 of the Occupational Code (Real Estate Brokers and Salespersons Act), MCL 339.2501 *et seq*., may file a lien over property in accordance with the CREBLA. MCL 570.583; MCL 570.584. A commercial real estate broker's lien attaches to real estate if the broker has a written commission agreement under which the broker is entitled to a commission, and the broker records its lien before the property is actually conveyed. MCL 570.584(1). MCL 570.585 addresses the creation of a lien escrow account and the release of the broker's lien:

> (1) If a claim of lien recorded under [MCL 570.584] would otherwise prevent the closing of a transaction involving commercial real estate, the parties to the transaction shall, subject to subsection (2),[1] establish an escrow account from the proceeds of the transaction in an amount sufficient to satisfy the lien. A buyer or seller shall not refuse to close the transaction because of the requirement of establishing an escrow account under this subsection. The money shall remain in the escrow account until the rights to the money have been determined by a written agreement of the parties, a judgment or order by a court of competent jurisdiction, or any other method agreeable to the parties.
>
> * * *
>
> (3) If an amount sufficient to satisfy a commercial real estate broker's lien is escrowed under subsection (1), the lien is extinguished and the real estate broker shall provide a release of lien that meets the requirements of . . . MCL 565.201 to 565.203 . . . [.]

Plaintiff argues that Mr. C's and Flagstar were not entitled to summary disposition because Mr. C's failed to comply with MCL 570.585(1), requiring "the parties to the transaction" to establish an escrow account. Plaintiff maintains that it was a party to the transaction, but that it did not agree to the escrow account. This interpretation is not supported by the statutory language.

MCL 570.582 provides definitions pertinent to the CREBLA. It defines "buyer," "claim of lien," "commercial real estate," "commercial real estate lien," "record," and "seller," but fails to define "parties," "transaction,"

---

[1] None of the circumstances described in Subsection (2), MCL 570.585(2), exists in this case.

or the phrase "parties to the transaction." The meanings of these terms are clear when read in the context of MCL 570.585.

MCL 570.585(1) provides that if a recorded claim of lien would prevent "the closing of a transaction involving commercial real estate, the parties to the transaction shall . . . establish an escrow account from the proceeds of the transaction in an amount sufficient to satisfy the lien." The CREBLA allocates rights and responsibilities to the parties in a real estate transaction. The licensed commercial real estate broker is given the right to record a lien, MCL 570.583 and MCL 570.584, and the right to enforce the lien, MCL 570.586. MCL 570.585, on the other hand, addresses how the "parties to the transaction" shall address the lien, and allows the real estate transaction to close despite the lien's existence.

Although plaintiff contends that the real estate broker is a party to the sales transaction, a real estate broker's right to a commission arises from a separate contractual agreement between the broker and the seller. The parties to the sale are the buyer and the seller. Moreover, MCL 570.585(1) provides that the buyer or seller may not refuse to close the transaction because of the escrow requirement. If the Legislature had intended to include the commercial real estate broker as a party to the transaction, it would have further provided that the broker could not unnecessarily impose additional conditions on the lien to prevent the sale from occurring. Here, the parties to the real estate sales transaction were the receiver and Mr. C's. Plaintiff, as GAM's commercial real estate broker, was not a party to the sale. Accordingly, the receiver and Mr. C's were not required to confer with plaintiff before creating the escrow account.

That the broker's presence is not required to negotiate the escrow amount is further supported by MCL 570.584(9), which addresses the contents of the broker's lien claim. The broker is directed to identify the "amount for which the lien is claimed." MCL 570.584(9)(c). This information would then be available to the buyer and the seller in the real estate transaction when funding the escrow account with "an amount sufficient to satisfy the lien" under MCL 570.585(1). The lien documents thereby protect the interests of the broker despite that it is not involved in the sales transaction or the creation of the escrow account.

Mr. C's and the receiver looked to plaintiff's recorded lien to determine the amount to place into escrow. Plaintiff listed the amount of its interest as $60,000 in the lien. Mr. C's and the receiver chose to provide a buffer and placed $75,000 in escrow. Mr. C's and the receiver complied with the CREBLA by escrowing the amount cited by plaintiff.

Once the amount cited in the lien is escrowed, "the lien is extinguished and the real estate broker shall provide a release of lien . . . [.]" MCL 570.585(3). Mr. C's and the receiver instigated the automatic extinguishment of the lien by creating the escrow account. Plaintiff was then required to file a lien release with the register of deeds. Plaintiff has been seeking the protection of the CREBLA, all the while violating its provisions. And plaintiff's interpretation would require the statute to be rewritten. According to plaintiff, escrowing the amount cited by the broker in its own lien documents would no longer require the extinguishment of the encumbrance. Rather, the lien figure would be the starting point for negotiations, allowing the broker to hold the land sale hostage until its demands were met. The CREBLA was designed to protect a

broker's right to collect the commission outlined in a brokerage agreement, not to allow a broker to punish a seller for shirking its contractual promises.

Accordingly, the circuit court properly granted summary disposition in favor of defendants. The lien was extinguished under the statute, and the court was required to remove it.

III. SLANDER OF TITLE

Plaintiff contends that in rendering its summary disposition ruling, the circuit court erroneously determined that the refusal to discharge the lien constituted slander of title. Claims for slander of title were recognized at common law "as a remedy for malicious publication of false statements that disparage a plaintiff's right in property." *B & B Investment Group v Gitler*, 229 Mich App 1, 8; 581 NW2d 17 (1998). "In Michigan, slander of title claims have both a common-law and statutory basis." *Id*. To establish either, a claimant must show falsity, malice, and special damages. *Id*.; see also MCL 565.108.[2]

In *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 596; 848 NW2d 425 (2014), this Court provided the following guidance regarding the malice element:

---

[2] The statute provides:

> No person shall use the privilege of filing notices hereunder for the purpose of slandering the title to land, and in any action brought for the purpose of quieting title to land, if the court shall find that any person has filed a claim for that reason only, he shall award the plaintiff all the costs of such action, including such attorney fees as the court may allow to the plaintiff, and in addition, shall decree that the defendant asserting such claim shall pay to plaintiff all damages that plaintiff may have sustained as the result of such notice of claim having been so filed for record.

> The crucial element is malice. A slander of title claimant must show some act of express malice, which implies a desire or intention to injure. Malice may not be inferred merely from the filing of an invalid lien; the plaintiff must show that the defendant knowingly filed an invalid lien with the intent to cause the plaintiff injury. A plaintiff may not maintain a slander of title claim if the defendant's claim under the mortgage or lien was asserted in good faith upon probable cause or was prompted by a reasonable belief that the defendant had rights in the real estate in question . . . . [Quotation marks, citations, and alterations omitted.]

Given this guidance, the malice necessary for a slander-of-title action does not exist when the offending party's actions rest on a rational, yet incorrect, interpretation of law. See *id*. at 598.

The claimant also must show that the alleged slander caused special damages. *B & B Investment*, 229 Mich App at 8. "[S]pecial damages . . . include litigation costs, impairment of vendibility, and loss of rent or interest." *Id*. at 9 (citations omitted). Attorney fees may be awarded pursuant to MCL 565.108 and are not limited to the time before the title cloud was removed. *Id*. at 11. Rather, the statute contemplates that attorney fees and costs may be awarded, in the court's discretion, for all expenses involved in the action. *Id*.

In *B & B Investment*, 229 Mich App at 4-5, the plaintiff and the defendant entered into a business relationship to purchase real estate from mortgage foreclosure and sheriff's sales. During their relationship, a dispute arose regarding the disbursement of funds involving two properties unrelated to the litigation. *Id.* at 5. Unable to resolve their differences, the defendant filed claims of interest against seven other properties owned by the plaintiff. *Id.* The district court concluded that the defendant had committed slander of

title with malicious intent because she held no cognizable interest in those seven properties, knew it was improper to file such claims, and was advised not to file them. *Id*. at 5. In *Sullivan v Thomas Org, PC*, 88 Mich App 77, 80; 276 NW2d 522 (1979), the plaintiffs alleged that the defendants had disparaged title by inappropriately filing a mechanic's lien out of revenge. This Court held that "the filing of an invalid lien may be a falsehood, even if the matter contained in the lien is correct." *Id*. at 83.

Here, the circuit court did not err by holding that the elements of slander of title were established as a matter of law. MCL 570.584(1) provides that a commercial real estate broker's lien attaches to real estate if: (a) the real estate broker has a written commission agreement; (b) the agreement entitles the broker to a commission; and (c) the lien claim attaches before the conveyance of the real estate occurs. Plaintiff had a written commission agreement with GAM, and the receiver became bound by the agreement following its appointment. Plaintiff was entitled to a commission under the listing agreement because it had the exclusive right to broker a sale and actually found the property's ultimate purchaser—Mr. C's. And plaintiff perfected its lien before the Mr. C's purchase was complete.

But conditions requiring release of the lien also existed. MCL 570.585(3) requires a real estate broker to release its lien once an amount sufficient to cover that lien is placed into escrow. Mr. C's and the receiver did so, triggering plaintiff's duty to release its lien. Even if Mr. C's and the receiver had failed to notify plaintiff of the escrow account until after plaintiff filed suit, plaintiff could have withdrawn its action and avoided legal costs. Moreover, Mr. C's repeatedly ad-

vised plaintiff to pursue the lien against GAM. Plaintiff responded that the GAM receivership voided all contracts, and purposely declined to bring GAM into the litigation. Indeed, the circuit court questioned why plaintiff had failed to sue GAM, but plaintiff never provided an answer. Thus, plaintiff failed to demonstrate the validity of its continued lien, or to dispel the claimed malice in response to defendant's motion for summary disposition. See *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Although the contents of the lien may have been correct, plaintiff failed to demonstrate that its lien was valid and not premised on a falsehood under the circumstances. *Sullivan*, 88 Mich App at 83.

Additionally, MCL 570.585(3) provides that if a sufficient amount to cover the lien is placed in escrow, the lien is extinguished and the real estate broker "shall release" the lien. Mr. C's and Flagstar exchanged e-mails with plaintiff's counsel, attempting to resolve the litigation and requesting that plaintiff discharge the lien. Despite these requests, plaintiff failed to do so. Plaintiff contends that it had the right to contest defendants' compliance with the statute because it was not permitted to negotiate the lien amount. Indeed, slander of title is not established when premised on a rational interpretation of law. *Wells Fargo*, 304 Mich App at 598. However, the record does not support plaintiff's contention that it was relying on any rational legal position in withholding its release. Plaintiff maintained its lien and subverted the court's rulings and orders even after the court granted summary disposition in Mr. C's favor and denied plaintiff's motions for relief from judgment and to amend its complaint. The circuit court held that the case had been closed by final order and the only outstanding issue was one of damages. Despite the court's rulings,

plaintiff filed a witness list and attempted to engage in discovery by serving a set of interrogatories. Plaintiff also failed to release the lien it had filed with the register of deeds.

In light of MCL 570.585, plaintiff could have, and should have, discharged the lien in accordance with the statute to avoid any claim for slander of title, and proceeded under MCL 570.586 to have the escrowed funds released. Plaintiff also could have filed a claim for breach of contract. Plaintiff's pursuit of these options would not have subjected it to a slander-of-title action. However, plaintiff's repeated failure to abide by the court's rulings and release the lien demonstrated malice. Accordingly, the court did not err in granting defendants' motion for summary disposition of the slander-of-title claim.

IV. COMPLAINT AMENDMENT

Plaintiff also challenges the circuit court's denial of its motion to amend its complaint to add GAM's receiver as a party defendant. Under the CREBLA, a real estate broker "may bring an action to enforce the lien," but must "name as defendants all persons that, at the time the action is filed, have an interest in the commercial real estate . . . that would be divested or impaired by the foreclosure of the lien." MCL 570.586(1) and (2). The action also "may include a claim on the contract from which the lien arises." MCL 570.586(3). The circuit court correctly determined that plaintiff's action against the purchaser of the property was extinguished when the purchaser participated in the creation of an escrow account based on the amount cited in the lien. Plaintiff's remaining challenge is to the correct calculation of its commission, and that claim lies between the parties to the exclusive listing agreement.

MCR 2.118(A)(2) provides, "[A] party may amend a pleading only by leave of the court" and "[l]eave shall be freely given when justice so requires." Moreover, MCR 2.116(I)(5) demands that a court allow a disappointed plaintiff the opportunity to amend its complaint after summary disposition is granted under MCR 2.116(C)(8), (9), or (10), unless the evidence reveals that amendment would not be justified. *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997). And pursuant to MCR 2.206(A)(2)(b), "[a]ll persons may be joined in one action as defendants . . . if their presence in the action will promote the convenient administration of justice." A motion to amend may be denied because of undue delay, bad faith or dilatory motive by the moving party, repeated failures to cure deficiencies in previously allowed amendments, undue prejudice to the opposing party, and futility. *Id*.

Here, plaintiff sought to add the receiver as a party defendant within the period of limitations governing its lien claim. See MCL 570.587(1) (establishing a one-year period of limitations for CREBLA lien actions). The motion to amend was filed in response to the court's summary dismissal of plaintiff's claims under MCR 2.116(C)(8) and (10). Plaintiff cursorily discussed the contents of its claim against the receiver by generally asserting that the actual amount of its commission as required by the listing agreement had not been adequately proven. However, amendments must be submitted in writing. MCR 2.118(A)(4). If a plaintiff does not present its proposed amended complaint to the court, there is no way to determine whether an amendment is justified. See *Lown v JJ Eaton Place*, 235 Mich App 721, 726; 598 NW2d 633 (1999). This is especially true here as plaintiff never specifically described its challenge to the $60,000 commission figure. Absent the submission of the proposed

complaint in writing or a clear statement of plaintiff's claim, we discern no abuse of the circuit court's discretion.

V. SPECIAL DAMAGES

A. BACKGROUND

After dismissing plaintiff's claim and concluding that Mr. C's had proven its slander-of-title count, the circuit court ordered the parties to proceed toward establishing Mr. C's "special damages." Mr. C's filed a motion for recompense of "all costs and attorney fees incurred" along with interest in relation to the slander claim. Mr. C's also requested costs and sanctions in connection with plaintiff's continued failure to release its lien in contravention of court orders. Plaintiff contended that Mr. C's motion was not the proper vehicle for the special damages request, contending that a damages trial had to be conducted. Plaintiff further contended that it could not be held in contempt because no court order specifically required it to release its broker's lien.

Following an October 2013 show cause hearing, the court ordered plaintiff to file a lien release. It also scheduled an evidentiary hearing to calculate Mr. C's special damages. Before the hearing, the parties submitted briefs disputing the legal scope of the special-damages award. Specifically, plaintiff argued that Mr. C's could collect only those costs necessary to remove the cloud on the title, a result achieved by the May 29, 2013 summary disposition judgment. Therefore, any costs accumulated in the assessment and collection of the damages award would not qualify. Plaintiff challenged any attorney-fee award to Flagstar. And plaintiff contended that Mr. C's was not permitted to rely on

the slander-of-title statute as it raised a solely common-law claim. Despite the parties' divergent opinions on the legal scope of the damages award, plaintiff did not dispute the reasonableness or accuracy of Mr. C's documents supporting the various elements that might be incorporated into the award.

The circuit court rejected plaintiff's challenges and awarded Mr. C's the full amount of its litigation costs. This included costs for which Mr. C's had indemnified Flagstar. The special-damages award totaled more than $20,000.

B. ANALYSIS

Plaintiff now reiterates its claims that MCL 565.108 does not control, that Mr. C's damages were limited to the time before the summary disposition judgment cleared the title, and that Mr. C's was not entitled to recovery of the costs for which it indemnified Flagstar. These challenges all lack merit.

Damages are "compensation which the law authorizes for an injury inflicted." *Strong v Neidermeier*, 230 Mich 117, 122; 202 NW 938 (1925). General damages are those that the law implies or that presumably accrue from the alleged wrong. *Kratze v Indep Order of Oddfellows*, 442 Mich 136, 148; 500 NW2d 115 (1993). Special damages arise from the events that transpired, not those implied by law, and may be awarded "if specifically pleaded and proved." *Id*. at 148-149. Michigan follows the "American rule," which prohibits an award of attorney fees unless a statute, rule, or contractual provision expressly provides to the contrary. *Watkins v Manchester*, 220 Mich App 337, 342; 559 NW2d 81 (1996). MCL 565.108 provides that a person found liable for slander of title may be required to pay

the injured party "all the costs of such action, including such attorney fees as the court may allow . . . ."

Plaintiff contends that the circuit court erred by awarding costs and attorney fees because Mr. C's did not plead the statutory cause of action. Indeed, Mr. C's counterclaim did not expressly identify whether it was premised on the statute or on the common law. However, in Mr. C's motion for summary disposition, responses to plaintiff's motions for relief from judgment and to amend the complaint, motion to strike interrogatories, and the motion for an order to show cause, Mr. C's alleged that plaintiff's actions were wrongful and frivolous and reflected continued violations of court orders. Mr. C's had also requested special damages, including costs and attorney fees. Thus, plaintiff was on notice that Mr. C's was requesting costs and attorney fees permitted by statute even absent a direct citation.

Plaintiff also alleged that costs and attorney fees could only be awarded for the period during which the cloud remained on the title, i.e., before the summary disposition judgment entered. However, as noted, special damages in a slander-of-title action include litigation costs, such as attorney fees, and are not limited to the period before the title cloud is removed. *B & B Investment*, 229 Mich App at 11 ("The statute contemplates recovery of attorney fees . . . expended in actions for slander of title, not simply to quiet title.").

Lastly, plaintiff contends that the circuit court erroneously awarded Mr. C's recovery of costs and attorney fees remitted to Flagstar because it constituted a "double dip." The court did not rule on whether the legal services provided to Mr. C's and Flagstar were duplicative. However, plaintiff stipulated to the legal cost assessments without citing any potentially dupli-

cative services. The circuit court correctly noted that Mr. C's mortgage documents required it to indemnify Flagstar for the costs incurred in this action, bringing those costs into Mr. C's special-damages claim. Plaintiff does not challenge the court's interpretation of those contractual agreements, thereby precluding relief. See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 388; 689 NW2d 145 (2004).

We affirm.

GLEICHER, P.J., and CAVANAGH and FORT HOOD, JJ., concurred.

KAEB v KAEB

Docket No. 319574. Submitted March 4, 2015, at Grand Rapids. Decided March 12, 2015, at 9:10 a.m.

Plaintiff, Stephanie Kaeb, filed a divorce action against defendant, Darin Kaeb, in the Ottawa Circuit Court, which entered a consent judgment granting the parties joint legal and physical custody over their three children. In 2011, Stephanie petitioned for a custody review, alleging, *inter alia*, that Darin had an alcohol problem that interfered with his ability to provide proper care for the children. In September 2011, the court, Jon A. Van Allsburg, J., entered an order giving Stephanie sole legal and physical custody and giving Darin very limited supervised parenting time. The order also required that Darin complete alcohol treatment and attend counseling. Through subsequent orders, the court gradually increased Darin's parenting time and eventually allowed him to have unsupervised parenting time. The orders continued the requirements that Darin participate in alcohol treatment and counseling. The court held a review hearing in May 2013. At the conclusion of the hearing, the court again expanded Darin's parenting time. The court also continued the requirements for alcohol treatment and counseling. The court entered a written order that was consistent with its decision from the bench in June 2013. In August 2013, Darin moved to amend the court's June 2013 order, seeking the removal of the requirements for alcohol treatment and counseling. In support of the motion, Darin attached a report by Dr. Michael Makedonsky, who opined that there was no clinical need for Darin to continue alcohol treatment. Darin also supported the motion with a letter from his counselor, Dr. Brent Ellens, who stated that Darin had made sufficient progress in developing the ability to manage his frustration and stress that he could manage his life without further counseling. At the conclusion of the hearing on Darin's motion, the court stated that there had been no change of circumstances since the May 2013 hearing. The court held that Darin's motion was without legal basis and was, therefore, frivolous. The court ordered Darin to pay Stephanie's costs and attorney fees associated with responding to the motion as a sanction. Notwithstanding its

determination that Darin's motion was frivolous, the court canceled the requirements that Darin participate in alcohol treatment and counseling. Darin appealed.

The Court of Appeals *held*:

Under MCR 2.114(D)(2), the signature of a party or attorney on a motion constitutes certification by the signer that to the best of his or her knowledge, information, and belief the motion 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. If a document is signed in violation of MCR 2.114(D)(2), the court, under MCR 2.114(E), shall impose on the signer, the represented party, or both, an appropriate sanction. Under MCL 722.27(1), a trial court may provide for reasonable parenting time by general or specific terms and conditions, and may modify its previous orders for proper cause shown or because of a change of circumstances. What constitutes proper cause or a change of circumstances under MCL 722.27(1)(c) will vary depending on the nature of the requested amendment or modification. If the request involves a change that alters an established custodial environment, then the more stringent framework from *Vodvarka v Grasmeyer*, 259 Mich App 499 (2003), will apply. If, however, the request involves a change to the duration or frequency of parenting time, the less stringent standard discussed in *Shade v Wright*, 291 Mich App 17 (2010), will apply. The imposition, revocation, or modification of a condition on the exercise of parenting time will generally not affect an established custodial environment or alter the frequency or duration of parenting time. Therefore, a more flexible understanding of "proper cause" or "change in circumstances" applies to a request to modify or amend a condition on parenting time; that is, a party requesting a change to an existing condition on the exercise of parenting time must demonstrate proper cause or a change of circumstances that would justify a trial court's determination that the condition in its current form no longer serves the child's best interests. In this case, the trial court clearly erred when it found that Darin's motion was submitted in violation of MCR 2.114(D)(2). The documents submitted with the motion were sufficient to establish proper cause for the trial court reconsider whether the conditions imposed on Darin's parenting time remained in the children's best interests. Although the trial court was free to reject the opinions in those documents and conclude that it was in the children's best interests to continue to impose those conditions, that alone did not warrant finding that the motion was frivolous. Therefore, the trial court erred when it

ordered, under MCR 2.114(E), that Darin pay Stephanie's costs and attorney fees associated with the motion.

Trial court decision ordering sanctions reversed, trial court orders requiring Darin to pay costs and fees to Stephanie vacated, and case remanded for further proceedings.

MURPHY, J., concurring in part and dissenting in part, would have affirmed the trial court's order awarding attorney fees incurred by Stephanie in responding to Darin's motion. It was clear from the record that following the evidentiary hearing on May 31, 2013, defendant almost immediately defied the court's ruling regarding required attendance at alcohol treatment and counseling and instead sought support for his view that he was not in need of counseling or alcohol treatment. This was not a situation in which the conditions no longer served the children's best interests. In this case, there was no proper cause to revisit the parenting-time conditions, nor was there any change of circumstances. Accordingly, Darin's motion to modify the conditions was not well grounded in fact or warranted by existing law and the imposition of attorney-fee sanctions under MCR 2.114(E) was appropriate. The trial court did not clearly err by ruling that defendant's motion was frivolous.

DIVORCE — CHILD CUSTODY — CONDITIONS ON PARENTING TIME — MODIFICATION — PROPER CAUSE OR A CHANGE OF CIRCUMSTANCES.

Under MCL 722.27(1), a trial court may provide for reasonable parenting time by general or specific terms and conditions, and may modify its previous orders for proper cause shown or because of a change of circumstances; what constitutes proper cause or a change of circumstances under MCL 722.27(1)(c) will vary depending on the nature of the requested amendment or modification; a party requesting a change to an existing condition on the exercise of parenting time that will not affect an established custodial environment or alter the frequency or duration of parenting time must only demonstrate proper cause or a change of circumstances that would justify a trial court's determination that the condition in its current form no longer serves the child's best interests.

Scholten Fant (by *Douglas J. Rooks*) for Stephanie Kaeb.

Bregman & Welch (by *Judy E. Bregman*) for Darin Kaeb.

Before: M. J. KELLY, P.J., and MURPHY and HOEKSTRA, JJ.

M. J. KELLY, P.J. In this appeal arising out of a parenting-time dispute, defendant, Darin Lee Kaeb, appeals by right the trial court's orders sanctioning him for filing a frivolous motion to modify the conditions placed on him in a parenting-time order; the trial court ordered him to pay the attorney fees incurred by plaintiff, Stephanie Kathleen Kaeb, in defending the motion. Because we conclude the trial court erred when it determined that Darin's motion was frivolous, we reverse the trial court's decision and vacate the orders compelling Darin to pay Stephanie's attorney fees.

I. BASIC FACTS

Darin and Stephanie married in July 1997. Three children were born to them during the marriage.

In December 2009, Stephanie sued for divorce and, in July 2010, the trial court entered a consent judgment of divorce. The consent judgment granted joint legal and physical custody to the parties, but provided that the children would reside primarily with Stephanie during the school year. The judgment gave Darin extensive parenting time during the school year and equal parenting time during summers.

In March 2011, Stephanie petitioned for a custody review on the basis of a change in circumstances. Although she discussed a variety of changes, her primary allegations were that that Darin had serious alcohol and gambling problems and might have mental health issues, which impaired his ability to provide proper care and custody to the children.

The trial court entered a stipulated order changing custody in September 2011. The order gave Stephanie sole legal and physical custody of the children and provided Darin with very limited supervised parenting time. The order further provided that Darin "shall complete his alcohol treatment and therapy, comply with all aftercare treatment recommendations, and shall abstain from the use of alcohol."

The trial court entered a new order in February 2012. The order provided Stephanie with sole legal and physical custody and gave Darin limited supervised parenting time. The order also required Darin to "continue alcohol treatment and therapy" and stated that he could petition for modification after "three months of compliance with the . . . schedule and requirements . . . ."

In July 2012, Darin moved for a change in custody and unsupervised parenting time. He stated that, since the court entered its earlier orders regarding custody, he had complied with the court's requirements and had completed various programs to treat his issues with anger and alcohol, which amounted to a change in circumstances that warranted revisiting custody and parenting time. The trial court did not hold an evidentiary hearing, but eventually entered an interim order allowing Darin to have unsupervised parenting time on specified days and providing that he must "continue with [Alcoholics Anonymous (AA)] and counseling . . . ."

In May 2013, the trial court held what it characterized as a "review hearing on matters of parenting time." Darin and Stephanie both testified at the hearing and described the circumstances surrounding their current parenting-time schedule. Darin also testified

that he was complying with the court's orders to remain sober, attend AA, and continue with counseling.

At the conclusion of the hearing, the trial court found that the evidence showed that Darin had been complying with the court's requirements. But it recognized that it could not "determine whether someone [who's] been alcohol dependent or alcohol abusive has been cured of that problem." Instead, the court stated, "maintaining sobriety is something that's proven over the course of time." To that end, the trial court required Darin "to continue counseling with Dr. Ellens, and to attend AA regularly" as conditions on his exercise of parenting time, which it expanded. Darin's lawyer thereafter expressed concern that it would be unfair to require his client to show a change of circumstances every few months in order to permit further expansion. For that reason, he asked the trial court if it could set a review at fixed intervals. The trial court disagreed that automatic review would be a good use of judicial resources and stated that any further "adjustments [to parenting time] will have to be [by] motion."

In June 2013, the trial court entered an order consistent with its decision from the bench. It provided that Darin must "maintain sobriety, shall continue to counsel with Dr. Brent Ellens, [and] shall continue to attend AA regularly."

In August 2013, Darin moved to amend the trial court's order of June 2013; he asked the trial court to remove the requirement that he continue to counsel with Ellens and continue to attend AA meetings. In support of his motion, he attached a report by Dr. Michael Makedonsky.

Makedonsky reported that he had interviewed Darin and performed psychological testing on him. He opined

that Darin was not suffering from any mental illness. He also stated that Darin said he had not gambled or had alcohol since September 2011 and was "very motivated and very committed to staying alcohol free." On the basis of his interview and testing, Makedonsky stated that there was no clinical need for Darin to continue with AA meetings: "It is the professional opinion of this examiner that his past use of alcohol was caused by the marital conflicts and the divorce process at the time." He further opined that Darin was "mentally and emotionally stable," did not pose "any risk of violence," and exhibited "adequate parenting skills."

Darin also presented a letter from Ellens discharging him from counseling. In the letter, Ellens informed him that he was free to continue counseling or return if he wished, but that he believed Darin had "made sufficient progress in developing the ability to manage [his] frustration and stress" that he could "proceed and manage [his] life without further counseling."

Stephanie argued in response that there were no grounds for amending the order because Darin failed to show that there was a sufficient change in the circumstances to warrant review.

The trial court held a hearing on the motion in September 2013. At the hearing, Ellens testified that he counseled Darin during the period of his court-ordered group counseling and later during private sessions. He said he sent Darin a letter discharging him from counseling in June 2013. Ellens admitted on cross-examination that he sent the letter at Darin's request.

Makedonsky also testified concerning his evaluation of Darin, which he conducted over the course of a few days ending in July 2013. Makedonsky listed the various inventories and tests that he performed and described the purpose for their use. The results showed

that Darin was cooperating with the testing. Makedonsky agreed that Darin had abused alcohol in the past, but stated that he did not believe that he was an alcoholic and did not believe that he needed to attend AA meetings; there was, he explained, no "clinical reason for it . . . ."

After the close of proofs, the trial court noted the contentious history of the case and described some of the problematic behaviors that led to the limitations on Darin's parenting time. The court expressed concern that Darin insisted on deciding for himself whether he should attend AA meetings and counseling—as could be seen from his effort to obtain a letter and report demonstrating that there was no clinical need for him to attend either, which he sought just after the court entered its previous order continuing those conditions. The court, however, disagreed that the letter and report constituted evidence of a change in circumstances sufficient to justify the parenting-time order: "There is no evidence here that there's been any change in circumstances since May 31, and certainly since June 20 when the current order was entered, and no argument that there's been any change in circumstances, only an argument that the Court was incorrect in ordering it -- ordering continued counseling and AA attendance in the first place." It determined that the motion was without "legal basis" and, accordingly, frivolous. For that reason, it ordered Darin to pay Stephanie's costs and reasonable attorney fees as a sanction. Notwithstanding this determination, the court stated that it would "cancel those two requirements" of its own accord. It did so because Darin was plainly determined not to participate and would not benefit from them.

In November 2013, the trial court entered an order removing the requirements that Darin attend AA and

counseling. In that same month, the trial court ordered Darin to pay $2,227.50 in costs and attorney fees to Stephanie. In December 2013, the trial court amended the order to require Darin to pay $2,090.00 in costs and attorney fees.

Darin now appeals in this Court.

II. SANCTIONS FOR A FRIVOLOUS MOTION

A. STANDARDS OF REVIEW

On appeal, Darin argues the trial court erred when it determined that his motion to remove the requirement that he attend AA and counseling was frivolous. He maintains that the trial court improperly determined that the change-of-circumstances threshold applied to his motion and, even if that standard did apply, the court erred when it determined that there was no evidence to support the motion. This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules to the facts. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). This Court, however, reviews for clear error the trial court's factual findings underlying its application of a court rule. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 387; 761 NW2d 353 (2008). To the extent that a trial court has discretion to impose a particular sanction, this Court reviews the trial court's decision for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008).

B. THE LAW

In this case, the trial court found that Darin's motion to remove the requirements that he attend AA and counseling was frivolous because he made the

motion without a legal basis for doing so—specifically, because he failed to show any change in circumstances to support the motion. The trial court did not cite the authority on which it relied, but it is evident that the trial court's determination did not involve a claim or defense in a civil action. See MCR 2.114(F); MCL 600.2591(1) (providing for sanctions related to the prosecution or defense of a civil action); MCR 2.625(A)(2). Accordingly, it appears that the trial court ordered sanctions under MCR 2.114(E).

1. MCR 2.114(E)

Whenever an attorney or party signs a motion, that person's signature constitutes "certification" that he or she has "read the document" and, "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 that the motion was not made for "any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." MCR 2.114(D). If a party brings a motion that has been signed in violation of MCR 2.114(D), the trial court must "impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ." MCR 2.114(E). The trial court may not assess punitive damages, but may order the person who signed it or a represented party to pay "the other party or parties the amount of the reasonable expenses incurred because of the filing . . . ." MCR 2.114(E). Because MCR 2.114(E) only requires the trial court to impose an appropriate sanction, which *may* include an order to pay reasonable attorney fees, the trial court has the discretion to tailor its sanction to the circum-

stances. See *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 726-727; 591 NW2d 676 (1998).

On appeal, Stephanie argues that the record evidence showed that Darin brought the motion at issue for an improper purpose. The evidence that he filed "repetitive and baseless" motions leading up to the motion to modify the parenting-time order, she maintains, is evidence from which the trial court "could conclude" that Darin filed the motion to harass or cause unnecessary delay or needlessly increase the costs of litigation in violation of MCR 2.114(D)(3). The trial court did not, however, find that Darin's motion was frivolous because he brought it for an improper purpose. Rather, it found that his motion was frivolous because there was "no evidence here that there's been any change in circumstances" since the entry of the last orders and, therefore, the motion was "without legal basis . . . ." This finding implicates MCR 2.114(D)(2) rather than MCR 2.114(D)(3). Therefore, we shall limit our review accordingly.[1]

In order to assess whether Darin's motion was "well grounded in fact" and "warranted by existing law" under MCR 2.114(D)(2), we must first address whether and how MCL 722.27(1) applies to the motion involved here.

2. PROPER CAUSE AND CHANGE OF CIRCUMSTANCES

Once a "custody dispute" comes before the trial court, it may take various actions "for the best interests of the child . . . ." MCL 722.27(1). The trial court may award custody to "1 or more of the parties in-

[1] We express no opinion regarding whether the proffered evidence would be sufficient to support a finding that Darin's motion was filed to harass, cause unnecessary delay, or needlessly increase the costs of litigation.

volved," "provide for payment of support for the child," and may provide for "reasonable parenting time of the child by the parties involved . . . by general or specific terms and conditions." MCL 722.27(1)(a) and (b). A trial court may also modify or amend "its previous judgments or orders" but only for "proper cause shown or because of change of circumstances . . . ." MCL 722.27(1)(c). The trial court may not modify or amend a previous judgment or order or issue a new order "so as to change the established custodial environment of a child unless there is presented clear and convincing evidence that it is in the best interest of the child." *Id*.

The Legislature limited a trial court's ability to modify or amend its orders in a custody case in order to erect a barrier to the removal of children from established custodial environments and to minimize disruptive changes to custody arrangements. See *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). Because the limitations were intended to serve as obstacles to revisiting judgments and orders, the Court in *Vodvarka*, in the context of an order affecting custody, determined that proper cause must be something more than "*any* appropriate ground for legal action"; it must be understood to mean "one or more appropriate grounds that have or could have a significant effect on the child's life to the extent that a reevaluation of the child's custodial situation should be undertaken." *Id*. at 511 (quotation marks omitted). Consistent with the obligation to avoid changes that might disrupt the child's custodial environment, the Court in *Vodvarka* further held that a change in circumstances cannot refer to a child's normal life changes; rather, a change in circumstances means 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." *Id*. at 513.

Since the decision in *Vodvarka*, this Court has recognized that the definitions applied by that Court to "proper cause" and "change of circumstances" should not be applied to orders amending or modifying parenting time. *Shade v Wright*, 291 Mich App 17, 28; 805 NW2d 1 (2010). *Vodvarka* should not be so extended, the Court in *Shade* explained, because a change in parenting time did not implicate the same concerns as a change in custody:

> The *Vodvarka* definitions of "proper cause" and "change of circumstances" are inapplicable to this case, in part, because the rationale for imposing more stringent constructions on the terms "proper cause" and "change of circumstances" with respect to custody determinations is far less applicable with respect to parenting time determinations. With respect to child custody disputes, "[t]he goal of MCL 722.27 is to minimize unwarranted and disruptive changes of custody orders, except under the most compelling circumstances." *Corporan v Henton*, 282 Mich App 599, 603; 766 NW2d 903 (2009). "Providing a stable environment for children that is free of unwarranted custody changes . . . is a paramount purpose of the Child Custody Act . . . ." *Vodvarka*, 259 Mich App at 511. Therefore, in the context of a child custody dispute, the purpose of the proper cause or change of circumstances requirement is "to 'erect a barrier against removal of a child from an established custodial environment and to minimize unwarranted and disruptive changes of custody orders.' " *Id*. at 509, quoting *Heid v AAASulewski (After Remand)*, 209 Mich App 587, 593-594; 532 NW2d 205 (1995).
>
> Such concerns do not exist, however, when a modification of parenting time does not alter the established custodial environment because determinations regarding child custody and parenting time serve different purposes. Whereas the primary concern in child custody determina-

> tions is the stability of the child's environment and avoidance of unwarranted and disruptive custody changes, the focus of parenting time is to foster a strong relationship between the child and the child's parents. See MCL 722.27a. [*Shade*, 291 Mich App at 28-29 (alteration in original).]

The Court in *Shade* declined to precisely define what proper cause or change of circumstances would be sufficient to warrant a change in parenting time, but nevertheless determined that the types of normal life-changes experienced by the child in its case were sufficient to warrant modification of the parenting-time arrangements, even though those changes would be insufficient to establish grounds for a change in custody under the definitions applied in *Vodvarka*. *Id*. at 30-31.

The Legislature authorized trial courts in custody disputes to provide for reasonable parenting time "for the best interests of the child . . . ." MCL 722.27(1); see also MCL 722.27a(1) ("Parenting time shall be granted in accordance with the best interests of the child."). The court may provide for parenting time through "general or specific terms" and may subject the parenting time to "conditions" when it is in the child's best interests. MCL 722.27(1)(b); see also MCL 722.27a(8) (stating that a parenting-time order may contain any reasonable terms or conditions that facilitate the orderly and meaningful exercise of parenting time). Consequently, the trial court had the authority to order Darin to attend AA meetings and participate in counseling as conditions on his exercise of parenting time, if the court determined that those restrictions were in the children's best interests.

After complying with the trial court's requirements for some time, Darin moved for the trial court to remove the conditions that it had imposed on his parenting

time. See MCL 722.27(1)(b).[2] Before the trial court could grant Darin's request, he had to demonstrate that there was proper cause or a change of circumstances that warranted the requested relief. MCL 722.27(1)(c). But, as the Court in *Shade* aptly noted, what constitutes proper cause or a change of circumstances under MCL 722.27(1)(c) will vary depending on the nature of the requested amendment or modification. If the request involves a change that alters an established custodial environment, then the more stringent framework from *Vodvarka* will apply. *Shade*, 291 Mich App at 27. If, however, the request involves a change to the duration or frequency of parenting time, the less stringent standard discussed in *Shade* will apply. See *id*. at 29-31 (discussing the need for flexibility in parenting-time schedules because the child's needs will change with age and with the level of the child's involvement in activities). Here, the requested modification did not involve either a change in custody or a change in the duration or frequency of parenting time—it involved a request to remove a condition on the exercise of parenting time. Consequently, neither *Shade* nor *Vodvarka* is directly on point.

Because the imposition, revocation, or modification of a condition on the exercise of parenting time will generally not affect an established custodial environment or alter the frequency or duration of parenting time,[3] we are persuaded that a lesser, more flexible, understand-

---

[2] Because the trial court imposed the requirements at issue as conditions on Darin's parenting time, we need not determine whether MCL 722.27(1)(c) applies to every order involving custody, child support, or parenting time even if the requested change would not alter custody, child support, parenting time, or a condition on parenting time.

[3] We do not, however, foreclose the possibility that the imposition, revocation, or modification of a condition on parenting time might be so significant that it amounts to a change in custody or parenting time.

ing of "proper cause" or "change in circumstances" should apply to a request to modify or amend a condition on parenting time. As in *Shade*, it is evident that even normal changes to the lives of the parties affected by a parenting-time order may so alter the circumstances attending the initial imposition of a condition that a trial court would be justified in revisiting the propriety of the condition. See *Shade*, 291 Mich App at 29-31. A condition that was in the child's best interests when the child was in elementary school might not be in the child's best interests after he or she reaches high school. Even ordinary changes in the parties' behavior, status, or living conditions might justify a trial court in finding that a previously imposed condition is no longer in the child's best interests. We conclude that "proper cause" should be construed according to its ordinary understanding when applied to a request to change a condition on parenting time; that is, a party establishes proper cause to revisit the condition if he or she demonstrates that there is an appropriate ground for taking legal action. See *Vodvarka*, 259 Mich App at 510-511 (recognizing that "proper cause" ordinarily means any appropriate ground for taking legal action, but declining to give the phrase its ordinary meaning when applied in the context of a request to alter an established custodial environment because that would not serve the purpose of erecting a barrier to unwarranted changes to custody). We hold, consistently with a trial court's authority to adopt, revise, or revoke a condition whenever it is in the best interests of the child to do so, see MCL 722.27(1); MCL 722.27a(1) and (8), that a party requesting a change to an existing condition on the exercise of parenting time must demonstrate proper cause or a change in circumstances that would justify a trial

court's determination that the condition in its current form no longer serves the child's best interests. MCL 722.27(1)(c).

C. APPLYING THE LAW

In this case, Darin moved to amend the parenting-time order at issue by removing the conditions on his exercise of parenting time. Specifically, he argued that the requirements that he attend AA meetings and continue counseling with Ellens were no longer necessary. He supported his motion with a letter from Ellens and a report by Makedonsky. In his letter, Ellens opined that Darin had demonstrated sufficient progress in his ability to handle his frustration and stress that he no longer needed to attend regular counseling sessions. Makedonsky similarly reported that he subjected Darin to various tests and determined that there was no clinical reason justifying Darin's continued participation in AA meetings. Both Ellens and Makedonsky testified consistently with these submissions at the hearing on the motion to modify the parenting-time order. Nevertheless, the trial court found that Darin's motion to remove the conditions was frivolous because he did not attempt to show that there had been a change in circumstances since the inclusion of the conditions in the last order, which the court believed was required under MCL 722.27(1)(c).

On this record, we conclude the trial court clearly erred when it found that Darin's motion was submitted in violation of MCR 2.114(D)(2). Even assuming that Ellens's letter and Makedonsky's report did not establish a change in circumstances since the trial court had last considered whether it was in the children's best interests to include the conditions on the parenting-time order, those documents were sufficient to establish

"proper cause" for the trial court to reconsider whether the conditions remained in the children's best interests. MCL 722.27(1)(c); MCL 722.27a(1). Ellens offered his opinion that the counseling sessions were no longer necessary to address the concerns that initially brought Darin to him. Likewise, Makedonsky offered his expert opinion that there was no clinical reason to require Darin to attend AA meetings. Although the trial court was free to reject the opinions and conclude that it was in the children's best interests to continue to impose those conditions, that alone did not warrant finding that the motion was frivolous. See *Kitchen v Kitchen*, 465 Mich 654, 663; 641 NW2d 245 (2002) ("[M]erely because [a] Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position."). A reasonable trial court would be justified in revisiting whether the conditions remained in the children's best interests on the basis of these expert opinions. Indeed, although it stated that it was not doing so for the reasons proffered by Darin in his motion, after the close of proofs, the trial court found on the whole record that it was appropriate to remove the conditions at issue. Consequently, it cannot be said that Darin's motion was not "well grounded in fact" and "warranted by existing law." MCR 2.114(D)(2).

The trial court clearly erred when it found that Darin's motion was frivolous under MCR 2.114(D)(2). See *Johnson Family Ltd Partnership*, 281 Mich App at 387. Therefore, it erred when it ordered him to pay Stephanie's costs and reasonable attorney fees associated with the motion under MCR 2.114(E).

III. REMAND TO DIFFERENT JUDGE

Darin also argues on appeal that this Court should assign this case to a different judge on remand because

it is evident from the record that the trial court harbored animosity against him and would likely be unable to put aside its view of him. We have carefully reviewed the record and have found no evidence that the trial court harbors a bias against Darin or that it would be unable to put aside previously expressed views or findings. See *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). Accordingly, we decline to assign this case to a different judge on remand.

IV. CONCLUSION

The trial court clearly erred when it found that Darin filed his motion to remove the conditions on his ability to exercise parenting time in violation of MCR 2.114(D)(2). The record shows that he properly supported his motion with documentary evidence and that the evidence established a proper cause for revisiting the conditions. See MCL 722.27(1)(c). Consequently, the trial court erred when it ordered Darin to pay the costs and attorney fees that Stephanie incurred to defend the motion as a sanction under MCR 2.114(E).

We reverse the trial court's decision to order sanctions, vacate the orders requiring Darin to pay costs and fees to Stephanie, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

HOEKSTRA, J., concurred with M. J. KELLY, P.J.

MURPHY, J. (*dissenting in part and concurring in part*). I would affirm the trial court's order awarding attorney fees to plaintiff, Stephanie Kaeb, associated with the costs incurred in responding to the motion brought by defendant, Darin Kaeb, to modify the

conditions placed on him relative to his exercise of parenting time. Accordingly, I respectfully disagree with the majority's holding on this issue. I do agree with the majority that, assuming the issue need be reached, there is no valid basis to remand the case to another trial judge.

I shall begin by making the assumption that the majority correctly states that, under MCL 722.27(1)(c), "a party requesting a change to an existing condition on the exercise of parenting time must demonstrate proper cause or a change in circumstances that would justify a trial court's determination that the condition in its current form no longer serves the child's best interests." Additionally, I agree with the majority's recitation of the factual history of this case, its reliance on MCR 2.114(D)(2) and (E), its discussion of the principles applicable to an analysis under MCR 2.114, and the majority's enunciation of the standards of review.

At the hearing on May 31, 2013, which was an evidentiary hearing and concerned multiple motions, defendant's continued attendance at AA meetings and counseling with Dr. Brent Ellens were two of the primary subjects of testimony in connection with whether defendant should be granted additional parenting time. Defendant argued that he had been faithfully going to counseling with Dr. Ellens and to AA meetings; therefore, his parenting time should be expanded. Although not to the full extent requested by defendant, the trial court indeed expanded his parenting time, conditioned on regular attendance at counseling sessions and at AA meetings. About three months later, at the conclusion of the hearing on defendant's motion to modify the conditions, the trial court ruled, in part, as follows:

[A]fter a hearing held on May 31 of this year, an order was entered, based on the Court's ruling on June 20, that said that Mr. Kaeb was required to continue his counseling with Doctor Ellens, and he was required to continue his attendance at AA.

It appears that within days of that order being entered, Mr. Kaeb requested and obtained from Doctor Ellens, a letter stating that he apparently doesn't need any further counseling, and, in fact, hasn't had any since the entry of that order. The -- the referral to Doctor [Makedonsky] was apparently for the purpose of establishing, at Mr. Kaeb's request, that he doesn't need AA counseling -- or doesn't need to attend AA. And there's a lot of testimony here about the differences between an alcohol abuser and an alcoholic. And frankly, the differences between the two appear[] to the Court to be irrelevant as it pertains to the safety of the children. Someone who's abusing alcohol and drives them -- with them in their car is just as much at risk of -- of injuring or killing the children as an alcoholic who drinks and gets in a car and drives the children. So frankly, the proper diagnosis of Mr. Kaeb's condition isn't all that helpful to the Court.

What's helpful to the Court is an analysis of his behavior and how we're going to prevent that kind of behavior in the future. Mr. Kaeb is insistent on deciding for himself all of these issues, as is evidenced by the fact that he's never presented any proof of attendance at AA, in spite of being ordered to attend, and he requested and obtained a discharge letter from his counselor just days after being ordered to continue counseling.

The Court, in considering a motion to modify a parenting time order, which is what this request is, is required to determine whether there's been a material change in circumstances or other proper cause sufficient to justify a modification . . . . There is no evidence here that there's been any change in circumstances since May 31, and certainly since June 20 when the current order was entered, and no argument that there's been any change in circumstances, only an argument that the Court was incorrect in ordering . . . continued counseling and AA

> attendance in the first place. So the . . . motion appears to be without legal basis, and therefore, frivolous. I'm going to order that Mr. Kaeb pay all of plaintiff's attorney's fees in responding to this motion and attending this hearing.

It is clear from the record that following the evidentiary hearing on May 31, 2013, defendant almost immediately defied the court's ruling regarding required attendance at counseling and AA meetings and instead sought support for his view that he was not in need of counseling or help through AA, even though defendant's parenting time had just been expanded because of prior and expected continued attendance at counseling and AA meetings. If defendant was not in need of counseling and AA at that point, he certainly was not in need of counseling and AA shortly beforehand on May 31st when the hearing was conducted. There was no miraculous change of circumstances, and defendant failed to present the evidence at the May 31st hearing upon which he later relied, even though this evidence clearly could have been procured and submitted on May 31st. When the trial court spoke of defendant's motion being frivolous and absent a legal basis, the court was recognizing that nothing had changed since May 31, 2013, and that defendant was essentially seeking reconsideration of the decision to continue parenting-time conditions. I conclude that there was no change of circumstances, MCL 722.27(1)(c), only a change in defendant's litigation strategy once he obtained expanded parenting time predicated on continued counseling and AA attendance. This was not a situation in which the conditions no longer served the children's best interests—as if there were sudden developments after May 31, 2013—because of previously unavailable evidence showing that defendant's alcoholism or alcohol abuse had come under control to the extent that counseling and AA were no longer necessary. Under these circumstances, I am

also of the view that there was no "*proper* cause" to revisit the parenting-time conditions. MCL 722.27(1)(c) (emphasis added).

Accordingly, defendant's motion to modify the conditions was not truly "well grounded in fact," nor "warranted by existing law," MCR 2.114(D)(2); therefore, the imposition of attorney-fee sanctions under MCR 2.114(E) was appropriate. The trial court did not clearly err by finding defendant's motion frivolous. See *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002). I also note that the trial court's decision to dispense with the conditions in no way negated or undermined its determination that defendant's motion was frivolous; rather, the court simply decided on its own to take a different approach given defendant's reticence about complying with the conditions. It is my position that we should affirm the trial court's award of attorney fees to plaintiff. Finally, I agree with the majority regarding defendant's request to have the case assigned to a different trial judge; reassignment is not warranted.

I respectfully dissent in part and concur in part.

MARKETPLACE OF ROCHESTER HILLS v COMERICA BANK

Docket No. 318894. Submitted March 10, 2015, at Detroit. Decided March 17, 2015, at 9:00 a.m. Leave to appeal sought.

Marketplace of Rochester Hills brought an action in Oakland Circuit Court against Comerica Bank seeking declaratory and injunctive relief for its claims of conversion and tortious interference. In 2007, Comerica loaned Marketplace about $25 million. The loan was secured with a mortgage on Marketplace's property. In addition to the mortgage, two guarantors executed agreements guaranteeing Marketplace's payment obligations. The mortgage included two provisions: (1) in the event of a default, Comerica could collect rents and profits from Marketplace's tenants, and (2) remedies under the mortgage could be pursued successively. In an earlier action by Comerica against Marketplace and the guarantors in August 2012, Comerica had asserted that Marketplace was in default and that the guarantors had breached the guaranty agreements. That action was dismissed with prejudice after the parties accepted a case evaluation. Marketplace brought the present action in June 2013 for tortious interference and conversion because Comerica was asking Marketplace's tenants to pay rents directly to Comerica. Marketplace contended that res judicata prevented Comerica from asserting its rights under the mortgage in the present case because Comerica did not, but should have, asserted in the first case any claims under the mortgage. Comerica moved for summary disposition under MCR 2.116(C)(8), claiming that while disposition of the first action released the guarantors from their obligations under the guaranty agreements, Marketplace had not been released from its obligations under the mortgage. Comerica further claimed that Marketplace had waived its res judicata argument because the mortgage specifically permitted Comerica to pursue successive remedies. In October 2013, the court, Wendy Lynn Potts, J., granted Comerica's motion for summary disposition, finding that (1) res judicata did not apply because Comerica did not bring a subsequent action against Marketplace, (2) Marketplace waived its res judicata argument by agreeing to successive remedies, and (3) Comerica's potential claims under the mortgage did not arise

from the same transaction as did Comerica's claims against the guarantors. Marketplace appealed.

The Court of Appeals *held*:

1. Marketplace's initiation of the second action was not premature. The ripeness doctrine requires that a party has sustained actual injury before that party can bring a claim. The deprivation of rents is an actual injury.

2. The joinder rules did not require Comerica to bring a claim for foreclosure in the first action because a claim for foreclosure and the claim that the guarantors breached the guaranty agreements did not both arise from the same transaction or occurrence. That is, any possible foreclosure action and the action involving the breach of the guaranty agreements did not both arise from the mortgage. The "same transaction or occurrence" requires that the same facts or evidence be necessary to maintain the two actions. The basis for both cases was the fact that Marketplace defaulted on the mortgage, but one fact shared between the two cases does not mean that the same facts or evidence are essential to maintain both actions. In the earlier case, to show a breach of the guaranty agreements, Comerica had to establish that (1) there was a valid contract, (2) the guarantors breached the contract, and (3) Comerica suffered damages. To establish a right to judicial foreclosure, Comerica would have to meet the statutory requirements for foreclosure and would have to show that judicial foreclosure was equitable. The maintenance of both actions would not require the use of identical facts or evidence.

3. Marketplace's claim that res judicata prevented Comerica from enforcing the mortgage was, on its face, a valid claim because res judicata can be raised by both plaintiffs and defendants. In this case, the trial court erred in holding that Marketplace was limited to using res judicata as a defense. However, the trial court properly concluded that res judicata did not prevent Comerica from enforcing the mortgage. The doctrine of res judicata bars a subsequent action between the same parties or their privies when (1) a prior action was decided on the merits, (2) the claim in the subsequent action arises from the same transaction as did the claim(s) in the first action, and (3) the matter at issue in the subsequent action was, or could have been, resolved in the first action. Res judicata would not prohibit Comerica from bringing an action for foreclosure because the facts or evidence necessary to resolve Comerica's breach of guaranty claim are not the same facts or evidence necessary to resolve any later claim by Comerica for foreclosure of the mortgage.

Affirmed.

Brooks, Wilkins, Sharkey & Turco, PLLC (by *Keefe A. Brooks* and *James M. McAskin*), for Marketplace of Rochester Hills.

Bodman, PLC (by *Thomas Van Dusen* and *Brian C. Summerfield*), for Comerica Bank.

Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

O'CONNELL, J. Plaintiffs (collectively "Marketplace") appeal as of right the trial court's order granting Comerica Bank's motion for summary disposition under MCR 2.116(C)(8). At issue in the present case is whether Comerica's prior action (the "guaranty action"), principally against the guarantors of Marketplace's mortgage, prevents Comerica from exercising its remedies under the parties' mortgage. For the reasons stated in this opinion, we affirm the decision of the learned trial court.[1]

I. FACTS AND PROCEDURAL HISTORY

In 2007, Comerica loaned Marketplace about $25 million. Comerica secured the loan with a mortgage on Marketplace's property, a regional shopping center in Rochester Hills. As additional security for the loan, Steven Grand and Gary Sakwa, individually and as trustees of the Stephen Grand Property Trust and the Gary Sakwa Living Trust respectively (collectively, the "guarantors"), executed guaranty agreements by

[1] In the present case, Marketplace confusingly contends that Comerica is estopped from asserting its rights under the parties' mortgage because Comerica should have, but did not, assert any claims involving the mortgage in the prior guaranty case. Marketplace's argument is essentially a reverse res judicata argument based on the absence of a claim rather than the previous disposition of a claim.

which they guaranteed Marketplace's payment obligations. As part of the mortgage, Marketplace agreed that Comerica could collect rents and profits from Marketplace's tenants in the event of a default. The parties' mortgage also provided a successive remedies clause:

> All remedies provided in this Mortgage are distinct and cumulative to any other right or remedy under this Mortgage, any other agreement or afforded by law, and may be exercised concurrently, independently or successively.

In August 2012, Comerica filed a complaint against Marketplace and the guarantors. In its complaint, Comerica asserted that the loan was in default and that the guarantors had breached the guaranty agreements. Comerica also sought appointment of a receiver. In February 2013, Marketplace filed a counterclaim in which Marketplace alleged various breaches of the loan documents, abuse of process, tortious interference, and conversion. The parties assert that the trial court dismissed the action with prejudice after the parties accepted a case evaluation.[2]

In June 2013, Marketplace filed the instant action, alleging claims of conversion and tortious interference, and seeking declaratory and injunctive relief to quiet title. Marketplace asserted that Comerica was improperly asking Marketplace's tenants to pay their rents directly to Comerica. According to Marketplace, Comerica could no longer assert rights under the mortgage because it should have, but did not, assert any claims involving the mortgage in the prior case.

---

[2] Neither the prior orders nor the case evaluation sheet is available in the lower court record.

Comerica promptly moved for summary disposition under MCR 2.116(C)(8). Comerica contended that the settlement in the prior action released the guarantors from their obligations under the guaranty agreements but did not release Marketplace from its obligations under the mortgage. Comerica also contended that Marketplace waived its res judicata argument because it agreed in the mortgage that Comerica could pursue its remedies successively.

In October 2013, the trial court granted Comerica's motion for summary disposition. It determined that res judicata did not apply because Comerica had not brought an action against Marketplace. The trial court further opined that Marketplace had waived any res judicata argument by agreeing in the mortgage that Comerica could pursue its rights successively. Finally, the trial court determined that Comerica's potential claims under the mortgage did not involve the same transaction as did Comerica's claims against the guarantors.

Marketplace now appeals. First, Marketplace contends that joinder rules required Comerica to join its possible foreclosure claim against Marketplace in the prior action. Second, it contends that res judicata bars Comerica from raising these claims in a successive suit. Under Marketplace's theory, Comerica has no claim against Marketplace under the mortgage, Comerica has no right to enforce the mortgage, and Comerica's present request that Marketplace's tenants pay rents to it is improper. Comerica responds that Marketplace's action is premature. Comerica also responds that the successive remedies clause allowed it to bring successive actions against Marketplace and the guarantors, regardless of the language of MCR 2.203(A) (governing compulsory joinder).

II. STANDARDS OF REVIEW

This Court reviews de novo issues of res judicata. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379; 596 NW2d 153 (1999). Standing is a question of law we review de novo, and ripeness is a constitutional issue we also review de novo. *Huntington Woods v Detroit*, 279 Mich App 603, 614; 761 NW2d 127 (2008). In addition, we review de novo a trial court's ruling on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

A party may move for summary disposition under MCR 2.116(C)(8) when "[t]he opposing party has failed to state a claim on which relief can be granted." However, when the trial court relies on facts outside the pleadings to decide the motion, we review the motion as though the trial court granted it under MCR 2.116(C)(10). *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A party is entitled to summary disposition under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law."

III. RIPENESS

As an initial matter, Comerica contends that Marketplace's action is premature. We disagree.

The doctrine of ripeness is a standing doctrine that "focuses on the *timing* of the action." *Mich Chiropractic Council v Comm'r of the Office of Fin and Ins Servs*, 475 Mich 363, 379; 716 NW2d 561 (2006) (opinion by YOUNG, J.), overruled in part on other grounds *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349; 792 NW2d 686 (2010). The ripeness doctrine requires that a party has

sustained an actual injury to bring a claim. *Huntington Woods*, 279 Mich App at 615. A party may not premise an action on a hypothetical controversy. *Id*.

Comerica contends that Marketplace's claims are merely hypothetical and based on a possible future foreclosure that has not yet occurred. However, Marketplace alleges that Comerica "sent another notice to the tenants of the Shopping Center directing them to make all payments to [the bank] . . . ." If Marketplace's assertions regarding the validity of the mortgage in light of the prior action are correct, Comerica has no right to ask Marketplace's tenants to make payments to it under the mortgage. The deprivation of rents is an actual injury. Accordingly, we conclude that Marketplace's claims are ripe for adjudication.

IV. JOINDER

Marketplace contends that Comerica was required to state a claim for foreclosure in the prior action because any possible foreclosure action and the prior guaranty action both arose out of the mortgage. We disagree.

MCR 2.203 provides the rules for compulsory and permissive joinder of claims. It states, in part:

> (A) Compulsory Joinder. In a pleading that states a claim against an opposing party, the pleader must join every claim that the pleader has against that opposing party at the time of serving the pleading, if it arises out of the transaction or occurrence that is the subject matter of the action and does not require for its adjudication the presence of third parties over whom the court cannot acquire jurisdiction.
>
> (B) Permissive Joinder. A pleader may join as either independent or alternate claims as many claims, legal or equitable, as the pleader has against an opposing party.

Two claims arise out of the same transaction or occurrence if "the same facts or evidence are essential to the maintenance of the two actions." *Jones v State Farm Mut Auto Ins Co*, 202 Mich App 393, 401; 509 NW2d 829 (1994) (addressing res judicata). "A comparison of the grounds asserted for relief is not a proper test." *Id*.

As an initial matter, Comerica argues that it brought claims in the prior suit against the guarantors only and that Marketplace was not a party to the prior action. Comerica is incorrect. The complaint clearly lists the Marketplace parties as defendants in the prior action. As part of that action, Comerica alleged that Marketplace was in default and requested that Marketplace deliver possession and control of the property to a receiver. Accordingly, the prior complaint stated a claim against Marketplace. Further, Marketplace filed several counterclaims on the basis of the mortgage itself. Even if Comerica was entitled to successively proceed against the *guarantors*, Comerica did not actually do so in this case. Marketplace was an opposing party in the prior action.

Accordingly, we must determine whether MCR 2.203(A) required Comerica to join all of its possible claims against Marketplace in the guaranty action. We conclude that Comerica did not have to do so because the prior case, which was principally based on the guaranty agreements (as well as a default status necessitating protection through receivership), concerned a different transaction or occurrence than any potential foreclosure claim against Marketplace.

In both actions, Comerica's claims rested on the fact that Marketplace had defaulted on the mortgage. But this is only one fact—it does not mean that the same facts or evidence are essential to maintain both actions.

In order to establish a breach of guaranty, Comerica had to establish that (1) there was a valid contract, (2) the guarantors breached that contract, and (3) it suffered damages. See *Comerica Bank v Cohen*, 291 Mich App 40, 54; 805 NW2d 544 (2010) (stating that a guaranty is construed like any other contract); *Stoken v J E T Electronics & Technology, Inc*, 174 Mich App 457, 463; 436 NW2d 389 (1988) (stating the elements of a breach of contract). And in order to justify the appointment of a receiver, Comerica had to establish that a receiver was necessary to prevent fraud or to protect against the imminent danger of property loss. *Weathervane Window, Inc v White Lake Constr Co*, 192 Mich App 316, 322; 480 NW2d 337 (1991).

In contrast, to establish a right to judicial foreclosure, Comerica would have to establish that it met the statutory requirements for foreclosure, including that a debt was secured by the mortgage. See MCL 600.3105(3). Comerica would also have to establish that judicial foreclosure was equitable. See *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 56; 503 NW2d 639 (1993); *Mich Trust Co v Cody*, 264 Mich 258, 263; 249 NW 844 (1933). Comerica did not need to establish these facts in the guaranty action. Thus, while some facts may have overlapped (such as whether Marketplace defaulted on the mortgage), the same facts or evidence were not essential to both actions.

We conclude that MCR 2.203(A) did not require Comerica to join any claims for foreclosure in the guaranty action. Accordingly, the trial court properly determined that MCR 2.203(A) did not require Comerica to state any foreclosure claims it may have had against Marketplace in the prior case.

V. RES JUDICATA

Marketplace next contends that the trial court im-

properly concluded that res judicata could not apply. Comerica contended that Marketplace could only raise a res judicata argument as a defense in an action for foreclosure brought by Comerica. The trial court agreed, determining that res judicata is a defense that Marketplace could only assert in a successive action against it by Comerica. We conclude that the trial court erred when it determined that Marketplace was only entitled to bring res judicata as a defense, but we conclude that the trial court properly determined that res judicata would not bar Comerica from enforcing the mortgage against Marketplace.

A party may be entitled to judgment as a matter of law on the basis of a prior judgment. MCR 2.116(C)(7). The doctrine of res judicata "prevent[s] multiple suits litigating the same cause of action." *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004). Res judicata bars a 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." *Id*. Res judicata bars "every claim *arising from the same transaction* that the parties, exercising reasonable diligence, could have raised but did not." *Id*. (Emphasis added). Just as with compulsory joinder, claims arise from the same transaction for the purpose of res judicata if they concern identical evidence or essential facts. See *id*. at 123.

Parties typically use the doctrine of res judicata as a shield rather than as a sword. But no caselaw indicates that res judicata is limited to a defense for use only by a defendant to seek judgment as a matter of law. To the contrary, plaintiffs in other cases have claimed res judicata. See *Fox v Martin*, 287 Mich 147, 149; 283 NW 9 (1938). And MCR 2.116(C)(7), which provides that a

party may be entitled to judgment as a matter of law on the basis of a prior judgment, not only refers to "dismissal of the action," but also to "[e]ntry of judgment," as possible relief in the trial court. We conclude that nothing precludes a plaintiff from asserting res judicata as a ground for judgment if the plaintiff has asserted a ripe claim. Accordingly, the trial court erred when it determined that Marketplace could not assert res judicata because this case did not involve a second suit by Comerica against Marketplace.

Accordingly, we consider the trial court's alternative ground for granting summary disposition—that res judicata did not apply to bar Comerica from seeking remedies under the mortgage because the guaranty action did not involve the same transaction or occurrence as would an action under the mortgage. Marketplace premises its entire case on its assertion that the prior action bars Comerica from enforcing the mortgage in any future action. But as we have previously discussed, Marketplace is wrong. The guaranty action did not arise from the same transaction or occurrence as would Comerica's potential actions under the mortgage. Because Marketplace's entire suit was based on the faulty premise that any future action on Comerica's part would be barred by res judicata, we conclude that the trial court properly granted summary disposition in favor of Comerica.

We affirm. Comerica may tax costs as the prevailing party. MCR 7.219(A).

BOONSTRA, P.J., and SAWYER, J., concurred with O'CONNELL, J.

PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST BOARD OF TRUSTEES v CITY OF PONTIAC No 1

Docket No. 316418. Submitted July 15, 2014, at Detroit. Decided March 17, 2015, at 9:05 a.m. Leave to appeal sought.

The Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (plaintiff) and the Board of Trustees of the City of Pontiac Police and Fire Retirement System (whose claims were later dismissed by stipulation) brought an action in the Oakland Circuit Court, alleging that the city's failure to pay its required annual contribution to the city's health and insurance trust for fiscal year July 1, 2011 through June 30, 2012 pursuant to an executive order issued by the city's emergency manager violated both Const 1963, art 9, § 24 and the ordinance under which the trust had been codified, and also constituted a breach of contract. The trust was established as a tax-exempt voluntary employees' beneficiary association, 26 USC 501(c)(9), to hold the contributions of police and firefighters and those of the city pursuant to collective bargaining agreements under which retired police officers and firefighters were to receive various healthcare benefits funded by the trust. The trust required the city to make annual payments in an amount determined by the trust's actuary, and it specified that the benefits it funded were to be considered guaranteed by Const 1963, art 9, § 24. Executive Order 225, issued August 1, 2012 under § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), stated that it was amending the trust to terminate the city's obligation to continue to make annual contributions to the trust and that the order had immediate effect. 2011 PA 4 was later repealed. The city moved for summary disposition, arguing that Const 1963, art 9, § 24 did not apply to healthcare benefits under *Studier v Mich Pub Sch Employees Retirement Bd*, 472 Mich 642 (2005) and that there was no ordinance violation or breach of contract because 2011 PA 4 authorized the emergency manager to amend city ordinances and modify collective bargaining agreements. The court, Daniel P. O'Brien, J., granted the city's motion for summary disposition of plaintiff's claims. Plaintiff appealed.

The Court of Appeals *held*:

1. The actions of the emergency manager under 2011 PA 4 remained valid and enforceable, despite the suspension and subsequent repeal of that act by referendum, provided that his actions comported with the terms of the act.

2. The trial court correctly dismissed plaintiff's constitutional claim. Const 1963, art 9, § 24 provides that the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions are a contractual obligation thereof that shall not be diminished or impaired thereby, and further provides that financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities. Under *Studier*, the second clause of Const 1963, art 9, § 24 applied only to accrued financial benefits, and prefunding insurance for future healthcare benefits was not an accrued financial benefit. Therefore, that clause did not apply in this case and, even if it had, it would not have guaranteed any particular method of funding accrued liability of future benefits.

3. The trial court correctly dismissed plaintiff's claim that the city violated an ordinance with respect to its funding of the trust. Plaintiff did not identify which ordinance had allegedly been violated, but only cited the provisions of the trust that obligated the city to financially contribute to the trust, and the city's alleged violation of these provisions would have been properly categorized as a breach of contract.

4. The trial court erred by granting summary disposition of plaintiff's claim for breach of contract. Article III, § 1 of the trust obligated the city to pay annual contributions to the trust that were determined to be actuarially necessary to fund the future retiree healthcare benefits as required by the applicable collective bargaining agreements. On July 1, 2012, the city's actuarially required contribution to the trust was past due. Consequently, without modification, the city's obligation to fund the trust was breached on July 1, 2012. Although a trust is generally distinguishable from a contract, a promise to place future property in trust may be enforced as a contract right. Reading the trust as whole, the city's obligation to fund the trust flowed from the pertinent collective bargaining agreements. Under MCL 141.1519(1)(k), the emergency manager could reject, modify, or terminate the terms and conditions of an existing collective bargaining agreement, and Article X, § 1 of the trust provided that it could be amended at any time by collective bargaining. Therefore, assuming the emergency manager properly invoked

the authority granted by 2011 PA 4, he could have retroactively eliminated the city's required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012. However, Executive Order 225 did not do so. Rather, it provided that the trust was amended to remove the city's obligations to "continue" to make contributions to the trust, which related to present and future action. Because Executive Order 225 was adopted August 1, 2012, given immediate effect, and applied to the present or future obligations under Article III, § 1 of the trust, by its own terms, it did not apply to the to the city's already accrued actuarially required contribution to the trust for the already ended fiscal year July 1, 2011 through June 30, 2012.

Reversed and remanded for further proceedings.

Sullivan, Ward, Asher & Patton, PC (by *Matthew I. Henzi*), for plaintiff.

Giarmarco, Mullins & Horton, PC (by *Stephen J. Hitchcock* and *John L. Miller*), for defendant.

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

PER CURIAM. Plaintiff Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust (trustees) appeals by right Oakland Circuit Judge Daniel Patrick O'Brien's order granting defendant's motion for summary disposition of plaintiff's complaint to require the city to pay its required annual contribution to the trust for the fiscal year ending June 30, 2012. The trust was established in 1996 as a tax-exempt voluntary employees' beneficiary association (VEBA), 26 USC 501(c)(9), to hold the contributions of police and firefighter employees and those of the city pursuant to collective bargaining agreements (CBAs) between the city and the various unions of the city's police officers and firefighters. The trust held and invested these contributions to provide health, optical, dental, and life-insurance benefits to police and firefighters who retired on or after August 22, 1996, as

required by the various CBAs. At issue is the efficacy of Executive Order 225 issued on August 1, 2012, pursuant to § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), by the city's emergency manager (EM), Louis H. Schimmel, which purported to amend the trust to remove the city's annual obligation to contribute to the trust agreement "as determined by the Trustees through actuarial evaluations." The trial court accepted defendant's argument that the city's EM properly modified the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012, by modifying the existing CBAs between the city and police and firefighter unions. The trial court also ruled that plaintiff's claim under Const 1963, art 9, § 24, was without merit under *Studier v Mich Pub Sch Employees Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005). We conclude, even assuming that Executive Order 225 was properly adopted pursuant to § 19(1)(k), that it did not retroactively eliminate the city's obligation to contribute to the trust for the fiscal year ending June 30, 2012; consequently, we reverse and remand for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 8, 2012, the Board of Trustees of the City of Pontiac Police and Fire Retirement System and plaintiff trustees filed their complaint in circuit court, asserting that defendant funded the City of Pontiac Police and Fire Retirement System (PFRS), which provided retirement benefits to retired employees of the police and fire departments. In addition, plaintiffs asserted that defendant funded the trust, a tax-exempt VEBA, 26 USC 501(c)(9), which provided health, optical, dental, and life-insurance benefits to police and firefighters who retired on or after August 22, 1996.

The trust is administered by its five-member board of trustees, which consists of the city's mayor, the city's finance director, a firefighter, a police officer, and a fifth trustee whom the other trustees would select and who could participate in the trust. Declaration of Trust, Art IV, § 1. Plaintiffs alleged that defendant, through its EM, failed to pay its required contribution to the trust for the fiscal year between July 1, 2011 and June 30, 2012, which was actuarially determined to be $3,473,923.28. The trust includes the following relevant provisions:

> ARTICLE I
> Definitions
>
> * * *
>
> Section 3: Contributions — The term Contributions as used herein, shall mean the payment required to be made to the Trustees and to the Trust Fund by the City *under the authority such as ordinance or City Council resolution or under any applicable existing Collective Bargaining Agreements or any future Collective Bargaining Agreements* for the purpose of providing group health, hospitalization and dental and optical and group life insurance for employees, retirees and beneficiaries covered by the Plan.
>
> * * *
>
> ARTICLE II
> Establishment of Trust
>
> Section 1: The purpose of this Trust Fund . . . is to provide health and insurance benefits to eligible participants and beneficiaries of the Plan . . . . The Grantor[1] intends the benefits provided by this Trust to be consid-

[1] "Grantor" is undefined, but the "declaration of trust and agreement" is stated to be by the city and the trustees of the trust and is signed by

ered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution.

* * *

ARTICLE III

Contributions to the Trust Fund

Section 1: (a) The City-Employer shall be required to pay to the Trust Fund such amounts as the Trustees may determine are actuarially certified and are actuarially necessary to fund the Trust and provide benefits provided by the Plan consistent with actuarial valuations and calculations made by the Actuary for the Trust to result in a Prefunded Plan.

Such contributions shall also be made in accordance with the Collective Bargaining Agreements between the collective bargaining associations and the employer City and this Trust Agreement, and such other regulations of the Board of Trustees as are not inconsistent with the aforesaid authority.

(b) In addition to the amounts paid by the City on behalf of Participants as set forth above and in the Collective Bargaining Agreements, the City shall contribute to the Trust Fund such additional moneys which together with those contributions and return on investments shall be sufficient to fund the benefits provided on a sound actuarial basis. Participants shall contribute those amounts required for additional extended Family Riders in effect as of 8-22-96 and otherwise as determined by the trustees.

* * *

Section 2. The Trustees may compel and enforce payments of contributions in any manner they deem proper.

---

the city's mayor and finance director—both in those capacities and also separately in their capacity as trustees—and by the other two original trustees.

The Trustees may make such additional rules and regulations for the enforcement of the collection payments as they deem proper.

* * *

ARTICLE V

Powers and Duties of the Trustees

* * *

Section 2: The Trustees shall carry out the purposes of this Trust Agreement, and may maintain any health benefit programs and insurance policy or policies now in force and effect and available to Police and Fire retirees of the City of Pontiac or may substitute other comparable or superior policies in lieu thereof. In providing group life insurance to the Participants of this Plan so as to effectuate the purposes of this Trust Agreement, the Trustees shall be bound by the terms of this Trust Agreement *and any applicable Collective Bargaining Agreements between the City and the collective bargaining associations* and shall comply with all applicable laws.

* * *

ARTICLE VII

Liabilities of the Parties

Section 1: The City shall not be liable for payment to the Trust of any amounts other than those required of it by this Trust Agreement or any applicable Collectible [sic] Bargaining Agreement. The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, *except as provided by the terms of the Collective Bargaining Agreements* between the collective bargaining association and the City and the terms of this Trust Agreement. . . .

* * *

> ARTICLE X
>
> Amendments
>
> Section 1: The provisions of this Declaration of Trust and Agreement may be amended at any time, by (A) collective bargaining between the collective bargaining associations identified in Article 1, Section 8 and the City of Pontiac (B) by a unanimous vote of the five (5) Trustees, concurred in by the City Council of the City of Pontiac provided, however, that such Amendments are not inconsistent with any applicable Collectible [sic] Bargaining Agreements and do not adversely affect the tax exempt status of the 501(c)9 Trust. . . . [Declaration of Trust, executed January 30, 1997 (emphasis added).]

Although the plain language of the trust does not directly state when a required contribution is due, plaintiff asserts and defendant agrees that the actuarially required contribution to the trust for the fiscal year commencing July 1, 2011 and ending June 30, 2012 was due on or before June 30, 2012. It is also undisputed that during the fiscal year ending June 30, 2012, the city's EM entered termination collective bargaining agreements with the various police and firefighter unions. The city also contracted to receive police services from Oakland County effective August 1, 2011, and fire services from Waterford Township, effective February 1, 2012.

On August 1, 2012, the city's EM issued Executive Order (EO) 225, which purported to amend the trust pursuant to § 19(1)(k) of 2011 PA 4, to terminate the city's annual actuarially required contribution to the trust for the fiscal year ending June 30, 2012. The substantive provision of the order read as follows:

> Article III of the Trust Agreement, Section 1, subsections (a) and (b) are amended to remove Article III obligations of the City to continue to make contributions to

the Trust as determined by the Trustees through actuarial evaluations.

The Order shall have immediate effect.

The issuance of EO 225 was preceded by the EM's letter of July 10, 2012 to State Treasurer Andrew Dillon, seeking concurrence in the EM's plan to invoke the authority of § 19(1)(k) of 2011 PA 4 to modify the trust by modifying existing CBAs to eliminate the city's obligation to contribute to the trust. The letter outlined the provisions of the trust regarding contributions, Art III, §§ (1)(a) and (b), and its provisions regarding amendments, Art X, § (1). The EM also stated in the letter that he "anticipated that the City will be required by the Trustees of the VEBA to contribute $3,915,371 during the fiscal year ending June 30, 2013."

In further making the case for the exercise of authority under § 19(1)(k) of 2011 PA 4, the EM wrote that he was unable to negotiate with local police and firefighter unions because the city had contracted for police and firefighter services, and the local unions no longer existed. The EM also noted that amendment of the trust by unanimous action of the trustees under Article X would not occur. The EM observed that "[u]nless action is taken to eliminate the VEBA contribution obligation the City anticipates that it will not be able to make the annual contribution required by the Trustees in June 2012, and for subsequent years thereafter." The EM also noted the termination of the city's obligation to the trust for the fiscal year ending June 30, 2012, would not create a hardship because the trust had sufficient assets to fund retiree insurance benefits for "a significant number of years going forward." The EM then stated that the "amount saved in the fiscal year beginning July 1, 2012, by a modification of the collective

bargaining agreements obligations to the Trust will significantly contribute to the City's ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year beginning June [sic] 1, 2012, and thereafter." The EM concluded his request for authority by noting: "Time is of the essence. The new fiscal year starts July 1, 2012. In order to have maximum impact on the 2012/2013 fiscal year given the time frames of notice to the Trustees of this action, I urge prompt consideration for this request."

The State Treasurer responded to the EM's July 10, 2012 letter in a letter dated July 16, 2012. In his letter, the State Treasurer outlined the "generalized economic problem" facing the city. The State Treasurer also reviewed the requirements of § 19(1)(k) of 2011 PA 4 to "reject, modify, or terminate one or more terms and conditions of an existing collective bargaining agreement." The State Treasurer also found with respect to the EM's request that the four conditions of MCL 141.1519(1)(k) had been satisfied. The State Treasurer approved the proposed modification without stating in which fiscal year it would commence but stated that the changes "can save the City approximately $3.9 million annually . . . ."

The EM issued Executive Order 225 on August 1, 2012, providing that it "have immediate effect." On August 8, 2012, plaintiff filed its complaint alleging, with respect to defendant's failure to pay its actuarially required contribution to the trust, in Count II, a violation of Const 1963, art 9, § 24; in Count IV, a violation of an ordinance; and in Count VI, a breach of contract. Plaintiff only challenged defendant's failure to pay its required contribution to the Trust for the fiscal year July 1, 2011 through June 30, 2012. The other counts in plaintiff's complaint related to defendant's failure to pay

its required contribution to the Pontiac Police and Fire Retirement System. On March 21, 2013, the parties stipulated to dismissing these claims, apparently because the claims had been settled.

On March 6, 2013, defendant moved for summary disposition. In relevant part, defendant argued that Count II was meritless because our Supreme Court held in *Studier*, 472 Mich 642, that Const 1963, art 9, § 24 does not apply to healthcare benefits. Defendant argued that Count IV was meritless because 2011 PA 4 authorized the emergency manager to amend city ordinances, and Count VI was meritless because 2011 PA 4 authorized the emergency manager to modify an existing collective bargaining agreement.

At the conclusion of the motion hearing, the trial court decided to grant defendant's motion for summary disposition in accordance with defendant's legal arguments. On May 14, 2013, the trial court entered its order granting defendant's motion for summary disposition. Plaintiff now appeals by right.

II. STANDARD OF REVIEW

Although the trial court did not identify under which subrule it granted summary disposition, we review the trial court's decision under the standard applicable to MCR 2.116(C)(10) "because the trial court's consideration went beyond the parties' pleadings." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). As with all such motions, we review de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich 274, 277-278; 681 NW2d 342 (2004). The trial court in deciding the motion must view the substantively admissible evidence submitted

up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Summary disposition may be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

The proper interpretation of a contract and the legal effect of one of its clauses are legal questions reviewed de novo. *Rory v Continental Ins Co*, 473 Mich 457, 461, 464; 703 NW2d 23 (2005). When determining the meaning of a contract, a court must assign undefined words in the contract their "plain and ordinary meaning that would be apparent to a reader of the instrument." *Id*. at 464. A dictionary may be consulted to ascertain the plain and ordinary meaning of words or phrases as they would appear to a reader of the contract. *Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007). After ascertaining the meaning of a contract's terms, "a court must construe and apply unambiguous contract provisions as written." *Rory*, 473 Mich at 461. Any other legal questions relating to interpretation of the contracts at issue or pertinent statutes are also reviewed de novo. *Studier*, 472 Mich at 649; *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 369; 803 NW2d 698 (2010).

III. ANALYSIS

A. REPEAL OF 2011 PA 4

2011 PA 4 was "suspended" on August 8, 2012, by the Board of State Canvassers' certification of the suffi-

ciency of the referendum petitions regarding the act filed on February 29, 2012. See Const 1963, art 2, § 9; MCL 168.477(2); *Stand Up For Democracy v Secretary of State*, 492 Mich 588, 595 n 3, 598, 619-620 (opinion by KELLY, J.); 822 NW2d 159 (2012); OAG, 2011-2012, No. 7267, p 72, 78 (August 6, 2012).[2] The Board of State Canvassers' certification on November 26, 2012, of the fall general election results disapproving 2011 PA 4 had the effect of repealing the act and reviving the Local Government Fiscal Responsibility Act, 1990 PA 72, MCL 141.1201 *et seq*., effective on the suspension of 2011 PA 4. See *Martin v Murray*, 309 Mich App 37, 41; 867 NW2d 444 (2015); see also *In re Detroit*, 504 BR 191, 216 (Bankr ED Mich, 2013), citing *Davis v Roberts*, unpublished order of the Court of Appeals, entered November 16, 2012 (Docket No. 313297). The revived 1990 PA 72 was repealed and replaced by 2012 PA 436, MCL 141.1541 *et seq*., effective March 28, 2013. See *Martin*, 309 Mich App at 42; *In re Detroit*, 504 BR at 216, 250.

The parties do not discuss the effect of the suspension of 2011 PA 4 one week following the issuance of Executive Order 225 on August 1, 2012. Their arguments assume, however, that the EM's actions pursuant to 2011 PA 4 before its suspension, provided the actions comported with the act's terms, remain valid and enforceable. We agree. As the Supreme Court stated in *Minty v Bd of State Auditors*, 336 Mich 370, 390-391; 58 NW2d 106 (1953), quoting *Cusick v Feldpausch*, 259 Mich 349; 353; 243 NW 226 (1932), quoting 1 Lewis' Sutherland Statutory Construction (2d ed), § 284:

---

[2] Opinions of the Attorney General are not binding, but we find OAG, 2011-2012, No. 7267, p 72, 78 (August 6, 2012), persuasive. See *Martin v Murray*, 309 Mich App 37, 41 n 4; 867 NW2d 444 (2015).

> " 'A law can be repealed by the law-giver; but *the rights which have been acquired under it while it was in force do not thereby cease*. It would be an act of absolute injustice to abolish with a law all the effects which it had produced. This is a principle of general jurisprudence; but a right to be within its protection must be a vested right. It must be something more than a mere expectation based upon an anticipated continuance of the existing law. It must have become a title, legal or equitable, to the present or future enjoyment of property, or to the present or future enforcement of a demand, *or a legal exemption from a demand made by another*.' " [Emphasis added; see also *Peters v Goulden*, 27 Mich 171, 171-172 (1873).]

The Legislature has similarly provided that the repeal of a statute will not affect a penalty, forfeiture, or liability incurred before the statute's repeal.

> The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability. [MCL 8.4a.]

Consequently, we conclude that if the EM validly acted pursuant to the authority of 2011 PA 4 to amend existing CBAs so that the terms of the trust were modified to remove the city's actuarially required contribution to the trust for the fiscal year ending June 30, 2012, then that action remains valid and enforceable despite the subsequent repeal by referendum of the act.

B. CONST 1963, ART 9, § 24

Count II of plaintiff's complaint alleges a violation of Const 1963, art 9, § 24, which reads in its entirety as follows:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

"These two clauses unambiguously prohibit the state and its political subdivisions from diminishing or impairing 'accrued financial benefits,' and require them to fund 'accrued financial benefits' during the fiscal year for which corresponding services are rendered." *Studier*, 472 Mich at 649. But the Court also held that "health care benefits are not 'accrued financial benefits' and, thus, are not protected by Const 1963, art 9, § 24." *Id*. at 670.

Plaintiff does not dispute the holding of *Studier*, but it does argue its claim in the instant case is distinguishable because Article II of the trust reads in relevant part: "The grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article 9, Section 24 of the State of Michigan Constitution." Therefore, plaintiff argues, the plain language of the trust elevates otherwise unprotected healthcare benefits to the protection of Const 1963, art 9, § 24. Plaintiff's argument is not premised on the first clause of Const 1963, art 9, § 24; plaintiff asserts that defendant violated the second clause of Const 1963, art 9, § 24 by refusing to fully fund the retirees' future group healthcare insurance benefits on an annual basis.

The trial court correctly dismissed this claim. As explained by the Court in *Studier*, the threshold question regarding whether the funding requirement of the

second clause of Const 1963, art 9, § 24 applies is whether "accrued financial benefits" are at issue. *Studier*, 472 Mich at 653.

> Specifically, the first clause contractually binds the state and its political subdivisions to pay for retired public employees' "accrued financial benefits . . . ." Thereafter, the second clause seeks to ensure that the state and its political subdivisions will be able to fulfill this contractual obligation by requiring them to set aside funding each year for those "financial benefits arising on account of service rendered in each fiscal year . . . ." [*Id*. at 654.]

So, because the funding requirement of the second clause of Const 1963, art 9, § 24 only applies to "accrued financial benefits," and prefunding insurance for future healthcare benefits are not "accrued financial benefits," *Studier*, 472 Mich at 654, 670, it follows that the second clause of Const 1963, art 9, § 24 would not apply in this case. Moreover, even if it had applied, the second clause of Const 1963, art 9, § 24 would not guarantee any particular method of funding accrued liability of future benefits. *Shelby Twp Police & Fire Ret Bd v Shelby Twp*, 438 Mich 247, 254; 475 NW2d 249 (1991); *Kosa v State Treasurer*, 408 Mich 356, 371-372; 292 NW2d 452 (1980). The trial court correctly concluded that plaintiff's constitutional claim lacked merit.

C. ORDINANCE VIOLATION

Count IV of plaintiff's complaint alleges a violation of an ordinance. Plaintiff does not identify which ordinance defendant allegedly violated. Rather, plaintiff only cites the provisions of the trust instrument obligating defendant to financially contribute to the trust. Defendant's alleged violation of these provisions would be properly categorized as a breach of contract.

"[W]here a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, our research has uncovered no local ordinance concerning healthcare benefits for retired police and firefighters. Chapter 92 of the Pontiac Municipal Code is titled "Retirement." The final article, Article IV, §§ 92-101 to 92-125, is titled "Policemen's and Firemen's Retirement System." Article IV apparently governs the PFRS. We are unable to identify any city ordinance governing the trust or healthcare benefits for retired police and firefighters, nor has plaintiff cited one. Consequently, we must conclude that the trial court correctly dismissed plaintiff's claim regarding an ordinance violation with respect to defendant's funding of the trust.

D. BREACH OF CONTRACT

Count VI of plaintiff's complaint asserts a claim for breach of contract regarding the actuarially required contribution to the trust for the fiscal year commencing July 1, 2011 through June 30, 2012, which the parties agree was due on or before June 30, 2012. There is no dispute that Article III, § 1 of the trust obligates defendant to pay annual contributions to the trust that are determined to be "actuarially necessary" to fund the future healthcare benefits of the pertinent retirees as required by the applicable collective bargaining agreements. Indeed, it was this significant ongoing liability that prompted the EM to seek the State Treasurer's authorization to modify the terms of the trust through the authority of § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k).

Initially we address whether the EM's action of issuing EO 225 on August 8, 2012 retroactively eliminates the city's obligation under the trust and various CBAs that accrued on or before June 30, 2012. On July 1, 2012, the city's actuarially required contribution to the trust was past due. Consequently, without modification, the city's obligation to fund the trust was breached on July 1, 2012. See *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 458; 761 NW2d 846 (2008) (stating that a breach of contract occurs when a party fails to perform its contractually required duties). We note that although a trust is generally distinguishable from a contract, a promise to place future property in trust may be enforced as a contractual right. See 76 Am Jur 2d Trusts § 250, p 309; 2 Restatement Trusts, 3d, § 41, comment c, pp 183-184. Here, reading the trust as a whole, the city's obligation to fund the trust flows from the pertinent collective bargaining agreements, and the trust is not an independent contractual obligation. See Declaration of Trust, Art I, § 1; Art III, § 1(a), cl 2; Art V, § 2. As stated in Article VII, § 1, "The City shall not be liable to make contributions to the Trust or pay any expenses whatsoever in connection therewith, *except as provided by the terms of the Collective Bargaining Agreements* between the collective bargaining association and the City and the terms of this Trust Agreement." (Emphasis added).

At oral argument, the parties disagreed whether the EM could retroactively modify the city's accrued trust liability but otherwise cited no pertinent authority to support their respective positions. We agree with defendant's position. Under 2011 PA 4, the EM could modify collective bargaining agreements, and, hence, could modify the city's obligation to contribute to the trust. Moreover, the trust itself, in Article X, § 1, provides that it may be "amended at any time" by

"collective bargaining . . . ." And, after complying with the conditions specified in 2011 PA 4, the EM could "reject, modify, or terminate 1 or more terms and conditions of an existing collective bargaining agreement." MCL 141.1519(1)(k). Because the parties to a collective bargaining agreement could apply its modified terms retroactively, we conclude that the EM also could do so under § 19(1)(k). See *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 326; 550 NW2d 228 (1996) ("Generally, parties are free to take from, add to, or modify an existing contract."). While a modification would normally require a "meeting of the minds" of the contracting parties, *id*. at 326-327, this requirement is dispensed with when the EM acts pursuant to the authority of § 19(1)(k). Consequently, assuming the EM properly invoked the authority granted by 2011 PA 4, the EM could retroactively eliminate the city's actuarially required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012.

But the question remains whether Executive Order 225, assuming it was properly adopted under the authority of 2011 PA 4, did, in fact, eliminate the city's actuarially required contribution to the trust for the fiscal year July 1, 2011 through June 30, 2012. We conclude it did not. The plain language of Executive Order 225 provides that the trust is "amended to remove Article III obligations of the City *to continue to make* contributions to the Trust[.]" (Emphasis added.) The term "continue" means to "go on or keep on without interruption, as in some course or action[.]" *Random House Webster's College Dictionary* (1992). Plainly, the term "continue" relates to present and future action. Further, Executive Order 225 provided that it "shall have immediate effect." Because Executive Order 225 was adopted August 1, 2012, given

immediate effect, and applied to the present of present or future obligations under Article III, § 1, by its own terms, it did not apply to the to the city's already accrued actuarially required contribution to the trust for the already ended fiscal year July 1, 2011 through June 30, 2012.

This plain reading of EO 225 is also supported by the EM's request for concurrence and the State Treasurer's approval of authority granted to the EM to adopt EO 225. In his letter to the State Treasurer of July 10, 2012, after noting the city's Article III funding obligation, the EM stated that it was "anticipated that the City will be required by the Trustees of the VEBA to contribute $3,915,371 *during the fiscal year ending June 30, 2013*." (Emphasis added.) While the EM also mentioned the city's trust obligation for the fiscal year ending June 30, 2012, he wrote that the "amount saved *in the fiscal year beginning July 1, 2012*, by a modification of the collective bargaining agreements obligations to the Trust will significantly contribute to the City's ability to make the contributions to all other retirees and employees for healthcare benefits for the fiscal year *beginning June [sic] 1, 2012*, and thereafter." (Emphasis added.) The EM concluded his letter with a request for timely action so as to "have *maximum impact on the 2012/2013 fiscal year . . . .*" (Emphasis added.) Thus, although not free of all ambiguity, the July 10, 2012 letter, read as a whole, is a request to amend the city's trust funding obligation beginning with the fiscal year commencing July 1, 2012.

Similarly, the State Treasurer's letter of July 16, 2012, determining that the four conditions of MCL 141.1519(1)(k) were satisfied and justified the EM's proposed action, supports determining that the modification applied to the city's trust contributions for the

fiscal year of July 1, 2012 to June 30, 2013, and thereafter. The State Treasurer, in finding that MCL 141.1519(1)(k)(*ii*)[3] was satisfied, wrote that "[t]he proposed modification of the collective bargaining agreements as to retiree health care contributions to a VEBA is reasonable and necessary" and "changes to language relating to retiree benefits can save the City approximately $3.9 million annually . . . ." The EM's July 10, 2012 letter referred to a similar amount as the city's anticipated required contribution to the trust for the fiscal year ending June 30, 2013.

We reverse and remand for further proceedings. We do not retain jurisdiction. No taxable costs are awarded to either party, a public question being involved. MCR 7.219.

MARKEY, P.J., and OWENS and FORT HOOD, JJ., concurred.

---

[3] MCL 141.1519(1)(k)(*ii*) provided: "Any plan involving the rejection, modification, or termination of 1 or more terms and conditions of an existing collective bargaining agreement is reasonable and necessary to deal with a broad, generalized economic problem."

PONTIAC POLICE AND FIRE RETIREE PREFUNDED GROUP HEALTH AND INSURANCE TRUST BOARD OF TRUSTEES v CITY OF PONTIAC No 2

Docket No. 316680. Submitted July 15, 2014, at Detroit. Decided March 17, 2015, at 9:10 a.m.

The Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Trust brought an action for declaratory judgment in the Oakland Circuit Court, alleging that the decision of the city's emergency manager to reduce the retiree healthcare benefits of firefighters and police by entering Executive Orders 206 and 207 under § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k), violated Const 1963, art 9, § 24 and constituted a breach of contract. Plaintiff's challenge to the executive order terminating the city's obligation to contribute to the trust, Executive Order 225, was addressed in a separate proceeding and dismissed by stipulation. 2011 PA 4 was later repealed. The city moved for summary disposition under MCR 2.116(C)(5), (C)(8), and (C)(10), arguing that plaintiff lacked standing to challenge Executive Orders 206 and 207; that its constitutional challenge was meritless under *Studier v Mich Pub Sch Employees Retirement Bd*, 472 Mich 642 (2005), which held that healthcare benefits are not protected by Const 1963, art 9, § 24; and that its breach-of-contract claim was meritless because the emergency manager had the authority under 2011 PA 4 to unilaterally modify collective bargaining agreements. The court, Shalina D. Kumar, J., granted the city's motion for summary disposition, ruling that although plaintiff had standing to bring the action, its constitutional and contractual arguments failed. Plaintiff appealed.

The Court of Appeals *held*:

1. The city's standing argument was properly before the Court. The city did not raise the issue of standing in its answer to the original complaint or in its answer to the amended complaint; rather, it raised the issue in its motion for summary disposition, which was filed after it had filed its answer to plaintiff's amended complaint. A claim that a plaintiff lacks standing is considered a motion under MCR 2.116(C)(5), i.e., that the plaintiff lacks the

legal capacity to sue. MCR 2.116(D)(2) provides that a motion for summary disposition based on MCR 2.116(C)(5) must be raised in a party's responsive pleading unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading. However, under MCR 2.116(D)(4), the trial court has the discretion to allow such a motion even if it is not timely. The city raised the issue of standing in its motion for summary disposition, plaintiff responded to the issue, and the trial court ruled. Thus, under traditional rules of appellate preservation, the issue was properly preserved, as was the related issue whether plaintiff was the real party in interest under MCR 2.201(B).

2. The trial court correctly ruled that plaintiff had standing to enforce the terms of the trust agreement. However, the portion of the lawsuit relating to the trust agreement was dismissed, and plaintiff did not have standing with respect to its remaining claims, which attempted to assert the rights of police and firefighter retirees to lifetime, unchanging healthcare benefits. These rights, if they existed, were based in contract. A party asserting a breach of contract must establish by a preponderance of the evidence that there was a contract that the other party breached, thereby resulting in damages to the party claiming breach. Plaintiff asserted no damages to itself as the governing corporate entity of the trust as a result of modifications to the collective bargaining agreements that affected retiree benefits. Rather, plaintiff attempted to assert the rights of the retirees. Plaintiff was not a party to the collective bargaining agreements, an assignee of a party to the contracts, or a third-party beneficiary of the collective bargaining agreements. Consequently, plaintiff was not the real party in interest to assert breach-of-contract claims regarding the collective bargaining agreements. The fact that plaintiff sought declaratory relief did not give it standing to sue under MCR 2.605 because there was no actual controversy between plaintiff and the city with regard to insurance benefits provided to retired police and firefighters. The fact that three of plaintiff's members were beneficiaries of the trust also did not give plaintiff standing to sue. Unlike a nonprofit group composed of members sharing a common interest or who asserted a common injury through their group association, plaintiff was a corporate body charged with the limited and specified duties to administer the trust assets in a fiduciary manner. The individual trustees did not necessarily share the same interests, nor could they assert their own individual personal interests in the name of the board. Therefore, the board of trustees could not gain standing because one or more of the individual trustees had a claim of injury in his individual capacity.

3. The trial court correctly granted summary disposition of plaintiff's claim that Executive Orders 206 and 207 violated Const 1963, art 9, § 24, which prohibits the state and its political subdivisions from diminishing or impairing accrued financial benefits and requires them to fund accrued financial benefits during the fiscal year for which corresponding services are rendered. Under *Studier*, healthcare benefits are not accrued financial benefits and therefore are not protected by Const 1963, art 9, § 24. Although the trust stated that its benefits were to be considered guaranteed by Const 1963, art 9, § 24, the parties to a contract cannot not elevate its provisions to the protection of a constitutional provision that plainly does not apply.

4. The trial court correctly granted summary disposition of plaintiff's claim for breach of contract. The source of the retirees' benefits was not the trust agreement itself but rather various collective bargaining agreements. Because the trust agreement was unaffected by Executive Orders 206 and 207, modification of the retirees' benefits could not have resulted in a breach of the trust agreement itself. After complying with the conditions specified in 2011 PA 4, the emergency manager had the authority under MCL 141.1519(1)(k) to reject, modify, or terminate one or more of the terms and conditions of existing collective bargaining agreements, which were the source of police and firefighter retiree healthcare benefits. Even if Executive Orders 206 and 207 had affected the trust agreement, their provisions operated prospectively only. Because there was no contention that the city breached the terms of the trust instrument with respect to providing benefits to the retirees, there was no breach of contract. Plaintiff's allegations related only to the collective bargaining agreements, with respect to which they did not have standing to sue.

Affirmed.

Sullivan, Ward, Asher & Patton, PC (by *Matthew I. Henzi*), for plaintiff.

Giarmarco, Mullins & Horton, PC (by *Stephen J. Hitchcock* and *John C. Clark*), for defendant.

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

PER CURIAM. Plaintiff Board of Trustees of the City of Pontiac Police and Fire Retiree Prefunded Group

Health and Insurance Trust (board of trustees or trustees) appeals by right Oakland Circuit Judge Shalina D. Kumar's order granting defendant's motion for summary disposition under MCR 2.116(C)(5) (lack of standing), (C)(8) (failure to state a claim), and (C)(10) (no genuine issue of material fact). We affirm.

I. FACTS AND PROCEEDINGS

The Board of Trustees of the City of Pontiac Police and Fire Retirement System (retirement system trustees) and plaintiff trustees filed a complaint in circuit court asserting that defendant funded the City of Pontiac Police and Fire Retirement System, which provided retirement benefits to retired police and firefighters. Plaintiffs also asserted that defendant funded the City of Pontiac Police and Fire Retiree Prefunded Group Health and Insurance Plan (the trust), a tax-exempt voluntary employees' beneficiary association, 26 USC 501(c)(9), which provided health, optical, dental, and life-insurance benefits to police and firefighters who retired on or after August 22, 1996. The trust's board of trustees is composed of five members: the city's mayor, the city's finance director, a firefighter, a police officer, and a fifth trustee whom the other trustees would select and who could participate in the trust.[1]

During the fiscal year ending June 30, 2012, the city's emergency manager (EM), Louis Schimmel, entered into termination collective bargaining agree-

[1] The pertinent provisions of the trust are set forth in the related case of *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Plan Bd of Trustees v City of Pontiac*, 309 Mich App 590; ___ NW2d ___ (2015) (Docket No. 316418) (*Trustees I*), involving Executive Order 225 and the city's actuarially required contribution to the trust for the fiscal year ending June 30, 2012.

ments (CBAs) with the various police and firefighter unions. The EM acted under the authority of § 19(1)(k) of 2011 PA 4, MCL 141.1519(1)(k).[2] The city also contracted to receive police services from Oakland County effective August 1, 2011, and fire services from Waterford Township, effective February 1, 2012. As of April 24, 2012, the CBAs outlining benefits funded by the trust included the Police Supervisors Contract Termination Agreement, the Police Non-Command Contract Termination Agreement, the Fire Contract Termination Agreement, the Police Supervisors Collective Bargaining Agreement, the Police Non-Command Collective Bargaining Agreement, and the Fire Collective Bargaining Agreement. On April 25, 2012, the city's EM issued Executive Orders 206 and 207, which modified the healthcare benefits set forth in the various CBAs. The executive orders were identical, with Executive Order 206 applying to firefighter retirees and Executive Order 207 applying to police retirees. Executive Orders 206 and 207 took effect on July 1, 2012, and modified retirees' healthcare benefits by requiring pre-Medicare-aged retirees to enroll in a Humana PPO-08 Plan, limiting Medicare-aged retirees to a Medicare Advantage Plan G, eliminating defendant's reimbursement of retirees' Medicare Part B premium, and requiring pre-Medicare-aged retirees to pay the amount above the "hard cap" of 2011 PA 152 or pay 20 percent of annual rates, whichever is greater.

---

[2] 2011 PA 4 was "suspended" on August 8, 2012, by the Board of State Canvassers' certification of the sufficiency of the referendum petitions regarding the act filed on February 29, 2012. The Board of State Canvassers' certification on November 26, 2012, of the fall general election results disapproving 2011 PA 4 had the effect of repealing the act and reviving the Local Government Fiscal Responsibility Act, 1990 PA 72, MCL 141.1201 *et seq*. We decided in *Trustees I*, Part III(A), that the actions of the EM that were authorized by 2011 PA 4 remained valid after the suspension and repeal of that act.

On August 29, 2012, a stipulated order of dismissal was entered as to the claim of the retirement system trustees because of Executive Order 224, which memorialized a settlement. On the same day, a stipulated order was entered authorizing plaintiff board of trustees[3] to file an amended complaint alleging that the city improperly reduced retiree healthcare benefits through Executive Orders 206 and 207. Count I alleged a violation of Const 1963, art 9, § 24; Count II alleged that through Executive Order 225 the city improperly sought to amend the trust by eliminating its obligation to financially contribute to the trust,[4] and Count III alleged a breach of contract claim. Plaintiff sought a declaratory ruling, an injunction, and monetary damages.

On February 13, 2013, the city moved for summary disposition under MCR 2.116(C)(5), (C)(8), and (C)(10). In its supporting brief the city argued that plaintiff trustees lacked standing to sue for a certain level of healthcare benefits because it was not responsible for the level of retirees' healthcare benefits. Rather, the city argued, the board of trustees was only responsible for ensuring compliance with the Internal Revenue Code, managing and investing trust funds, and providing health, optical, dental, and life-insurance benefits to police and firefighters who retired on or after August 22, 1996, as required by the various CBAs. The city also argued that Count I was meritless because of our Supreme Court's holding in *Studier v Mich Pub Sch Employees Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), that healthcare

[3] Hereafter referred to as the singular plaintiff, board of trustees, or simply the trustees.

[4] On April 29, 2013, the parties stipulated to dismiss plaintiff's claims to the extent they challenged Executive Order 225, which is the subject of *Trustees I*.

benefits are not protected by Const 1963, art 9, § 24, and that Count III was meritless because the emergency manager had the authority under 2011 PA 4 to unilaterally modify collective bargaining agreements.

On May 22, 2013, the trial court entered its opinion and order granting defendant's motion for summary disposition. The trial court first concluded that the trustees had standing:

> Pursuant to the language of the Trust Agreement, Plaintiff is responsible for ensuring the Trust's compliance with the Internal Revenue Code, as well as investing, managing, and controlling the Trust's assets. In addition, Plaintiff has the "right and duty to enforce . . . the performance of all obligations provided in th[e] Trust." As Plaintiff is the entity responsible for the Trust's assets and required to enforce each obligation set forth in the Trust, Plaintiff has standing to bring the instant lawsuit.

The trial court then concluded that Count I was meritless because healthcare benefits are not protected by Const 1963, art 9, § 24. The trial court also concluded that Count III was meritless because the emergency manager validly amended the various CBAs pursuant to the authority granted by 2011 PA 4.

II. STANDARD OF REVIEW

Although the trial court did not identify under which subrule it granted summary disposition, we review the trial court's decision under the standard applicable to MCR 2.116(C)(10) "because the trial court's consideration went beyond the parties' pleadings." *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 59; 680 NW2d 50 (2004). We review de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a claim. *Corley v Detroit Bd of Ed*, 470 Mich

274, 277-278; 681 NW2d 342 (2004). In deciding the motion, the trial court must view the substantively admissible evidence submitted up to the time of the motion in a light most favorable to the party opposing the motion. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Summary disposition may be granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

III. ANALYSIS

A. STANDING

The city first argues that plaintiff board of trustees lacks standing to maintain the instant action. In particular, the city notes that the trustees have specific and limited duties under the trust agreement. The trust agreement limits the duties of the board of trustees to carrying out the purposes of the trust, maintaining the trust's tax-exempt status under the Internal Revenue Code, and investing, managing, and controlling the trust's assets. While the purpose of the trust is to provide group insurance benefits for police and firefighter retirees, the nature and extent of those benefits is determined by the pertinent CBAs between the city and the various police and firefighter unions. The city also argues that nothing in the trust agreement establishes that the board of trustees has any role in determining the extent of the benefits afforded the retirees, and the trustees are expressly "bound by the terms of [the] Trust Agreement and any applicable

Collective Bargaining Agreements between the City and the collective bargaining associations . . . ." Consequently, the city argues, the board of trustees has no more interest in the level of retiree health insurance benefits than any other citizen does, and under the doctrine of standing, the board of trustees is not a proper party to assert the claims made in this lawsuit.

Initially, we must decide whether the city's standing argument is properly before the Court. An appellee who has taken no cross-appeal may nevertheless argue that a judgment in its favor be affirmed for reasons that were rejected by the lower court. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). But the city did not raise the issue of standing in its answer to the original complaint or in its answer to the amended complaint. This Court has viewed a claim that a plaintiff lacks standing as a motion under MCR 2.116(C)(5), i.e., that the plaintiff lacks the legal capacity to sue. See *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 528; 695 NW2d 508 (2004). Further, to preserve a motion under subrule (C)(5), a party must raise the issue in its "first responsive pleading or in a motion filed prior to that pleading." *Id*., citing MCR 2.116(D)(2). Here, the city did not do so; it raised the issue in its motion for summary disposition that was filed after it had filed its answer to plaintiff's amended complaint. While the Court in *Glen Lake* held that the defendant in that case had waived the issue of standing by not timely raising it,[5] we conclude that in this case the issue has been properly preserved for our review.

---

[5] The Court also noted that the defendant "affirmatively acquiesced to [the] plaintiffs' right to sue by entering into a stipulation agreeing to the entry of a modified lake level order . . . ." *Glen Lake*, 264 Mich App at 529. The Court, therefore, applied the rule: "A party cannot stipulate a

MCR 2.116(D)(2) provides that a motion for summary disposition based on the "grounds listed in subrule (C)(5), (6), and (7) must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading." But the trial court has the discretion to allow such a motion even if it was not timely. "It is within the trial court's discretion to allow a motion filed under this subsection to be considered if the motion is filed after such period." MCR 2.116(D)(4). In this case, the city raised the issue of standing in its motion for summary disposition, plaintiff responded to the issue, and the trial court ruled. Thus, under traditional rules of appellate preservation, the issue has been properly preserved. See *Gen Motors Corp v Dep't of Treas*, 290 Mich App 355, 386; 803 NW2d 698 (2010) (noting that an issue is generally not preserved for appellate review unless it was raised before and decided by the trial court).

Additionally, the city essentially argues that the board of trustees is not the real party in interest, MCR 2.201(B), to assert claims of injury flowing from modification of the pertinent CBAs that determine retiree insurance benefits. Our Supreme Court has held that the defense that a plaintiff is not the real party in interest "is not the same as the legal-capacity-to-sue defense." *Leite v Dow Chem Co*, 439 Mich 920, 920 (1992). A motion for summary disposition asserting as its basis the doctrine of standing invokes a prudential doctrine that "focuses on whether a litigant 'is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable.' " *Lansing*

matter and then argue on appeal that the resultant action was error." *Id*. (citation and quotation marks omitted).

Sch Ed Ass'n v Lansing Bd of Ed, 487 Mich 349, 355; 792 NW2d 686 (2010) (citation omitted). "A motion based on such a defense would be within MCR 2.116(C)(8) or MCR 2.116(C)(10), depending on the pleadings or other circumstances of the particular case." *Leite*, 439 Mich at 920. A motion for summary disposition based on subrule (C)(8) or (C)(10) "may be raised at any time[.]" MCR 2.116(D)(4). Therefore, we conclude that the city timely raised the issues of standing and whether plaintiff is the real party in interest, so they are properly presented for our review.

The issue of standing presents a question of law that is reviewed de novo on appeal. *Barclae v Zarb*, 300 Mich App 455, 467; 834 NW2d 100 (2013). Likewise, the related issue of whether a plaintiff is the real party in interest is also a question of law that we review de novo. *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

MCR 2.201(B) provides that "[a]n action must be prosecuted in the name of the real party in interest . . . ." The real party in interest is a party who is vested with a right of action in a given claim, although the beneficial interest may be with another. *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356; *Barclae*, 300 Mich App at 483. In general, standing requires a party to have a sufficient interest in the outcome of litigation to ensure vigorous advocacy and "in an individual or representative capacity some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy." *Bowie v Arder*, 441 Mich 23, 42; 490 NW2d 568 (1992) (citation and quotation marks omitted); see also *Lansing Sch Ed Ass'n*, 487 Mich at 355-356. Both the doctrine of standing and the included real-party-in-interest rule are prudential limi-

tations on a litigant's ability to raise the legal rights of another. *Lansing Sch Ed Ass'n*, 487 Mich at 355-356; *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 355. Further, "a litigant has standing whenever there is a legal cause of action." *Lansing Sch Ed Ass'n*, 487 Mich at 372. But plaintiffs must assert their own legal rights and cannot rest their claims to relief on the rights or interests of third parties. *Barclae*, 300 Mich App at 483. The real party in interest is one who is vested with the right of action as to a particular claim, or, stated otherwise, is the party who under the substantive law in question owns the claim asserted. *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356.

First, we agree with the trial court that the board of trustees has standing to enforce the terms of the trust agreement. The trust agreement specifically affords the trustees "the right and duty to enforce payment of all contributions provided for in the Collective Bargaining Agreement and the performance of all obligations provided in this Trust." Declaration of Trust, Art V, § 4. Also, the trustees "may compel and enforce payments of contributions in any manner they deem proper." *Id*., Art III, § 2. And, in general, the board of trustees has a duty to "enforce any claims of the trust . . . and to marshal and collect outstanding trust property." *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356. Thus, under the terms of the trust agreement, the trustees have a right of action to compel payment of contributions that are specified in the agreement. But this part of the lawsuit, which involves Executive Order 225, was dismissed. Plaintiff's remaining claims attempt to assert the rights of third parties, police and firefighter retirees. The retirees' rights to assert lifetime, unchanging healthcare benefits must, if they exist, be based in contract. See, e.g., *M & G Polymers USA, LLC v Tacket*, ___ US ___;

135 S Ct 926; 190 L Ed 2d 809 (2015); see also *Allied Chem & Alkali Workers of America v Pittsburgh Plate Glass Co*, 404 US 157, 181 n 20; 92 S Ct 383; 30 L Ed 2d 341 (1971). As the retirees' rights to healthcare benefits flow from the pertinent CBAs, they are governed by ordinary contract principles. *M & G Polymers*, 135 S Ct at 933; 190 L Ed 2d at 816.

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in *damages to the party claiming breach*." *Miller-Davis Co v Ahrens Const Co*, 495 Mich 161, 178; 848 NW2d 95 (2014) (emphasis added). In this case, the board of trustees asserts no damages to itself as the governing corporate entity of the trust as a result of modifications to the CBAs that affect retiree benefits. Rather, the board attempts to assert the rights of the retirees. The board of trustees is not a party to the CBAs, an assignee of a party to the contracts, or a third-party beneficiary of the CBAs. Simply stated, the board of trustees is not vested with, nor does the board own, a cause of action with respect to the city's alleged breach of contract regarding retiree benefits provided in the pertinent CBAs. Just as trust beneficiaries may not enforce rights owned by the trust, the trust through its board of trustees may not enforce contract rights of the beneficiaries who are determined outside the terms of the trust. See *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356-357 (holding that the beneficiary of a trust was not the real party in interest regarding rights owned by the trust). Consequently, the board of trustees is not the real party in interest to assert breach-of-contract claims regarding the CBAs. *Id*.; MCR 2.201(B). The board of trustees lacked standing because it was not the proper party to assert the breach-of-contract claims

that the retirees might have regarding modification of the pertinent CBAs affecting the retirees' benefits. *Lansing Sch Ed Ass'n*, 487 Mich at 355-356.

The board of trustees presented two arguments below regarding standing that we find without merit. First, the board suggested that it had standing under MCR 2.605 because it sought declaratory relief. See *Lansing Sch Ed Ass'n*, 487 Mich at 372 (holding that "whenever a litigant meets the requirements of MCR 2.605, it is sufficient to establish standing to seek a declaratory judgment"). MCR 2.605(A)(1) provides: "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." The declaratory judgment rule, however, "incorporates the doctrines of standing, ripeness, and mootness." *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012). Also, the essential requirement of an action for declaratory relief is an "actual controversy." *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20. The Court explained in *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978): "The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief. In general, "actual controversy" exists where a declaratory judgment or decree is *necessary to guide a plaintiff's future conduct in order to preserve his legal rights*." Emphasis added; see also *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Director*, 472 Mich 117, 126; 693 NW2d 374 (2005), overruled in part on other grounds *Lansing Sch Ed Ass'n*, 487 Mich at 371 n 18.

In this case, there is no "actual controversy" between the board of trustees and the city with regard to

insurance benefits provided to police and firefighter retirees. The modifications to the CBAs affecting the retiree benefits do not affect the legal rights of the board of trustees or the trust itself. The board of trustees does not need guidance regarding its future conduct in administering the trust, and the board's legal rights are not jeopardized by any changes in the retirees' benefits resulting from modification of the pertinent CBAs. Consequently, there is no "actual controversy" between the board of trustees and the city, i.e., no adverse interest necessitating a " ' "sharpening of the issues[.]" ' " *Lansing Sch Ed Ass'n*, 487 Mich at 372 n 20, quoting *Associated Builders & Contractors*, 472 Mich at 126, quoting *Shavers*, 402 Mich at 589. In short, plaintiff does not have standing under MCR 2.605 because the modified CBAs do not affect the trustees' legal rights.

The board of trustees also argued below that it had standing in this case because three of its members are also beneficiaries of the trust. This argument is without merit. "It is not disputed that, under Michigan law, an organization has standing to advocate for the interests of its members if the members themselves have a sufficient interest." *Lansing Sch Ed Ass'n*, 487 Mich at 373 n 21, citing *Trout Unlimited, Muskegon-White River Chapter v White Cloud*, 195 Mich App 343, 348; 489 NW2d 188 (1992). In *Trout Unlimited*, the plaintiff was a "nonprofit corporation dedicated to preserving and improving cold-water fishing resources" that alleged that a dam was improperly rebuilt after being destroyed by heavy rains and resulting flooding. *Id*. at 345-346. The trial court ruled that the plaintiff lacked standing. This Court opined that "[a] nonprofit corporation has standing to advocate interests of its members where the members themselves have a sufficient stake or have sufficiently adverse and real interests in the matter being litigated." *Id*. at 348. This principle

does not apply to the instant case because the board of trustees is not a nonprofit group composed of members sharing a common interest or who assert through their group association a common injury. Rather, the board of trustees is a corporate body charged with the limited and specified duties to administer the trust assets in a fiduciary manner to provide benefits that are specified in the pertinent CBAs. The board of trustees must act as a whole on the majority vote of its members.[6] The individual trustees do not necessarily share the same interests, nor may they assert in the name of the board their own individual personal interests. See *In re Beatrice Rottenberg Living Trust*, 300 Mich App at 356-357. Consequently, the board of trustees does not gain standing because one or more of the individual trustees has a claim of injury in his individual capacity.

For all the foregoing reasons, we conclude that the board of trustees is not the real party in interest and does not have standing to assert claims regarding modifications of the CBAs affecting the nature and extent of police and firefighter retiree benefits. Because this Court will affirm a trial court's decision if it reaches the correct result, albeit for the wrong reason, *Burise v City of Pontiac*, 282 Mich App 646, 652 n 3; 766 NW2d 311 (2009), we affirm the trial court's grant of summary disposition to the extent that plaintiff claims that Executive Orders 206 and 207 improperly modified the pertinent CBAs regarding police and firefighter retiree benefits. But because we agree with the trial court that the board of trustees has standing to enforce the terms of the trust agreement itself, we briefly address the merits of plaintiff's claims.

---

[6] "All decisions shall be made by at least three (3) affirmative votes." Declaration of Trust, Art IV, § 10.

B. CONSTITUTIONAL CLAIM

Plaintiff alleges that Executive Orders 206 and 207 violate Const 1963, art 9, § 24, which reads as follows:

> The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby.
>
> Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities.

"These two clauses unambiguously prohibit the state and its political subdivisions from diminishing or impairing 'accrued financial benefits,' and require them to fund 'accrued financial benefits' during the fiscal year for which corresponding services are rendered." *Studier*, 472 Mich at 649. But the Court also held that "health care benefits are not 'accrued financial benefits' and, thus, are not protected by Const 1963, art 9, § 24." *Id*. at 670.

Plaintiff trustees do not dispute the holding of *Studier*. Instead they argue that the instant case is distinguishable because Article II of the trust reads in relevant part: "The Grantor intends the benefits provided by this Trust to be considered a benefit guaranteed by Article IX, Section 24 of the State of Michigan Constitution." Therefore, the trustees argue, the plain language of the trust elevates otherwise unprotected healthcare benefits to the protection of Const 1963, art 9, § 24. While not clearly stated, it appears the trustees rely on the first clause of Const 1963, art 9, § 24.

The trial court correctly dismissed this claim. As explained by the Court in *Studier*, the threshold question regarding whether the terms of Const 1963, art 9,

§ 24 apply is whether "accrued financial benefits" are at issue. *Studier*, 472 Mich at 653-654. "Health care benefits, however, are not benefits of this sort." *Id*. at 654. The parties to a contract cannot elevate its provisions to the protection of a constitutional provision that plainly does not apply. *Id*. at 658-659. At best, this claim is one for breach of contract, not a constitutional violation. And, for the reasons already discussed, and those to follow, plaintiff's breach-of-contract claim fails.

C. BREACH OF CONTRACT

Plaintiff's breach-of-contract argument has two prongs. First, plaintiff argues that Executive Orders 206 and 207 breached the trust instrument itself, which states that covered retirees will be provided healthcare benefits as stated in the various CBAs between the city and police and firefighter unions. Second, plaintiff argues that the last CBAs, the termination agreements, either explicitly provided for retiree healthcare benefits or incorporated the provisions of earlier CBAs regarding retiree benefits. Both of these arguments fail.

As plaintiff recognizes, the source of the retirees' benefits is not the trust agreement itself but rather the various CBAs that provide for certain benefits. See *Pontiac Police & Fire Retiree Prefunded Group Health & Ins Plan Bd of Trustees v City of Pontiac*, 309 Mich App 590; ___ NW2d ___ (2015) (*Trustees I*), Part III(D). And, as we have discussed, the trust agreement itself was unaffected by Executive Orders 206 and 207; consequently, modification of the retirees' benefits could not possibly result in a breach of the trust agreement. After complying with the conditions specified in 2011 PA 4, the emergency manager could "reject,

modify, or terminate" one or more of the terms and conditions of an existing CBA, which in this case is the source of police and firefighter retiree healthcare benefits. MCL 141.1519(1)(k); *Trustees I*. Even assuming that Executive Orders 206 and 207 affected the trust agreement, we note that the new provisions of the orders operated prospectively only, becoming effective on July 1, 2012. So, there has been no breach of contract because there was no contention that the city breached the terms of the trust instrument with respect to providing benefits to the retirees. The allegation is only that collective bargaining agreements have been amended, altering the nature and extent of retiree benefits under the CBAs. As we have decided, plaintiff lacks standing to assert a breach of contract with respect to the CBAs. Plaintiff's contract claims also fail.

We affirm. No taxable costs are awarded to either party, a public question being involved under MCR 7.219.

MARKEY, P.J., and OWENS and FORT HOOD, JJ., concurred.

VAN BUREN COUNTY EDUCATION ASSOCIATION and DECATUR EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA v DECATUR PUBLIC SCHOOLS

Docket No. 320272. Submitted March 4, 2015, at Detroit. Decided March 17, 2015, at 9:15 a.m.

Van Buren County Education Association (VBCEA), a bargaining unit for teachers, and Decatur Educational Support Personnel Association, MEA/NEA (DESPA), a bargaining unit for support personnel, charged respondent Decatur Public Schools with engaging in unfair labor practices. At issue was respondent's unilateral choice between two options under the Publicly Funded Health Insurance Contribution Act, 2011 PA 152 (PA 152), that imposed limits on the maximum contributions respondent could make to its employees' health care costs. The charging parties claimed that respondent's unilateral choice between the two limiting options in PA 152—the hard-caps option and the 80/20 plan—conflicted with a public employer's duty under the Public Employee Relations Act (PERA) to negotiate health insurance benefits. According to VBCEA and DESPA, respondent's choice between the two options was a matter subject to bargaining during negotiation of their respective collective bargaining agreements. The administrative law judge (ALJ) concluded that PERA required respondent to bargain with the collective bargaining units over respondent's choice between the two options, but recommended dismissal of the charges because DESPA had failed to request bargaining on the issue and the expiration of the collective bargaining agreement between VBCEA and the Decatur Public Schools created an impasse which permitted unilateral action. The Michigan Employment Relations Commission (MERC) reviewed the ALJ's findings and concluded that there was no conflict between the mandate in PA 152 requiring a public employer to implement one of the two options and PERA's mandate that health insurance benefits be negotiated. MERC dismissed both unfair labor practice charges. The charging parties appealed.

The Court of Appeals *held*:

1. MERC properly dismissed the unfair labor practice charges against respondent because respondent's choice between the two

limiting health care contribution plans was not subject to bargaining between respondent and VBCEA or DESPA during negotiations for the parties' respective collective bargaining agreements. PA 152 placed limits on the maximum amount that a public employer may contribute to medical benefit plans for its employees or elected public officials and required a public employer to choose between the hard-caps option and the 80/20 plan. MERC properly held that the choice between the hard-caps option and the 80/20 plan was not a mandatory issue to be negotiated by the parties to a collective bargaining agreement. PERA requires that public employers bargain collectively with representatives of its employees in good faith with respect to wages, hours, and other terms and conditions of employment, but that requirement and the mandate of PA 152 could be reconciled and were not in conflict. Even though a public employer's choice between contribution limits was not subject to negotiation, the parties were free to negotiate the precise health care contribution, up to the maximum contribution defined in the hard-caps option or the 80/20 plan.

2. MERC properly concluded that DESPA was not entitled to relief, regardless whether PA 152 required a public employer to negotiate a public employer's choice of health care contribution limits, because DESPA had made no request to begin negotiating a new collective bargaining agreement.

3. MERC properly rejected the charge by VBCEA and DESPA that respondent was not required to implement either of the two health care contribution limits immediately after expiration of their respective collective bargaining agreements. According to the plain language of PA 152, the limiting option chosen by a public employer did not apply to employees covered by a collective bargaining agreement in place at the time PA 152 was enacted. However, PA 152 clearly states that any collective bargaining agreement made after the effective date of PA 152 must be consistent with the terms in MCL 15.563 and MCL 15.564, and MCL 15.569 imposes financial penalties on a public employer not in compliance with PA 152.

Affirmed.

PUBLIC EMPLOYMENT — COLLECTIVE BARGAINING — LIMITS ON HEALTH INSURANCE BENEFITS.

The mandate in 2011 PA 152 that a public employer implement one of two options—the hard-caps option or the 80/20 plan—limiting the maximum amount the employer may contribute to its employees' health care benefits does not conflict with the mandate under

> the Public Employee Relations Act that a public employer bargain in good faith with its employees' representatives with regard to wages, hours, and other terms and conditions of employment; the public employer's choice of options implementing the limits on health care contributions is not one of the matters about which the employer has a duty to bargain with its employees' representatives when negotiating a new collective bargaining agreement.

White Schneider Young & Chiodini, PC (by *Jeffrey S. Donahue*), for Van Buren County Education Association and Decatur Educational Support Personnel Association, MEA/NEA.

Thrun Law Firm, PC (by *Roy H. Henley*), for Decatur Public Schools.

Before: JANSEN, P.J., and METER and BECKERING, JJ.

PER CURIAM. Charging parties, Van Buren County Education Association and Decatur Educational Support Personnel Association, MEA/NEA, appeal as of right the January 21, 2014 decision of the Michigan Employment Relations Commission (MERC) dismissing two unfair labor practice charges against respondent, Decatur Public Schools. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

A. PA 152

The facts in this case are largely undisputed and involve Van Buren County Education Association (VBCEA), a bargaining unit for teachers in Van Buren County, Decatur Educational Support Personnel Association (DESPA), a bargaining unit for support personnel, and the Decatur Public Schools. This case involves a public employer's contributions to its employees' health insurance costs, and whether the employer has a duty to bargain with its employees'

representatives with regard to the method of calculating the limits imposed on its contributions to employees' health care costs under 2011 PA 152 (PA 152), the Publicly Funded Health Insurance Contribution Act, MCL 15.561 *et seq*.[1] PA 152 was effective on September 27, 2011. The act places limits on the maximum amount that a public employer can contribute to medical benefit plans for its employees or elected public officials. Among other matters, PA 152 provided what the parties refer to as "hard caps" for contributions to medical benefit plans for respondent's employees. Section 3 of the act provides in relevant part:

> Except as otherwise provided in this act, a public employer that offers or contributes to a medical benefit plan for its employees or elected public officials shall pay no more of the annual costs or illustrative rate and any payments for reimbursement of co-pays, deductibles, or payments into health savings accounts, flexible spending accounts, or similar accounts used for health care costs, than a total amount equal to $5,500.00 times the number of employees and elected public officials with single-person coverage, $11,000.00 times the number of employees and elected public officials with individual-and-spouse coverage or individual-plus-1-nonspouse-dependent coverage, plus $15,000.00 times the number of employees and elected public officials with family coverage, for a medical benefit plan coverage year beginning on or after January 1, 2012. [MCL 15.563(1).]

In addition to the hard-caps option set forth in Section 3, a public employer, excluding the state, could elect to comply, "[b]y majority vote of its governing body," with Section 4 of PA 152. MCL 15.564(1). The option in Section 4 provides that a public employer

[1] The Legislature has since amended the act; some of the amendments were curative and intended to operate retroactively. See 2013 PA 270, effective December 30, 2013. None of the amendments, curative or otherwise, are pertinent to the issues raised in this appeal.

"shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials." MCL 15.564(2). Thus, subject to certain exemptions set forth in Section 8 that are not applicable to the instant matter,[2] PA 152 gave a public employer two options for contributing to the costs of medical benefit plans for its employees.

In enacting PA 152, the Legislature recognized that medical benefit plans may have been subject to existing collective bargaining agreements (CBAs), and it grandfathered in a public employer's contributions to medical benefit plans under existing CBAs. Nonetheless, PA 152 mandated compliance with the act for any CBAs negotiated on or after September 27, 2011, the effective date of PA 152. Collective bargaining agreements in effect on September 27, 2011, remained in effect until their expiration. In this regard, Section 5 of PA 152 provides:

> (1) If a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for 1 or more employees of a public employer on September 27, 2011, *the requirements of section 3 or 4 do not apply to an employee covered by that contract until the contract expires*. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under section 4. *The requirements of sections 3 and 4 apply to any extension or renewal of the contract*.
>
> (2) A collective bargaining agreement or other contract that is executed on or after September 27, 2011 shall not include terms that are inconsistent with the requirements of sections 3 and 4. [MCL 15.565 (emphasis added).]

[2] MCL 15.568 applies to local units of government.

Section 9 of the act contains a penalty for failure to comply with the contributions limit:

> If a public employer fails to comply with this act, the public employer shall permit the state treasurer to reduce by 10% each economic vitality incentive program payment received under 2011 PA 63 and the department of education shall assess the public employer a penalty equal to 10% of each payment of any funds for which the public employer qualifies under the state school aid act of 1979, 1979 PA 94, MCL 388.1601 to [MCL] 388.1772, during the period that the public employer fails to comply with this act. Any reduction setoff or penalty amounts recovered shall be returned to the fund from which the reduction is assessed or upon which the penalty is determined. The department of education may also refer the penalty collection to the department of treasury for collection consistent with section 13 of 1941 PA 122, MCL 205.13. [MCL 15.569.]

B. UNFAIR LABOR PRACTICE CHARGE BY VBCEA

Charging party VBCEA and respondent were parties to a CBA that became effective on July 1, 2011, and expired on June 30, 2012. On or about May 14, 2012, before the first bargaining session on the new CBA, superintendent Elizabeth Godwin sent a memorandum to VBCEA members regarding their insurance premiums for the upcoming school year. The memorandum indicated that effective July 1, 2012, the day after the then-current CBA expired, respondent intended to implement a hard cap[3] on its contributions as set forth in PA 152. Godwin also sent letters to VBCEA members regarding the deductions that would be taken from their last paychecks in June 2012 that would be necessary to cover those members' increased health care contributions.

[3] "Hard cap" refers to the limits set forth in MCL 15.563.

On or about May 22, 2012, respondent and VBCEA held their first bargaining session for the new CBA. According to Godwin's affidavit, which the charging parties did not refute, respondent and VBCEA began to negotiate at this session, among other matters, the hard-cap option chosen by respondent. Although the parties met and bargained, they did not reach an agreement, and respondent proceeded with implementing the hard caps on health care costs.

On June 29, 2012, VBCEA filed an unfair labor practice charge against respondent, alleging that health insurance benefits were a mandatory subject of collective bargaining under the Public Employee Relations Act (PERA). See MCL 423.215(1). VBCEA also alleged that respondent had a duty to maintain the terms and conditions of the existing CBA until the parties either reached a successor agreement or an impasse.

VBCEA contended that respondent implemented the hard-cap limits with no meaningful bargaining, in violation of PERA. VBCEA requested that respondent be found in violation of PERA for refusing to bargain and that insurance coverage contribution amounts be returned to the amounts that existed under the expired CBA until the parties reached either a successor agreement or an impasse.

C. UNFAIR LABOR PRACTICE CHARGE BY DESPA

Respondent and charging party DESPA were parties to a collective bargaining agreement that took effect on November 14, 2011, and expired on June 30, 2012. In May 2012, respondent, just as it had done with VBCEA, sent notices to DESPA members regarding increased insurance costs associated with respondent's decision to implement the hard-cap limits set forth in

PA 152. At that time, respondent and DESPA had not yet scheduled their first bargaining session for a new CBA, nor had DESPA requested bargaining.

In response to the memorandum indicating respondent's choice of the hard-cap limits and the increased deductions associated with the hard-cap limits, DESPA filed an unfair labor practice charge against respondent that was virtually identical to the charge filed by VBCEA.

D. AGENCY PROCEEDINGS

On December 20, 2012, the parties presented arguments to an administrative law judge (ALJ), who issued a decision and recommended order dismissing the unfair labor practice charges. Recognizing that there is a mandatory duty to bargain over health insurance benefits under PERA, the ALJ agreed with the charging parties' contentions that there was a duty to bargain over the employer's choice of implementing the hard caps in MCL 15.563 or the 80% contribution plan (80/20 plan) in MCL 15.564, but nevertheless found that respondent did not violate its duty to bargain in this case. First, as to DESPA, the ALJ found, based on unrebutted evidence, that DESPA never requested bargaining; therefore, respondent could not have violated a duty to bargain with regard to DESPA. Second, as to VBCEA, which did request bargaining, the ALJ found that the expiration of an existing CBA amounted to a "statutorily imposed impasse" under PA 152, and permitted respondent to take unilateral action in implementing the hard-caps plan. Therefore, respondent's actions were permitted under PERA, and there was no merit to VBCEA's unfair labor practice charge.

The charging parties and respondent filed exceptions to the ALJ's findings, and the matter was reviewed by MERC. On January 21, 2014, MERC issued a decision and order in which it dismissed the charges filed by the charging parties. Turning first to the charge filed by DESPA, MERC found that, regardless whether there was a duty to bargain over the implementation of hard caps or the 80/20 plan, the charge was without merit. In so finding, MERC noted that DESPA did not assert that it demanded bargaining, nor did the record contain any such demand. Even assuming a duty to bargain, there was, reasoned MERC, no requirement for the employer to initiate bargaining. Instead, an employer's duty to bargain under PERA is conditioned on a demand for bargaining by the union.

Next, turning to the charge filed by VBCEA, MERC found that there was no conflict between PA 152 and PERA's bargaining mandates, and it further concluded that respondent had no duty to bargain on its choice between the hard-caps option and the 80/20 plan. MERC also rejected the charging parties' contention that respondent was not required to implement the mandates of PA 152 immediately after the expiration of an existing CBA. The charging parties appealed as of right MERC's decision and order.

II. STANDARD OF REVIEW

"The MERC is the sole state agency charged with the interpretation and enforcement of [the] highly specialized and politically sensitive field" of public sector labor law. *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 313; 605 NW2d 363 (1999), aff'd 463 Mich 353 (2000).

> We review MERC decisions pursuant to Const 1963, art 6, § 28, and MCL 423.216(e). MERC's findings of fact are conclusive if they are supported by competent, material, and substantial evidence on the record considered as a whole. MERC's legal determinations may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law. In contrast to [] MERC's factual findings, its legal rulings are afforded a lesser degree of deference because review of legal questions remains de novo, even in MERC cases. [*Branch Co Bd of Comm'rs v Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America, UAW*, 260 Mich App 189, 192-193; 677 NW2d 333 (2003) (citations and quotation marks omitted; alteration in original).]

Resolution of the issues raised in this case involve statutory interpretation, which this Court ordinarily reviews de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011); *Detroit Pub Sch v Conn*, 308 Mich App 234, 242; 863 NW2d 373 (2014). While review is de novo, appellate courts give respectful consideration to MERC's interpretation of a statute. *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 97, 103; 754 NW2d 259 (2008). However, the agency's interpretation is not binding on this Court, and the agency's interpretation "cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *In re Complaint of Rovas*, 482 Mich at 103.

III. ANALYSIS

We are first asked to consider whether PERA and PA 152 conflict and whether an employer has a duty to bargain over the decision to implement the hard-caps option or the 80/20 plan. In making this determination, we recognize that "an appellate court's first duty is to harmonize, if possible, apparently conflicting legisla-

tive enactments in order to carry out the Legislature's intent to the fullest extent possible." *St Clair Co Ed Ass'n v St Clair Co Intermediate Sch Dist*, 245 Mich App 498, 518; 630 NW2d 909 (2001).

A. PERA

"The PERA governs the relationship between public employees and governmental agencies." *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77-78; 833 NW2d 225 (2013). "PERA drastically altered public employee labor relations in Michigan. It represents the Legislature's intent to assure[] public employees of protection against unfair labor practices, and of remedial access to a state-level administrative agency with special expertise in statutory unfair labor practice matters." *Id*. at 78 (citations and quotation marks omitted; alteration in original). In the past, this Court and our Supreme Court have held that the provisions of PERA "take precedence over other conflicting laws to ensure uniformity, consistency, and predictability in the critically important and complex field of public sector labor law." *Kent Co Deputy Sheriffs' Ass'n*, 238 Mich App at 313. See also *Rockwell v Crestwood Sch Dist Bd of Ed*, 393 Mich 616, 630; 227 NW2d 736 (1975) ("The supremacy of the provisions of the PERA is predicated on the Constitution . . . and the apparent legislative intent that the PERA be the governing law for public employee labor relations.").

Pertinent to the case at bar, PERA imposes on public employers a duty to bargain collectively with the representatives of its employees "in good faith with respect to wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1). See also *AFSCME Local 25 v Wayne Co*, 297 Mich App 489, 494; 824 NW2d 271 (2012) (explaining that PERA imposes a

duty to bargain collectively upon the expiration of a CBA). Wages, hours, and other conditions of employment, including health insurance benefits, are "mandatory subjects of bargaining." *Ranta v Eaton Rapids Pub Sch Bd of Ed*, 271 Mich App 261, 270; 721 NW2d 806 (2006). While a public employer has a duty to bargain, that duty is not implicated absent a request by the employees to enter into negotiations. *St Clair Prosecutor v AFSCME, AFL-CIO, St Clair Co Gen Employees Chapter, Local 1518*, 425 Mich 204, 242; 388 NW2d 231 (1986). Thus, an employer's duty to bargain is "expressly condition[ed]" on the employees' request for bargaining. *Local 586, SEIU v Village of Union City*, 135 Mich App 553, 557; 355 NW2d 275 (1984).

B. CLAIM OF DESPA

As an initial matter, because the duty to bargain is expressly conditioned on a request for bargaining from the employees, we find that, even assuming a duty to bargain over the choice between the hard-cap limits and the 80/20 plan, DESPA's claim is meritless as it is undisputed that DESPA never requested bargaining in this case. See *Local 586, SEIU*, 135 Mich App at 557. The charging parties do not even challenge this portion of MERC's decision.

C. PA 152

Next, in order to evaluate the issue briefed by the charging parties as it relates to VBCEA, we turn to PA 152. PA 152 exclusively concerns health insurance benefits and provides, for purposes of this case, two different means of capping an employer's contributions to its employees' health insurance benefits. The first, set forth in MCL 15.563, establishes the hard-caps option. In MCL 15.564, the Legislature provided a

second option—the 80/20 plan—for a public employer's contributions to its employees' health care benefits. As was in effect at the time of the charging parties' unfair labor practice charges, the 80/20 option provided:

> (1) By a majority vote of its governing body, a public employer, excluding this state, may elect to comply with this section for a medical benefit plan coverage year instead of the requirements in section 3. The designated state official may elect to comply with this section instead of section 3 as to medical benefit plans for state employees and state officers.
>
> (2) For medical benefit plan coverage years beginning on or after January 1, 2012, a public employer shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials. For purposes of this subsection, total annual costs includes the premium or illustrative rate of the medical benefit plan and all employer payments for reimbursement of co-pays, deductibles, and payments into health savings accounts, flexible spending accounts, or similar accounts used for health care but does not include beneficiary-paid copayments, coinsurance, deductibles, other out-of-pocket expenses, other service-related fees that are assessed to the coverage beneficiary, or beneficiary payments into health savings accounts, flexible spending accounts, or similar accounts used for health care. Each elected public official who participates in a medical benefit plan offered by a public employer shall be required to pay 20% or more of the total annual costs of that plan. The public employer may allocate the employees' share of total annual costs of the medical benefit plans among the employees of the public employer as it sees fit. [MCL 15.564.]

With a nod toward existing CBAs that were not in compliance with the limitations imposed in Sections 3 and 4, MCL 15.565 clarified that the requirements contained in the statute only applied to new CBAs, those going into effect on or after September 27, 2011, not existing CBAs:

> (1) If a collective bargaining agreement or other contract that is inconsistent with sections 3 and 4 is in effect for 1 or more employees of a public employer on September 27, 2011, the requirements of section 3 or 4 do not apply to an employee covered by that contract until the contract expires. A public employer's expenditures for medical benefit plans under a collective bargaining agreement or other contract described in this subsection shall be excluded from calculation of the public employer's maximum payment under section 4. The requirements of sections 3 and 4 apply to any extension or renewal of the contract.
>
> (2) A collective bargaining agreement or other contract that is executed on or after September 27, 2011 shall not include terms that are inconsistent with the requirements of sections 3 and 4.

D. DOES PA 152 CONFLICT WITH PERA, AND IS THERE A DUTY TO BARGAIN?

"The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself." *Krohn*, 490 Mich at 156 (citations and quotation marks omitted). Here, both PA 152 and PERA concern, at least to some degree, the subject of health insurance benefits for public employees. This Court must attempt to construe the statutes so as to avoid a conflict. See *St Clair Co Ed Ass'n*, 245 Mich App at 518. As noted, in the past, our Supreme Court has held that when PERA conflicts with another statute, PERA, as the predominant law in the field of public employee relations, prevails. See, e.g., *Rockwell*, 393 Mich at 629.

We find that PA 152 and PERA do not conflict and that there is no duty to bargain over the employer's choice between the hard-cap limits and the 80/20 plan. Initially, the plain language of PA 152 does not give rise

to an obligation to bargain with regard to this choice. Notably, MCL 15.563(1) states that a public employer "*shall pay no more of the annual costs*" than "a total amount equal to" the hard caps set forth in the statute (emphasis added). The word "shall" is a mandatory directive, indicating that the hard-caps option is the default position. See *Smitter v Thornapple Twp*, 494 Mich 121, 136; 833 NW2d 875 (2013) ("The Legislature's use of the word 'shall' generally indicates a mandatory directive, not a discretionary act."). As an alternative to the hard-caps requirement, the public employer may, "[b]y majority vote of its governing body," elect to comply with the 80/20 plan. MCL 15.564(1). Nothing in this language gives rise to the idea that there is a duty to bargain with regard to the choice between hard caps and the 80/20 plan. Rather, the choice is left to the "governing body" of the public employer to decide, by majority vote, if it will depart from the default position of the hard caps. As noted by MERC, this interpretation is buttressed by examination of the repeated references in PA 152 to "total annual costs" of health care contributions and the fact that the limits imposed by the act apply to the total annual costs of contributions for all the employer's employees and all bargaining groups. The act does not speak of total annual costs for each type of plan chosen by each individual bargaining group; rather, the act speaks only of the total annual costs of contributions for the public employer's "employees." See MCL 15.563 and MCL 15.564. This supports the interpretation that an employer is to choose one type of plan for all of its employees, not that the employer is to bargain over the choice of plans with each of its labor groups. In other words, the choice of contribution limits for all employees is left solely to the public employer.

Moreover, this result is not in conflict with the collective bargaining mandates of PERA, nor does it remove health insurance benefits from the realm of mandatory bargaining. PERA requires bargaining on certain subjects, including health insurance benefits. PA 152 does not foreclose bargaining on health insurance benefits. Rather, as MERC recognized, PA 152 sets *limits* on the amount of health insurance benefits a public employer may pay. Nothing in the statute prevents bargaining up to the statutorily imposed limits. Indeed, PA 152 expressly recognized the right of collective bargaining, as it mandated that the limits not take effect until *after* the expiration of a CBA if the existing CBA contained terms that were inconsistent with the limits prescribed in MCL 15.563 or MCL 15.564. See MCL 15.565(1). Employees may still bargain for health insurance benefits up to the limit imposed by the employer's choice, whether that limit be in the form of hard caps or the 80/20 plan. For instance, if the employer chooses the hard-caps option, different employee bargaining groups can bargain for the amount that the employer will pay, up to the hard-cap limits. As long as, after negotiations, the employer does not exceed the hard-cap amounts imposed by the statute, the employer remains in compliance with the statute.

Examination of the 80/20 plan yields the same result. The 80/20 plan provides that a public employer "shall pay not more than 80% of the total annual costs of all of the medical benefit plans it offers or contributes to for its employees and elected public officials." MCL 15.564(2). Again, this gives various employee groups the ability to bargain with regard to the total amount, up to a maximum of 80% of costs, that the employer will contribute to that group's health insurance costs. In sum, the fact that the governing body of

the public employer has the discretion to choose the plan that will affect the parameters of bargaining does not conflict with the public employer's obligation to bargain under PERA. See *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 67-68; 214 NW2d 803 (1974) ("The home rule cities act and PERA can be easily harmonized by reading the home rule cities act to empower a city to set up the procedures for its pension plan in the charter and to leave the substantive terms of the plan to collective negotiation.").

Furthermore, finding a conflict between the statutes on the issue of a public employer's choice between the hard-caps option and the 80/20 plan would effectively read into PA 152 language that the Legislature did not include. MCL 15.564 only states that the "governing body" of a public employer "may elect to comply with this section . . . ." It does not state that a bargaining unit may force the hand of the governing body to choose the 80/20 plan, or even that a bargaining unit may force the governing body to vote on the choice between the hard-cap limits and the 80/20 plan. Rather, the statute simply states that the governing body "may elect to comply with this section . . . instead of the requirements in section 3." MCL 15.564(1). This Court should not read into MCL 15.564 words that were not within the intent of the Legislature as derived from the plain language of the statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011).

Our conclusion that there is no conflict between PA 152 and PERA is strengthened by comparing the interaction of PA 152 and PERA in the instant case with cases in which courts have found conflicts between PA 152 and other statutes. Notably, in *Rockwell*, 393 Mich 616, one of the seminal cases on the su-

premacy of PERA, there existed a conflict between PERA and the Teachers' Tenure Act (TTA) that was much more direct and apparent than any alleged conflict in the case at bar. In *Rockwell*, a school board and teachers' union became embattled in a labor dispute that involved teachers' strikes. *Id*. at 626. After two strikes, the school board ordered teachers to return to work or submit a letter of resignation; otherwise, their employment would be terminated. *Id*. at 626-627. More than three-fourths of the teachers neither returned to work nor submitted a letter of resignation, and the school board terminated their positions. *Id*. at 627. Pertinent to that case, PERA enabled public employers to discipline employees for striking, and if the employer disciplined the employee, the employee was entitled to request a determination whether he violated the provisions of PERA; thus, the determination came *after* the discipline. *Id*. at 624.

In contrast, the TTA required a hearing *before* discharge, and directed that discharge could only occur for reasonable and just cause, and only after notice and a hearing. *Id*. at 625. The dispute in that case concerned whether the procedures in PERA—determination *after* discipline—or the procedures in the TTA—determination *before* discipline—controlled. *Id*. at 628-629. In resolving this issue, our Supreme Court found that the TTA, which was enacted before PERA, could not have been intended to consider labor disputes between school boards and their employees,[4] and that PERA was intended to be the predominant law governing public employee labor relations. *Id*. at 630. There-

[4] "The 1937 Legislature in enacting the teachers' tenure act could not have anticipated collective bargaining or meant to provide for the resolution of labor relations disputes in public employment." *Rockwell*, 393 Mich at 630.

fore, the Court found that the disciplinary procedures set forth in PERA with regard to teachers who participated in a "concerted" strike should apply rather than those set forth in the TTA, as the disciplinary procedures under the TTA primarily concerned the actions of individual teachers. *Id*. at 631-632.

Similarly, in *Detroit Bd of Ed v Parks*, 417 Mich 268, 281; 335 NW2d 641 (1983), our Supreme Court found a conflict between the TTA and PERA and refused to read into CBAs entered into under PERA requirements from the TTA concerning the standard for discharge. As a result, the teacher in *Parks* was precluded from invoking the substantive or procedural provisions of the TTA because PERA controlled in that situation. *Id*. at 282-283.

The instant case is distinguishable from *Rockwell* and *Parks*. PA 152 and PERA do not contain conflicting provisions as to collective bargaining rights. Rather, the statutes and their respective mandates can be read without conflict. As noted, PA 152 simply sets limits on the total costs a public employer may contribute toward its employees' medical benefit plans. The statute gives the employer a choice as to which limits to implement—the hard-caps option or the 80/20 plan. Once the employer makes that choice, nothing prohibits or prevents collective bargaining on the issue of health insurance contributions up to the limits imposed by the statute. Therefore, PA 152 and PERA do not conflict, and can be reconciled with one another. See *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996) (explaining that when possible, statutes should be construed to avoid conflict and to avoid a finding of repeal by implication).[5]

---

[5] Because we hold that an employer does not have a duty to bargain over the choice between implementing hard-cap limits or the 80/20 plan,

E. IMPOSITION OF HARD CAPS IMMEDIATELY AFTER EXPIRATION OF CBAs

Lastly, we address the charging parties' contention that respondent was not required to implement its choice of the hard-caps option immediately after expiration of the parties' existing CBAs. The charging parties argue that respondent could have waited until after bargaining to make its choice, and that it had enough time to ensure that the benefits paid were within either the hard-cap limits or the 80/20 plan. The importance of this issue is largely dependent on whether respondent had a duty to bargain with regard to the choice between the hard-cap limits and the 80/20 plan. With no duty to bargain over the implementation of the hard-caps option or the 80/20 plan, nothing prevented respondent from unilaterally implementing the plan on the date the existing CBAs expired. See *Grand Rapids Community College Faculty Ass'n v Grand Rapids Community College*, 239 Mich App 650, 656-657; 609 NW2d 835 (2000).

Moreover, PA 152 is clear that, when an existing CBA expired, a public employer was to comply with the statute. Indeed, the limits imposed by either the hard-caps option or the 80/20 plan came into play at the time the previous CBA expired. See MCL 15.565(1) (explaining that, in the event the public employer and its employees were parties to a CBA, the limits imposed on employer health care contributions "do not apply to an employee covered by that contract *until* the contract expires" (emphasis added)). The word "until" means

---

the charging parties' allegation that the ALJ erred by finding that PA 152 created a "statutorily imposed impasse" when VBCEA's existing CBA expired becomes moot. Indeed, if bargaining was not required, nothing prohibited respondent from taking unilateral action, and whether PA 152 created a statutorily imposed impasse has no bearing on this case. Thus, we do not decide this issue.

"up to the time that or when[.]" *Random House Webster's College Dictionary* (2005).[6] Thus, a public employer's ability to delay implementation of the limits imposed by PA 152 lasted "up to the time that or when" the CBA expired, but no longer. See MCL 15.565(1). There is no language in the statute indicating that an employer is allowed to delay implementation of the hard-caps option or the 80/20 plan. And PERA, in MCL 423.215b(1), is clear that the employee is required to bear the increased costs of maintaining health insurance benefits after expiration of a CBA.[7] There is no merit to the charging parties' contentions.

Affirmed.

JANSEN, P.J., and METER and BECKERING, JJ., concurred.

---

[6] A reviewing court may consult dictionaries in order to give words their common and ordinary meaning. *Krohn*, 490 Mich at 156.

[7] MCL 423.215b, which was enacted as an amendment to PERA in 2011, provides, in pertinent part:

> (1) Except as otherwise provided in this section, after the expiration date of a collective bargaining agreement and until a successor collective bargaining agreement is in place, a public employer shall pay and provide wages and benefits at levels and amounts that are no greater than those in effect on the expiration date of the collective bargaining agreement. The prohibition in this subsection includes increases that would result from wage step increases. *Employees who receive health, dental, vision, prescription, or other insurance benefits under a collective bargaining agreement shall bear any increased costs of maintaining those benefits that occur after the expiration date.* The public employer may make payroll deductions necessary to pay the increased costs of maintaining those benefits. [Emphasis added.]

PEOPLE v BALDES

Docket No. 320460. Submitted March 10, 2015, at Detroit. Decided March 17, 2015, at 9:20 a.m.

Christopher R. Baldes pleaded guilty in the Macomb Circuit Court to various charges related to a series of home invasions. The presentence investigation report indicated that the sentencing guidelines recommended a range of 57 to 95 months' imprisonment. At the initial sentencing hearing, the court, Diane M. Druzinski, J., noted that defendant had been determined to be a good candidate for drug treatment court, and indicated that she would discuss the case with the drug treatment court team. After doing so, the court sentenced defendant to a two-year drug treatment court program and five years' probation, over the prosecution's objection that the court lacked a sufficient reason for departing downward from the guidelines recommendation. The prosecutor appealed, arguing that the trial court had violated MCL 600.1068(2) by sentencing defendant to drug treatment court without the prosecutor's approval.

The Court of Appeals *held*:

The trial court erred by sentencing defendant to drug treatment court without the prosecutor's approval. Under MCL 600.1068(2), if a defendant is eligible for deviation from the sentencing guidelines, the prosecutor must approve of the admission of the individual into the drug treatment court in conformity with the memorandum of understanding entered into by the circuit court and the prosecuting attorney under MCL 600.1062. The signature of an assistant prosecutor on a screening document that approved defendant's referral for assessment for admission to drug treatment court did not constitute the prosecutor's approval of defendant's admission. Further, even if defendant's assertion that an assistant prosecutor was present at the drug court team meeting was true, it did not constitute approval under MCL 600.1068 or waive the prosecutor's right to later demand enforcement of the sentencing guidelines.

Sentence vacated; case remanded for resentencing.

SENTENCING — SENTENCING GUIDELINES — DEPARTURES — DRUG TREATMENT COURTS — PROSECUTOR APPROVAL.

A court may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved; the prosecutor's failure to object before sentencing to a defendant's potential admission to a drug treatment court does not constitute the prosecutor's approval of defendant's admission or waive the prosecutor's right to later demand enforcement of the sentencing guidelines (MCL 600.1068(2)).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, and *Joshua D. Abbott*, Chief Appellate Attorney, for the people.

Fischer, Garon, Hoyumpa and Rancilio (by *Daniel N. Garon*) for defendant.

Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

O'CONNELL, J. The Macomb County Prosecutor appeals by leave granted the trial court's decision to sentence defendant, Christopher Robert Baldes, to five years' probation and drug treatment court. We vacate Baldes's sentence and remand for resentencing.

I. FACTS

Baldes participated in a series of home invasions in Fraser and Roseville. Baldes pleaded guilty to various charges related to the home invasions. At the plea proceeding, the assistant prosecutor indicated that Baldes was seeking admission to drug treatment court. On November 19, 2013, Baldes appeared for sentencing. The trial court noted that Baldes had been screened and was a good candidate for drug treatment court. The trial court indicated that it had not yet

made a decision, but that the drug treatment court team was meeting the following day and it would discuss his case.

On November 22, 2013, Baldes again appeared for sentencing. Baldes's presentence investigation report indicated that the sentencing guidelines recommended a minimum sentence of 57 to 95 months' imprisonment, but the Department of Corrections recommended a sentence of three years' probation, subject to the conditions of drug treatment court. At the second sentencing hearing, the trial court indicated that it intended to admit Baldes into drug treatment court. The assistant prosecutor objected to admitting Baldes to drug treatment court and contended that the trial court did not have sufficient reason to depart downward from the sentencing guidelines.

The trial court determined that it did not need to articulate substantial and compelling reasons to depart downward from the sentencing guidelines in order to admit Baldes to drug treatment court, but it then stated several reasons on the record to do so, including Baldes's age, education, potential for rehabilitation, minimal criminal record, and family support. The trial court sentenced Baldes to serve five years' probation and a two-year drug treatment court program, which included serving 240 days in jail and successfully completing a rehabilitation program, completing a 30- to 45-day inpatient rehabilitation program on release and subsequently living in a "three-quarter house" with restrictions, daily support meetings for 90 days, an alcohol monitoring tether, and intensive outpatient counseling.

II. STANDARDS OF REVIEW

This Court reviews de novo issues of statutory interpretation. *People v Williams*, 475 Mich 245, 250;

716 NW2d 208 (2006). The purpose of statutory interpretation is to determine the Legislature's intent. *Id*. To do so, this Court examines the plain and ordinary language of the statute. *Id*. If the statute's plain and ordinary language is not ambiguous, we must enforce the statute as written. *Id*.

III. PROSECUTORIAL APPROVAL FOR DRUG TREATMENT COURT

The prosecutor contends that the trial court violated MCL 600.1068(2) when it sentenced Baldes to drug treatment court without the prosecutor's approval. Baldes contends that a prosecutor's approval of a defendant's admission to drug treatment court constitutes a waiver of any challenge to the trial court's decision to depart downward from the sentencing guidelines to admit the defendant to drug treatment court. We agree that the prosecutor's approval would constitute a waiver of the trial court's decision to depart from the sentencing guidelines. See *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (stating that a party's intentional relinquishment of a known right constitutes a waiver that extinguishes any later error). But we conclude that the prosecutor did not approve of the downward departure in this case.

If admission into drug treatment court would deviate from a defendant's recommended sentence under the sentencing guidelines, the prosecutor must approve that defendant's admission into drug court:

> In the case of an individual who will be eligible for . . . deviation from the sentencing guidelines, the prosecutor must approve of the admission of the individual into the drug treatment court in conformity with the memorandum of understanding under [MCL 600.1062]. [MCL 600.1068(2).]

MCL 600.1062 provides that

> if the drug treatment court will include in its program individuals who may be eligible for . . . deviation from the sentencing guidelines, the circuit or district court shall not adopt or institute the drug treatment court unless the circuit or district court enters into a memorandum of understanding with each participating prosecuting attorney . . . . The memorandum of understanding shall describe the role of each party.

The Macomb County memorandum of understanding describes the role of the prosecuting attorney. However, it does not provide any procedure for a prosecuting attorney to approve admission of a defendant into drug treatment court when that defendant's sentence deviates from the sentencing guidelines.

The prosecutor contends that he did not approve of Baldes's admission into drug treatment court. We agree. The prosecutor clearly indicated on the record that he did not support admitting Baldes into drug treatment court because doing so would constitute a large deviation from Baldes's sentencing guidelines. Accordingly, the prosecutor not only did not approve of Baldes's admission to drug treatment court, he expressly disapproved.

Baldes contends that the prosecutor approved his admission into drug treatment court when (1) a different assistant prosecutor previously approved his admission into the drug treatment court when the prosecutor signed a screening document, or (2) the prosecutor participated in the drug treatment court team meeting without objection. We disagree.

The drug treatment court statute provides that, to be admitted to drug treatment court, an individual must "complete a preadmissions screening and evaluation assessment[.]" MCL 600.1064(3). The screening

document in this case did not state that it constituted approval of the individual's admission into the drug treatment court program. The document is titled "screener's checklist." It includes eight requirements and then indicates that, if a person does not meet the requirements, the "candidate is not eligible and should not be referred for assessment." A prosecutor signed at the bottom of the form above the words "Approved, Assistant Prosecutor."

There is simply nothing on the screening checklist that indicates that the prosecutor approved admitting Baldes into drug treatment court, much less did so when his admission deviated from the sentencing guidelines. Nothing on the screening checklist indicates that the prosecutor approved admitting Baldes into the program if he satisfactorily completed the assessment. Rather, the language of the form clearly indicates that it only refers Baldes for an assessment. We conclude that the prosecuting attorney's decision to sign the referral form did not constitute a waiver or approval.

We also conclude that we may not infer the prosecutor's approval from the prosecutor's failure to object before the sentencing hearing. A party's failure to timely assert a right constitutes a forfeiture, not a waiver. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Even if we accept Baldes's assertion that the assistant prosecutor was present at the team meeting, there is simply no record of the drug treatment court team meeting, and thus we have no record of whether the prosecuting attorney approved admitting Baldes into the drug treatment court at the team meeting, or simply failed to object. The only record is that the prosecutor was silent before the second sentencing hearing. We conclude that a prosecutor's si-

lence is not sufficient to constitute approval under MCL 600.1068 and does not waive the prosecutor's right to later demand enforcement of the sentencing guidelines.

In sum, we conclude that the trial court erred when it admitted Baldes into drug treatment court when doing so constituted a departure from Baldes's sentencing guidelines recommendation and the prosecutor did not approve. It may be the best practice for a prosecutor to waive any deviation from the sentencing guidelines in writing, but an oral approval on the record at the plea, sentencing, or other hearing would be sufficient. However, courts may not admit a defendant into a drug treatment court program when doing so departs from the sentencing guidelines and the prosecutor has not approved.

We vacate and remand for resentencing. We do not retain jurisdiction.

BOONSTRA, P.J., and SAWYER, J., concurred with O'CONNELL, J.

In re SPEARS

Docket No. 320584. Submitted January 7, 2015, at Grand Rapids. Decided March 19, 2015, at 9:00 a.m.

The Department of Human Services (DHS) filed a petition in Leelanau Circuit Court Juvenile Division to take jurisdiction over three minors because of alleged abuse and neglect. The minors' mother requested that the proceedings be transferred to the tribal court of the Grand Traverse Band of Ottawa and Chippewa Indians (the tribe). The tribe refused the transfer because the minors were not members of the tribe and were not eligible for membership in the tribe. The DHS subsequently filed a supplemental petition to terminate the mother's parental rights. A month after the DHS filed its supplemental petition, and more than one year after the circuit court took jurisdiction over the minors, the tribe filed a notice of intervention based on its finding that the minors were indeed eligible for membership in the tribe, a fact discovered after the mother's adoption records were unsealed. The minors' mother filed a motion to dismiss the DHS's supplemental petition for noncompliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. She also filed a motion to transfer the proceedings to tribal court. The circuit court, Larry J. Nelson, J., granted the mother's motion, but the tribal court again declined the transfer, in part because it would not be in the minors' best interests. The mother ultimately and voluntarily released her parental rights to the minors, and following a hearing, the circuit court terminated the father's parental rights to the minors. Adoption proceedings followed the terminations. The minors' foster parents, with whom the minors had been living for several years, wished to adopt the minors, as did the minors' paternal grandparents. The tribe favored the minors' paternal grandparents for adoption, and the Michigan Children's Institute's agent, Bethany Christian Services, recommended that the foster parents be permitted to adopt the minors. The foster parents filed a petition to adopt the minors, after which the tribe moved to transfer the adoption proceedings to the tribal court. The minors' attorney and guardian ad litem filed a motion asking the circuit court to deny the transfer to the tribal court, stating that there was good cause not to transfer

the proceedings because of the length of time the minors had been in placement and the late stage of the proceedings. The circuit court reasoned that there was good cause not to transfer the proceedings to the tribal court because the statutory grounds necessary to deny a motion to transfer also extended to any hardship caused to the minors if the proceedings were transferred. The circuit court concluded that clear and convincing evidence showed that a transfer would cause the minors undue stress and hardship, and the circuit court denied the motion to transfer the proceedings to the tribal court. The circuit court stayed the proceedings, including its order denying the transfer, pending the exhaustion of appellate remedies. The Grand Traverse Band of Ottawa and Chippewa Indians appealed the circuit court's denial of its motion to transfer the proceedings.

The Court of Appeals *held*:

The circuit court erred by denying the tribal court's motion to transfer the proceedings to tribal court. The governing statute, MCL 712B.7(5), requires the circuit court to transfer the proceedings unless a parent objects to the transfer, or one of two other circumstances is present. A circuit court is permitted to deny a request to transfer proceedings to the tribal court if (1) the tribe does not have a tribal court, or (2) the tribal court is unable to mitigate an undue hardship caused to the parties or witnesses who are required to present evidence in the tribal court. In this case, the circuit court improperly interpreted MCL 712B.7(5) and impermissibly expanded its authority to deny a transfer request. The circuit court was not allowed by statute to consider whether the minors themselves would suffer undue hardship if the proceedings were transferred to tribal court. In addition, the circuit court failed to identify any party or witness who would suffer undue hardship if required to present evidence in tribal court.

Reversed and remanded.

Matthew J. Feil for Grand Traverse Band of Ottawa and Chippewa Indians.

Brott, Settles & Brott, PC (by *Wilson D. Brott*), for Tim and Anne Donn.

Joseph T. Hubbell, Prosecuting Attorney, for Leelanau County.

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

PER CURIAM. Appellant, Grand Traverse Band of Ottawa and Chippewa Indians (the tribe), appeals by leave granted the circuit court's order denying its request to transfer adoption proceedings to the tribal court pursuant to § 7 of the Michigan Indian Family Preservation Act (MIFPA), MCL 712B.1 *et seq*. We conclude that the circuit court committed error warranting reversal under MCL 712B.7(5) by denying the tribe's request to transfer these proceedings to the tribal court. The statute only permits the circuit court to find good cause not to transfer in two instances, and the circuit court improperly construed the statute to give it greater authority to deny a transfer. We therefore reverse and remand for further proceedings consistent with this opinion.

I. FACTUAL BACKGROUND

This case began in 2010 when the Department of Human Services (DHS) petitioned the circuit court to take jurisdiction over the minors under MCL 712A.2 on the basis of alleged abuse and neglect. The circuit court took jurisdiction over the minors in August 2010, and in September 2010, the minors' mother requested that the circuit court transfer the case to the tribal court. The circuit court notified the tribe of the proceedings in November 2010, and the tribe responded that the minors were not members of the tribe nor were they eligible for tribal membership. The DHS filed a supplemental petition in November 2011 seeking termination of the parental rights of the minors' mother.

In December 2011, the tribe filed a notice of intervention, stating that the minors were, in fact, enrolled members of the tribe or eligible for tribal membership.

This determination was made possible after adoption records regarding the minors' mother were unsealed and provided to the tribe's membership office. The minors were enrolled as members of the tribe in February 2012. On February 13, 2012, the minors' mother filed a motion to dismiss the supplemental petition for noncompliance with the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. The mother also filed a motion to transfer the case to the tribal court, which the circuit court granted. However, the tribal court declined the transfer, stating in part that the transfer would not be in the best interests of the minors.

On April 6, 2012, the minors' mother voluntarily released her parental rights to the minors. And on April 18, 2012, following a hearing, the circuit court entered an order terminating the parental rights of the minors' father.

The minors' foster parents, respondents Tim Donn and Anne Donn, with whom the minors had been residing for several years, wished to adopt the minors. The minors' paternal grandparents in Missouri also wished to adopt the minors. The circuit court ordered that the minors remain with the Donns until the Michigan Children's Institute (MCI), through its agent, Bethany Christian Services, completed its assessment and recommended an adoptive placement. The tribe favored the minors' paternal grandparents for adoption of the minors.

On December 6, 2013, the MCI recommended adoptive placement with the Donns, who filed a petition for adoption on December 13, 2013. The tribe filed a motion on December 23, 2013, to transfer the proceedings to its tribal court. The tribe also moved the tribal court to accept the transfer. The minors' attorney and

guardian ad litem recommended that the circuit court deny the requested transfer to the tribal court, stating that there was good cause not to transfer based on the length of time the children had been in placement, the late stage of the proceedings, and the amount of time it would take to appoint a new guardian ad litem in the tribal court and then to inform him or her of the lengthy background of the proceedings.

The circuit court held a hearing on February 6, 2014, regarding the tribe's motion to transfer. The circuit court denied the request due to the advanced stage of the case, noting that the tribal court had already once denied a transfer on the basis that a transfer was not in the best interests of the minors. The circuit court further noted that nothing had changed since the tribal court's denial, with the exception of MCI's adoption recommendation. The circuit court also concluded a transfer would not be in the best interests of the children.

The circuit court addressed the "good cause" defined in MCL 712B.7(5) that was required to deny the tribe's transfer request. The circuit court observed that the tribe did have a tribal court, MCL 712B.7(5)(a), but ruled that the "undue hardship" of MCL 712B.7(5)(b) was not limited to the hardship imposed on witnesses to present evidence in the tribal court. The circuit court explained that it found "clear and convincing evidence that hardship to the parties; to wit, the three children, would occur if this transfer were granted." The circuit court noted that the minors were undergoing stress and that they needed permanency. Additionally, the circuit court found that the minors had been out of a parent's home for nearly five years and should not be subjected to any more stress in that regard.

On February 7, 2014, the circuit court entered its order denying the tribe's motion to transfer for the reasons stated on the record. The circuit court also stayed all proceedings, including its order denying a transfer to tribal court, pending the exhaustion of appellate remedies.

II. ANALYSIS

A. STANDARD OF REVIEW

Statutory interpretation is a question of law that this Court reviews de novo. *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012). Any factual determinations of the lower court are reviewed for clear error. *Id*.; MCR 2.613(C).

When interpreting a statute, a court's primary goal is to ascertain and effectuate the intent of the Legislature. *Titan Ins Co v State Farm Mut Auto Ins Co*, 296 Mich App 75, 83; 817 NW2d 621 (2012). The intent of the Legislature is found in the terms of the statute, giving its words their plain and ordinary meaning. *Id*.; *In re Kostin Estate*, 278 Mich App 47, 57; 748 NW2d 583 (2008). Nontechnical "words and phrases shall be construed and understood according to the common and approved usage of the language . . . ." MCL 8.3a. Where a word used in a statute is undefined, a dictionary may be consulted to discern the word's common meaning. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). Courts must enforce clearly expressed statutory language as written. *Id*.

"The Legislature is presumed to be aware of all existing statutes when enacting a new statute." *Hughes v Almena Twp*, 284 Mich App 50, 66; 771 NW2d 453 (2009). "Statutes that relate to the same subject or

share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Titan Ins Co*, 296 Mich App at 84.

B. DISCUSSION

We begin our review of the MIFPA by looking at the legal background in which it was enacted. First, we examine federal law regarding Indian child welfare. Our Supreme Court summarized the legislative history of the ICWA:

> In 1978, Congress enacted [the Indian Child Welfare Act, 25 USC 1901 *et seq*.] in response to growing concerns over "abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes." Senate hearings conducted between 1974 and 1978 considered the harm of these child welfare practices, not only to the Indian children and their parents, but also to the Indian tribes. [*In re Morris*, 491 Mich at 97-98, quoting *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989).]

When it enacted the ICWA, Congress declared that it was establishing "*minimum Federal standards* for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests of Indian children and to promote the stability and security of Indian tribes and families . . . ." 25 USC 1902 (emphasis added). The ICWA specifically defines "child custody proceeding" to include those proceedings concerning the foster care and adoptive placements of Indian children as well as proceedings involving the termination of parental rights. 25 USC 1903(1). Tribal courts have presumptive and concurrent jurisdiction with

state courts over such proceedings when Indian children, such as the minors in this case, reside outside an Indian reservation and are not wards of the tribal court. See 25 USC 1911(b); *Holyfield*, 490 US at 36 ("Section 1911(b) . . . creates concurrent but presumptively tribal jurisdiction in the case of children not domiciled on the reservation."). 25 USC 1911(b) states:

> In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, that such transfer shall be subject to declination by the tribal court of such tribe.

The ICWA does not define "good cause" sufficient for a state court to deny a proper request to transfer an Indian child placement proceeding to a tribal court but the Bureau of Indian Affairs (BIA) has issued guidelines commenting on the question. See Bureau of Indian Affairs, *Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed Reg 67591, § C.3 (November 26, 1979).[1] According to the BIA guidelines as they existed at the time of these proceedings,

> (a) Good cause not to transfer the proceeding exists if the Indian child's tribe does not have a tribal court as defined by the Act to which the case can be transferred.
>
> (b) Good cause not to transfer the proceeding may exist if any of the following circumstances exists:

[1] The BIA's Guidelines for State Courts have been updated since the events in this case occurred. See 80 Fed Reg 10146 (February 25, 2015). This opinion refers only to the version of the guidelines in effect during these proceedings—those published on November 26, 1979.

(i) The proceeding was at an advanced stage when the petition to transfer was received and the petitioner did not file the petition promptly after receiving notice of the hearing.

(ii) The Indian child is over twelve years of age and objects to the transfer.

(iii) The evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or the witnesses.

(iv) The parents of a child over five years of age are not available and the child has had little or no contact with the child's tribe or members of the child's tribe.

(c) Socio-economic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in a determination that good cause exists.

(d) The burden of establishing good cause to the contrary shall be on the party opposing the transfer. [*Id*.]

With regard to the timeliness of a request to transfer a child custody proceeding to a tribal court, the commentary to § C.1 of the BIA guidelines made the following observation:

While the Act permits intervention at any point in the proceeding, it does not explicitly authorize transfer requests at any time. Late interventions do not have nearly the disruptive effect on the proceeding that last minute transfers do. A case that is almost completed does not need to be retried when intervention is permitted. The problems resulting from late intervention are primarily those of the intervenor, who has lost the opportunity to influence the portion of the proceedings that was completed prior to intervention.

Although the Act does not explicitly require transfer petitions to be timely, it does authorize the court to refuse to transfer a case for good cause. When a party who could have petitioned earlier waits until the case is almost

> complete to ask that it be transferred to another court and retried, good cause exists to deny the request.
>
> Timeliness is a proven weapon of the courts against disruption caused by negligence or obstructionist tactics on the part of counsel. If a transfer petition must be honored at any point before judgment, a party could wait to see how the trial is going in state court and then obtain another trial if it appears the other side will win. Delaying a transfer request could be used as a tactic to wear down the other side by requiring the case to be tried twice. The Act was not intended to authorize such tactics and the "good cause" provision is ample authority for the court to prevent them. [BIA Guidelines at 67590, § C.1 Commentary.]

Further, the BIA guidelines discuss undue hardship to the parties or the witnesses, § C.3(b)(iii), as a factor for finding good cause to deny a transfer by quoting the House Report on the ICWA with respect to § 1911(b) and further commenting as follows:

> "The subsection is intended to permit a State court to apply . . . a modified doctrine of *forum non conveniens*, in appropriate cases, to insure that the rights of the child as an Indian, the Indian parents or custodian, and the tribe are fully protected." Where a child is in fact living in a dangerous situation, he or she should not be forced to remain there simply because the witnesses cannot afford to travel long distances to court.
>
> Application of this criterion will tend to limit transfers to cases involving Indian children who do not live very far from the reservation. This problem may be alleviated in some instances by having the court come to the witnesses.
>
> * * *
>
> The timeliness of the petition for transfer, discussed at length in the commentary to section C.l, is listed as a factor to be considered. . . . Long periods of uncertainty concerning the future are generally regarded as harmful

> to the well-being of children. For that reason, it is especially important to avoid unnecessary delays in child custody proceedings. [BIA Guidelines at 67591-67592, § C.3 Commentary.]

In 2010, the Michigan Court Rules were amended to reflect the requirements of the ICWA regarding petitions to transfer child custody proceedings to a tribal court. The amended court rules also defined good cause not to transfer in reference to the BIA Guidelines. Specifically, MCR 3.905(C)(1), as adopted February 2, 2010, effective May 1, 2010, 485 Mich ccxxxiv, stated that "[i]n determining whether good cause not to transfer exists, the court shall consider the Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed Reg No 228, 67590-67592, C.2-C.4 (November 26, 1979)." MCR 3.905(C)(1) was again amended on March 20, 2013, effective immediately, to reflect the Legislature's adoption of the MIFPA, which established standards for finding good cause to deny the transfer of an Indian child custody proceeding to a tribal court. The 2013 version of MCR 3.905(C)(1) did not refer to the BIA guidelines and instead incorporated the criteria of MCL 712B.7(3)-(5):

> (1) If either parent or the Indian custodian or the Indian child's tribe petitions the court to transfer the proceeding to the tribal court, the court shall transfer the case to the tribal court unless either parent objects to the transfer of the case to tribal court jurisdiction or the court finds good cause not to transfer. When the court makes a good-cause determination under this section, adequacy of the tribe, tribal court, or tribal social services shall not be considered. A court may determine that good cause not to transfer a case to tribal court exists only if the person opposing the transfer shows by clear and convincing evidence that either of the following applies:
>
> (a) The Indian tribe does not have a tribal court.

> (b) The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate. [493 Mich cciv-ccv.]

The Michigan Legislature enacted the MIFPA, MCL 712B.1 *et seq*., which took effect on January 2, 2013, with the purpose of protecting "the best interests of Indian children and promot[ing] the stability and security of Indian tribes and families." MCL 712B.5(a). The best interests of Indian children are to be determined in child custody proceedings in consultation with the Indian child's tribe, in accordance with the ICWA, and the policy specified in the MIFPA. MCL 712B.5. In MCL 712B.7(3), the MIFPA addresses transfers to a tribal court of a child custody proceeding involving an Indian child not domiciled or residing within the reservation of the Indian child's tribe:

> In any state court child custody proceeding, for an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer the proceeding to the Indian tribe's jurisdiction, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe, provided that the transfer is subject to declination by the tribal court of the Indian tribe.

Unlike the ICWA, the MIFPA provides circuit courts with a clear and unambiguous standard for determining what constitutes "good cause to the contrary" when considering a petition to transfer an Indian child custody case to a tribal court. MCL 712B.7(5) provides:

> A court may determine that good cause not to transfer a case to tribal court exists *only if* the person opposing the transfer shows by clear and convincing evidence that *either* of the following applies:

> (a) The Indian tribe does not have a tribal court.
>
> (b) The requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate. [Emphasis added.]

MCL 712B.7(4) of the MIFPA further provides: "When a court makes a good cause determination under this section, adequacy of the tribe, tribal court, or tribal social services shall not be considered." As already noted, MCR 3.905(C)(1) was amended to delete reference to the BIA guidelines and instead incorporate the requirements of the MIFPA.[2]

With this extended legal history, we address the issue presented in this case: May a circuit court find "good cause not to transfer a case to tribal court" under MCL 712B.7(5)(b) on the basis of "undue hardship" to an Indian child or children as a result of delay in the proceedings due to the transfer of a long-pending case to tribal court? Stated otherwise, does the "undue hardship" provision in MCL 712B.7(5)(b) permit a circuit court to deny a request to transfer an Indian child custody proceeding to a tribal court based on the timeliness of the request or the effect the transfer may have on the child's best interests? However meritorious these considerations may be, we conclude that the plain language of MCL 712B.7(5)(b) does not permit the circuit court to consider either the timeliness of the request or its possible effect on the child's best inter-

[2] Before its amendment in 2013, MCR 3.807(B)(2)(a), adopted February 2, 2010, and effective May 1, 2010, was worded identically to the version of MCR 3.905(C)(1) that incorporated the BIA guidelines. See 485 Mich ccxxxi. MCR 3.807(B)(2)(a) was also amended after the enactment of the MIFPA, and using language identical to the 2013 version of MCR 3.905(C)(1), eliminated reference to the BIA guidelines and incorporated the requirements of the MIFPA. See 493 Mich cciicciii.

ests in determining whether there exists "good cause not to transfer a case to tribal court."

In answering the question above, our primary goal is to ascertain and effectuate the intent of the Legislature. *Titan Ins Co*, 296 Mich App at 83. In doing so, we must first examine "the most reliable evidence of the Legislature's intent, the language of the statute itself." *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013). We must give effect to every word, phrase, and clause in a statute, and we must avoid a construction that would render part of the statute surplusage or nugatory. *Id*. Thus, we ascertain the intent of the Legislature from the terms of the statute, giving the terms their plain and ordinary meaning. *In re Kostin Estate*, 278 Mich App at 57. Where the terms of a statute are clear and unambiguous, we must enforce the statute as written. *Id*.; *Book-Gilbert*, 302 Mich App at 541.

MCL 712B.7(3) unambiguously provides that a court "shall" transfer proceedings to a tribal court unless either parent objects or there is "good cause to the contrary." Further, MCL 712B.7(5) unambiguously provides that good cause not to transfer a case to tribal court exists "only if" clear and convincing evidence shows that one of two circumstances exist. And because there is no dispute that a tribal court exists, MCL 712B.7(5)(a), the sole issue is whether the circuit court properly concluded that "[t]he requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate" under MCL 712B.7(5)(b).

By its plain language, good cause not to transfer an Indian child custody proceeding to a tribal court under MCL 712B.7(5)(b) has three components. First, there

must be an undue hardship on the parties or witnesses that will be required to present evidence in the tribal court.[3] See MCL 712B.7(5)(b), which states that "[t]he requirement of the parties or witnesses to present evidence in tribal court would cause undue hardship to *those* parties or witnesses . . . ." (Emphasis added.) Second, the undue hardship must stem from the requirement to present evidence in the tribal court. See *id*., which mandates that "[t]he requirement of the parties or witnesses to present evidence . . . *would cause* undue hardship . . . ." (Emphasis added.) Third, the Indian tribe must be unable to mitigate the undue hardship caused by the requirement of the parties or witnesses to present evidence in the tribal court. *Id*.

In ruling that there was good cause not to transfer the proceedings to the tribal court, the circuit court ignored each of the criteria in MCL 712B.7(5)(b). First, the circuit court based its decision on an undue hardship to the minors without determining whether the minors were required to present evidence in the tribal court. The circuit court also did not identify any other parties or witnesses that would be required to present evidence in the tribal court. And the circuit court failed to explain why the tribal court would be unable to mitigate any anticipated undue hardship. Moreover, the circuit court did not relate the anticipated undue hardship to the requirement of presenting evidence in the tribal court. Instead, the circuit court ruled that it

[3] We note that MCR 3.903(A)(19)(b) defines "party" to include the "petitioner, child, respondent, and parent, guardian, or legal custodian in a protective proceeding." We also observe that MCL 712B.7(6), MCR 3.807(B)(3), and MCR 3.905(D) all extend the right to intervene in an Indian child custody proceeding to the Indian child. "In any state court child custody proceeding, *an Indian child*, the Indian custodian of the child, and the Indian child's tribe have a right to intervene at any point in the child custody proceeding." MCL 712B.7(6) (emphasis added).

would give MCL 712B.7(5)(b) a "wider" interpretation, allowing it to consider the timeliness of the request and the minors' best interests. We have no doubt that the circuit court was motivated by its understanding of what would be in the minors' best interests. Nevertheless, "[w]hen 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 . . . ." *Book-Gilbert*, 302 Mich App at 542. However wise it may have been for the Legislature to provide that there is good cause not to transfer a case to a tribal court when the transfer request is made at an advanced stage of the proceeding or when a transfer would negatively affect a minor's best interests, the Legislature chose to define "good cause" using criteria different from the criteria considered in the BIA guidelines. We must enforce the unambiguous language of MCL 712B.7(5)(b) as written. *Book-Gilbert*, 302 Mich App at 541; *In re Kostin Estate*, 278 Mich App at 57.

Although the BIA guidelines provide separately that good cause not to transfer a case to a tribal court may exist if a request to transfer is made "at an advanced stage . . . and the petitioner did not file the petition promptly after receiving notice of the hearing," BIA Guidelines at 67591, § C.3(b)(i), the Michigan Legislature chose not to include timeliness of the request for transfer as a basis for finding good cause under MCL 712B.7(5). Instead, the Michigan Legislature decided to impose a more exacting standard than the one provided in the ICWA's "minimum Federal standards," 25 USC 1902, by specifying that good cause not to transfer exists *only if* (1) "[t]he Indian tribe does not have a tribal court," or (2) "[t]he requirement of the parties or witnesses to present evidence in tribal court

would cause undue hardship to those parties or witnesses that the Indian tribe is unable to mitigate." MCL 712B.7(5)(a)-(b).

Further, the BIA guidelines consider the timeliness of a request to transfer in part because the ICWA permits Indian tribes to intervene in state child custody proceedings at any time, but does not explicitly permit them to request transfers at any time. BIA Guidelines at 67590, § C.1 Commentary. Compare 25 USC 1911(c) (permitting intervention in state court proceedings "at any point in the proceeding") with 25 USC 1911(b) (requiring transfers in the absence of good cause to the contrary or an objection by either parent, without specifying when transfer requests may or may not be made). But unlike the ICWA, Michigan Court Rules expressly provide that "[a] petition to transfer may be made *at any time* in accordance with MCL 712B.7(3)." MCR 3.807(B)(2)(d); MCR 3.905(C)(4) (emphasis added). See e.g., *In re NV*, 744 NW2d 634, 638 (Iowa, 2008) (finding that the Iowa legislature, when it adopted the Iowa version of the ICWA, included the undue hardship provision of the BIA guidelines but not the provision dealing with the timeliness of a transfer request).

Finally, although the Donns argue that the circuit court's decision should be affirmed because the tribal court waived its right to accept a transfer by declining a prior transfer request, they present no authority supporting the position that a tribal court can waive its jurisdiction at all, let alone by merely declining a prior request. Accordingly, we find this argument has been abandoned. See *Bronson Methodist Hosp v Mich Assigned Claims Facility*, 298 Mich App 192, 199; 826 NW2d 197 (2012) (holding that an appellant abandons an argument made with only superficial treatment and

little or no citation of supporting authority). Further, our court rules broadly provide that "[a] petition to transfer may be made at any time . . . ," and respondents point to no authority limiting this right. MCR 3.807(B)(2)(d); MCR 3.905(C)(4).

We reverse and remand for further proceedings consistent with this opinion. Because a question of public policy is involved, no taxable costs may be assessed under MCR 7.219. We do not retain jurisdiction.

RIORDAN, P.J., and MARKEY and WILDER, JJ., concurred.

CITY OF STERLING HEIGHTS v CHRYSLER GROUP, LLC

Docket No. 317310. Submitted March 10, 2015, at Detroit. Decided March 19, 2015, at 9:05 a.m.

The city of Sterling Heights filed a petition in the Macomb Circuit Court seeking review of a decision by the State Tax Commission, which had granted applications filed by Chrysler Group, LLC, for certain air pollution control tax-exemption certificates. The applications concerned a new building being constructed for the painting of automobiles and included requests for exemption certificates for pollution control equipment and for the building cost attributable to housing the pollution control equipment. The court, Peter J. Maceroni, J., reversed the commission's granting of the certificates, remanded the matter to the commission, and ordered the commission to refer the applications to the Michigan Department of Environmental Quality (MDEQ) for a technical evaluation. Chrysler appealed by leave granted.

The Court of Appeals *held*:

1. Under MCL 324.5904(1), an air pollution control tax-exemption certificate exempts a facility from real and personal property taxes imposed under the General Property Tax Act. A facility must meet the requirements of MCL 324.5901, which defines the term "facility," and MCL 324.5903, which requires that the facility be designed and operated primarily to remove pollutants from the air, to qualify for an exemption certificate. Because an applicant may seek an exemption certificate for a facility, and a facility by definition includes a part of a structure, an applicant may seek an exemption certificate for a part of a building. Chrysler, therefore, could seek an exemption certificate for part of a structure as long as that part of the structure was designed and operated primarily to control, capture, and remove pollutants from the air.

2. Under MCL 324.5902(2), the commission must seek approval from the MDEQ before issuing a tax-exemption certificate. Under MCL 324.5903, if the MDEQ finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air and is suitable, reasonably adequate, and meets the intent and purposes of Part 55 of the

Natural Resources and Environmental Protection Act, which concerns air pollution control, and the rules promulgated under that part, the MDEQ must notify the commission, which shall issue a certificate. In a 2011 appropriations act, the Legislature directed the MDEQ to enter into a memorandum of understanding with the Department of Treasury to develop a process for the review and approval of tax-exemption certificates in accordance with a list of commonly approved air pollution control equipment that had previously been adopted by the commission. Pursuant to this directive, the commission, the Department of Treasury, and the MDEQ signed a memorandum of understanding in which they agreed on a process to create a list of commonly approved equipment. The memorandum provided that the MDEQ would submit to the commission a list of pollution control equipment that the MDEQ commonly approved. The commission would then approve that list. The MDEQ additionally provided that it would assist in the review of petitions when the equipment was not identified on the annual pollution control equipment list approved by the MDEQ. In accordance with the Legislature's directive and the subsequent memorandum of understanding, the MDEQ may preapprove certain facilities and the commission need not seek additional approval before issuing an exemption certificate for those facilities. Unfortunately, the "List of Commonly Approved Air Pollution Control Equipment" pertinent to this case did not actually comply with MCL 324.5903. For facilities on a preapproved list to meet the requirements of MCL 324.5903, the list must only include, or at least clearly indicate, facilities that the MDEQ has found are designed and operated primarily for the control, capture, and removal of pollutants from the air and are suitable and adequate to meet the purposes of Part 55 of the Natural Resources and Environmental Protection Act. In this case, the MDEQ had not made the proper findings regarding the facilities for which Chrysler sought exemption under MCL 324.5903. Accordingly, the circuit court properly determined that the commission's decision was not supported by competent, material, and substantial evidence and correctly remanded the matter for the commission to refer Chrysler's specific applications to the MDEQ.

Affirmed.

BOONSTRA, P.J., concurring, agreed with the majority that Chrysler's applications for air pollution control tax-exemption certificates should have been evaluated by the MDEQ and that the circuit court, therefore, properly reversed the commission's decision and remanded the matter for referral to the MDEQ, but

his reasoning differed. The pertinent statutes do not afford the commission or the MDEQ carte blanche to preapprove facilities on the basis of the memorandum of understanding. The act pursuant to which the memorandum was adopted did not authorize the commission or the MDEQ to create future lists of preapproved facilities regardless of the factual circumstances. The act, instead, directed the MDEQ to enter into a memorandum of understanding relating to certain equipment. In addition, the evidence was inadequate that the facilities for which Chrysler requested the exemption certificates met the requirements of MCL 324.5901 and MCL 324.5903.

1. TAXATION — AIR POLLUTION CONTROL TAX-EXEMPTION CERTIFICATES — FACILITIES — PART OF A BUILDING.

Under MCL 324.5904(1), an air pollution control tax-exemption certificate exempts a facility from real and personal property taxes imposed under the General Property Tax Act; a facility must meet the requirements of MCL 324.5901, which defines the term "facility," and MCL 324.5903, which requires that the facility be designed and operated primarily to remove pollutants from the air, to qualify for an exemption certificate; an applicant may seek an exemption certificate for a part of a building as long as that part of the structure was designed and operated primarily to control, capture, and remove pollutants from the air.

2. TAXATION — AIR POLLUTION CONTROL TAX-EXEMPTION CERTIFICATES — FACILITIES — APPROVAL BY THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY.

Under MCL 324.5902(2), the State Tax Commission must seek approval from the Michigan Department of Environmental Quality (MDEQ) before issuing an air pollution control tax-exemption certificate; under MCL 324.5903, if the MDEQ finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air and is suitable, reasonably adequate, and meets the intent and purposes of Part 55 of the Natural Resources and Environmental Protection Act and the rules promulgated under that part, the MDEQ must notify the commission, which shall issue a certificate; in accordance with a separate legislative directive and a memorandum of understanding signed by the commission, the Department of Treasury, and the MDEQ, the MDEQ may preapprove certain facilities and the commission need not seek additional approval before issuing an exemption certificate for those facilities; for facilities on a preapproved list to meet the requirements of MCL 324.5903, the list must only include, or at least clearly indicate, facilities that the

> MDEQ has found are designed and operated primarily for the control, capture, and removal of pollutants from the air and are suitable and adequate to meet the purposes of Part 55 of the Natural Resources and Environmental Protection Act.

O'Reilly Rancilio PC (by *Marc D. Kaszubski*, *James J. Sarconi*, and *Nathan D. Petrusak*) for Sterling Heights.

Dykema Gossett PLLC (by *Carl Rashid, Jr.*, and *Shaun M. Johnson*) for Chrysler Group, LLC.

Before: BOONSTRA, P.J., and SAWYER and O'CONNELL, JJ.

O'CONNELL, J. Chrysler Group, LLC (Chrysler) appeals by leave granted the circuit court's order reversing the decision of the State Tax Commission (the Commission) to grant Chrysler's petition for air pollution control tax-exemption certificates. The circuit court remanded for the Michigan Department of Environmental Quality (MDEQ) to evaluate Chrysler's petitions. We affirm.

I. FACTS

On June 15, 2012, Chrysler filed two petitions for air pollution control tax-exemption certificates with the Michigan Department of Treasury. The first petition was for an exemption of about $81 million for a new automobile painting building. The petition included requests for several pieces of pollution control equipment and, as part of the petition, a request for about $47 million that represented the "percentage of the new paint shop facility . . . attributable to pollution control equipment based on the floor plan . . . ." In the second petition, Chrysler sought an exemption of about $5 million for completed aspects of the existing

paint shop, including repairs to equipment, new piping and storage equipment, and a request for about $2.5 million representing the "value of [the] pollution control portion" of the real property.[1] In response to the petitions, the Commission requested additional information, which Chrysler provided. Chrysler also submitted petitions for water pollution control tax-exemption certificates.

In December 2012, the Commission held a hearing on Chrysler's petitions. At the hearing, Sterling Heights contended that the painting building did not qualify for exemptions because it served the primary purpose of painting vehicles rather than removing air pollution. Chrysler responded that it could seek exemptions for those portions of the building that did serve the primary purpose of air pollution control. The Commission declined to refer the petitions to the MDEQ and granted the air pollution control certificates in the full amounts.

Sterling Heights appealed in the Macomb Circuit Court. The parties reiterated the arguments that they had raised before the Commission. The circuit court reversed and remanded. It reasoned that, because the Commission was required to submit the petition to the MDEQ but had failed to do so, its decision was not supported by competent, material, and substantial evidence. The circuit court required the Commission to refer the petitions to the MDEQ for "a technical evaluation." Chrysler now appeals.

II. STANDARDS OF REVIEW

A party may appeal the Commission's decision on a pollution control tax-exemption certificate in the circuit

[1] Capitalization altered.

court. MCL 324.5907. The circuit court must set aside the agency's order if, among other reasons, the decision violates a statute or it was not supported by competent, material, and substantial evidence. MCL 24.306(1).

This Court reviews the circuit court's decision to determine whether the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's factual findings." *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 607; 809 NW2d 453 (2011) (quotation marks and citation omitted). Substantial evidence is "evidence that a reasoning mind would accept as sufficient to support a conclusion." *Dignan v Mich Pub Sch Employees Retirement Bd*, 253 Mich App 571, 576; 659 NW2d 629 (2002). Substantial evidence is "more than a mere scintilla but less than a preponderance of the evidence." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 584; 701 NW2d 214 (2005) (quotation marks and citation omitted).

This Court reviews de novo questions of statutory interpretation. *Paris Meadows, LLC v Kentwood*, 287 Mich App 136, 141; 783 NW2d 133 (2010). When interpreting a statute, our goal is to give effect to the intent of the Legislature as expressed through the statute's language. *Id*. If the statute's language is not ambiguous, we must enforce the statute as written. *Id*.

III. WATER POLLUTION CONTROL TAX-EXEMPTION CERTIFICATES

Chrysler contends that the circuit court violated its subject matter jurisdiction by voiding water pollution control tax-exemption certificates that Sterling Heights did not appeal. Sterling Heights concedes that it did not appeal the water pollution control tax-

exemption certificates, but it argues that Chrysler's argument lacks merit because the circuit court did not void the water pollution control tax-exemption certificates. We conclude that Chrysler's assertion is without merit.

Chrysler contends the circuit court expressed a belief at the hearing that the air pollution control tax-exemption certificates could not be separated from the water pollution control tax-exemption certificates. "[A] court speaks through its written orders and judgments, not through its oral pronouncements." *In re Contempt of Henry*, 282 Mich App 656, 678; 765 NW2d 44 (2009). Regardless of the circuit court's statements at the hearing, its written remand order did not include the water pollution control tax-exemption certificates:

> **IT IS HEREBY ORDERED** that the State Tax Commission's granting of the December 13, 2012, Air Pollution Control Tax Exemption Certificates . . . is hereby REVERSED for the reasons stated on the Record;
>
> **IT IS FURTHER ORDERED** that the State Tax Commission[']s granting of real property exemptions for the Paint Shops is hereby Reversed and Vacated; and remanded, for the reasons stated on the record.
>
> **IT IS FURTHER ORDERED** that the State Tax Commission shall refer these applications to the Michigan Department of Environmental Quality to perform a technical evaluation.[2]

Accordingly, we reject Chrysler's argument that the trial court improperly included the water pollution control tax-exemption certificates in its remand order. The language of the order itself only concerned the air pollution control tax-exemption certificates.

---

[2] The order was typed with handwritten amendments that are incorporated in this quotation.

IV. AIR POLLUTION CONTROL TAX-EXEMPTION CERTIFICATES

Regarding the air pollution control tax-exemption certificates, Chrysler first contends that it may seek an exemption certificate for parts of a structure, as long as the primary purpose of that part of the structure is pollution control. Sterling Heights contends that a building is only exempt if the entire building would be exempt and, because the main purpose of the painting building is to paint cars, Chrysler is not entitled to any exemption. We conclude that Chrysler may seek exemption certificates for portions of its building.

An exemption certificate exempts a facility from real and personal property taxes imposed under the General Property Tax Act. MCL 324.5904(1). A facility must meet the requirements of both MCL 324.5901 and MCL 324.5903 to qualify for an exemption certificate. *DaimlerChrysler Corp v State Tax Comm*, 482 Mich 220, 226; 753 NW2d 605 (2008) (opinion by YOUNG, J.); *id*. at 237 (KELLY, J., concurring in result); *id*. at 248-249 (WEAVER, J., concurring in part and dissenting in part). A facility may include structures, parts of structures, or accessories of structures or equipment:

> As used in [MCL 324.5901 through MCL 324.5908], "facility" means machinery, equipment, structures, or any part or accessories of machinery, equipment, or structures, installed or acquired for the primary purpose of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state. [MCL 324.5901.]

To qualify for an exemption certificate, the facility must also be designed and operated primarily to remove pollutants from the air:

> If the [MDEQ] finds that the facility is designed and operated primarily for the control, capture, and removal of

> pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 [of the Natural Resources and Environmental Protection Act, MCL 324.5501 through MCL 324.5542, which concerns air pollution control] and rules promulgated under that part, the [MDEQ] shall notify the state tax commission, which shall issue a certificate. The effective date of the certificate is the date on which the certificate is issued. [MCL 324.5903.]

The plain language of the statute does not support Sterling Heights's argument that the entire facility must operate to control air pollution because the definition of facility includes "equipment, structures, *or any part or accessories of*" equipment or structures. See MCL 324.5901 (emphasis added). Because a party may seek an exemption for a facility, and a facility by definition includes a part of a structure, a party may seek an exemption for a part of a building. Therefore, we conclude that Chrysler may seek a tax exemption for part of a structure as long as that part of the structure is designed and operated primarily to control, capture, and remove pollutants from the air.

The Michigan Supreme Court's decision in *DaimlerChrysler* does not support Sterling Heights's argument. In *DaimlerChrysler*, the Michigan Supreme Court considered whether the petitioners could seek tax-exemption certificates for "test cells": structures in which the petitioners tested new motor vehicles to ensure that the vehicles complied with emissions standards. *DaimlerChrysler*, 482 Mich at 223 (opinion by YOUNG, J.); *id*. at 243 (WEAVER, J., concurring in part and dissenting in part.) The Michigan Supreme Court concluded that the petitioners were not entitled to exemption certificates. *Id*. at 236 (opinion by YOUNG, J); *id*. at 242 (KELLY, J., concurring in result). In his lead opinion, Justice YOUNG reasoned that the petitioners

were not entitled to the exemption because "the *test cells* . . . are not the source of the removal, control, or capture of pollution"; rather, the cells were only used to test the engines and thus were only indirectly responsible for removing pollution from the air. *Id*. at 229 (opinion by YOUNG, J.). See *id*. at 239-242 (KELLY, J., concurring in result) (agreeing with Justice YOUNG's conclusion that the petitioners were not entitled to exemption certificates for the test cells because it could be argued that they were not designed and operated primarily for the removal of pollutants from the air).

This decision is distinguishable from the facts in this case. In *DaimlerChrysler*, the petitioners sought exemptions for testing buildings that did not directly contribute to removing pollution from the air; the engines reduced air pollution, not the building the engines were tested in. In this case, Chrysler seeks exemptions for equipment and parts of structures that either directly contribute to removing pollution from the air or that house equipment that does so. We conclude that this is not a case in which Chrysler seeks an exemption certificate for a structure that is only indirectly responsible for removing pollution from the air. Accordingly, as long as the portions of the paint shop for which Chrysler seeks an exemption have the primary purpose of controlling or disposing of air pollution, Chrysler may seek an exemption for those parts of the structure.

Second, Chrysler contends that the circuit court erroneously remanded to the Commission to have the MDEQ evaluate its petition. According to Chrysler, the Commission did not need to refer its petition for air pollution control tax-exemption certificates to the MDEQ because a memorandum of understanding between the Commission, the Department of Treasury,

and the MDEQ provided a preapproved list of commonly approved air pollution control equipment. Sterling Heights contends that the MDEQ must review and approve each petition individually.

The Commission must seek approval of the MDEQ before issuing a tax-exemption certificate:

> Before issuing a certificate, the state tax commission shall seek approval of the [MDEQ] and give notice in writing by certified mail to the department of treasury and to the assessor of the taxing unit in which the facility is located or to be located, and shall afford to the applicant and the assessor an opportunity for a hearing. [MCL 324.5902(2).]

The MDEQ must make certain findings before approving a facility:

> If the [MDEQ] finds that the facility is designed and operated primarily for the control, capture, and removal of pollutants from the air, and is suitable, reasonably adequate, and meets the intent and purposes of part 55 and rules promulgated under that part, the [MDEQ] shall notify the state tax commission, which shall issue a certificate. [MCL 324.5903.]

In a 2011 appropriations act, the Legislature directed the MDEQ to "enter into a memorandum of understanding with the department of treasury to develop a process for the review and approval of tax exemption certificates in accordance with the list of commonly approved air pollution control equipment adopted by the state tax commission . . . ." 2011 PA 63, art VII, part 2, § 311. Pursuant to this directive, the Commission, Department of Treasury, and MDEQ signed a memorandum of understanding in which they agreed on a process to create a list of commonly approved equipment. The memorandum provided that the MDEQ would submit to the Commission a list of

pollution control equipment that the MDEQ commonly approved. The Commission would then approve that list. The MDEQ additionally provided that it would assist in the review of petitions "where the equipment is not identified on the annual pollution control equipment list approved by the MDEQ."

We agree with Chrysler that, pursuant to the Legislature's directive and in accordance with the memorandum of understanding, the MDEQ may preapprove certain facilities and the Commission need not seek additional approval before issuing an exemption certificate for those specific facilities. Nothing in the language of MCL 324.5902 provides a specific time frame during which the Commission shall seek the MDEQ's approval of certain equipment. It simply provides that the MDEQ must approve a facility before the Commission may issue an exemption certificate.[3] No language in the relevant statutes precludes the MDEQ from finding in advance that certain equipment or facilities meet the requirements of MCL 324.5903.

Unfortunately, the "List of Commonly Approved Air Pollution Control Equipment" pertinent to this case does not actually comply with MCL 324.5903. The list is extremely generic and broad. It not only includes facilities that are "commonly" exempt, but also includes facilities that are "sometimes" or "rarely" tax exempt. Further, some of the facilities that are listed as commonly tax exempt have subsequent caveats that

[3] We recognize that our holding is contrary to the unpublished decision in *City of River Rouge v EES Coke Battery Co, LLC*, unpublished opinion per curiam of the Court of Appeals, issued December 9, 2014 (Docket Nos. 314789, 315621, 315632, 315633, 315634, 315635, & 315638). However, unpublished decisions are not binding. MCR 7.215(C)(1). And Chrysler in this case has raised a specific argument regarding the timing language of MCL 324.5902 that was not decided in this unpublished decision.

state that the facility may not be tax exempt for certain uses or under certain circumstances. Other portions of the list include ancillary systems that range from the broad ("electrical equipment for exempt equipment") to the specific ("equipment used to treat an exempt collector inlet gas stream," with examples).[4] These ancillary lists do not indicate whether the listed items are commonly, sometimes, or rarely tax exempt.

In this case, Chrysler sought tax exemptions for some facilities that were listed as commonly tax exempt. But it also sought exemptions for other facilities under some of the broad, unclear categories. Unless the MDEQ unequivocally listed the specific equipment or parts of structures for which Chrysler sought exemption on the preapproved list, the Commission did not have preapproval for those facilities. The memorandum of understanding and the list itself clearly contemplate that there would be situations in which facilities would fall outside the MDEQ's list of approved equipment. And in this case, many of Chrysler's requested exemptions were not specifically contained on the MDEQ's list.

In sum, the list on which Chrysler relied is meaningless as a tool from which to determine the MDEQ's preapproval. For facilities on a preapproved list to meet the requirements of MCL 324.5903, the list must only include, or at least clearly indicate, facilities that the MDEQ has found are designed and operated primarily for the control, capture, and removal of pollutants from the air and are suitable and adequate to meet the purposes of Part 55 of the Natural Resources and Environmental Protection Act. The list in this case did not do so.

---

[4] Capitalization altered.

Accordingly, we conclude that the circuit court properly determined that the Commission's decision was not supported by competent, material, and substantial evidence. The MDEQ had not made findings regarding the facilities for which Chrysler sought exemption under MCL 324.5903. Further, the Commission's decision was contrary to established law because it did not follow the statutory directive of MCL 324.5902(2) to obtain the MDEQ's approval. We conclude that the learned circuit court properly remanded for the Commission to refer Chrysler's specific petitions to the MDEQ.

We affirm. As the prevailing party, Sterling Heights may tax costs. MCR 7.219(A).

SAWYER, J., concurred with O'CONNELL, J.

BOONSTRA, P.J. (*concurring*). I respectfully concur in the result reached by the majority, as well as in much of its reasoning. I specifically agree with the majority and the trial court that Chrysler Group, LLC's applications for air pollution control tax-exemption certificates should have been evaluated by the Michigan Department of Environmental Quality (MDEQ) and that the trial court, therefore, properly reversed the decision of the State Tax Commission (STC) to grant Chrysler's applications and remanded to the MDEQ.

I write separately to explain my somewhat differing reasoning, and to highlight certain concerns. For example, I do not read the pertinent statutes as affording the MDEQ or the STC carte blanche to "preapprove" facilities based on the memorandum of understanding (MOU) that those agencies entered into at the direction of the Legislature, pursuant to § 311 of Part 2, Article VII, of 2011 PA 63,[1] purportedly in the interests

[1] 2011 PA 63 was an omnibus appropriations act.

of streamlining the process for evaluating applications for pollution control tax exemptions. The MOU indeed purports to require the MDEQ to "[a]nnually by June 1, review and submit to the STC the pollution control equipment list commonly approved by the MDEQ for pollution control tax exemptions," and "[w]hen requested by the STC, assist in the review of a limited number of applications where the equipment is not identified on the annual pollution control equipment list approved by the MDEQ." Further, the MOU purports to require the STC to "[a]nnually by July 1, approve a list of air . . . pollution control equipment determined to be commonly approvable for pollution control tax exemptions by the MDEQ."

However, § 311—pursuant to which the MOU was adopted—provides in its totality as follows:

> The [MDEQ] shall enter into a memorandum of understanding with the department of treasury to develop a *process* for the review and approval of tax exemption certificates in accordance with the list of commonly approved air pollution control *equipment adopted by the state tax commission on August 16, 2010* and the list of commonly approved water pollution equipment adopted by the state tax commission on August 16, 2010. [2011 PA 63, art VII, part 2, § 311 (emphasis added).]

I first note (as a portion of the italicized language reflects) that § 311 refers to a specific list in the past tense, i.e., one that was "adopted by the [STC] on August 16, 2010 . . . ." Nowhere in that statutory language does the Legislature authorize or direct the MDEQ or the STC to take it upon themselves to create future lists[2] that arguably may then be deemed

[2] The list provided by the parties on appeal indicates that it was approved by the STC on June 12, 2012.

to constitute preapproved equipment regardless of the particular factual circumstances.

Second, § 311 requires the MDEQ to enter into an MOU "to develop a *process* for the review and approval of tax exemption certificates" in accordance with the list referred to in § 311. (Emphasis added.) I am unable to read that language as clearly authorizing the MDEQ and the STC to preapprove equipment for tax exemption without undergoing the otherwise-required statutory evaluation in the particular circumstances presented.

Third, § 311 refers to the entry into an MOU concerning "commonly approved air pollution control *equipment* . . . ." (Emphasis added.) I am aware of no definition of the term "equipment" that would make it synonymous with the term "facility," as defined in MCL 324.5901. To the contrary, MCL 324.5901 defines "facility" to mean "machinery, *equipment*, structures, or any part or accessories of machinery, *equipment*, or structures" under certain conditions. The Legislature's inclusion of the term "equipment" within the statutory definition of "facility" along with items *other than* "equipment," i.e., "machinery," "structures," and "any part or accessories" of such "machinery" or "structures," demonstrates to me that the Legislature understood the meaning of "equipment" and "facility" to be different, and that the inclusion of the term "equipment" within the definition of "facility" reflects that "equipment" necessarily has a narrower definition than does "facility." See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 12-17; 795 NW2d 101 (2009). Consequently, I do not read § 311 as directing the MDEQ to enter into an MOU relating

to "facilities," as defined in MCL 324.5901, but rather as meaning what it says—an MOU that relates to certain "equipment."[3]

Ultimately, these observations lead me to the same outcome as the majority: the "list" in question is not appropriately used in this case to effect a preapproval of the purported "facilities" that are the subject of Chrysler's applications.

Further, I find inadequate record evidence that those purported "facilities" either meet the statutory definition of "facility," in that they were "*installed or acquired for the primary purpose* of controlling or disposing of air pollution that if released would render the air harmful or inimical to the public health or to property within this state," MCL 324.5901, or that they were "*designed and operated primarily for* the control, capture, and removal of pollutants from the air, and [are] suitable, reasonably adequate, and meet[] the intent and purposes of part 55 [of the Natural Resources and Environmental Protection Act, MCL 324.5501 through MCL 324.5542, concerning air pollution control] and rules promulgated under that part," MCL 324.5903. (Emphasis added.)[4]

---

[3] Neither 2011 PA 63 nor the Natural Resources and Environmental Protection Act, MCL 324.101 *et seq*., provides a definition of "equipment," nor has our caselaw defined the term in this context. Given the nonexistence of a statutory definition, this Court may consult a dictionary to aid in its interpretation. See *Johnson v Pastoriza*, 491 Mich 417, 436; 818 NW2d 279 (2012). The *Merriam-Webster's Collegiate Dictionary* (11th ed) defines "equipment" as "the set of articles or physical resources serving to equip a person or thing: as (1) : the implements used in an operation or activity . . . (2) : all the fixed assets *other than land and buildings* of a business enterprise (3) : the rolling stock of a railway . . . ." (Emphasis added.) "Equipment" would, therefore, seem not to include a building or structure, or a portion thereof, although it nonetheless may constitute a "facility."

[4] Without the requisite MDEQ findings under MCL 324.5903, for example, I am unable to conclude from the current record (as apparently

I fully appreciate that there may be a value in streamlining processes, and that budgetary restraints may provide added incentive for such streamlining. However, those factors do not excuse agency noncompliance with statutory requirements. The trial court therefore properly remanded this matter to the MDEQ for an evaluation of whether the statutory requirements of MCL 324.5901 and MCL 324.5903 are met, absent which it would not be appropriate for the STC to grant the sought-after air pollution control tax-exemption certificates.

---

the majority does) that "Chrysler seeks exemptions for equipment and parts of structures that either directly contribute to removing pollution from the air or that house equipment that does so" or that "this is not a case in which Chrysler seeks an exemption certificate for a structure that is only indirectly responsible for removing pollution from the air."

EICKELBERG v EICKELBERG

Docket No. 318840. Submitted January 13, 2015, at Detroit. Decided January 27, 2015. Approved for publication March 19, 2015, at 9:10 a.m.

Meggan Eickelberg, also known as Meggan Griffin, filed a complaint for divorce against Ethan Eickelberg in the Macomb Circuit Court. The court entered a consent judgment in 2010, awarding the parties joint legal custody of their three minor children and awarding physical custody to plaintiff. When the divorce complaint was filed, the parties lived in Clinton Township. Defendant subsequently moved to Perry. In March 2013, defendant moved from Perry to Marshall, which is approximately 126 miles from Clinton Township. In April 2013, plaintiff moved to terminate a court-appointed parenting coordinator. In the motion, plaintiff also contended that defendant's recent move implicated MCL 722.31. In response, defendant moved to change the parenting-time exchange location and to modify parenting time because of his move. The court, Kathryn A. George, J., ruled that defendant was not required to seek permission for his move to Marshall because Marshall is not more than 100 miles from Perry. The court granted defendant's motion to change the parenting-time schedule and exchange location and denied plaintiff's request to terminate the parenting-time coordinator. The court also ordered additional miscellaneous relief. The Court of Appeals granted plaintiff's delayed application for leave to appeal.

The Court of Appeals *held*:

MCL 722.31(1) states that a parent of a child whose custody is governed by court order shall not change the legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order was issued and that a child whose parental custody is governed by court order has, for the purposes of MCL 722.31, a legal residence with each parent. The appropriate residence on which to focus when applying the 100-mile rule is the child's legal residence at the time of the commencement of the action in which the order governing custody was issued. That a

parent may have subsequently relocated a child's legal residence does not change the residence that is the focus of the 100-mile rule. In this case, the children's legal residence was in Clinton Township, not Perry, at the time of the commencement of the divorce action. In accordance with MCL 722.31(2) and (4), defendant was required to seek court approval or plaintiff's consent before moving to Marshall because Marshall is more than 100 miles from Clinton Township. On remand, the trial court had to consider the issue within the framework of the four-step approach set forth in *Rains v Rains*, 301 Mich App 313, 325 (2013). Under that approach, the court had to (1) determine whether defendant established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4) supported a motion for a change of domicile, (2) if the factors supported a change in domicile, then the trial court had to determine whether an established custodial environment existed, (3) if an established custodial environment existed, then the trial court had to determine whether the change of domicile would modify or alter that established custodial environment, and (4) if, and only if, the trial court found that a change of domicile would modify or alter the children's established custodial environment, the trial court then had to determine whether the change in domicile would be in the children's best interests by considering whether the best-interest factors in MCL 722.23 had been established by clear and convincing evidence.

Order granting defendant's motion to modify the parties' parenting-time schedule and exchange location, denying plaintiff's motion to terminate the parenting-time coordinator, and granting other relief vacated; case remanded to the trial court for further proceedings.

PARENT AND CHILD — CHILD CUSTODY — CHANGES OF DOMICILE — 100-MILE RULE.

MCL 722.31(1) states that a parent of a child whose custody is governed by court order shall not change the legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order was issued and that a child whose parental custody is governed by court order has, for the purposes of MCL 722.31, a legal residence with each parent; the appropriate residence on which to focus when applying the 100-mile rule is the child's legal residence at the time of the commencement of the action in which the order governing custody was issued; that a

> parent may have subsequently relocated a child's legal residence does not change the residence that is the focus of the 100-mile rule.

Anne Argiroff, PC (by *Anne Argiroff*), for plaintiff.

Before: BECKERING, P.J., and JANSEN and BOONSTRA, JJ.

PER CURIAM. Plaintiff, Meggan Eickelberg, also known as Meggan Griffin, appeals by delayed leave granted the circuit court's order granting defendant Ethan Eickelberg's motion to modify the parties' parenting-time schedule and parenting-time exchange location, denying plaintiff's motion to terminate the parenting-time coordinator, and ordering other relief. We vacate that order and remand for further proceedings.

Plaintiff and defendant were married in May 1999 and have three minor children. On October 7, 2010, the court entered a consent judgment of divorce dissolving the parties' marriage and awarding them joint legal custody of their children with physical custody awarded to plaintiff. When the complaint for divorce was filed, both parties lived in Clinton Township. At some point after plaintiff filed the complaint for divorce, defendant moved to Perry, which was approximately 86 miles from plaintiff's home in Clinton Township. In March 2013, defendant moved again, to Marshall, which is approximately 126 miles from plaintiff's home in Clinton Township. Defendant contends that his move to Marshall was required by his job as a first lieutenant in the United States Army.

After the divorce, the parties experienced difficulty communicating about the children, so the circuit court appointed a parenting coordinator. In April 2013,

plaintiff moved to terminate the parenting coordinator. Additionally, she contended that defendant's recent move to Marshall was a change of domicile over 100 miles from the children's original residence in Clinton Township, implicating MCL 722.31. In response, defendant moved to change the parenting-time exchange location and to modify parenting time because of his move. He requested that the parenting-time exchange be moved to a location that was more convenient in light of his move to Marshall and that the circuit court eliminate his midweek parenting time on Wednesday evenings, as such parenting time was no longer feasible in light of his move. In exchange for the midweek visit, defendant proposed that he be awarded extra parenting time during the children's summer vacation.

At the hearing on the parties' motions, plaintiff argued that defendant's move to Marshall violated MCL 722.31 because he moved more than 100 miles from the children's original legal residence at the time of the commencement of the divorce action without court approval. The court concluded, however, that defendant was not required to seek court permission for his move from Perry to Marshall because Marshall was not more than 100 miles from Perry. The circuit court rejected plaintiff's contention that the appropriate residence on which to focus was the children's legal residence at the time of the commencement of the action on which the original custody order was based; instead, the circuit court focused on defendant's residence immediately before the move at issue. Thereafter, the court granted defendant's motion to change the parenting-time exchange location and to modify the parenting-time schedule, denied plaintiff's motion to terminate the parenting-time coordinator, and ordered other relief, including: makeup parenting time for defendant, that the parties participate in a parental-

coordination evaluation, that all communication between the parties be in writing, and that the parties be prohibited from scheduling extracurricular activities for the children except with mutual written agreement.

On appeal, plaintiff argues that the court misinterpreted MCL 722.31(1) when addressing defendant's move to Marshall and, as a result, failed to evaluate the move according to the factors set forth in the statute. We agree. The question whether the court misinterpreted MCL 722.31 is a question of law that we review de novo on appeal. *Burba v Burba (After Remand)*, 461 Mich 637, 647; 610 NW2d 873 (2000). "The goal of statutory interpretation is to give effect to the Legislature's intent as expressed in the statutory language. In examining the language of a statute, this Court will normally give the words used in the statute their plain and ordinary meaning." *Bowers v VanderMeulen-Bowers*, 278 Mich App 287, 292; 750 NW2d 597 (2008) (citation and quotation marks omitted).

Pertinent to this appeal, MCL 722.31(1) provides as follows:

> A child whose parental custody is governed by court order has, for the purposes of this section, a legal residence with each parent. Except as otherwise provided in this section, a parent of a child whose custody is governed by court order shall not change a legal residence of the child to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued.

The circuit court ignored the plain language of MCL 722.31(1) by focusing on the number of miles defendant moved from his most recent address in Perry, rather than focusing on the number of miles defendant moved

from "the child's legal residence *at the time of the commencement of the action* . . . ." MCL 722.31(1) (emphasis added). The plain language of the statute provides that a child whose parental custody is governed by a court order—such as the judgment of divorce in the case at bar—has a legal residence with each parent. Further, the plain language of the statute provides that, when custody is governed by a court order, a parent shall not change a legal residence of a child—except in conformance with MCL 722.31(2) through (4)—"to a location that is more than 100 miles from the child's legal residence at the time of the commencement of the action in which the order is issued." Accordingly, the appropriate residence on which to focus when applying the 100-mile rule is "*the child's legal residence at the time of the commencement of the action in which the order* [*governing custody*] *is issued*." That a parent may have subsequently relocated a child's legal residence *after* the issuance of the order governing custody does not change the residence that is the focus of the 100-mile rule.

In this case, as noted, the children's legal residence was in Clinton Township *at the time of the commencement of the action* in which the judgment of divorce was issued. Because there is no dispute that Marshall is more than 100 miles from Clinton Township, defendant was required to seek court approval, or plaintiff's consent, before making the move. See MCL 722.31(2) and (4). Because plaintiff did not grant approval, the circuit court should have evaluated defendant's move using the factors set forth in MCL 722.31(4). See *Brown v Loveman*, 260 Mich App 576, 590-591; 680 NW2d 432 (2004).

Moreover, if the move requires a modification of parenting time that results in a change in the children's

custodial environment, then the court must consider the best-interest factors set forth in MCL 722.23 to determine whether the moving party proved by clear and convincing evidence that the move and consequent change in the established custodial environment and parenting time is in the children's best interests. *Brown*, 260 Mich App at 590-591. Overall, in deciding the matter on remand, the circuit court is to consider the issue within the framework of the four-step approach set forth by this Court in *Rains v Rains*, 301 Mich App 313, 325; 836 NW2d 709 (2013):

> First, a trial court must determine whether the moving party has established by a preponderance of the evidence that the factors enumerated in MCL 722.31(4), the so-called *D'Onofrio*[1] factors, support a motion for a change of domicile. Second, if the factors support a change in domicile, then the trial court must then determine whether an established custodial environment exists. Third, if an established custodial environment exists, the trial court must then determine whether the change of domicile would modify or alter that established custodial environment. Finally, if, and only if, the trial court finds that a change of domicile would modify or alter the child's established custodial environment must the trial court determine whether the change in domicile would be in the child's best interests by considering whether the best-interest factors in MCL 722.23 have been established by clear and convincing evidence.

Finally, we note that plaintiff contends that the circuit court erred by failing to conduct an evidentiary hearing with regard to the numerous parenting-time issues decided at the April 29, 2013 hearing. We first note that the record belies plaintiff's claims that the circuit court did not hear sworn testimony from the

---

[1] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

parties, as plaintiff and defendant were sworn at the outset of the hearing. In addition, we note that plaintiff concedes that "[t]he application of the factors in MCL 722.31(4) would address these parenting time issues." Because we are remanding with instructions for the circuit court to conduct a hearing on those very factors, we decline to address plaintiff's assertion of error in any more detail.

We therefore vacate the circuit court's order and remand for consideration of defendant's move to Marshall using the factors set forth in MCL 722.31(4) and for further proceedings consistent with this opinion. We do not retain jurisdiction.

BECKERING, P.J., and JANSEN and BOONSTRA, JJ., concurred.

ADLER v DORMIO

Docket No. 319608. Submitted March 10, 2015, at Lansing. Decided March 19, 2015, at 9:15 a.m.

In 2006, Jennifer D. Adler brought a paternity action in the Livingston Circuit Court against Aaron Dormio, naming him as the biological father of her son. Defendant was served with notice of the complaint by substituted service. Plaintiff moved for entry of a default order of filiation after defendant failed to respond. The court entered an order of filiation and a universal child support order requiring defendant to pay $297 per month in child support, retroactive to the date of the child's birth. Plaintiff later moved to modify the child support order to include childcare costs. The court agreed, raising defendant's monthly child support liability to $665. According to defendant, he first learned of the paternity case when his wages were garnished in 2009. In 2012, he moved to set aside the judgment of filiation under the newly enacted Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*. Genetic testing excluded defendant as the child's father, and the court set aside the order of filiation and terminated defendant's support obligation effective September 2012. Defendant's child support arrearage of more than $45,000 was unaffected by the order. Defendant moved for relief from the child support and child support enforcement orders under MCR 2.612(C)(1)(f). The court, Miriam A. Cavanaugh, J., denied the motion. Defendant sought leave to appeal, which the Court of Appeals granted.

The Court of Appeals *held*:

The RPA permits a man who has been determined in a court to be the father of a child to file a motion with the court to set aside that determination if it was based on his failure to participate in the proceedings. Under MCL 722.1443(3), a judgment entered under the act does not relieve a man from a support obligation that was incurred before the action was filed or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment. Under MCR 2.612(C)(1), a court may relieve a party from a final judgment, order, or proceeding on six grounds. MCR 2.612(C)(1)(f) specifically states that a court may relieve a party from a final judgment, order, or proceeding for any reason

justifying relief from the operation of the judgment other than those listed in MCR 2.612(C)(1)(a) through (e). To grant relief under Subrule (f), the following requirements must be met: (1) the reason for setting aside the judgment must not fall under Subrules (a) through (e), or if it does, additional factors must exist that persuade the court that injustice will result if the judgment is allowed to stand, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. Generally, relief is granted under Subrule (f) only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. But there is nothing in the language of the court rule indicating that it may not be used to grant relief from a child support order. Relief, therefore, is available under the rule to defendant and others who are successful under the RPA. The trial court in this case failed to articulate its reasons for denying defendant's motion, and the record, therefore, was insufficient to determine whether the trial court abused its discretion by denying the motion. Consequently, the trial court's order had to be vacated and the case remanded to the trial court for that court to determine whether defendant was entitled to relief under MCR 2.612 and to articulate the reasons for its holding.

Trial court order denying defendant's motion for relief from the child support and child support enforcement orders vacated; case remanded for the trial court to decide the motion and articulate its reasoning.

JUDGMENTS — RELIEF FROM JUDGMENTS — CHILD SUPPORT ORDERS — REVOCATION OF PATERNITY ACT.

Under MCL 722.1443(3) of the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., a judgment entered under the act does not relieve a man from a support obligation that was incurred before the action was filed or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment; MCR 2.612(C)(1) permits a court to relieve a party from a final judgment, order, or proceeding on six grounds; relief from child support and child support enforcement orders is available under the court rule to those who successfully obtain a judgment under the RPA.

Akiva Goldman & Associates (by *Matthew M. Schultz* and *Akiva E. Goldman*) for Aaron Dormio.

Before: WILDER, P.J., and SERVITTO and STEPHENS, JJ.

STEPHENS, J. Defendant appeals from the circuit court's order denying his motion to vacate a modified universal child support order (UCSO). We vacate and remand.

I. BACKGROUND

The underlying case arises from a paternity complaint filed by plaintiff on December 7, 2006, naming defendant as the biological father of her son, who was born on April 14, 2005. Defendant was served by substituted service with the paternity complaint on December 27, 2006, and with an order for genetic testing on January 8, 2007. Plaintiff filed a default application and moved for entry of a default order of filiation after defendant failed to respond to either the complaint or the order for testing. At the April 12, 2007 motion hearing, the trial court entered a judgment of filiation and a UCSO requiring defendant to pay $297 per month in child support, retroactive to the child's date of birth, April 14, 2005. On plaintiff's motion, the court modified the UCSO to include $368 per month for childcare effective from October 6, 2006, bringing defendant's total monthly liability for child support and childcare to $665.

Defendant claims to have first learned about the paternity case when his wages were garnished in the summer of 2009. In 2012, defendant filed a motion to set aside the judgment of filiation under § 13(3), MCL 722.1443(3), of the then new Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., in which he denied paternity. Genetic tests excluded defendant as the father. The court held a best interests hearing to set aside the judgment of filiation and terminated defen-

dant's child support obligation effective September 2012, the date of the filing of the RPA petition. More than $45,000 in arrears that had accrued before that date was unaffected by the order.

Subsequently, defendant attempted to set up a payment plan for the arrears through the Friend of Court. Because only $300 of the arrears was owed to the state of Michigan, the Friend of the Court declined to enter a discharge plan and instructed defendant to "file a motion for relief of judgment to be heard by the circuit court."

Defendant filed a motion with the circuit court to vacate the support orders and support enforcement orders under MCR 2.612(C)(1)(f). He argued below, as he argues on appeal, that although MCL 722.1443(3) does not provide a mechanism for relief from arrearages owed for a child the court determined was not his, the Legislature clearly intended such relief to be available. The trial court denied defendant's motion after stating that defendant had failed to meet his burden under MCR 2.612(C)(1)(f). It is from that order that defendant appeals.

II. THE REVOCATION OF PATERNITY ACT AND RELIEF UNDER MCR 2.612

Defendant argues that the plain language of MCL 722.1443(3) allows him to seek relief under MCR 2.612(C)(1). We agree.

The proper interpretation of a statute is a legal question that this Court reviews de novo. *Gilliam v Hi-Temp Prod, Inc*, 260 Mich App 98, 108; 677 NW2d 856 (2003). The fundamental rule of statutory interpretation is to give effect to the Legislature's intent. *Klooster v Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011). The Court accomplishes this by focusing on

the language the Legislature adopted in the statute, giving meaning to every word, phrase, and clause in the statute and considering both their plain meaning and their context. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 131-132; 807 NW2d 866 (2011). "Courts may not speculate regarding legislative intent beyond the words expressed in a statute." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-218; 801 NW2d 35 (2011). A statute that is clear and unambiguous on its face should be enforced as written. *Dep't of Agriculture v Appletree Mktg, LLC*, 485 Mich 1, 8; 779 NW2d 237 (2010).

The RPA became effective June 12, 2012. 2012 PA 159.[1] Among other things, it permits an affiliated father[2] whose "paternity was determined based on the affiliated father's failure to participate in the court proceedings" to "file a motion with the court that made the determination to set aside the determination." MCL 722.1439(1). See also MCL 722.1443(2)(c). The judgment of filiation in this case was entered against defendant on a motion for entry of default after defendant failed to respond or appear at proceedings. Typically, a motion under MCL 722.1439 must be filed within 3 years after the child's birth or one year of the order of filiation, whichever is later. MCL 722.1439(2). However, these requirements did not apply to persons, such as defendant, who filed their motions by June 12, 2013. MCL 722.1439(2).

---

[1] 2012 PA 159 is titled: "AN ACT to provide procedures to determine the paternity of children in certain circumstances; to allow acknowledgments, determinations, and judgments relating to paternity to be set aside in certain circumstances; to provide for the powers and duties of certain state and local governmental officers and entities; and to provide remedies."

[2] " 'Affiliated father' means a man who has been determined in a court to be the child's father." MCL 722.1433(b).

MCL 722.1443(3) of the RPA provides:

> A judgment entered under this act does not relieve a man from a support obligation for the child or the child's mother that was incurred before the action was filed *or prevent a person from seeking relief under applicable court rules to vacate or set aside a judgment*. [Emphasis added.]

The clear and unambiguous language of the statute indicates that while a judgment under the RPA does not automatically excuse a parent from compliance with prior support orders, it also does not bar a motion to have the judgment vacated or set aside by means of any applicable court rule.

This Court reviews a trial court's decision whether to set aside a judgment under MCR 2.612 for an abuse of discretion. *Heugel v Heugel*, 237 Mich App 471, 478; 603 NW2d 121 (1999). A trial court has not abused its discretion if its decision results in an outcome within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). The "interpretation of a court rule, like a matter of statutory interpretation, is a question of law that this Court reviews de novo." *CAM Constr v Lake Edgewood Condo Ass'n*, 465 Mich 549, 553; 640 NW2d 256 (2002).

MCR 2.612(C)(1) provides six grounds under which a court may relieve a party from "a final judgment, order, or proceeding":

> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
>
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
>
> (d) The judgment is void.

> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
>
> (f) Any other reason justifying relief from the operation of the judgment.

As long as a party meets the requirements for obtaining relief under one of the specified grounds, nothing in the text of MCR 2.612(C)(1) indicates that it may not be used to grant relief from a UCSO.

Defendant seeks relief under Subrule (f). *Heugel* establishes the following criteria for relief under Subrule (f):

> (1) the reason for setting aside the judgment must not fall under sub-sections a through e,[3] (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. [*Heugel*, 237 Mich App at 478-479 (citations omitted).]

At the hearing on the motion, the trial court focused on whether defendant met the necessary common-law criteria to obtain relief under MCR 2.612(C)(1)(f). Ultimately, the court noted an absence of caselaw on the interplay between the RPA and MCR 2.612 and stated "I just think legally I don't think the Court can grant the relief that you're requesting." In the end, the court

---

[3] The Court relaxed this requirement somewhat by stipulating that a trial court could "properly grant relief from a judgment under MCR 2.612(C)(1)(f), even where one or more of the bases for setting aside a judgment under subsections a through e are present, when additional factors exist that persuade the court that injustice will result if the judgment is allowed to stand." *Heugel*, 237 Mich App at 481.

simply stated that it did not believe that defendant had met his burden under MCR 2.612(C)(1)(f), and denied defendant's motion "for the reasons stated on the record." However, the court offered no reasons for its denial of defendant's motion other than its belief that defendant had not met his burden. We cannot say as a matter of law whether this defendant can meet the burden under MCR 2.612; however, we can state that relief under that rule is available to this defendant and others who are successful under the RPA. Our review of the record shows that the trial court did not state the reasons for its holding.[4] Consequently, we vacate the trial court's order and remand this matter to the trial court. On remand, the trial court must decide whether defendant is entitled to relief under MCR 2.612 and articulate its reasons for granting or denying the motion.

III. CONCLUSION

We hold that MCL 722.1443(3) allows a person who has obtained a judgment under the RPA to seek relief from prior child support orders under MCR 2.612. MCL 722.1443(3) specifically allows a defendant to resort to applicable court rules to seek relief from prior support orders. MCR 2.612(C)(1) expressly provides for such relief and does not limit the type of orders from which relief may be sought. Therefore, the text of the statute and the court rule provide no legal reason to bar defendant from seeking relief from the modified UCSO under MCR 2.612. We also conclude, given the record before us, that we cannot determine whether the trial court abused its discretion by denying defen-

[4] Although the court raised questions about each of the three *Heugel* criteria, nowhere did it specify which criterion (or criteria) defendant failed to meet.

dant's motion. See *Woodington v Shokoohi*, 288 Mich App 352, 371; 792 NW2d 63 (2010).

The order of the trial court denying defendant's motion to vacate the support order and to set aside all support enforcement orders is vacated. The issue of the applicability of MCR 2.612(C) to defendant's case is remanded to the trial court, which must decide the issue and articulate its reasoning. We do not retain jurisdiction.

WILDER, P.J., and SERVITTO, J., concurred with STEPHENS, J.