MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

November 13, 2014, through January 8, 2015

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COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2019[1]
MICHAEL J. TALBOT	2021[2]
Chief Judge Pro Tem	
DAVID H. SAWYER	2017[3]
CHRISTOPHER M. MURRAY	2021[4]
Judges	
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2019
E. THOMAS FITZGERALD	2015[5]
HENRY WILLIAM SAAD	2021
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2021
PETER D. O'CONNELL	2019
WILLIAM C. WHITBECK	2017[6]
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[7]

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

[1] Chief Judge to January 1, 2015.
[2] Chief Judge from January 1, 2015.
[3] Chief Judge Pro Tem to January 1, 2015.
[4] Chief Judge Pro Tem from January 1, 2015.
[5] To January 1, 2015.
[6] To November 21, 2014.
[7] From December 5, 2014.

SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015[1]
STEPHEN J. MARKMAN	2021
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2023
BRIDGET M. McCORMACK	2021
DAVID F. VIVIANO	2017
RICHARD H. BERNSTEIN	2023[2]

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Reporter of Decisions: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

[1] To January 1, 2015.

[2] From January 1, 2015.

TABLE OF CASES REPORTED

JUDGE

MICHAEL F. GADOLA

Judge Gadola was appointed to the Court effective January 5, 2015 to replace Judge William C. Whitbeck. He graduated from Michigan State University's James Madison College (B.A., 1985) and graduated with honors from the Wayne State University Law School (J.D., 1990), where he served as Editor-in-Chief of the Wayne Law Review. He practiced law with the Dickinson Wright law firm in Detroit and Lansing. He served as Deputy Legal Counsel, Counsel for Executive Organization, and Director of the Office of Regulatory Reform for Governor John Engler. He went on to serve as House Majority Counsel in the Michigan Legislature and as Michigan Supreme Court Counsel. He then served as Legal Counsel to Governor Rick Snyder. Judge Gadola is a fellow of the Michigan State Bar Foundation, a member of the Michigan Supreme Court Historical Society, a member of the Advisory Board for the Michigan Chapter of the Federalist Society, and is a former chairman of the Saint Vincent Catholic Charities board of directors and former board member of the Boys & Girls Club of Lansing, and his term expires January 1, 2017.

COURT OF APPEALS CASES

BARNES v FARMERS INSURANCE EXCHANGE

Docket No. 314621. Submitted July 18, 2014, at Detroit. Decided July 29, 2014. Approved for publication November 13, 2014, at 9:00 a.m.

Crystal Barnes brought an action in the Wayne Circuit Court against the Michigan Assigned Claims Facility (MACF) and State Farm Mutual Automobile Insurance Company, seeking personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*. Barnes had been injured in an accident while driving a car that was jointly titled to her and her mother, Joyce Burton. Burton had allowed her policy to lapse after she became unable to drive and subsequently asked Richard Huling to use the car to drive her to and from church. Huling obtained a State Farm policy for the car, and he was the only person who had insurance on it. After the accident, Barnes applied for PIP benefits under Huling's State Farm policy, which State Farm denied. Farmers Insurance Exchange was ultimately substituted as a defendant in place of the MACF, which was dismissed with prejudice. State Farm moved for summary disposition, arguing that Barnes could not recover PIP benefits from it because the policy covered only the named insured, Huling. The court, Daniel P. Ryan, J., granted State Farm's motion, concluding among other things that Huling was not an owner of the vehicle. No one appealed the grant of summary disposition to State Farm. Farmers subsequently moved for summary disposition, arguing that under MCL 500.3113(b), a vehicle owner who fails to obtain PIP coverage cannot recover PIP benefits and that because Huling was not an owner, the car had no owner's policy in effect at the time of the accident. The court granted summary disposition in favor of Farmers, ruling that the no-fault act required that at least one of the vehicle's owners have insurance and that because neither Barnes nor Burton had insurance, Barnes was barred from seeking PIP benefits. Barnes appealed.

The Court of Appeals *held*:

MCL 500.3101(1) requires the owner or registrant of a motor vehicle to maintain personal protection insurance. MCL 500.3113(b) provides that a person is not entitled to be paid PIP benefits for an accidental bodily injury if at the time of the accident

the person was the owner or registrant of a motor vehicle involved in the accident with respect to which the security required by MCL 500.3101 was not in effect. Barnes argued that she could recover PIP benefits as an owner of the car as long as someone had insurance on the vehicle, in this case Huling. Under the plain language of MCL 500.3113(b), however, when none of the owners has the requisite coverage, no owner may recover PIP benefits. Huling had previously been determined not to be an owner, and Barnes was therefore precluded from recovering PIP benefits.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ELIGIBILITY — LACK OF COVERAGE BY OWNER.

MCL 500.3101(1) requires the owner or registrant of a motor vehicle to maintain personal protection insurance (PIP); MCL 500.3113(b) further provides that a person is not entitled to PIP benefits for an accidental bodily injury if at the time of the accident the person was the owner or registrant of a motor vehicle involved in the accident with respect to which the security required by MCL 500.3101 was not in effect; under the plain language of MCL 500.3113(b), if none of the owners of the vehicle has the requisite coverage, no owner may recover PIP benefits, regardless of whether a nonowner has PIP coverage on the vehicle.

Law Offices of Brian E. Muawad, PC (by *Brian E. Muawad* and *Michael J. Carelli*), for Crystal Barnes.

Cory, Knight & Bennett (by *Kristen J. Kosciolek*) for Farmers Insurance Exchange.

Before: JANSEN, P.J., and SAAD and DONOFRIO, JJ.

PER CURIAM. Plaintiff appeals as of right the trial court's order granting Farmers Insurance Exchange's motion for summary disposition pursuant to MCR 2.116(C)(10) regarding plaintiff's action for no-fault personal protection insurance (PIP) benefits. We affirm.

This dispute arises from an automobile accident in which plaintiff was injured while driving a 2004 Chevrolet Cavalier. Plaintiff and her mother, Joyce Burton,

who lived together in the same house in Detroit, indisputably were the only titled owners of the Cavalier at the time of the accident. Burton originally insured the Cavalier under an Allstate Insurance Company policy. But she allowed that policy to lapse after health problems resulted in the amputation of both of her legs, leaving her unable to drive. Thereafter, Burton requested that Richard Huling, a close friend from her church, use the Cavalier to drive her to and from frequent church visits. Burton testified that she paid Huling to insure the Cavalier and that Huling bought a no-fault policy from State Farm Mutual Automobile Insurance Company in 2008. It was undisputed that no one else besides Huling had insurance on the vehicle.

While the Cavalier's title listed Burton and plaintiff's Detroit address, Huling claimed that he regularly garaged the Cavalier at his home in Novi. But he also admitted that "[f]rom time to time," he would leave the vehicle in Detroit at Burton and plaintiff's home. Burton testified that plaintiff regularly used the Cavalier to drive herself to and from work and to drive Burton to doctor appointments and shopping.

At the time of the accident, plaintiff was driving the Cavalier by herself. After the accident, she applied for PIP benefits, claiming entitlement under Huling's State Farm policy. Following State Farm's denial of benefits, plaintiff filed the present lawsuit, originally naming the Michigan Assigned Claims Facility (MACF) and State Farm as defendants. Defendant Farmers Insurance Exchange ultimately substituted for the MACF, and the trial court dismissed the MACF from the case with prejudice.

State Farm brought a motion for summary disposition on the basis that plaintiff could not recover PIP benefits from it under the policy because the policy only

covered the named insured, Huling, and was never intended to benefit plaintiff. Accordingly, State Farm contended that plaintiff was without insurance through which she could claim PIP benefits and that her only recourse was through the MACF or Farmers. In opposing the motion, Farmers argued that Huling was a constructive owner of the vehicle,[1] which meant that under Michigan's insurer priority statute, MCL 500.3114, plaintiff had to recover her benefits from State Farm and not Farmers. Plaintiff did not file a brief in opposition, appear at the motion hearing, or otherwise state any opposition to State Farm's motion. The trial court granted State Farm's motion, relying on the facts that the policy applied only to Huling, Huling was not an owner of the vehicle, and Huling was not in the vehicle at the time of the accident. The trial court also noted that Huling had obtained the "policy of insurance for his own personal protection." No party appealed the order granting summary disposition in favor of State Farm.

Farmers later brought its own motion for summary disposition under MCR 2.116(C)(10), arguing that under MCL 500.3113(b), if an owner fails to obtain PIP coverage, he or she cannot recover PIP benefits. Farmers relied on the trial court's dismissal of State Farm, which Farmers argued necessarily meant that Huling was not an owner and, therefore, that the Cavalier had no owner's policy at the time of the accident. Accordingly, Farmers contended that plaintiff, as the owner of an uninsured vehicle involved in an accident, was ineligible for PIP benefits.

Plaintiff opposed the motion, arguing, in relevant part, that controlling caselaw provided that the

[1] See MCL 500.3101(2)(h)(*i*) (providing that the term "owner" includes one who has the use of the vehicle for a period of more than 30 days).

security-of-insurance requirements of the no-fault act are linked to the vehicle, not the person claiming PIP benefits. Plaintiff, therefore, contended that the Cavalier was insured under Huling's State Farm policy and that it did not matter that Huling was not named on the vehicle's title or was not otherwise an owner.

On January 18, 2013, the trial court held a hearing on Farmers' motion. After hearing arguments from both parties, the trial court ruled that the no-fault act required at least one of the "owners" to have insurance. It reasoned that because neither plaintiff nor Burton had insurance, plaintiff was barred from seeking benefits under the no-fault act. The trial court granted summary disposition for Farmers.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Id*. Summary disposition is proper if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10).

The primary goal of the judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 217; 801 NW2d 35 (2011). The first criterion in determining intent is the specific language of the statute. *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n* (*On Rehearing*), 484 Mich 1, 13; 795 NW2d 101 (2009). The Legislature is

presumed to have intended the meaning it plainly expressed, *Joseph*, 491 Mich at 206, and clear statutory language must be enforced as written, *Velez v Tuma*, 492 Mich 1, 16-17; 821 NW2d 432 (2012).

The purpose of the Michigan no-fault act, MCL 500.3101 *et seq.*, "is to broadly provide coverage for those injured in motor vehicle accidents without regard to fault." *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 37; 748 NW2d 574 (2008) (quotation marks and citation omitted). The no-fault act, however, requires the "owner or registrant of a motor vehicle" to maintain "personal protection insurance [PIP], property protection insurance, and residual liability insurance." MCL 500.3101(1). The no-fault act sets forth a consequence in the event that the required insurance is lacking. MCL 500.3113 provides that

> [a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by [MCL 500.3101 or MCL 500.3103] was not in effect.

The issue in the present case is whether MCL 500.3113(b) bars plaintiff's receipt of PIP benefits. Plaintiff relies on this Court's opinion in *Iqbal* as standing for the proposition that she can recover as an owner as long as *anyone* had insurance on the vehicle. We do not believe that *Iqbal* stands for this broad proposition.

In *Iqbal*, the plaintiff was injured while driving a car that was titled and registered only in his brother's name. The brother insured the car through Auto Club

Insurance Association. The plaintiff lived with his sister, who had a household no-fault insurance policy issued by Bristol West Insurance Group. The plaintiff sought PIP benefits. Following the trial court's determination that Bristol had priority to handle the claim, Bristol argued that the plaintiff should be precluded under MCL 500.3113(b) from receiving PIP benefits because the plaintiff was an owner of the car (he had primary possession of it) and did not insure the car himself. The trial court ruled that whether the plaintiff was an owner under MCL 500.3101(2) was irrelevant because the car indisputably was insured by the brother, who was an owner. *Iqbal*, 278 Mich App at 33-36.

This Court agreed that the plaintiff was not precluded by MCL 500.3113(b) from receiving PIP benefits. The Court stated that even while assuming that the plaintiff was an owner,

> the phrase "with respect to which the security required by [MCL 500.3101] . . . was not in effect," [MCL 500. 3113(b)], when read in proper grammatical context, defines or modifies the preceding reference to the motor vehicle involved in the accident, here the BMW, and not the person standing in the shoes of an owner or registrant. The statutory language links the required security or insurance solely to the vehicle. Thus, the question becomes whether the BMW, and not plaintiff, had the coverage or security required by MCL 500.3101. . . . While plaintiff did not obtain this coverage, there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b), *making it irrelevant whether it was plaintiff's brother who procured the vehicle's coverage or plaintiff*. [*Id.* at 39-40 (emphasis altered).]

In the present case, plaintiff cites *Iqbal* and argues that the fact that neither she nor Burton insured the Cavalier does not matter because Huling did. Plaintiff

contends that this is so regardless of whether Huling was an owner of the Cavalier. *Iqbal* should not be read so broadly as to apply to even nonowners. The Court made it clear that it was addressing the problem of whether the statute required "each and every owner" to maintain insurance on a vehicle. *Id*. at 40 n 2. The Court opined that to so hold would preclude an owner who obtained insurance from receiving PIP benefits as long as any other co-owner did not maintain coverage as well. *Id*.

In further support of our view that *Iqbal* does not protect owners of vehicles if no *owner* provides the insurance, we note that *Iqbal* relied on *Jasinski v Nat'l Indemnity Ins Co*, 151 Mich App 812; 391 NW2d 500 (1986), and *State Farm Mut Auto Ins Co v Sentry Ins Co*, 91 Mich App 109; 283 NW2d 661 (1979). Both cases involved at least one owner having obtained the insurance coverage. See *Jasinski*, 151 Mich App at 819 (stating that "the no-fault act has been satisfied because . . . the titled owner . . . maintained security for payment of no-fault benefits"); *State Farm*, 91 Mich App at 115 (stating that each "owner" or "registrant" did not have to have a separate policy and that the policy in question was obtained by the registered title holder). Additionally, to hold otherwise would render nugatory the language of MCL 500.3101(1) that requires "[t]he owner or registrant of a motor vehicle" to maintain insurance, which is not favored. See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002).

Therefore, while *Iqbal* held that each and every owner need not obtain insurance, it did not allow for owners to avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance. Thus, under the plain language of MCL 500.3113(b), when none of

the owners maintains the requisite coverage, no owner may recover PIP benefits. And because it is undisputed that the only coverage was supplied by Huling, who had been deemed to not be an owner,[2] plaintiff is precluded under the no-fault act from recovering PIP benefits.

Affirmed. Farmers, as the prevailing party, may tax costs pursuant to MCR 7.219.

JANSEN, P.J., and SAAD and DONOFRIO, JJ., concurred.

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[2] The trial court's award of summary disposition in favor of State Farm conclusively established this fact and has not been challenged by any party on appeal.

PEOPLE v HUTCHESON

Docket No. 313177. Submitted October 15, 2014, at Detroit. Decided November 13, 2014, at 9:05 a.m.

David K. Hutcheson pleaded guilty in the Genesee Circuit Court, Judith A. Fullerton, J., to a charge of attempted assault with intent to commit criminal sexual conduct. He was sentenced to 36 months' probation but, after pleading guilty of violating his probation, he was resentenced on the original conviction to 29 to 60 months' imprisonment. The Court of Appeals granted, in part, defendant's delayed application for leave to appeal that alleged that the trial court erred by assessing points under Offense Variable (OV) 1, MCL 777.31, and OV 2, MCL 777.32, for his use of a weapon to assault the victim when defendant only used his bare hands to assault the victim.

The Court of Appeals *held*:

Defendant's use of his bare hands did not support the assessment of 10 points under MCL 777.31(1)(d). An offender's bare hands cannot be treated as weapons under OV 1 because, unlike a gun or a knife, hands are not an article distinct from the particular offender. An offender can only have 10 points asessed under OV 1 if a victim was touched by a weapon distinct from the offender, and an offender's bare hands do not satisfy that test. Because defendant's bare hands do not qualify as a weapon under OV 1, zero points should have been assessed under OV 2 because defendant possessed or used no weapons when he assaulted the victim. Because the trial court's errors in scoring OV 1 and OV 2 altered defendant's minimum sentence range under the guidelines, resentencing is required. Defendant's sentence is vacated and the matter is remanded to the trial court for resentencing.

Sentence vacated and case remanded for resentencing.

1. SENTENCES — OFFENSE VARIABLE 1 — WEAPONS — BARE HANDS.

An offender's bare hands cannot be treated as weapons when scoring Offense Variable 1, MCL 777.31.

2. SENTENCES — OFFENSE VARIABLE 1 — WORDS AND PHRASES — WEAPON.

A "weapon," for purposes of scoring Offense Variable 1, MCL 777.31, is

> an article or instrument used for bodily assault or defense or any instrument used for attack or defense in a fight or in combat; an "article" is a thing or person of a particular and distinctive kind or class; and an "instrument" is one used by another as a means or aid.

Law Offices of Robert J Boyd III, PC (by *Robert J Boyd III*), for defendant.

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

WILDER, J. We granted, in part, defendant's delayed application for leave to appeal to permit a challenge to the scoring of his sentencing guidelines.[1] Defendant pleaded guilty to a charge of attempted assault with intent to commit criminal sexual conduct, MCL 750.520g(1), and was sentenced to 36 months' probation. Defendant later pleaded guilty of a violation of his probation, MCL 771.1 *et seq.*, and was resentenced on the original conviction for attempted assault with intent to commit criminal sexual conduct to 29 to 60 months' imprisonment. We vacate defendant's sentence and remand for resentencing.

I

Defendant was the live-in boyfriend of the victim in this case. The victim was sleeping in their home when defendant woke her by putting his hands down her pants. When the victim told defendant to stop, he became angry, punched her, and tried to choke her. After being unable to undress the victim, defendant ordered her to take her pants off. The victim began to comply with defendant's demand out of fear, but as she began taking her pants off, defendant saw her bruised

[1] *People v Hutcheson*, unpublished order of the Court of Appeals, entered July 16, 2013 (Docket No. 313177).

face and told her she needed to go to the hospital. Defendant and the victim left the home as though heading to the hospital, but, instead, the victim quickly ran to a neighbor's house and called 911. Defendant fled the scene.

Defendant was charged with assault with intent to commit sexual penetration, but by agreement with the prosecutor, he pleaded guilty to the reduced charge of attempted assault with intent to commit sexual penetration. At his sentencing hearing on the reduced charge, defendant objected to the scoring of Offense Variable (OV) 1, MCL 777.31, at 10 points and OV 2, MCL 777.32, at 1 point, arguing that he never used a weapon when he attacked the victim. The trial court overruled the objection, finding that defendant's hands could be considered dangerous weapons under the circumstances of this case. The trial court initially sentenced defendant to 36 months' probation, but defendant subsequently violated his probation by using cocaine. Following his guilty plea on the probation violation, the trial court sentenced defendant to 29 to 60 months' imprisonment.

II

Defendant contends that because he only used his bare hands to assault the victim, the trial court erred by assessing points under OV 1 and OV 2. Defendant further argues that, if these offense variables were improperly scored as he alleges, he is entitled to be resentenced. We agree with both arguments.

A

In an appeal claiming that the scoring of the sentencing guidelines was erroneous, the trial court's findings

of fact are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. The

> goal in interpreting a statute "is to ascertain and give effect to the intent of the Legislature. The touchstone of legislative intent is the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written." [*Id*. at 439, quoting *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008) (citations and some quotation marks omitted).]

"Importantly, ' "[s]tatutory language should be construed reasonably, keeping in mind the purpose of the act," ' and to avoid absurd results." *Hodge v US Security Assoc, Inc*, 306 Mich App 139, 152; 855 NW2d 513 (2014), quoting *Draprop Corp v City of Ann Arbor*, 247 Mich App 410, 415; 636 NW2d 787 (2001), quoting *Rose Hill Ctr, Inc v Holly Twp*, 224 Mich App 28, 32; 568 NW2d 332 (1997); see also *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

B

MCL 777.31(1), providing that "[o]ffense variable 1 is aggravated use of a weapon," also provides, in relevant part:

> Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon ..... 25 points

(b) The victim was subjected or exposed to a harmful biological substance, harmful biological device, harmful chemical substance, harmful chemical device, harmful radioactive material, harmful radioactive device, incendiary device, or explosive device ..... 20 points

(c) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon ..... 15 points

(d) The victim was touched by any other type of weapon ..... 10 points

(e) A weapon was displayed or implied ..... 5 points

(f) No aggravated use of a weapon occurred ... 0 points

We conclude that defendant credibly argues that, under the facts in this case, defendant's use of his bare hands to attack the victim did not support the assessment of 10 points under MCL 777.31(1)(d). In *People v Lange*, 251 Mich App 247, 256-257; 650 NW2d 691 (2002), this Court, examining both Michigan jurisprudence regarding the definition of "weapon" as used in other criminal statutes as well as dictionary definitions, concluded that the term "weapon" should be defined as an " ' *article or instrument . . . used . . . for bodily assault or defense*,' " *id*., quoting *People v Vaines*, 310 Mich 500, 506; 17 NW2d 729 (1945), or " 'any instrument . . . used for attack or defense in a fight or in combat,' " *Lange*, 251 Mich App at 257, quoting *Random House Webster's College Dictionary* (1997). An "article" is defined as "a thing or person of a particular and distinctive kind or class." *Merriam Webster's Collegiate Dictionary* (2003). An "instrument" is defined as "one used by another as a means or aid." *Id*. Applying these definitions of article and "instrument" to the instant case, we conclude that

an offender's bare hands cannot be treated as weapons under OV 1 because, unlike a gun or a knife, hands are not an article distinct from the particular offender. Likewise, the offender's bare hands are not an instrument "used by another"; rather, the offender's hands are an integral part of, and not separate from, the offender.

Moreover, as this Court has explained, a weapon can be either animate or inanimate. See *People v Kay*, 121 Mich App 438, 443-444; 328 NW2d 424 (1982). For example, in *Kay*, this Court found that a car driven on the streets of Flint and used to attack a person so as to inflict injury and a horse ridden under similar circumstances so as to inflict injury on a victim on Mackinac Island, would both be considered to be dangerous weapons. *Id*. at 444. If the car or horse touches the victim in the course of being used as a weapon, a score of 10 points under OV 1 would be warranted. But it would be absurd to find that the offender is also a weapon in that scenario because his or her bare hands were used to steer the car or pull on the reins. *Hodge*, 306 Mich App at 152. We conclude that an offender can only have 10 points assessed under OV 1 if a victim was touched by a weapon distinct from the offender, and an offender's bare hands do not satisfy that test.

We further note that, in the context of defining the term "dangerous weapons" in the felonious assault statute, MCL 750.82, this Court has held that where a defendant used his bare hands, *People v VanDiver*, 80 Mich App 352, 356; 263 NW2d 370 (1977), or teeth, *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993), overruled on other grounds by *People v Edgett*, 220 Mich App 686 (1996), the evidence did not support a finding that the defendant used a "dangerous weapon." This Court in *VanDiver*, 80 Mich App at 356-357,

identified four other assault statutes including " '[a]ssault and infliction of serious injury' (commonly referred to as aggravated assault)," MCL 750.81a, that, unlike felonious assault, do not require the use of a dangerous weapon:

> If we were to rule that bare hands could be a dangerous weapon, it would lead to anomalous results, for practically every assault that would qualify as an aggravated assault . . . would also be capable of prosecution as an assault with a dangerous weapon . . . . It is our belief that the Legislature did not contemplate this result but instead intended that the statutes should be distinct and separate.

Here too, if a weapon is construed to include an offender's bare hands under OV 1, every offender who touches a victim during the commission of an offense may conceivably be subject to a 10-point score. Such a construction of OV 1 does not appear to have been contemplated by the Legislature, and we decline to adopt it.

In conclusion, we hold that an offender's bare hands do not qualify as a weapon under MCL 777.31, and that the trial court erred by assessing 10 points for OV 1 because defendant used only his bare hands, and no distinct weapon, to assault the victim.

C

MCL 777.32 scores the "lethal potential of the weapon possessed or used." MCL 777.32(1). If "[t]he offender possessed or used any other potentially lethal weapon," MCL 777.32(1)(e), besides a harmful biological substance or device, a harmful chemical substance or device, an incendiary or explosive device, a fully automatic weapon, a firearm, or a cutting or stabbing weapon, one point should be assessed.

MCL 777.32(1)(a) to (e). If "[t]he offender possessed or used no weapon," zero points should be assessed. MCL 777.32(1)(f).

Because defendant's bare hands do not qualify as a weapon under OV 1, necessarily, zero points should have been assessed under OV 2 because defendant "possessed or used no weapon" when he assaulted the victim. MCL 777.32(1)(f). Therefore, the trial court erred by scoring any points under OV 2.

III

Defendant was originally scored a total of 55 prior record variable (PRV) points and 36 OV points, placing him in PRV Level E and OV Level IV, with a minimum sentence range under the guidelines of 14 to 29 months. MCL 777.66. Reducing the scores for OV 1 and OV 2 to zero will reduce the total OV points to 25, which places defendant in a different cell of the sentencing grid with a minimum sentence range of 12 to 24 months. *Id*. An erroneous scoring of a guidelines variable requires resentencing if the error alters the recommended minimum sentencing guidelines range. *People v Jackson*, 487 Mich 783, 793-794; 790 NW2d 340 (2010). Because the trial court's errors in scoring OV 1 and OV 2 altered defendant's minimum sentence range under the guidelines, resentencing is required.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

FITZGERALD, P.J., and OWENS, J., concurred with WILDER, J.

BROOKS WILLIAMSON AND ASSOCIATES, INC v MAYFLOWER CONSTRUCTION CO

Docket No. 317122. Submitted October 15, 2014, at Detroit. Decided November 13, 2014, at 9:10 a.m.

Brooks Williamson and Associates, Inc., brought an action in the Wayne Circuit Court against defendants, Mayflower Construction Company and its owner, William R. Eldridge, alleging breach of contract and claims regarding an open account/account stated, unjust enrichment, quantum meruit, fraudulent transfer under MCL 566.31, violation of the building contract fund act, MCL 570.151 *et seq*., and conversion. Plaintiff sought treble damages under MCL 600.2919a and alleged facts to support piercing Mayflower's corporate veil. In a separate divorce case involving Eldridge brought three years earlier, the court, Deborah Ross Adams, J., had appointed Gregory J. Saffady as a receiver with the authority to preserve Eldridge's property, assets, and interests, including Mayflower. Saffady was directed and authorized to initiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions necessary to collect, preserve, or increase the assets of Eldridge. In the present action, plaintiff's complaint was served on Saffady, as receiver for defendants, and Christopher Nesi, as attorney for Eldridge. Defendants failed to answer the complaint. Plaintiff filed a request for admissions, interrogatories, and the production of documents. Saffady responded that he could not make admissions or denials because he lacked knowledge regarding the matters addressed and could not produce documents because they had not been provided by Eldridge. Plaintiff filed a case evaluation summary and served a copy on Saffady and Eldridge's attorney. In the text of the document, plaintiff argued that it was entitled to a default judgment because defendants failed to defend the action. Plaintiff also stated in the document that it was "filing a default and default judgment contemporaneously with this brief." On April 3, 2013, plaintiff requested entry of a default judgment. On April 9, 2013, the trial court, Kathleen Macdonald, J., entered a default judgment for plaintiff. A proof of service indicated that plaintiff's request for a default and the default judgment were served on Saffady, Saffady's attorney, and Eldridge, through his attorney, by mail on April 10, 2013. On

April 29, 2013, defendants filed a motion to set aside the entry of the default judgment, arguing that Saffady had appeared in the action and plaintiff was therefore obligated, and had failed, to send notice to defendants of the request for a default judgment. Eldridge attached an affidavit of meritorious defenses to the motion. The court denied defendants' motion to set aside the default judgment on the bases that defendants failed to establish either good cause or a meritorious defense. Defendants appealed.

The Court of Appeals *held*:

1. Defendants' claim that they were never served with the summons and complaint is inconsistent with the record and does not establish good cause to set aside the default judgment. The receivership order made Saffady an agent authorized by law to accept service of process for defendants. Saffady signed an acknowledgment of service as defendants' agent. Defendants received service of process.

2. Defendants' claim that they did not receive proper notice regarding the request to enter a default judgment does establish good cause to set aside the default judgment. Because defendants appeared in the action when Saffady entered a general appearance by answering the request for admissions, interrogatories, and the production of documents, notice of plaintiff's intent to request entry of a default judgment was required under MCR 2.603(B)(1)(a)(i). The statement placed in plaintiff's case evaluation summary did not constitute adequate notice of the intent to request a default judgment that is consistent with either the letter or the spirit of MCR 2.113(C)(1)(d).

3. Defendants failed to establish a meritorious defense and, therefore, have not satisfied the requirements of MCR 2.603(D)(1) for setting aside a default judgment. The plain language of the court rule requires a defendant to provide both evidence of good cause and an affidavit of facts showing a meritorious defense in order to set aside a default judgment. When it is shown that a party did not receive notice of the opponent's intent to request a default judgment, the requirement in MCR 2.603(D)(1) that a party must show a meritorious defense to set aside a default judgment results in a denial of the constitutional right to due process and is unenforceable. Defendants, having established good cause to set aside the default judgment because they did not receive notice of plaintiff's request for entry of a default judgment, were not constitutionally required to also establish a meritorious defense. The trial court erred by denying the motion to set aside the default judgment. The order denying the motion to set aside

the default judgment was reversed and the matter was remanded to the trial court for further proceedings.

Reversed and remanded.

DEFAULT JUDGMENTS — SETTING ASIDE — GOOD CAUSE — MERITORIOUS DEFENSES.

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, generally shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed; however, the requirement that a party must show a meritorious defense to set aside a default or a default judgment results in the denial of the party's constitutional right to due process and is unenforceable when it is shown that the party established good cause to set aside the default or the default judgment because the party did not receive notice of the opponent's intent to request a default judgment (MCR 2.603(B)(1) and (D)(1)).

Clark Hill PLC (by *Matthew T. Smith* and *Brian P. Lick*) for plaintiff.

Anthony L. DeLuca, PLC (by *Anthony L. DeLuca*), for defendants.

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

WILDER, J. Defendants, Mayflower Construction Company, doing business as Mayflower Custom Homes (Mayflower), and William R. Eldridge, appeal as of right an April 9, 2013 order by Wayne Circuit Judge Kathleen Macdonald awarding a default judgment to plaintiff, Brooks Williamson and Associates, Incorporated. We reverse and remand.

I

This action arises from a contract for plaintiff to perform environmental consulting and permit-application services for Mayflower's neighborhood development construction project. Plaintiff claimed that it

provided the contracted-for services, from June 2006 to November 2007, but that Mayflower failed to pay monthly invoices, which eventually totaled $18,852.83, plus costs and fees. Plaintiff further averred that, as a direct result of Mayflower's repeated failure to pay the invoices, plaintiff stopped providing additional services to Mayflower and did not submit its final permit application.

In March 2009, in a separate divorce case involving Mayflower's owner, Eldridge, Judge Deborah Ross Adams appointed Gregory J. Saffady as a receiver with the authority to preserve Eldridge's property, assets, and interests, including Mayflower. In the trial court's order, Saffady was "directed and authorized to . . . [i]nitiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions or proceedings in state, federal or foreign jurisdictions necessary to . . . collect, preserve, or increase the assets of [Eldridge]."

Plaintiff first learned that defendants were subject to receivership when it sent a demand letter for payment of the invoices to Eldridge. On July 10, 2012, plaintiff filed the complaint in the instant case, alleging claims regarding (1) breach of contract; (2) an open account/account stated; (3) unjust enrichment; (4) quantum meruit; (5) a violation of the building contract fund act, MCL 570.151 *et seq*.; (6) conversion and treble damages under MCL 600.2919a; (7) commingling, siphoning, and misappropriating of funds, and disregard of corporate formalities by Eldridge, rendering Mayflower a mere instrumentality of Eldridge, thus warranting the piercing of Mayflower's corporate veil; and (8) fraudulent transfer under MCL 566.31. The complaint was served on Saffady, as receiver for defendants, and Christopher J. Nesi, as attorney for Eldridge. Defendants never answered the complaint.

Plaintiff filed a request for admissions, interrogatories, and production of documents on January 23, 2013. In February 2013, Saffady responded that he could not admit or deny the interrogatories and requests for admissions because he lacked knowledge regarding the matters addressed, and he could not produce documents because they were not provided to him by Eldridge.

On April 1, 2013, plaintiff filed a document captioned "BROOKS WILLIAMSON AND ASSOCIATES, INC.'s CASE EVALUATION SUMMARY" with the Wayne Circuit Court's Mediation Tribunal Association. The case evaluation summary was served both on Saffady and on Eldridge's attorney. In the text of that document, plaintiff argued *inter alia* that it was entitled to a default judgment under MCR 2.313 because defendants failed to defend the action. Plaintiff also stated in the case evaluation summary that it was "filing a default and default judgment contemporaneously with this brief."

On April 3, 2013, plaintiff requested that the court clerk enter a default against defendants for failure to plead or otherwise defend as provided by law, but the clerk did not honor the request. On April 9, 2013, Judge Kathleen Macdonald entered a default judgment for plaintiff awarding $56,846.40. A proof of service indicates that plaintiff's request for a default and the default judgment were served on Saffady, Saffady's attorney, and Eldridge, through his attorney, by mail on April 10, 2013, one day after Judge Macdonald entered the default judgment.

On April 15, 2013, Saffady's attorney submitted a letter to the case evaluation panel, stating, in part, that Eldridge had failed to cooperate with Saffady or provide Saffady any information from which the receiver could develop a response to the allegations of the complaint.

On April 29, 2013, defendants filed a motion to set aside the entry of the default judgment, arguing, in part, that Saffady had appeared in the action and that plaintiff was therefore obligated, and had failed, to send notice to defendants of the request for a default judgment under MCR 2.603(B)(1)(a)(i). In an affidavit of meritorious defenses attached to the motion, Eldridge maintained that the allegations by plaintiff were false, that he did not conduct business in an individual capacity and there was no basis to pierce the corporate veil, that plaintiff did not complete the work Mayflower had asked it to perform (or at least failed to timely complete the work), that plaintiff failed to communicate appropriately with Mayflower, and that Mayflower did not benefit from any of plaintiff's work. Eldridge further claimed that, because the work was not completed, the lots in the neighborhood development lost value when the real estate market declined.

Plaintiff's response to defendants' motion urged the trial court to deny the motion to set aside the default judgment. Plaintiff contended that Saffady elected not to expend receivership resources to defend the action, that even though Eldridge's attorney received a copy of all the pleadings, Eldridge also failed to defend the action, and that a default judgment was appropriate when 10 months had passed without defendants answering the complaint. Plaintiff also argued that defendants failed to satisfy the requirements for setting aside a default judgment, challenging defendants' claim that the default judgment should be set aside on the basis that defendants did not receive notice of the request for a default judgment as required by MCR 2.603(B)(1)(a)(i). Regarding the issue of notice, plaintiff first argued that defendants were not entitled to notice because they did not appear in the action, the request for relief was the same as requested in the complaint,

and the complaint stated the specific amount demanded. Plaintiff argued in the alternative that it did notify defendants of the intent to request a default judgment by stating in the case evaluation summary filed with the mediation tribunal that it was also contemporaneously filing the request for a default and a default judgment. Finally, plaintiff maintained that the general denials in Eldridge's affidavit were insufficient to establish a meritorious defense.

Following oral argument, the trial court denied defendants' motion to set aside the default judgment. In its oral ruling denying the motion, the trial court held that defendants failed to establish either good cause or a meritorious defense. It reasoned that Eldridge "had notice of everything that was going on in this case. He failed to cooperate with the receiver in the divorce case and in this case, which is why the default was entered. So there is no good cause here." The trial court did not specifically address any of defendants' asserted meritorious defenses on the record.

II

Defendants first argue that the trial court erred by concluding that they failed to establish good cause to set aside the default judgment. Defendants contend that plaintiff not only failed to personally serve the summons and complaint on defendants, but that plaintiff also failed to give defendants proper notice of the filing of plaintiff's request for entry of a default judgment. We agree, in part.

A

This Court reviews a trial court's ruling on a motion to set aside a default judgment for an abuse of discre-

tion. *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 97; 666 NW2d 623 (2003). "[A]lthough the law favors the determination of claims on the merits, it also has been said that the policy of this state is generally against setting aside defaults and default judgments that have been properly entered." *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 229; 600 NW2d 638 (1999) (citation omitted).

"The interpretation and application of court rules present questions of law," *Lamkin v Engram*, 295 Mich App 701, 707; 815 NW2d 793 (2012), and this Court "interpret[s] court rules using the same principles that govern statutory interpretation" *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). The goal in interpreting court rules is to "give[] effect to the rule maker's intent as expressed in the court rule's terms, giving the words of the rule their plain and ordinary meaning. If the language poses no ambiguity, this Court need not look outside the rule or construe it, but need only enforce the rule as written." *Peterson v Fertel*, 283 Mich App 232, 235-236; 770 NW2d 47 (2009) (citations and quotation marks omitted).

B

Under MCR 2.603(D)(1), "[a] motion to set aside a default or a default judgment . . . shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed." " 'The good cause requirement . . . may be satisfied by demonstrating a procedural irregularity or defect or a reasonable excuse for failing to comply with the requirements that led to the default judgment.' " *Bullington v Corbell*, 293 Mich App 549, 560-561; 809 NW2d 657 (2011), quoting *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 533; 672 NW2d 181 (2003).

1

Defendants' claim that they were never served with the summons and complaint is inconsistent with the record and does not establish good cause to set aside the default judgment. A court " 'cannot adjudicate [an in personam] controversy without first having obtained jurisdiction [over the] defendant by service of process . . . .' " *Lawrence M Clarke, Inc v Richco Constr, Inc* , 489 Mich 265, 274; 803 NW2d 151 (2011), quoting *Eisner v Williams*, 298 Mich 215, 220-221; 298 NW 507 (1941). MCR 2.105(H)(1) provides: "Service of process on a defendant may be made by serving a summons and a copy of the complaint on an agent authorized by written appointment or by law to receive service of process." In this case, under the receivership order, Saffady was a receiver for Eldridge and his businesses and he was authorized to "defend . . . any actions or proceedings . . . necessary to . . . collect, preserve, or increase the assets of [Eldridge]." The receivership order therefore made Saffady an agent authorized by law to accept service of process for defendants. *Id.* In this capacity, Saffady signed an acknowledgement of service. Therefore, defendants received service of process. Despite defendants' claim that, in addition to service upon Saffady, defendants were also entitled to be personally served with the summons and complaint, service on Saffady was sufficient under MCR 2.105(H)(1), and defendants cannot establish good cause to set aside the default judgment on this ground.

2

Defendants' claim that they did not receive proper notice regarding the request to enter a default judg-

ment, however, does establish good cause to set aside the default judgment. MCR 2.603(B)(1) provides, in relevant part:

> (a) A party requesting a default judgment must give notice of the request to the defaulted party, if
>
> (i) the party against whom the default judgment is sought has appeared in the action;
>
> (ii) the request for entry of a default judgment seeks relief different in kind from, or greater in amount than, that stated in the pleadings; or
>
> (iii) the pleadings do not state a specific amount demanded.
>
> (b) The notice required by this subrule must be served at least 7 days before entry of the requested default judgment.
>
> (c) If the defaulted party has appeared, the notice may be given in the manner provided by MCR 2.107.

The relief sought in the request for entry of the default judgment was the same relief requested in the pleadings, MCR 2.603(B)(1)(a)(ii), and the pleadings stated the specific amount demanded, MCR 2.603(B)(1)(a)(iii). But, under MCR 2.603(B)(1)(a)(i),

> any action on the part of a defendant that recognizes the pending proceedings, with the exception of objecting to the court's jurisdiction, will constitute a general appearance. Only two requirements must be met to render an act adequate to support the inference that there is an appearance: (1) knowledge of the pending proceedings and (2) an intent to appear. [*In re Gordon Estate*, 222 Mich App 148, 158 n 9; 564 NW2d 497 (1997) (citations and quotation marks omitted).]

Because defendants appeared in the action when Saffady entered a general appearance by answering the request for admissions, interrogatories, and the produc-

tion of documents, notice of plaintiff's intent to request entry of a default judgment was required. MCR 2.603(B)(1)(a)(i).

Plaintiff claims that, even if notice was required under MCR 2.603(B)(1)(a)(i), timely notice was provided in the text of the case evaluation summary it filed with the mediation tribunal and sent to defendants on April 1, 2013. We find that the statement plaintiff placed in its case evaluation summary did not constitute adequate notice. MCR 2.113(A) applies to the captioning of "all motions, affidavits, and other papers provided for by these rules," and MCR 2.113(C)(1)(d) requires "the identification of the pleading . . . ." The purpose of the notice of intent to request a default judgment is to give an opponent the opportunity to contest damages. See *Dollar Rent-A-Car Sys v Nodel Constr*, 172 Mich App 738, 743-744; 432 NW2d 423 (1988). Nothing in the document captioned "BROOKS WILLIAMSON AND ASSOCIATES, INC.'s CASE EVALUATION SUMMARY" identified that the pleading contained or was intended to be notice of plaintiff's intent to request entry of a default judgment. As such, the statement of intention contained in the body of the case evaluation summary cannot be considered as notice that is consistent with either the letter or the spirit of MCR 2.113(C)(1)(d). Our construction of this court rule prevents a party from concealing notice in the text of a document that might not be given close or immediate attention before the entry of a default judgment and preserves the fair opportunity for a defendant to contest damages where the defendant might otherwise not dispute liability.

C

Defendants next argue that they established a meritorious defense. We disagree.

> In determining whether a defendant has a meritorious defense, the trial court should consider whether the affidavit contains evidence that:
>
> (1) the plaintiff cannot prove or defendant can disprove an element of the claim or a statutory requirement;
>
> (2) a ground for summary disposition exists under MCR 2.116(C)(2), (3), (5), (6), (7) or (8); or
>
> (3) the plaintiff's claim rests on evidence that is inadmissible. [*Shawl v Spence Bros, Inc*, 280 Mich App 213, 238; 760 NW2d 674 (2008).]

In *Huntington Nat'l Bank v Ristich*, 292 Mich App 376, 393; 808 NW2d 511 (2011), the "defendant submitted a document entitled affidavit of meritorious defense with his motion to set aside the default . . . ." But this Court concluded that "the affidavit did not provide the trial court with any particular facts establishing a meritorious defense." Rather, the defendant merely asserted that he disputed the amount of the debt owed to the plaintiff. This Court held that "[m]erely contesting the amount of liability does not establish a meritorious defense."

In contrast to the insufficient affidavit in *Huntington*, this Court concluded that the affidavit in *Bullington*, 293 Mich App at 560, was sufficient where the defendants asserted several defenses, including the open and obvious nature of an alleged stairway defect. This Court held that the "open and obvious danger doctrine arguably affords [the] defendants with a complete defense to this premises liability claim."

In the affidavit at issue in the instant case, Eldridge did not establish that defendants can disprove the key elements of plaintiff's claims, particularly (1) whether Mayflower was obligated to pay the outstanding invoices from June 2006 to November 2007, (2) whether Mayflower was liable for treble damages

for converting plaintiff's property, and (3) whether Mayflower's corporate veil could be pierced to reach Eldridge and hold him liable for any damages owed to plaintiff.

1

Eldridge's affidavit focused on the losses Mayflower suffered from plaintiff's failure to complete the work, specifically—submitting the final permit application. But the parties do not dispute that plaintiff failed to submit the final permit application. Plaintiff claimed Mayflower repeatedly breached its obligation to pay numerous invoices for environmental consulting and for services rendered in preparation of the final permit application, and it therefore refused to provide any additional services to Mayflower, including submitting the final permit application, before the invoices were paid. In his affidavit, Eldridge failed to articulate any particular facts disputing Mayflower's obligation to pay the outstanding invoices. Under *Huntington*, no meritorious defense was established with regard to Mayflower's obligation.

2

In the complaint, plaintiff alleged that defendants converted plaintiff's property, particularly funds that should have been reserved in trust to pay plaintiff, laborers, subcontractors, and other suppliers under MCL 570.151, and plaintiff was therefore entitled to treble damages. In their brief on appeal, defendants argue that plaintiff's conversion claim is "totally unfounded," but, in his affidavit, Eldridge made no reference to conversion, MCL 570.151, or treble damages. Again, absent any particularized facts disputing these

claims, *Huntington*, 292 Mich App at 393, we cannot conclude that defendants established a meritorious defense.

3

In the "Piercing The Corporate Veil" section of the complaint, plaintiff alleged, in relevant part:

> 60. Upon information and [belief,] Eldridge was the sole owner and officer of Mayflower.
>
> 61. Upon information and belief, Eldridge commingled assets of Mayflower with personal assets, and/or assets of his other entities.
>
> 62. Upon information and belief, Defendants commingled Building Contract Fund Act funds with personal assets, and/or assets of his other entities.
>
> 63. Upon information and belief, Defendants disregarded the corporate formalities.
>
> 64. Upon information and belief, Mayflower was a mere instrumentality of Eldridge.
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> 65. Upon information and belief, defendants exploited the corporate form to commit wrongful and/or fraudulent acts.
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> 66. Upon information and belief, Eldridge siphoned Mayflower's funds and/or trust funds for his own benefit.
>
> 67. Upon information and belief, Defendants misappropriated, for their own use and benefit, funds paid to or received by Mayflower.
>
> 68. Plaintiff[] has been damaged by the corporate shell-game engaged in by Defendants, and it would be unjust to allow them to hide behind the corporate veil to avoid paying the amount owed to Plaintiff[].

In his affidavit, Eldridge merely averred:

> I never conducted any business with Plaintiff in my individual capacity and there is no basis for Plaintiff to attempt

> to "pierce the corporate veil." None of Plaintiff's claims against me personally have any merit whatsoever.

Although Eldridge claimed that he did not conduct business in his individual capacity, he failed to offer any facts disputing the allegations of commingling, misappropriating, and siphoning of assets, and disregard for corporate formalities. Under *Huntington*, no meritorious defense was established regarding whether Mayflower's corporate veil could be pierced to reach Eldridge and hold him liable for the damages owed to plaintiff.

D

Having concluded that defendants failed to establish a meritorious defense and therefore have not satisfied the requirements of MCR 2.603(D)(1), we must next address defendants' argument that regardless of their failure to prove a meritorious defense, because good cause to set aside the default judgment *has* been established, a substantial defect in the proceeding has been shown and, thus, manifest injustice would occur were we to permit the default judgment to stand. Although not specifically stated as such by defendants, defendants' argument is properly characterized as an assertion that it is a violation of due process principles to require a party moving to set aside a default judgment under MCR 2.603(D)(1) to demonstrate a meritorious defense under circumstances where the movant did not receive proper notice under MCR 2.603(B)(1). This Court reviews "de novo constitutional questions such as whether a party was denied due process . . . ." *Lima Twp v Bateson*, 302 Mich App 483, 503; 838 NW2d 898 (2013).

As we noted earlier in this opinion, this Court "interpret[s] court rules using the same principles that

govern statutory interpretation." *In re Sanders*, 495 Mich at 404; see also *Lamkin*, 295 Mich App at 707. Moreover, "[s]tatutes are presumed to be constitutional, and we have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *In re Sanders*, 495 Mich at 404.

> Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity. [*Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939).]

When faced with a claim that the application of a court rule renders it unconstitutional, we must analyze the court rule "as applied" to the particular case. See *Keenan v Dawson*, 275 Mich App 671, 681; 739 NW2d 681 (2007).

In *Petroff v Petroff*, 88 Mich App 18; 276 NW2d 503 (1979), this Court analyzed the former versions of the court rules at issue here, GCR 1963, 520.2(2) and GCR 1963, 520.4.

GCR 1963, 520.2(2) provided:

> Judgment by default may be entered as follows:
>
> * * *
>
> (2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor . . . . If the party against whom judgment by default is sought has appeared in the action, he . . . shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application.

GCR 1963, 520.4 provided:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may

> likewise set it aside in accordance with Rule 528. If personal service was made upon the party against whom the default was taken, it shall not be set aside unless application to have it set aside is made either before the entry of judgment or within 4 months after the default was regularly filed or entered except as provided in Rule 528. Any order setting aside such default shall be conditioned upon the party against whom the default was taken paying the taxable costs incurred by the other party in reliance upon the default, except as prescribed in subrule 526.8. Other conditions may be imposed as the court deems proper. A proceeding to set aside default or a default judgment, except when grounded on want of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

This Court held that, even though GCR 1963, 520.4 "makes it eminently clear" that both good cause and a meritorious defense are required to set aside a default judgment, prior cases had not required the showing of a meritorious defense when a party failed to provide notice of the application for a judgment. *Petroff*, 88 Mich App at 20. In addition, this Court held that

> constitutional due process requires notice so that an opportunity is provided to attend and present a claim or defense. We think that GCR 1963, 520.2(2) is an expression of a fundamental concept of law. It is patently unfair to compel a party to demonstrate a meritorious defense in order to get a default judgment set aside when the manner in which the default judgment was entered constituted a denial of due process. A party is entitled to due process regardless of the merits of his claim or defense. [*Id*. at 21.]

Defendants cite *Perry v Perry*, 176 Mich App 762, 770; 440 NW2d 93 (1989), in which this Court, analyzing MCR 2.603(B) and MCR 2.603(D), successor court rules to GCR 1963, 520.2(2) and GCR 1963, 520.4, followed the reasoning in *Petroff* and held that the meritorious

defense requirement in MCR 2.603(D) "need not be followed in order for the defaulted party to prevail in its efforts to set aside a default judgment" where the notice provision in MCR 2.603(B)(1) was not satisfied.[1]

In *Peralta v Hts Med Ctr, Inc*, 485 US 80, 83, 86-87; 108 S Ct 896; 99 L Ed 2d 75 (1988), the United States Supreme Court held that a defendant's constitutional due process rights were impaired when, despite having received neither timely service of process nor notice of a default judgment, he was nevertheless required to show a meritorious defense in order to set aside the default judgment. The Court explained:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them the opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 [70 S Ct 652; 94 L Ed 865] (1950). Failure to give notice violates "the most rudimentary demands of due process of law." *Armstrong* v. *Manzo*, 380 U.S. 545, 550 [85 S Ct 1187; 14 L Ed 2d 62] (1965). [*Id*. at 84.]

The Court reasoned that a party with notice of the suit and the default judgment might have impleaded another party at fault, negotiated a settlement, or paid the debt alleged (as opposed to having his or her property sold at auction). *Id*. at 85.

While the plain language of MCR 2.603(D)(1) requires a defendant to provide both evidence of good cause and an affidavit of facts showing a meritorious defense in order to set aside a default judgment, we agree with the reasoning of this Court in *Petroff* and the United States Supreme Court in *Peralta* that, without a

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[1] We note that, because *Petroff* and *Perry* were decided before November 1, 1990, they are not binding on this Court. MCR 7.215(J)(1).

showing that a party has received notice of the request for entry of a default judgment, the requirement that a party must show a meritorious defense in order to set aside a default judgment runs afoul of the party's constitutional rights. *Cady*, 289 Mich at 505. A party served with a complaint who does not dispute liability may reasonably choose not to respond to the complaint because the party lacks a defense to the claim. Nevertheless, that party is still entitled to contest the plaintiff's asserted damages and is entitled to notice of a request for entry of a default judgment in order to exercise that opportunity. The failure to provide notice denies that required opportunity. Applying this principle in this case, even if Mayflower was liable for the amount of the unpaid invoices ($18,852.83), the failure to comply with the notice provision under MCR 2.603(B)(1) precluded it from challenging the potential award of treble damages, which would have otherwise been within the trial court's discretion to award or deny. We therefore find that, when it is shown that that party did not receive notice of the opponent's intent to request a default judgment, the requirement in MCR 2.603(D)(1) that a party must show a meritorious defense to set aside a default judgment results in a denial of the constitutional right to due process. We hold that that portion of the court rule is unenforceable as applied to a party who has not been provided adequate notice. *Cady*, 289 Mich at 505; see also *In re Petition by Wayne Co Treasurer*, 478 Mich 1, 10-11; 732 NW2d 458 (2007) (concluding that the portion of a statute purporting to limit a court's jurisdiction to modify judgments of foreclosure was unconstitutional and unenforceable as applied to property owners who were denied due process).

Accordingly, defendants, having established good cause to set aside the default judgment because they did not receive notice of plaintiff's request for entry of a default judgment, were not constitutionally required to

also establish a meritorious defense. The trial court erred by denying defendants' motion to set aside the default judgment.

E

Plaintiff alternatively argues that, if this Court finds that a default judgment was inappropriate under MCR 2.603, the trial court could have entered a default judgment as a sanction under MCR 2.313(B) or (D), for defendants' failure to cooperate with the receivership order and their failure to comply with discovery requests. Because the trial court did not exercise its discretion to sanction defendants under MCR 2.313, plaintiff's contention is unpreserved. Having no lower court ruling to review regarding the application of MCR 2.313 to the facts of this case, we decline to address in the first instance plaintiff's alternative grounds in support of maintaining the default judgment entered in its favor. See *King v Mich State Police Dep't*, 303 Mich App 162, 184-185; 841 NW2d 914 (2013) (where there was no exercise of discretion to review with respect to newly asserted grounds for awarding attorney fees, this Court declined to address the plaintiff's unpreserved arguments on appeal).

III

We reverse the trial court's order denying defendants' motion to set aside the default judgment and remand for further proceedings. We do not retain jurisdiction. Defendants, as prevailing parties on appeal, may tax costs pursuant to MCR 7.219.

FITZGERALD, P.J., and OWENS, J., concurred with WILDER, J.

PEOPLE v LANE

Docket No. 313818. Submitted November 4, 2014, at Detroit. Decided November 13, 2014, at 9:15 a.m.

D'Andre Louis Lane was convicted of first-degree felony murder and first-degree child abuse following a jury trial in the Wayne Circuit Court. The charges had been brought in connection with the disappearance of his two-year-old daughter. While the child lived primarily in a home with her mother and other relatives, Lane agreed in 2011 to help with child care by taking temporary custody of her. During that time, Lane hit the child often with a homemade paddle, frequently in connection with her toilet-training accidents. One evening, according to Lane, the child had diarrhea, and she fell out of bed while getting up to go to the bathroom and hit her head on the floor. Lane said that he kept her awake for a few hours after that in case she had a concussion. The next morning he brought her along in his car while he took his other children to school. He had covered the child's car seat with a blanket, which also covered her head as he carried her out. He returned home distraught and claimed that he had been carjacked and that the thieves had driven off with his daughter in the car. The police subsequently found the car in an alley, still running, with a car seat covered by a blanket on the backseat. The child was never found. After a pretrial hearing, the court, Vonda R. Evans, J., allowed the admission at trial of evidence that a cadaver dog had detected the odor of decomposing human remains in the room where the child slept, on the car's backseat and in its trunk, and on the blanket and car seat. Lane appealed his convictions.

The Court of Appeals *held*:

1. The trial court did not abuse its discretion by admitting the cadaver dog evidence. MRE 702 permits the trial court to admit expert opinion testimony if it concludes that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. The court must determine (1) that the testimony is based on sufficient facts or data, (2) that the testimony is the product of reliable principles and methods, and (3) that the witness applied the principles and methods reliably to the facts of the case. The

court must ensure that the expert testimony meets that standard of reliability required by MRE 702. Michigan courts have held that tracking dog evidence is admissible. Cadaver dog evidence is not significantly different from other forms of tracking dog evidence. The court must, however, consider the reliability of the cadaver dog evidence in each case. Cadaver dog evidence is sufficiently reliable if the proponent of the evidence establishes as a foundation (1) that the dog's handler was qualified to use the dog, (2) that the dog was trained and accurate in identifying human remains, (3) that circumstantial evidence corroborated the dog's identification, and (4) that the evidence was not so stale or contaminated as to make it beyond the dog's competency to identify the evidence. The trial court correctly determined that the prosecution had provided a sufficient foundation to admit the cadaver dog evidence in this case. Nor was the evidence irrelevant under MRE 401 and MRE 403. Rather, it was probative and not unfairly prejudicial.

2. MCL 750.136b(2) provides that a person is guilty of first-degree child abuse if he or she knowingly or intentionally causes serious physical or serious mental harm to a child, which includes any physical injury to a child that seriously impairs the child's health or physical well-being. The elements of felony murder, MCL 750.316(1)(b), are (1) the killing of a person, (2) with the intent to kill, do great bodily harm, or create a high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony, which includes first-degree child abuse. The victim's body is not necessary to establish that he or she was killed. Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime. There was circumstantial evidence from which the jury could conclude that the child was dead and that Lane both physically injured and killed her. Therefore, sufficient evidence supported Lane's convictions.

3. The trial court did not abuse its discretion by denying Lane's motion for a mistrial after the prosecutor showed to the jury an unredacted video of Lane's interview with the police. The prosecutor and Lane had agreed to redact any information related to Lane's former criminal history and gang affiliation. The audio portion of the video had been deleted for the segment at issue, but the closed captioning had not. While the prosecutor stated that she did not know what had happened, the trial court properly con-

cluded that the closed-captioned information had been on the screen for only a few seconds and that the error could be remedied with a curative instruction.

4. A prosecutor commits misconduct if the prosecutor abandons his or her responsibility to seek justice and, in doing so, denies the defendant a fair and impartial trial. A prosecutor can deny the right to a fair trial by making improper remarks that so infect the trial with unfairness that it makes the resulting conviction a denial of due process. A court must evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor's comments in context and in light of the defendant's arguments. Lane contended that the prosecutor committed misconduct when she argued in her opening statement and during closing arguments that Lane's explanation for the child's disappearance was untrue and stated her belief that Lane was guilty. During opening statements, a prosecutor may state the facts that will be proved at trial. A prosecutor may not offer his or her personal belief about the defendant's guilt, but may summarize what he or she thinks the evidence will show. During closing arguments, a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them as they relate to the prosecution's theory of the case. The prosecutor's statements in this case, reviewed in context, did not constitute plain error.

5. A prosecutor may also not inject issues into a trial that are broader than the defendant's guilt or innocence. The prosecutor commits misconduct when he or she invites the jurors to suspend their powers of judgment and decide the case on the basis of sympathy or civic duty. The prosecutor did not inject issues broader than Lane's guilt into the trial. Rather, she urged the jury to find Lane guilty on the basis of the evidence and its sense of judgment and stated that, as a result, the child would have justice done. Accordingly, Lane did not show plain error.

6. A prosecutor may not make a statement of fact that is unsupported by the evidence. The prosecutor may, however, argue reasonable inferences arising from the evidence to the extent that the inferences relate to the prosecutor's theory of the case. The prosecutor did not argue facts that were not in evidence when she stated that one witness had testified that the child's eyes were open on the morning Lane carried her to his car but added that a person's eyes can still be open when that person is dead. She was clearly offering the prosecution's theory. The trial court instructed the jury that the arguments were not evidence, and Lane did not establish that the prosecutor's argument constituted plain error that affected his substantial rights.

7. Lane failed to establish the factual basis of his claim of ineffective assistance of counsel. To prove that defense counsel was not effective, a defendant must show (1) that defense counsel's performance fell below an objective standard of reasonableness and (2) that there is a reasonable probability that counsel's deficient performance prejudiced the defendant. A defendant is prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different. There is, however, a presumption that counsel provided effective assistance. Counsel's assistance may be ineffective if he or she unreasonably fails to develop the defendant's defenses by adequately impeaching the witnesses against the defendant. MRE 607 provides that any party may attack the credibility of a witness. MRE 608 prohibits the use of most specific instances of the witness's conduct for the purposes of attacking or supporting the witness's credibility, however, unless they are probative of truthfulness or untruthfulness. Because the cadaver dog's handler never testified that his dog was 100 percent accurate, evidence of a specific instance in which that dog was inaccurate was not probative of the handler's truthfulness and would not have been valid impeachment evidence.

Affirmed.

EVIDENCE — EXPERT WITNESSES — CADAVER DOG EVIDENCE — RELIABILITY.

Evidence that a cadaver dog detected the odor of decomposing human remains is sufficiently reliable and may be admitted into evidence under MRE 702 if the proponent of the evidence establishes as a foundation (1) that the dog's handler was qualified to use the dog, (2) that the dog was trained and accurate in identifying human remains, (3) that circumstantial evidence corroborated the dog's identification, and (4) that the evidence was not so stale or contaminated as to make it beyond the dog's competency to identify the evidence.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Jason W. Williams*, Assistant Prosecuting Attorney, for the people.

Jonathan B. D. Simon for D'Andre L. Lane.

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

PER CURIAM. Defendant, D'Andre Louis Lane, appeals as of right his convictions, following a jury trial, of first-degree felony murder[1] and first-degree child abuse.[2] The trial court sentenced Lane to serve terms of life imprisonment for his murder conviction and 11 to 30 years' imprisonment for his child abuse conviction. We affirm.

I. FACTS

A. BACKGROUND FACTS

Lane was the father of Bianca Jones, who was two years old when she disappeared. In 2011, Bianca primarily lived with her mother, Banika Jones; her grandmother, Lilia Jones Weaver; her uncle, Gerry Weaver; and Mary Ford-Gandy on Custer Street in Detroit. Lane, Anjali Lyons, and Bianca's seven-year-old half-sister and two-year-old half-sister lived with Lisa Dungey on Mitchell Street in Detroit.

Jones testified that after Bianca was born, Lane often visited her. In late 2011, Lane agreed to help Jones with child care by taking temporary custody of Bianca. Jones testified that Lane was glad that Bianca would be able to spend some time with her sisters. According to Jones, Lane picked Bianca up on November 26, 2011. At that time, he was driving Dungey's silver Grand Marquis because his car had broken down. Lane was going to keep Bianca until before Christmas, and Bianca was to share a bed with her two-year-old sister.

Lyons testified that Lane was responsible for child discipline in the house. Dungey testified that Lane used time-outs, but testified that Lane hit the children with

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[1] MCL 750.316(1)(b).

[2] MCL 750.136b(2).

a homemade paddle, fashioned from a wooden stick with a duct-tape-covered sponge on one end. According to Lyons, Lane kept the paddle in a linen closet down the hall from the children's room. The closet door squeaked when it was opened. Lyons could not recall if Lane ever used the paddle on Bianca, but the seven-year-old testified that Lane had used the paddle to give Bianca "a whooping."

Jones testified that Bianca was almost toilet-trained, but still had accidents and wore pull-up diapers at night. Jones did not pack any pull-ups for Bianca when Lane picked Bianca up. Lyons testified that if Bianca or the two-year-old had an accident at night, Lane would ask them questions, spank them, and give them a time-out.

According to Lyons, between November 26 and December 2, 2011, Bianca had diarrhea and more than one accident. At trial, Lyons testified that she did not remember how Lane reacted to Bianca's accidents. Lyons's preliminary examination testimony was admitted as substantive evidence. At her preliminary examination, Lyons testified that Lane became angry, frustrated, and irritated, and in response to an investigative subpoena, Lyons testified that Lane was "more upset" the second time that Bianca had an accident.

Clinton Nevers testified that he worked out in Lane's basement every morning. According to Nevers, on November 29, 2011, he was sitting in Lane's living room after working out. He heard "three hard paddles" and a baby begin to cry. Nevers went to investigate and Lane met him in the doorway of a bedroom where Bianca was crying. Lane told him that Bianca had urinated and defecated on his floor and "he don't play that s***."

According to Dungey, she picked Lyons up from work on December 1, 2011. She also picked up the seven-

year-old and Lane's teenage nephew and dropped them off at her house. She did not return until the following morning. Lyons testified that she put the children to bed around 10:30 p.m., sat with Lane and Lane's nephew for an hour, and then went to bed.

According to Lyons, the sound of Bianca crying woke her during the night. She heard "a couple taps" from the downstairs bathroom and a toilet flushing. Lyons heard Lane ask Bianca about wetting the bed, heard the closet door open, and heard Lane hitting Bianca with the paddle. Lyons did not get up to investigate. Lyons agreed at trial that in response to the investigative subpoena, she had stated that she heard four or five smacking sounds and that Bianca was crying "like she was really intensely in pain."

In a video interview with the police that was played for the jury, Lane stated that Bianca had a little diarrhea that night and did not sleep well. According to Lane, at some time around 1:00 a.m., Bianca fell out of bed while getting up to go to the bathroom and hit her head on the floor. Lane took her to the bathroom, then kept her awake for a few hours in case she had a concussion.

Lane's nephew testified that he spent the night at Dungey's house and that he and Lane stayed up until 3:00 or 4:00 a.m. According to the nephew, Bianca soiled herself in her sleep and Lane brought her out to the living room. Lane tried to keep Bianca awake by "standin' her up" and "tapp[ing] her with a paddle" on the buttocks. The nephew testified that Bianca was not crying and that Lane eventually put Bianca back to bed.

Lyons and Dungey both testified that Lane usually drove the seven-year-old to school while Bianca and the two-year-old stayed home, and neither could recall Lane

ever taking Bianca along on the ride. Lane took Bianca out to the car with him on December 2, 2011.

According to Lane, he woke at around 6:45 a.m. and took Bianca and the two-year-old to the bathroom. Bianca seemed tired and "out of it a little bit." Lane's nephew testified that Lane brought Bianca into the living room before they left and sat her on the couch. Bianca was "[j]ust looking." The seven-year-old testified that she could not remember if she saw Bianca moving that morning. The seven-year-old testified that she had told the truth when she previously said that she did not see Bianca up, moving, talking, walking, or standing on her own.

Lane's nephew testified that Lane put a blanket over Bianca's head when he carried her to the car. According to Lane, he draped a blanket over Bianca's head when he took her outside because it was cold. He removed the blanket from Bianca's head when he put her in the car, but she went back to sleep, so he covered her back up. Lane's nephew testified that Bianca's eyes were open in the car and she was "just looking" and did not make any noises.

Rico Blackwell, a friend of Lane, testified that he was walking to Wayne Community College on the morning of December 2, 2011. According to Blackwell, he heard Lane call his name and Lane pulled up to him in "a white nice vehicle." Lane was the only person in the vehicle, and Blackwell saw bags in the backseat. Blackwell and Lane spoke briefly, and Blackwell told Lane that he was late to class. Blackwell gave Lane his phone number, and Lane called him briefly so that Lane's phone number registered in Blackwell's phone. Lane looked "distraught" and did not offer Blackwell a ride to school. According to FBI Agent Christopher Hess, cell

phone towers showed that Lane's phone placed a 14- to 18-second call to Blackwell at 8:55 a.m.

According to Dungey, Lane called her briefly to mention that he was going to Banika Jones's house to pick up more clothes for Bianca. Some time after that, Lane called back, crying and saying that someone had taken Bianca. Lyons testified that she could hear Lane screaming on Dungey's phone. Dungey testified that she heard a woman take Lane's phone. The woman said that someone had taken Bianca, that she was going to call the police, and hung up.

According to Ford-Gandy, who lived with Jones, she was still in bed when someone began banging on her door and yelling outside. It was between 9:00 and 9:15 a.m. Weaver testified that he heard a loud crash that sounded like "someone was busting down the door." When he went downstairs, Lane was in the living room. According to Weaver, Lane was sobbing uncontrollably and kept saying "they got her." Weaver could not make sense of what Lane was saying, but Lane eventually said that he had been carjacked by people with guns.

Weaver assumed that Lane had called the police, and Weaver called Lilia Jones Weaver, Bianca's grandmother. According to cell phone records, Lane called Dungey at 9:40 a.m. Ford-Gandy testified that, after Lane admitted he had not called the police, she used his phone to call them. Lane's cell phone records indicated that the 911 call was placed at 9:47 a.m.

Detroit Police Officer Patrick Lane testified that he arrived at Lane's house within five minutes of the 911 call. According to Officer Lane, Lane was very "shaken up" and it took a while for him to respond to any questions. Lane eventually stated that he had been

driving "a black Crown Vic."[3] When Officer Lane asked Lane where the carjacking occurred, Lane pointed to the nearby corner of Custer and Brush.

In his recorded interview, Lane stated that he met Blackwell on Howard Street. Then he drove along Woodward to Warren, turned right, took Warren to Brush, turned left, and headed south on Brush to Grand Boulevard. On Grand Boulevard, he stopped at a stop sign and someone behind him was honking at him. The other car was small, red, and had square headlights. Someone in the other car said that Lane's lights were out, so he left his car to see if they were out. At that point, the front seat passenger got out of the other car holding a gun, jumped into Dungey's car, and drove off.

Detroit Police Officer Richard Arslanian testified that he heard a broadcast that a "black Mercury" with a child in the backseat was carjacked, and he began looking for the vehicle in the area of Brush, Custer, and Philadelphia Streets. At 10:15 a.m., Officer Arslanian found Dungey's car in an alley. According to Officer Arslanian, the car's door was open, the car had its keys in the ignition and was running, and there was a child's car seat on the backseat that was covered by a blanket. The car was about half a mile from Custer.

Detroit Police Officer David LeValley testified that he thought it was "significant" that Bianca was not in the car. According to Officer LeValley, on the basis of his familiarity with crime reports, he would have expected the carjacker to leave the child in the vehicle. LeValley testified about extensive efforts by the police and the community to locate Bianca, but Bianca was never found.

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[3] We presume this reference is to a Ford Crown Victoria sedan.

Agent Hess testified that he reviewed Lane's cell phone records. Lane's 8:55 a.m. call to Blackwell was not consistent with Lane's being on Brush at that time because the area the call came from was four blocks west of Brush, on an area of the I-75 service drive near I-94.

Agent Hess testified that he took Lane on a "ride-along" on December 9, 2011. On the ride-along, Lane stated that he met Blackwell at the corner of Lafayette and Cass. Then he took Lafayette to Griswold, turned left, took Griswold to Grand River, turned right, took Grand River to Woodward, and turned left. According to Hess, Lane's body language during the ride-along was "significant." Lane "would not look to the left" when they passed the alley where Officer Arslanian had found Dungey's car. Lane also got "worked up" when Hess drove along St. Aubin, east of I-75: he began breathing faster and shallower and started covering his face more than he had previously.

Andrea Halverson, an expert in DNA and forensic science, testified that she tested a DNA sample from the paddle. She excluded Jones and Dungey as contributors to the sample, but could not exclude Bianca or Lane. Halverson also tested a blood sample from a pillow, which matched Bianca's DNA profile.

At trial, FBI Canine Program Manager Rex Stockham testified as an expert in forensic canine operation. Stockham testified about the process of training and testing victim recovery dogs. Stockham's protocol called for regular single- and double-blind testing of dogs throughout their working lives. Stockham's program had three full-time handlers in its program, including Martin Grime. Stockham testified that he had tested Morse and Keela, Grime's dogs, and that both dogs had accuracy ratings in the high 90% range. Stockham

testified that dogs have been able to smell the odor of decomposition as soon as 2 hours after a victim's death, or years after a victim's burial.

Grime testified as an expert in the training and employment of cadaver dogs. According to Grime, he is a full-time contractor for the FBI. Grime worked with Morse, a dog "trained to search for and detect the odor of decomposing human remains," and Keela, "trained to search for and locate specifically human blood." Grime testified that there was no method to test the dogs' responses when there is no recoverable material and that the odor of decomposition might transfer if a person touches a dead body and then touches something else.

According to Grime, on December 4, 2011, he took his dogs to an enclosed warehouse that contained 31 vehicles. Grime was told that Bianca had been in one of the vehicles at the time of the carjacking, but was not told which vehicle was involved. Morse alerted Grime to the presence of the odor of decomposition in the back seat and trunk of a silver Grand Marquis. Keela later screened the car and did not alert Grime to the presence of human blood.

Grime testified that, after the vehicle screening, he took the dogs to an administrative building to screen the items removed from Dungey's car. Grime did not know where the objects were located in the building, and the objects had been placed in a room filled with "all sorts of things." Morse alerted Grime to the odor of decomposition in Bianca's car seat and a bag containing Bianca's blanket. Grime later took the dogs to Dungey's house. Morse alerted him to the odor of decomposition in a room that contained bunk beds and a closet without a door.

B. EVIDENTIARY HEARING

Before trial, Lane moved to exclude the cadaver dog evidence, contending in part that it was not admissible under MRE 702. At the evidentiary hearing, Stockham had testified that he had started a science-based victim recovery dog program for the FBI. The program's protocol called for regular single- and double-blind testing of the dogs throughout their working lives. Stockham's program had three full-time dog handlers in its program, including Grime.

Stockham testified that Grime was a recognized expert in the field of animal behavior in the United Kingdom who worked with and trained Morse and Keela. Stockham had tested Grime and Morse in 2011. On one occasion, Morse gave a "nonproductive response" when he "barked in a blank room." No samples were in the room, but Stockham could not exclude the possibility that trace matter was there.

According to Stockham, no instruments can detect and confirm the presence of human remains. It is not clear whether a dog reacts to a single compound or a combination of compounds in a decomposing body. Therefore, nonproductive responses cannot be verified as correct or incorrect. Instead, Stockham assumes that the result is correct if the dog has routinely passed testing before and after the incident. Grime admitted that there was no scientific testing method that could corroborate Morse's responses in this case.

Grime submitted Morse and Keela's training reports into evidence. Over the course of 49 tests, Morse gave no false negative or false positive responses to tests in controlled environments. He gave one "unexplained" response, which was a single bark in a "blank" room. Morse scored 100% in tests on December 2 and December 6, 2011. Morse was tested on a variety of dates

between January 21, 2011, and February 13, 2013. Morse scored 100% in all but one test, on which he scored 95 to 100%. Morse did not give false positive responses to animal remains during his tests.

Following the evidentiary hearing, the trial court denied Lane's motion to exclude the cadaver dog evidence. At trial, the trial court instructed the jury to consider the cadaver dog evidence carefully and not to convict Lane solely on the basis of that evidence.

II. CADAVER DOG EVIDENCE

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to admit or exclude evidence.[4] The trial court abuses its discretion when its decision falls outside the range of principled outcomes[5] or when it erroneously interprets or applies the law.[6] We review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.[7]

B. ADMISSIBILITY OF EXPERT OPINION

1. LEGAL STANDARDS

MRE 702 permits the trial court to admit expert opinion testimony on areas of specialized knowledge:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experi-

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[4] *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

[5] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[6] *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006).

[7] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

> ence, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

"[T]he court may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability."[8] The *Daubert* test examines the reliability of the evidence.[9] The purpose of this test is to "ensure that a jury is not relying on unproven and ultimately unsound scientific methods."[10]

2. APPLYING THE STANDARDS

Lane contends that the trial court erred when it admitted the cadaver dog evidence in this case because the testimony was not the product of reliable principles or methods. We disagree.

Michigan courts applied the older *Davis-Frye*[11] test to the admissibility of tracking dog evidence. In *People v Riemersma*, this Court considered whether tracking dog evidence was admissible.[12] In *Riemersma*, the dog's handler testified about the dog's reliability during testing and in prior investigations.[13] Additionally, circumstantial evidence corroborated the dog's identification.[14]

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[8] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). See *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 589; 113 S Ct 2786; 125 L Ed 2d 469 (1993); *People v Beckley*, 434 Mich 691, 718-719; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.).

[9] *Daubert*, 509 US at 589-594; *Beckley*, 434 Mich at 719.

[10] *Beckley*, 434 Mich at 719.

[11] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

[12] *People v Riemersma*, 104 Mich App 773; 306 NW2d 340 (1981).

[13] *Id*. at 782.

[14] *Id*.

This Court concluded that, under those circumstances, the tracking dog evidence was admissible.[15]

The *Riemersma* Court relied on this Court's previous holding in *People v Norwood* regarding the necessary foundation to establish that tracking dog evidence is reliable.[16] This Court has held that tracking dog evidence is sufficiently reliable if the proponent of the evidence shows four things:

> (1) the handler was qualified to use the dog; (2) the dog was trained and accurate in tracking humans; (3) the dog was placed on the trail where circumstances indicate the alleged guilty party to have been; and, (4) the trail had not become so stale or contaminated as to be beyond the dog's competency to follow it.[17]

We reject Lane's argument that, because chemical evidence cannot corroborate whether there was decomposition at the locations Morse identified in this case, the evidence must be excluded as unreliable. Clearly, the four-part test adopted by this Court to ensure the reliability of *tracking* dog evidence does not exactly correlate to the use of *cadaver* dogs. However, cadaver dog evidence is not significantly different from other forms of tracking dog evidence. Tracking dogs and cadaver dogs both use a precise sense of smell to identify scents that are outside the range of human ability to detect. Scientific devices can no more follow the scent left on a piece of discarded clothing from the scene of a robbery to a person's home than they can identify the smell of decomposing human remains. Just as it is not a reason to exclude all tracking dog evidence,

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[15] *Id*.

[16] *Id*. at 781-782, citing *People v Norwood*, 70 Mich App 53; 245 NW2d 170 (1976).

[17] *People v Harper*, 43 Mich App 500, 508; 204 NW2d 263 (1972). See also *Norwood*, 70 Mich App at 55.

the lack of scientific verification of the presence of a specific scent is not a reason to exclude cadaver dog evidence in a blanket fashion. We conclude that the trial court must instead consider the reliability of the cadaver dog evidence in each case.

We also conclude that the trial court did not err by applying the tracking dog test to cadaver dog evidence. Essentially, the trial court in this case applied the foundational requirements of *Norwood* to another form of dog-based evidence. The trial court determined that Grime and Stockham were "more than qualified," that they had employed sufficient training methods, and that circumstantial evidence supported Morse's identification of the car, car seat, and blanket because Morse identified those items when neither Morse nor Grime had any prior knowledge that those items were involved in this case. While the trial court did not specifically determine that the evidence was not stale, Grime's dogs tested the evidence on December 4, 2011, a mere two days after Bianca's disappearance on December 2, 2011, and there was no evidence that the car, car seat, or blanket were contaminated with other human remains.

In sum, we conclude that cadaver dog evidence is sufficiently reliable under *Daubert* and *Gilbert* if the proponent of the evidence establishes the foundation that (1) the handler was qualified to use the dog, (2) the dog was trained and accurate in identifying human remains, (3) circumstantial evidence corroborates the dog's identification, and (4) the evidence was not so stale or contaminated as to make it beyond the dog's competency to identify it. We conclude that, here, the trial court correctly ruled that the prosecutor had provided a sufficient foundation to admit the cadaver dog evidence in this case. Accordingly, we conclude that

the trial court did not abuse its discretion by admitting the evidence under MRE 702.

C. RELEVANCE

1. LEGAL STANDARDS

The trial court may only admit relevant evidence.[18] Relevant evidence is evidence that has any tendency to make a fact of consequence more or less probable.[19] But even when evidence is relevant, the trial court may not admit it if the danger of its prejudicial effect substantially outweighs its probative value.[20] The prejudicial effect of the evidence substantially outweighs its probative value when evidence is only marginally probative, but the trier of fact may give the evidence undue or preemptive weight.[21]

Evidence is probative if it has *any* tendency to make a fact of consequence more or less probable.[22] Unfair prejudice occurs if use of the evidence would be inequitable or if there is a danger that the jury will give it undue or preemptive weight.[23]

2. APPLYING THE STANDARDS

Lane contends that the trial court erred because (1) the evidence was uncorroborated and thus not probative and (2) the evidence was unfairly prejudicial because it invited the jury to rely on the infallibility of the dog. We disagree.

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[18] MRE 402.

[19] MRE 401.

[20] MRE 403.

[21] *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998); *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

[22] *Crawford*, 458 Mich at 389-390.

[23] *Blackston*, 481 Mich at 462.

The killing of a human being is an element of murder.[24] Because Bianca's body was never recovered and Lane alleged that she had been kidnapped, the fact of Bianca's death was in contention. The reaction of a cadaver dog to the child's car seat, blanket, and bedroom certainly makes the fact of Bianca's death more likely to be true.

As discussed, it is not necessary to have a machine confirm the presence of the odor of decomposition to admit the cadaver dog evidence. In tracking dog cases, this Court has concluded that the evidence is corroborated when circumstantial evidence also supports the reliability of the dog.[25] In this case, circumstantial evidence supported the dog's reliability. Morse identified Dungey's car and items associated with Bianca without Morse or Grime knowing that those items were involved in Bianca's disappearance. Further, the seven-year-old testified that Bianca did not walk, talk, move, or speak on the morning of her disappearance, witnesses testified that Lane took Bianca to his car with a blanket over her head, and Lane's nephew testified that Bianca was "[j]ust looking" while she was on the couch and in the car. We conclude that the evidence was probative in this case.

We also disagree with Lane's contention that it was highly likely that the jury would give the cadaver dog evidence presumptive weight. The record simply does not support Lane's assertions that Grime and Stockham testified that the dogs were infallible. Rather, Stockham testified that the dogs' accuracy was in the high 90% range, and Grime specifically testified that he would not say that the dogs were perfect. The trial court

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[24] See *People v Nowack*, 462 Mich 392, 401; 614 NW2d 78 (2000).

[25] See *Riemersma*, 104 Mich App at 781 (noting that the defendant's boot print matched a boot print in the snow at the scene of a robbery).

also instructed the jury that it could not convict Lane solely on the basis of the cadaver dog evidence. This Court presumes that jurors follow their instructions.[26] We conclude that the trial court did not err by admitting irrelevant evidence.

III. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

A claim that the evidence was insufficient to convict a defendant invokes that defendant's constitutional right to due process of law.[27] This Court reviews de novo a defendant's challenge to the sufficiency of the evidence supporting his or her conviction.[28] We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution had proved the crime's elements beyond a reasonable doubt.[29]

B. LEGAL STANDARDS

"A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child."[30] "Serious physical harm" is "any physical injury to a child that seriously impairs the child's health or physical well-being . . . ."[31]

The elements of felony murder are (1) the killing of a person, (2) with the intent to kill, do great bodily harm,

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[26] *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

[27] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992); *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

[28] *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011).

[29] *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

[30] MCL 750.136b(2).

[31] MCL 750.136b(1)(f).

or create a high risk of death or great bodily harm with the knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of an enumerated felony.[32] First-degree child abuse is an enumerated felony.[33] The victim's body is not necessary to establish that he or she was killed.[34] Circumstantial evidence and reasonable inferences arising from the evidence may be sufficient to prove the elements of a crime.[35]

C. APPLYING THE STANDARDS

Lane contends that, because Bianca's body was never found and there was no physical evidence that she was dead or injured, there was no evidence that Bianca suffered a physical injury or death. We disagree.

We conclude that this case is distinguishable from *People v Fisher*. In *People v Fisher*, a panel of this Court held that the prosecution fails to present sufficient evidence that a person was killed when the prosecution did not present evidence of an act that resulted in death.[36] In *Fisher*, the defendant had physically abused his wife and threatened to kill her.[37] The defendant's wife filed for divorce, and she was last seen in the defendant's company. The defendant told investigators that he had dropped his wife off at her car.[38]

This Court held that the evidence was not sufficient to prove that the defendant committed an act that

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[32] *Nowack*, 462 Mich at 401.

[33] MCL 750.316(1)(b).

[34] *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992).

[35] *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

[36] *Fisher*, 193 Mich App at 287.

[37] *Id*. at 286.

[38] *Id*.

resulted in his wife's death.[39] This Court reasoned that, while inferences may support the elements of a crime, inferences may not be based solely on speculation.[40] A complete absence of physical or circumstantial evidence showing that a person is dead is not sufficient to establish the inference that a missing person was killed.[41]

There was circumstantial evidence from which the jury could conclude that Bianca is dead and that Lane both physically injured and killed her. The prosecutor presented evidence that Lane had punished Bianca for toilet training incidents by hitting her with a paddle, that he was getting more frustrated with Bianca's toilet training accidents, and that on the morning of December 2, 2011, he hit Bianca and she cried as if she was "intensely in pain." Bianca's seven-year-old sister did not see Bianca talking, walking, or moving the next morning. Bianca's eyes were open, but she was "just looking." Lane carried her outside to Dungey's car with a blanket over her head. When Blackwell spoke with Lane later that morning, Lane was the only person in the car. When Lane told police that he was carjacked, he told them that he was driving a black Crown Victoria rather than a silver Grand Marquis. Lane gave inconsistent statements about where he drove that morning. Morse alerted Grime to the odor of decomposition on Dungey's car, Bianca's car seat, and Bianca's blanket. Morse also alerted Grime to the odor of decomposition in Bianca's room, and the police discovered blood on Bianca's pillow.

We conclude that, viewing this evidence in the light most favorable to the prosecution, a rational finder of fact could find that Lane physically injured Bianca in

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[39] *Id*. at 287.

[40] *Id*. at 289.

[41] *Id*. at 288-289.

the early morning of December 2, 2011, and that the injury seriously impaired Bianca's health. A rational finder of fact could also find that Lane's actions resulted in Bianca's death. Accordingly, we conclude that sufficient evidence supported Lane's convictions.

IV. MISTRIAL

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to deny a defendant's motion for a mistrial.[42] The trial court abuses its discretion when its decision falls outside the range of principled outcomes.[43]

B. LEGAL STANDARDS

The trial court should only grant a mistrial for " 'an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial' "[44] and when "the prejudicial effect of the error cannot be removed in any other way."[45] The trial court may consider, among other things, whether the prosecutor intentionally presented the information to the jury or emphasized the information.[46]

C. APPLYING THE STANDARDS

Lane contends that the trial court abused its discretion when it denied his motion for a mistrial after the

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[42] *People v Waclawski*, 286 Mich App 634, 708; 780 NW2d 321 (2009).

[43] *Babcock*, 469 Mich at 269.

[44] *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010), quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

[45] *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

[46] See *id.*; *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146, 148; 730 NW2d 708 (2007).

prosecutor admitted an unredacted interview into evidence, contrary to the prosecutor and Lane's pretrial agreement to redact any information related to Lane's criminal history and former gang affiliation. We disagree.

The prosecutor submitted into evidence Lane's interview with two officers, Julius Moses and John Quincy, on December 3, 2011. The recorded interview was about four hours long. Before playing the recorded interview, the prosecutor indicated that the recording had been redacted, and defense counsel indicated that the recording was "redacted and approved by the defense." The audio portion of the videorecording was deleted for redactions, but the closed captioning was not. During the interview, the officers asked Lane if he used to be in a gang. Lane replied: "It was a long time ago. . . . [B]ack when I was like 15 . . . ." Lane also stated that he was caught and served two years in a juvenile detention facility.

Defense counsel challenged the information during the playing of the recording, and later moved for a mistrial. The prosecutor agreed that the information should have been redacted and stated, "I don't know what happened." The trial court denied defense counsel's motion, concluding that the information had been on the screen for only seconds and that it could be remedied with a curative instruction.

Lane contends on appeal that the error was clearly intentional. We disagree. Lane did not raise this argument below, and the trial court did not conclude that the prosecutor's error was intentional. Instead, after considering the circumstances and nature of the information, the trial court concluded that the error was not so prejudicial that a jury instruction could not cure it. The record does not support Lane's assertion that the

prosecutor intentionally included the evidence. We conclude that the trial court's decision did not fall outside the range of principled outcomes.

V. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

This Court will not reverse a conviction on the basis of prosecutorial misconduct unless the defendant "timely and specifically" challenged the alleged misconduct before the trial court or unless a failure to review the issue would result in a miscarriage of justice.[47] We review unpreserved claims of prosecutorial misconduct for plain error.[48] We will not find error requiring reversal if a curative instruction could have alleviated the effect of the prosecutor's misconduct.[49]

B. LEGAL STANDARDS

A prosecutor has committed misconduct if the prosecutor abandoned his or her responsibility to seek justice and, in doing so, denied the defendant a fair and impartial trial.[50] A prosecutor can deny a defendant his or her right to a fair trial by making improper remarks that "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."[51] We must evaluate instances of prosecutorial misconduct on a

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[47] *Unger*, 278 Mich App at 234-235 (quotation marks and citation omitted).

[48] *Id*. at 235.

[49] *Id*.

[50] *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007); *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003).

[51] *Donnelly v DeChristoforo*, 416 US 637, 643; 94 S Ct 1868; 40 L Ed 2d 431 (1974). See *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

case-by-case basis, reviewing the prosecutor's comments in context and in light of the defendant's arguments.[52]

C. APPLYING THE STANDARDS

1. LANE'S VERACITY AND GUILT

Lane contends that the prosecutor committed misconduct when she argued in her opening and closing statements that Lane's explanation for Bianca's disappearance was untrue. Lane also contends that the prosecutor stated her belief that Lane was guilty. Reading the prosecutor's statements in context, we disagree.

During opening statements, a prosecutor may "state the facts that will be proved at trial."[53] A prosecutor may not offer his or her personal belief about the defendant's guilt, but may summarize what he or she thinks the evidence will show.[54] During closing argument, a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them, as they relate to the prosecutor's theory of the case.[55]

The prosecutor stated the following during her opening statement:

> At around 9:00 a.m., the defendant claims he was car-jacked. He claims that the car-jackers took the car with Bianca inside and just drove off.
>
> * * *
>
> After the car-jacking, the defendant was left with his cellphone. He claims that he called Lisa Dungey, and ran to the Custer home, the home where he was right near, for help.

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[52] *Dobek*, 274 Mich App at 64.

[53] *People v Ericksen*, 288 Mich App 192, 200; 793 NW2d 120 (2010).

[54] *Id*.

[55] *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 236.

> This is where the defendant's car-jacking story goes from implausible and unlikely to unequivocally false.
>
> The evidence will show that in fact the defendant was on the east side of Detroit at 8:55 that morning. He did not call Lisa Dungey until 9:40. The defendant, himself, never called 911. The defendant has never accounted for his whereabouts between 8:55 a.m., and 9:40 a.m., when he called Lisa Dungey.
>
> * * *
>
> He even lies about the color of the car, telling the police that it was black, when it was, in fact, a light silver gray.
>
> * * *
>
> The defendant would have you believe that two car-jackers turned from car-jackers to child abductors, in a six block ride, and decided they didn't want the car, but took the baby from beneath the blanket, and then spread out the blanket and took off somewhere.
>
> Eventually, as the investigation continued, the evidence compounded to show that the defendant's story was not only implausible, but it was a complete lie.

During rebuttal closing argument, the prosecutor concluded by stating: "When you think about all of that, that will lead you to one primary conclusion, and that is that the defendant is guilty. The defendant is guilty." During his closing argument, defense counsel argued that Lane was confused during his ride-along with Agent Hess. In response, the prosecutor argued in rebuttal:

> Mr. Lane is confused? What is he confused about? Because he can't keep all his lies straight. That's why he's confused.
>
> When he's standing out there, and he's trying to remember where he was, and what he did, I bet it's real confusing,

> when you killed your baby, and the FBI is on to you, and you're trying to figure out how to clean it all up. It would be confusing, wouldn't it?
>
> But I bet you what wouldn't be confusing: if somebody kidnapped your baby and stole your baby from your arms. You would remember every moment, every turn, everything you saw. That would be imprinted in your mind, forever. You'd never forget it. It wouldn't be confusing. He's confused because he's lying, and he can't keep all his lies straight.

Reviewing the prosecutor's statements in context, we conclude that they do not constitute plain error. In her opening statement, the prosecutor did not offer an opinion about Lane's guilt. Rather, the prosecutor summarized what she believed that the evidence would show. Similarly, the prosecutor's statements in closing were arguments about the evidence and inferences arising from it as they related to the prosecutor's statement of the case. The prosecutor did not state her personal opinion of Lane's guilt or veracity, but rather indicated that the evidence showed that Lane had lied to the police and was guilty. Finally, the trial court instructed the jurors that the attorneys' statements were not evidence and that they should draw their own conclusions. There is no indication that the trial court's instruction failed to remove any possible prejudice from these remarks.

On these bases, we conclude that Lane has not shown plain error in the prosecutor's remarks, or shown that any error affected his substantial rights.

2. CIVIC DUTY

Lane next contends that the prosecutor made an improper civic duty argument in her closing argument. Again, we disagree.

The prosecutor may not inject issues into a trial that are broader than the defendant's guilt or innocence.[56] The prosecutor commits misconduct when he or she invites jurors to suspend their powers of judgment and decide the case on the basis of sympathy or civic duty.[57]

During her closing argument, the prosecutor argued that

> just because you can successfully dispose of a body does not mean you should get away with murder. We can't bring her body back. We can ask you for a measure of justice for Bianca.
>
> He wants you to buy the story that he tried selling to the police. He wants you to buy it, despite the fact that it's completely illogical and defies common sense. . . .
>
> We, ladies and gentlemen, are asking you to stand up for justice for Bianca. We are asking you to apply your common sense and logic to this evidence. Find him guilty. The evidence has proven his guilt, beyond a reasonable doubt.

Reviewing the prosecutor's statements in context, we conclude that the prosecutor did not inject issues broader than Lane's guilt into the trial. The prosecutor did not urge the jury to suspend its powers of judgment and find Lane guilty on the basis of civic duty or sympathy. Rather, the prosecutor urged the jury to find Lane guilty on the basis of the evidence and its sense of judgment, and, as a result, Bianca would have justice. Accordingly, Lane has not shown plain error. And again, the trial court instructed the jury to determine Lane's guilt on the basis of the evidence admitted at trial.

We conclude that Lane has not shown that the prosecutor's statements constituted a plain error that affected his substantial rights.

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[56] *People v Cooper*, 236 Mich App 643, 650-651; 601 NW2d 409 (1999).

[57] *Unger*, 278 Mich App at 237; *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

3. FACTS NOT IN EVIDENCE

Lane contends that the prosecutor argued facts not in evidence when she argued that Bianca was dead even though her eyes were open. We disagree.

The prosecutor may not make a statement of fact that is unsupported by the evidence.[58] But the prosecutor may argue reasonable inferences arising from the evidence to the extent that the inferences relate to the prosecutor's theory of the case.[59]

We disagree with Lane's contention that the prosecutor argued *facts* not in evidence. The prosecutor contended that Lane's nephew had testified that Bianca's eyes were open on the morning of December 2, 2011, but "eyes can be open when you're dead. They can be fixed and dialated [sic]." It is clear that the prosecutor was offering the *theory* that Bianca's eyes could have been open even though she was dead. And again, the trial court instructed the jury that the arguments were not evidence. We conclude that Lane has not established that the prosecutor's argument constituted plain error that affected Lane's substantial rights.

VI. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

A criminal defendant has the fundamental right to effective assistance of counsel.[60] A defendant's claim of ineffective assistance of counsel "is a mixed question of fact and constitutional law."[61] Generally this Court

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[58] *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

[59] *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 236.

[60] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[61] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

reviews for clear error the trial court's findings of fact and reviews de novo questions of law.[62] But a defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his or her counsel was ineffective.[63] When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.[64]

B. LEGAL STANDARDS

To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.[65] We must presume that counsel provided effective assistance.[66] A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.[67]

Counsel may provide ineffective assistance if counsel unreasonably fails to develop the defendant's defenses by adequately impeaching the witnesses against the defendant.[68] MRE 607 provides that any party may

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[62] *Id*.

[63] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *Unger*, 278 Mich App at 242.

[64] *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012), vacated in part on other grounds 493 Mich 864 (2012).

[65] *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[66] *Unger*, 278 Mich App at 242.

[67] *Pickens*, 446 Mich at 312.

[68] See *People v Trakhtenberg*, 493 Mich 38, 54-55; 826 NW2d 136 (2012).

attack the credibility of a witness. MRE 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in [MRE] 609, may not be proved by extrinsic evidence." But MRE 608(b) does allow a party to inquire into specific instances of conduct "if probative of truthfulness or untruthfulness . . . ."

C. APPLYING THE STANDARDS

Lane contends that defense counsel provided ineffective assistance when he failed to impeach Grime with evidence that one of his cadaver dogs, Eddie, in 2009 had given an alert to the odor of decomposition on what was determined to be a piece of coconut shell. We disagree.

The basis of Lane's claim is that his counsel was ineffective for failing to admit certain impeachment evidence. Lane contends that Grime testified that his dogs are 100 percent accurate and that counsel should have impeached Grime with the evidence involving Eddie. Lane bases his argument on a factual predicate that the record does not support.

The defendant must show the factual predicates of his or her claims on appeal.[69] Grime testified that Morse's proficiency test results were "very high" and that during specific training dates before and after December 4, 2011, Morse tested 100 percent positive and with 100 percent efficiency. However, Grime did not testify that "his dogs" were 100 percent accurate or flawless. To the contrary, when asked whether Morse was "pretty much perfect," Grime testified that he

[69] *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

"wouldn't say that" and that his dogs were not 100 percent correct.

Because Grime never testified that his dogs were 100 percent accurate, evidence of a specific instance in which one of Grime's dogs was inaccurate was not probative of Grime's truthfulness and would not have been valid impeachment evidence. Accordingly, we reject Lane's assertion of ineffective assistance of counsel because he has failed to establish the factual basis of his claim.

VII. CONCLUSION

We conclude that the trial court did not abuse its discretion by admitting unreliable cadaver dog evidence or denying Lane's motion for a mistrial when the prosecutor failed to redact evidence that Lane was involved in a gang. We also conclude that sufficient circumstantial evidence supported Lane's convictions of felony murder and first-degree child abuse. We conclude that Lane has not shown that the prosecutor committed misconduct and that Lane has not established the factual predicate of his claim of ineffective assistance of counsel.

We affirm.

WHITBECK, P.J., and FITZGERALD and MURRAY, JJ., concurred.

D'ALESSANDRO CONTRACTING GROUP, LLC v WRIGHT

Docket No. 317201. Submitted November 4, 2014, at Detroit. Decided November 13, 2014, at 9:20 a.m.

D'Alessandro Contracting Group, LLC (DCG), and its surety, Safeco Insurance Company of America, brought a breach-of-contract action in the Genesee Circuit Court against Genesee County Drain Commissioner Jeffrey Wright and the Division of Water and Waste Services in connection with a sewer construction project that defendants had hired DCG to complete. Construction was stopped when it was discovered that some of the pipes DCG had installed were cracked, and defendants hired independent engineering firm Hubbel, Roth, and Clark (HRC) to determine the cause. Defendants shared the resulting HRC report with the firm Architecture, Engineering, Consulting, Operations, and Maintenance (AECOM), which had succeeded the original project designer and had agreed to indemnify defendants for any losses arising out of project design errors. Defendants brought a counterclaim against DCG for breach of contract and entered into a joint defense agreement with AECOM to protect their confidential communications, including the HRC report, which defendants had designated as privileged. However, AECOM had already disclosed the HRC report to plaintiffs during prior discovery. Plaintiffs moved for a determination that defendants had waived the work-product privilege by disclosing the report to AECOM and to Safeco, by telling plaintiffs they would give them a copy of the report, and by filing a counterclaim. The court, Geoffrey L. Neithercut, J., concluded that the HRC report was prepared in anticipation of litigation and that plaintiffs had failed to show a substantial need for it, but ultimately ruled that defendants had waived the work-product privilege by disclosing the report to AECOM because AECOM was a potential adversary. The court denied defendants' motion for reconsideration, and defendants appealed.

The Court of Appeals *held*:

1. The circuit court correctly ruled that the HRC report constituted material prepared in anticipation of litigation. However, because the circuit court did not review the report, its order was vacated to the extent that it applied the work-product privi-

lege to the report in its entirety. The matter was remanded for the court to review the report in camera and determine which parts, if any, are not subject to work-product protection.

2. The circuit court's order was reversed to the extent the court found defendants had waived any privilege as to the report. Under the common-interest doctrine, defendants had a reasonable expectation of confidentiality in disclosing the HRC report to AECOM, which, as defendants' indemnitor, shared defendants' interest in prevailing. The circuit court erred by concluding that the possibility of a future dispute between defendants and AECOM rendered AECOM a potential adversary for purposes of determining whether defendants had waived the work-product privilege. Further, the circuit court did not address whether defendants disclosed the HRC report to a representative of Safeco, which was essential to determining whether defendants had waived the work-product privilege. The circuit court was required to make the necessary findings on remand.

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

EVIDENCE — WORK-PRODUCT PRIVILEGE — COMMON-INTEREST DOCTRINE.

Under the common-interest doctrine, the disclosure of a party's work product to a third party with a common interest does not result in a waiver of the work-product privilege if there is a reasonable expectation of confidentiality between the transferor and the recipient.

Thomas, DeGrood & Witenoff, PC (by *Michelle A. Thomas*), for plaintiffs.

Barry A. Wolf, Attorney at Law, PLLC (by *Barry A. Wolf*), and *Miller, Canfield, Paddock and Stone, PLC* (by *Joseph F. Galvin*), for defendant.

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

MURRAY, J. At issue in this case is the applicability and potential waiver of the work-product privilege in the context of an indemnification relationship. It comes to us on defendants' interlocutory appeal of the Gen-

esee Circuit Court's order compelling defendants' production of their investigation report related to a sewer system construction project gone awry. Defendants, Genesee County Drain Commissioner Jeffrey Wright and the Division of Water and Waste Services, maintain that the circuit court incorrectly determined that their sharing that report with their indemnitor constituted a waiver of the work-product privilege. Plaintiffs, D'Alessandro Contracting Group, LLC ("DCG"), and its surety, Safeco Insurance Company of America, cross-appeal this same order, arguing that defendants lacked any privilege in the first instance.

We hold that although the circuit court correctly ruled that the report was prepared in anticipation of litigation, the court otherwise erred in two respects. First, the court erred in ruling that the work-product privilege applied to the report in its entirety without conducting an in camera review to determine which parts of the report, if any, are not subject to that privilege. Second, the circuit court erred in finding defendants "waived any privilege" as to the report. Accordingly, we remand for proceedings consistent with this opinion, including an in camera review of the report to determine the scope of the work-product doctrine's application and for resolution of whether defendants disclosed the report to Safeco, thereby waiving any work-product protection.

I. BACKGROUND

The pertinent facts of this case are straightforward. They trace back to June 2009, when the parties discovered cracking in some of the pipes installed by DCG during a sewer construction project for Genesee County. Fault was soon at issue, and so, the following month, defendants hired an independent engineering firm—

Hubbel, Roth, and Clark (HRC)—to investigate and determine the cause of the pipe cracking. Of particular concern was whether defective design or defective installation could be the culprit. On September 8, 2009, defendants received a report from HRC and in turn shared it with the successor to the firm responsible for the project's design, Architecture, Engineering, Consulting, Operations, and Maintenance (AECOM), which had agreed to indemnify defendants for any losses arising out of project design errors. The HRC report—which defendants did not provide to DCG despite their alleged promise to do so—is not part of the record on appeal.

Over the ensuing year, the parties attempted to resolve their dispute, but nevertheless remained at an impasse. Plaintiffs then commenced this lawsuit on December 14, 2010, alleging breach of contract. Defendants counterclaimed, also alleging breach of contract as well as an action on the bonds. To protect their confidential communications, including the HRC report which defendants had designated as privileged, defendants and AECOM entered into a joint defense agreement. This effort hit a stumbling block, however, as AECOM had already inadvertently disclosed the HRC report to plaintiffs during prior discovery.

Upon obtaining the HRC report, plaintiffs notified defendants of the disclosure[1] and subsequently moved for a determination that defendants had waived the work-product privilege by disclosing the report to AECOM, a potential adversary in future proceedings, as well as to Safeco, by failing to provide the report to plaintiffs as promised, and by filing a counterclaim. Defendants responded that the report was prepared in anticipation of litigation and that no waiver resulted

[1] See MCR 2.302(B)(7).

from the disclosure to AECOM because of their common interest and because MCR 2.302(B)(3) otherwise protects work product shared with an indemnitor absent plaintiffs' showing of substantial need and undue hardship.

Although the circuit court agreed with defendants that the HRC report was prepared in anticipation of litigation and that plaintiffs had failed to show a substantial need for it given that a representative from DCG was present at the work site during HRC's inspection, the court ultimately ruled in plaintiffs' favor. The court held that defendants' disclosure of the report to AECOM constituted a waiver because AECOM could be a "potential adversary," who, although not named as a defendant, had "participated in the design of this project. And the Drain Commission could well decide later on to make them responsible." An order was entered reflecting this ruling on March 18, 2013. On reconsideration, the circuit court summarily addressed defendants' common-interest argument, determining that palpable error was nonexistent. This appeal ensued.

II. ANALYSIS

As they argued below, defendants assert on appeal that their common interest with AECOM as well as the plain language of MCR 2.302(B)(3)(a) precluded the circuit court's holding that their disclosure of the HRC report to AECOM waived the work-product privilege. Plaintiffs argue in their cross-appeal that this Court need not even reach the issue of waiver since the report is not privileged in the first place. We hold that although the report was prepared in anticipation of litigation, the circuit court erred in concluding the report was subject to the privilege in its totality without conducting an in camera review. The circuit court additionally erred in

concluding that defendants "waived any privilege" to the report. As discussed below, remand is appropriate (1) for an in camera review to determine the scope of the work-product privilege's applicability, (2) to resolve whether the report was disclosed to Safeco, and (3) to determine whether a disclosure to Safeco resulted in a waiver of the privilege.

A. STANDARD OF REVIEW

Generally, we review the grant or denial of a discovery motion for an abuse of discretion. *Linebaugh v Sheraton Mich Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). However, whether a party may assert the work-product privilege and whether a party has waived that privilege are questions of law that we review de novo. *Augustine v Allstate Ins Co*, 292 Mich App 408, 419; 807 NW2d 77 (2011). "Once we determine whether the privilege is applicable, this Court then reviews whether the trial court's order was an abuse of discretion." *Id*. A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). A court's factual findings underlying its determination of the existence and waiver of the work-product privilege are reviewed for clear error. *Messenger v Ingham Co Prosecutor*, 232 Mich App 633, 637; 591 NW2d 393 (1998). To the extent defendants' appeal requires interpretation of a court rule or otherwise implicates the circuit court's ruling on reconsideration, our review is de novo and for an abuse of discretion, respectively. *In re FG*, 264 Mich App 413, 417; 691 NW2d 465 (2004); *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

As an initial matter, plaintiffs argue on cross-appeal that the HRC report is not privileged work product and

that the circuit court erred in "unilaterally" deciding otherwise. However, while defendants argued below that the report was prepared in anticipation of litigation, plaintiffs declined to reply and presented none of the arguments below which they now assert on cross-appeal. Because of this, defendants assert plaintiffs have waived their argument. But "[w]aiver is the intentional relinquishment or abandonment of a known right," *In re Contempt of Dorsey*, 306 Mich App 571, 590; 858 NW2d 84 (2014) (citation and quotation marks omitted), and plaintiffs *never* conceded the preliminary issue they present on cross-appeal. Rather, they focused on waiver of the work-product privilege, merely assuming its existence arguendo. This deficiency therefore renders plaintiffs' arguments on cross-appeal unpreserved, not waived. *Gen Motors Corp v Dep't of Treasury*, 290 Mich App 355, 386-387; 803 NW2d 698 (2010).

We may review an unpreserved issue such as this one where, among other things, "the issue involves a question of law and the facts necessary for its resolution have been presented." *Id*. at 387. These circumstances are present here, and therefore our review of plaintiffs' cross-appeal is for plain error affecting substantial rights. *Wolford v Duncan*, 279 Mich App 631, 637; 760 NW2d 253 (2008).

B. APPLICABILITY OF THE WORK-PRODUCT PRIVILEGE

As stated before, plaintiffs' cross-appeal comes down to whether defendants may assert the work-product privilege at all. The touchstone of the work-product doctrine is whether "notes, working papers, memoranda or similar materials" were prepared in anticipation of litigation. *Messenger*, 232 Mich App at 637-638, quoting *Black's Law Dictionary* (6th ed), citing Fed R Civ P 26(b)(3). If they were, this work

product is " 'cloaked with a qualified immunity without regard to whether [it was] prepared by an attorney or by some other person and whether such other person was engaged by an attorney.' " *Leibel v Gen Motors Corp*, 250 Mich App 229, 245; 646 NW2d 179 (2002) (citation omitted). Work product is prepared in anticipation of litigation " 'if the prospect of litigation is identifiable, either because of the facts of the situation or the fact that claims have already arisen.' " *Great Lakes Concrete Pole Corp v Eash*, 148 Mich App 649, 654 n 2; 385 NW2d 296 (1986), quoting *United States v Davis*, 636 F2d 1028 (CA 5, 1981). Thus, the doctrine "does not require that an attorney prepare the disputed document only after a specific claim has arisen." *Leibel*, 250 Mich App at 246. The doctrine does require, however, that the materials subject to the privilege pertain to more than just "objective facts." *Great Lakes*, 148 Mich App at 657; see also *Ostoin v Waterford Twp Police Dep't*, 189 Mich App 334, 337; 471 NW2d 666 (1991).

Along these lines, this Court has previously instructed that with regard to expert reports, although the facts and expert opinion they contain are not work product per se,

> "[t]he arrangement of those facts and opinions in a report, made directly responsive to the inquiries of an attorney, is, however, work product; a disclosure of the report itself would betray those thoughts, mental impressions, formulations of litigation strategy, and legal theories of the attorney that are protected by the work-product [privilege]. To hold that a party to a litigation could attain copies of those reports by merely making a demand for production without more would have the practical effect of chilling the ability of an attorney and his retained expert witness to freely communicate in writing. See also 2 Martin, Dean & Webster, Michigan Court Rules Practice, pp 173, 177." [*Franzel v Kerr Mfg Co*, 234 Mich App 600, 621-622; 600

NW2d 66 (1999) (alterations in original), quoting *Backiel v Sinai Hosp of Detroit*, 163 Mich App 774, 778; 415 NW2d 15 (1987).]

It is clear that the HRC report was prepared in anticipation of litigation. As the circuit court found, it is undisputed that both sides were already aware of the underlying factual problem, i.e., that the pipes had cracked. Left to be determined was the cause of those cracks. It is for this reason that defendants' counsel retained HRC. Even the HRC consulting request form expressly states that the HRC report was to "discuss [the] reasons for failure," "provide recommendations," "determine the cost of corrections," and "to develop a design review . . . *in case this goes to court*." (Emphasis added.)

That the prospect of litigation was readily identifiable and not a mere hypothetical preventative measure is equally clear. Indeed, not only had litigation previously arisen between the parties regarding other aspects of the project, but also one of defendants' representatives averred that during their prior negotiations the parties had discussed potential litigation concerning the subject of this lawsuit. The circuit court correctly held that the HRC report was prepared for this very purpose.[2]

While in many cases this conclusion may well be decisive as to the applicability of the work-product privilege, we are not prepared to make that ruling on the record before us. As noted, the report is not part of the record on appeal, and the circuit court did not

[2] Defendants' argument that MCR 2.302(B)(3)(a) triggers the work-product privilege is incorrect and does not otherwise support our conclusion. Indeed, that rule *recognizes* the existing work-product privilege and operates to limit an opposing party's access to work product absent a showing of substantial need and undue hardship. See *Messenger*, 232 Mich App at 639. That the report could fall within the ambit of this court rule would result from the fact that the work-product privilege applies in the first place, which is the central issue of plaintiffs' cross-appeal.

review the report in any way before making its determination. According to the parties, the report contains no indication that it was intended as exclusive work product, and although the report purportedly opines on the causes of the pipe cracking, it is possible the report may contain objective facts to which plaintiffs would otherwise be entitled. Even the circuit court found when ruling on the issue of substantial need that "everybody's got the same facts here" based on the presence of plaintiffs' representative at HRC's investigation. Without reviewing the report, however, neither we nor the circuit court are able to make this determination conclusively. See *Koster v June's Trucking, Inc*, 244 Mich App 162, 164; 625 NW2d 82 (2000) (holding that the trial court erred in failing to conduct an in camera inspection where the trial court ordered the defendants' entire claim file be turned over without determining whether the work-product privilege protected the documents); *Ostoin*, 189 Mich App at 339 ("The trial court abused its discretion by categorically denying discovery of the files without first conducting an in camera inspection to determine whether they contain relevant, nonprivileged material subject to discovery by plaintiff."); see also *United States v Deloitte LLP*, 391 US App DC 318, 328; 610 F3d 129 (2010) (the court "will therefore remand this question to the district court for the purpose of independently assessing whether the document was entirely work product, or whether a partial or redacted version of the document could have been disclosed"). Accordingly, the circuit court on remand should review the report in camera and determine which parts, if any, are not subject to work-product protection.[3]

[3] In reaching our conclusion, we do not imply that an in camera review is always necessary before ruling on the applicability of the work-product

C. WAIVER OF THE WORK-PRODUCT PRIVILEGE

This brings us to the question of whether plaintiffs waived the work-product privilege. "Like the attorney-client privilege, a party may waive work-product protections." *Augustine*, 292 Mich App at 421. Although waiver may occur upon voluntary disclosure of work product to a third party since such action necessarily "runs the risk the third party may reveal it, either inadvertently or under examination by an adverse party," *Lawrence v Bay Osteopathic Hosp, Inc*, 175 Mich App 61, 75; 437 NW2d 296 (1989) (MACKENZIE, J., concurring in part and dissenting in part), that principle is not ironclad, see *In re Columbia/HCA Healthcare Corp Billing Practices Litigation*, 293 F3d 289, 304 (CA 6, 2002) (" 'We conclude, then, that while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege.' "), quoting *Permian Corp v United States*, 214 US App DC 396, 401; 665 F2d 1214 (1981). To the contrary, MCR 2.302(B)(3)(a) expressly recognizes that where work product is prepared for certain third parties, the qualified privilege may be retained. As MCR 2.302(B)(3)(a) states:

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privilege, but only that this review is necessary here. Nor are plaintiffs correct that defendants must have intended to keep the report "absolutely confidential" or that litigation must be the "sole driving force" behind the report's creation. Contrary to plaintiffs' position, the former contention goes to waiver, *Leibel*, 250 Mich App at 243 ("whether the [work-product] privilege has been destroyed by this disclosure depends on whether the privilege has been waived"), and as for the latter, plaintiffs have cited no authority in support, see *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (issues not briefed or properly supported are abandoned), and otherwise ignore that HRC's consulting request form indicates that potential future litigation was the very purpose of this inquiry.

> Subject to the provisions of subrule (B)(4), a party may obtain discovery of documents and tangible things otherwise discoverable under subrule (B)(1) and prepared in anticipation of litigation or for trial by or for another party or another party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

This rule clearly identifies material subject to the work-product privilege. Pertinent here is the rule's provision that work product prepared either "by or for . . . another party's representative" qualifies. Defendants seize on this clause, arguing that because the rule expressly identifies an indemnitor as another party's representative, their disclosure to AECOM cannot constitute a waiver since the plain language of the court rule recognizes that disclosure as falling within the parameters of the privilege. As plaintiffs observe, however, defendants presented no evidence that the report was prepared "by or for" AECOM as the rule requires; it was only provided by defendants to AECOM after its preparation. But, while plaintiffs are correct on that point, this does not end our inquiry.

Related is defendants' claim that their common interest with AECOM prevents their disclosure of the HRC report from constituting a waiver. While courts in this state have not expressly addressed the so-called common-interest doctrine, several federal courts have concluded that the disclosure of work product to a third party does not result in a waiver if there is a reasonable expectation of confidentiality between the transferor (defendants) and the recipient (AECOM). See, e.g., *Deloitte*, 391 US App DC at 330. As the United States

Court of Appeals for the District of Columbia Circuit explained:

> A reasonable expectation of confidentiality may derive from common litigation interests between the disclosing party and the recipient. . . . [T]he existence of common interests between transferor and transferee is relevant to deciding whether the disclosure is consistent with the nature of the work product privilege. This is true because when common litigation interests are present, the transferee is not at all likely to disclose the work product material to the adversary. [*Id*. (quotations marks and citations omitted).]

See also *In re Subpoenas Duces Tecum*, 238 US App DC 221, 226; 738 F2d 1367 (1984) (finding waiver of the work-product privilege because, among other things, "appellants did not have any proper expectations of confidentiality which might mitigate the weight against them of such general considerations of fairness in the adversary process"); compare *In re Chevron Corp*, 633 F3d 153, 165 (CA 3, 2011) ("[T]he work-product doctrine protects an attorney's work from falling into the hands of an adversary, and so disclosure to a third party does not necessarily waive the protection of the work-product doctrine. Rather, the purpose behind the work-product doctrine requires a court to distinguish between disclosures to adversaries and disclosures to non-adversaries, and it is only in cases in which the material is disclosed in a manner inconsistent with keeping it from an adversary that the work-product doctrine is waived.") (quotations marks, citations, and brackets omitted), and *Lectrolarm Custom Sys, Inc v Pelco Sales, Inc*, 212 FRD 567, 572 (ED Cal, 2002) ("The existence of a common defense allows the parties and counsel allied in that defense to disclose privileged information to each other without destroying the privileged nature of those communications.").

Federal courts' application of the common-interest doctrine is instructive. Indeed, because both the state and federal rules recognizing the work-product doctrine are "virtually identical,"[4] *Leibel*, 250 Mich App at 245, our courts routinely "rely on federal cases for guidance in determining the scope of the work-product doctrine,"[5] *id*., which federal courts have found broader than the federal court rule's recognition of the doctrine, *Deloitte*, 391 US App DC at 324 (work-product doctrine "partially codified" in Rule 26(b)(3)); *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F3d 379, 383 (CA 2, 2003) (work-product doctrine "codified in part" in Rule 26(b)(3)).

Under the circumstances of this case, application of the common-interest doctrine is straightforward. We conclude that defendants had a reasonable expectation of confidentiality in sharing the HRC report with AECOM. As defendants' indemnitor for damages resulting from the design of the sewer construction project, the indemnification agreement required AECOM to cover losses

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[4] Federal Rule of Civil Procedure 26(b)(3) provides in relevant part:

> (A) *Documents and Tangible Things*. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:
>
> (*i*) they are otherwise discoverable under Rule 26(b)(1); and
>
> (*ii*) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

[5] "Michigan's civil work-product privilege may be traced to the common-law work-product privilege that was established by the United States Supreme Court in *Hickman v Taylor*, 329 US 495; 67 S Ct 385; 91 L Ed 451 (1947)." *People v Gilmore*, 222 Mich App 442, 451; 564 NW2d 158 (1997).

caused "in whole or in part by the negligent acts or omissions of the ENGINEER." AECOM therefore undoubtedly shares defendants' interest in prevailing lest AECOM be on the hook financially. To be sure, it defies common sense, then, to suggest that defendants and AECOM did not share the common interest of preventing defendants' work product from falling into the hands of their adversary, even though AECOM is not a party to this action. See *Lectrolarm Custom Sys*, 212 FRD at 572 ("Where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel, communications may be deemed privileged whether litigation has been commenced against both parties or not.") (quotation marks and citation omitted).[6] This is the very goal the work-product privilege protects, and it is consistent with MCR 2.302(B)(3)(a), which would otherwise recognize as privileged material prepared in anticipation of litigation for an indemnitor like AECOM.

The circuit court's finding that "AECOM sounds like a potential adversary" does not alter our conclusion. Indeed, even assuming this is true, "the possibility of a future dispute between [the receiving party] and [the

[6] Plaintiffs maintain that because defendants' joint defense agreement was not in place until *after* AECOM's disclosure, defendants may not assert the common-interest doctrine. This is not the rule, however. Indeed, while "a reasonable expectation of confidentiality may be rooted in a confidentiality agreement or similar arrangement between the disclosing party and the recipient," *Deloitte*, 391 US App DC at 330, the absence of such an agreement is not decisive as to whether parties share a common interest, see *Lennar Mare Island, LLC v Steadfast Ins Co*, ___ F Supp 2d ___, ___; opinion of the Eastern District of California, issued April 7, 2014 (Docket No. 2:12-cv-2182) (explaining that the common-interest exception in the context of the work-product privilege is construed more broadly than in the context of the attorney-client privilege, and that therefore the existence of a joint defense agreement merely serves as "further evidence" that a disclosure did not waive the work-product privilege).

disclosing party] does not render [the receiving party] a potential adversary for the present purpose. If it did, any voluntary disclosure would constitute waiver." *Deloitte*, 391 US App DC at 329; see also *Schaeffler v United States*, 22 F Supp 3d 319, 337 (SD NY, 2014) ("The mere possibility that a dispute may arise at some point in the future between the disclosing party and the receiving party is insufficient to create a waiver of the work product protection."). Rather, "[w]ork product protection is waived only if disclosure to a third party substantially increases the risk that it will be obtained by an adversary . . . . This risk must be evaluated from the viewpoint of the party seeking to take advantage of the doctrine." *United States v Ghavami*, 882 F Supp 2d 532, 541 (SD NY, 2012).

We cannot see how from defendants' viewpoint the disclosure of the report to AECOM would substantially increase the risk of plaintiffs obtaining the report. Rather, given AECOM's common interest with defendants in defeating plaintiffs' allegations, the opposite would be true, especially considering that were defendants to prevail, AECOM would avoid the imposition of liability under the indemnification agreement.[7] It bears emphasis that this conclusion is also consistent with this Court's application of MCR 2.302(B)(3)(a), which affords work-product protection despite a potential conflict between a party and its representative. See *Koster*, 244 Mich App at 166 (holding that MCR 2.302(B)(3)(a) may apply to material prepared by or for a party's insurer despite the fact that " 'the tripartite relationship between insured, insurer, and defense counsel

[7] Plaintiffs' reliance on *Cooey v Strickland*, 269 FRD 643, 653 (SD Ohio, 2010) for the proposition that an attorney's presence is necessary to preserve application of the common-interest doctrine is misplaced since the application of the doctrine in that case pertained to preserving the attorney-client privilege.

contains rife possibility of conflict' because '[t]he interest of the insured and the insurer frequently differ' ") (alteration in original), quoting *Atlanta Int'l Ins Co v Bell*, 438 Mich 512, 519; 475 NW2d 294 (1991). In short, the circuit court erred in ruling that defendants' potential adversarial relationship with AECOM vitiated the work-product privilege.

Defendants are not yet in the clear, however. Indeed, although argued and briefed below, the circuit court did not address whether defendants disclosed the HRC report to a representative of Safeco. This is essential to determining whether defendants waived the privilege, for defendants do not and cannot argue that no waiver would have resulted from that alleged disclosure. This is because defendants could not reasonably expect that such a disclosure would insulate the report from an adversary. But, since the parties rely on conflicting affidavits concerning whether the deputy drain commissioner in fact disclosed the report to the Safeco representative, we are in no position to resolve this issue. The circuit court must make the necessary findings on remand to determine whether defendants sufficiently disclosed the report to Safeco and, in so doing, waived the work-product privilege.

Before concluding, we note briefly that plaintiffs have advanced two additional arguments in favor of waiver. The first pertains to defendants' alleged promise to share the HRC report with them. The second pertains to the effect of defendants filing their counterclaims, i.e., whether filing their counterclaims constituted a waiver.[8] However, despite the fact that plaintiffs' *entire* motion hinged on the issue of waiver, plaintiffs presented neither additional contention be-

[8] See *Howe v Detroit Free Press, Inc*, 440 Mich 203, 221-222; 487 NW2d 374 (1992).

low. Thus, even setting aside our reluctance to address these unpreserved arguments, plenary review is otherwise improper since the circuit court may determine on remand whether plaintiffs may attempt these proverbial second (and third) bites at the apple.

III. CONCLUSION

We affirm the circuit court's order granting plaintiffs' motion on the basis that the report constitutes material prepared in anticipation of litigation, but we vacate the order to the extent that it found the work-product privilege applicable to the report in its entirety. We further reverse the circuit court's order to the extent the court found defendants had "waived any privilege" as to the report. We remand for proceedings consistent with this opinion, including an in camera review of the report to determine the scope of the work-product doctrine's application, for resolution of whether defendants disclosed the report to Safeco, and whether any such disclosure constituted a waiver of the work-product privilege.

We do not retain jurisdiction. No costs, neither party having prevailed in full. MCR 7.219.

WHITBECK, P.J., and FITZGERALD, J., concurred with MURRAY, J.

LINDEN v CITIZENS INSURANCE COMPANY OF AMERICA

Docket No. 312702. Submitted April 1, 2014, at Lansing. Decided November 13, 2014, at 9:25 a.m. Leave to appeal sought.

India Arne Thomas, a minor, was injured in an automobile accident on July 17, 2001. No identifiable insurance coverage applied to her injury. On June 24, 2010, Howard T. Linden, conservator of the estate of India Arne Thomas, a disabled minor, gave written notice of India's claim for personal protection insurance (PIP) benefits under the no-fault motor vehicle insurance act to the Michigan Assigned Claims Facility (MACF). The MACF assigned the claim to Citizens Insurance Company of America. Citizens (hereafter defendant) denied the claim on the basis that it was time-barred under MCL 500.3145(1) and MCL 500.3174. On December 8, 2010, Linden (hereafter plaintiff) brought an action in the Ingham Circuit Court to recover PIP benefits for India. The court, Rosemarie E. Aquilina, J., denied defendant's motion for summary disposition or partial summary disposition and granted partial summary disposition in favor of plaintiff on all issues raised in defendant's motion. The court ruled that the one-year period of limitations in MCL 500.3145(1) was tolled by the minority/insanity tolling provisions of MCL 600.5851(1). The court also ruled that the one-year-back rule of MCL 500.3145(1) did not apply to plaintiff because MCL 500.3174 does not contain such a rule and because the doctrine of *contra non valentem* prevents a time prescription from running against a person incapable of protecting their rights, such as India. The Court of Appeals granted defendant's application for leave to appeal.

The Court of Appeals *held*:

1. There is no dispute that plaintiff's action is a civil action. A reasonable construction of the phrase "under this act" in MCL 600.5851(1) is that all civil actions are brought under the Revised Judicature Act, whether based on statute, common law, or contract.

2. The trial court properly held that the minority/insanity tolling provisions of MCL 600.5851(1) apply to the one-year period of limitations provided in the first sentence of MCL 500.3145(1). The one-year-back rule contained in the third

sentence of MCL 500.3145(1) is not subject to the minority/insanity tolling provisions of MCL 600.5851(1). The trial court erred by not applying the one-year-back rule.

3. The trial court erred by concluding that the equitable doctrine of *contra non valentem* precluded all time limitations of MCL 500.3145(1) from running against plaintiff. Plaintiff did not allege any unusual circumstance, such as fraud or mutual mistake, that would provide a basis for involving judicial equitable powers as a means to disregard the plain language of MCL 500.3145(1).

Affirmed in part, reversed in part, and remanded.

LIMITATION OF ACTIONS — NO-FAULT ACT — REVISED JUDICATURE ACT — ONE-YEAR-BACK RULE.

The one-year period of limitations provided in the first sentence of MCL 500.3145(1) is subject to the minority/insanity tolling provisions of MCL 600.5851(1); the one-year-back rule contained in the third sentence of MCL 500.3145(1) is not subject to the minority/insanity tolling provisions of MCL 600.5851(1).

Sinas, Dramis, Brake, Boughton & McIntyre, PC (by *George T. Sinas, Timothy J. Donovan*, and *Joel T. Finnell*), for plaintiff.

Anselmi & Mierzejewski, PC (by *John D. Ruth* and *Lawrence J. Pochron, Jr.*), for defendant.

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM. In this action for personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq.*, defendant appeals by leave granted[1] the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7) or, in the alternative, partial summary disposition under MCR 2.116(C)(10), and granting partial summary disposition in favor of plaintiff. We affirm in part, reverse in part, and remand.

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[1] *Thomas Estate v Citizens Ins Co*, unpublished order of the Court of Appeals, entered July 15, 2013 (Docket No. 312702).

Plaintiff brought this action to recover PIP benefits on behalf of India Arne Thomas (India), for accidental bodily injuries arising out of a July 17, 2001 automobile accident. It is undisputed that India was a minor at the time of the accident. Plaintiff alleges that India sustained massive catastrophic brain damage and other extensive physical injuries in the accident, resulting in her being confined to a wheelchair and requiring around-the-clock life-sustaining medical care, monitoring, and supervision. It is also undisputed that no identifiable coverage applied to India's injury and that written notice of India's claim for PIP benefits was first given to the Michigan Assigned Claims Facility (MACF) on June 24, 2010.

The MACF assigned the claim to defendant, who denied PIP benefits on the basis that plaintiff's claim was time-barred under MCL 500.3145(1) and MCL 500.3174. Plaintiff filed this action on December 8, 2010. Following a hearing, the trial court denied defendant's motion for summary disposition or partial summary disposition and it granted partial summary disposition in favor of plaintiff on all issues raised in defendant's motion. First, the trial court ruled that the one-year period of limitations in MCL 500.3145(1) was tolled by the minority/insanity tolling provisions of MCL 600.5851(1). Second, the trial court ruled that the one-year-back rule of MCL 500.3145(1) did not apply to plaintiff because MCL 500.3174 does not contain such a rule and because the equitable doctrine of *contra non valentem* prevents a time prescription from running against a person incapable of protecting their rights, such as India.

This Court reviews de novo both questions regarding the interpretation and application of statutes and a

decision to grant or deny a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006).

When considering a motion for summary disposition under MCR 2.116(C)(7), "the trial court must accept as true the allegations of the complaint unless contradicted by the parties' documentary submissions." *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 443; 761 NW2d 846 (2008). If the pleadings and documentary evidence reveal no genuine issues of material fact, the court decides whether a claim is barred as a matter of law. *Id*. at 443-444. Summary disposition under MCR 2.116(C)(10) is appropriate when, considering the evidence and all legitimate inferences in the light most favorable to the nonmoving party, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. *Coblentz*, 475 Mich at 567-568.

Defendant first argues that, under MCL 500.3145(1) and MCL 500.3174, plaintiff cannot maintain this action because written notice of injury was not given to the MACF within one year of the accident. We disagree.

The primary goal of interpreting statutory language is to effectuate the Legislature's intent. *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246; 801 NW2d 629 (2010). If the language used in the statute is clear, the Legislature must have intended the meaning it plainly expressed, and the statute must be enforced as written. *Id.* at 246-247. "Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent." *Whitman v City of Burton*, 493 Mich 303, 312; 831 NW2d 223 (2013). A statutory provision is ambiguous only if it irreconcilably conflicts with another pro-

vision or when it is equally susceptible to more than one meaning. *Lafarge Midwest*, 290 Mich App at 247.

If construction of a statute is necessary, a "court must consider the object of the statute in light of the harm it is designed to remedy and apply a reasonable construction that best accomplishes the purposes of the statute." *C D Barnes Assoc, Inc v Star Heaven, LLC*, 300 Mich App 389, 408; 834 NW2d 878 (2013). Every word of the statute is presumed to have some meaning, so courts should avoid any construction that would render any part of the statute surplusage or nugatory. *Whitman*, 493 Mich at 311-312. Statutes that relate to the same subject or share a common purpose are *in pari materia* and must be read together as one law. *Titan Ins Co v State Farm Mut Auto Ins Co*, 296 Mich App 75, 84; 817 NW2d 621 (2012).

Under the no-fault act, uninsured claimants may obtain PIP benefits through an assigned claims plan. MCL 500.3172. Previously, uninsured persons were required to file their claims through the MACF.[2] MCL 500.3172; 2012 PA 204. At the time relevant to this action, MCL 500.3174 provided as follows:

> A person claiming through an assigned claims plan shall notify the facility of his claim within the time that would have been allowed for filing an action for personal protection insurance benefits if identifiable coverage applicable to the claim had been in effect. The facility shall promptly assign the claim in accordance with the plan and notify the claimant of the identity and address of the insurer to which the claim is assigned, or of the facility if the claim is assigned to it. An action by the claimant shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have

[2] Following the enactment of 2012 PA 204, such claims are now filed through the Michigan Automobile Insurance Placement Facility. MCL 500.3171.

> been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later.

Defendant is correct that the first sentence of MCL 500.3174 contains a notice provision, but it only required plaintiff to notify the MACF of the claim "within the time that would have been allowed for filing an action for [PIP] benefits if identifiable coverage applicable to the claim had been in effect." MCL 500.3174. The third sentence limits the time in which a plaintiff could bring an action for PIP benefits, stating that it "shall not be commenced more than 30 days after receipt of notice of the assignment or the last date on which the action could have been commenced against an insurer of identifiable coverage applicable to the claim, whichever is later." Thus, plaintiff timely notified the MACF of her claim and timely filed her action if she accomplished both within the time that would have been allowed for her to file an action if identifiable coverage had been available.

The time that would have been allowed to file an action if identifiable coverage had been available is governed by MCL 500.3145(1), which provides, in pertinent part:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits

> for any portion of the loss incurred more than 1 year before the date on which the action was commenced.

As our Supreme Court has explained, the statute contains two distinct limitations on the time for commencing an action. *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 61, 70; 718 NW2d 784 (2006).[3] Under the first half of the first sentence, a claimant may file an action for benefits not later than one year after the date of the accident causing injury. *Id.* Under the second half of the first sentence and the second sentence, a claimant may file an action for benefits at any time within one year of the most recent allowable expense if the claimant gave written notice of injury to the insurer within one year after the accident or the insurer previously paid PIP benefits for the injury. *Id.* at 70 (stating that "in cases where the insured has given notice or the insurer has previously paid benefits," the claimant "is subject to the separate and distinct period of limitations for filing suit that starts at the time of the most recent loss").

Notably, MCL 500.3145(1) does not require a claimant to give written notice of injury if an action is commenced within one year of the accident. And if MCL 600.5851(1) tolled the one-year period of limitations for filing an action for PIP benefits, plaintiff's deadline to notify the MACF of her claim under MCL 500.3174 would be tolled to the same extent.

MCL 600.5851(1) provides as follows:

> Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action *under this act* is under 18 years of age or insane at the time the claim accrues, the person or those claiming

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[3] The Court's decision in *Cameron* was overruled by *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010). In *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 204; 815 NW2d 412 (2012), however, the Court overruled *Regents* and reinstated *Cameron*.

> under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852. [Emphasis added.]

There is no dispute on appeal that plaintiff is entitled to the protections of MCL 600.5851(1). Instead, the issue is whether MCL 600.5851(1) applies to an action for PIP benefits under the no-fault act.

Defendant argues that MCL 600.5851(1) cannot be invoked in an action under the no-fault act because under a 1993 amendment, the statute was expressly limited to actions "under *this act*," meaning the Revised Judicature Act (RJA), and an action under the no-fault act is not under the RJA. Defendant asserts that the meaning of the phrase "under this act" is an open question for this Court to decide in light of *Cameron*, 476 Mich at 64, which vacated this Court's ruling that the tolling provision at issue does not apply to the statute of limitations for no-fault actions because it was unnecessary to reach the issue. Plaintiff responds, without citation of controlling authority, that all civil actions are brought "under" the RJA and argues that the Michigan Supreme Court has never doubted that MCL 600.5851(1) applies to actions under the no-fault act.

In *Klida v Braman*, 278 Mich App 60; 748 NW2d 244 (2008), this Court decided the meaning of the phrase "under this act" after a lengthy discussion and analysis. The Court concluded that all civil actions are brought "under the RJA," whether based on statute, common law, or contract, and that MCL 600.5851(1) is applicable to such actions. The Court opined:

> We conclude that a reasonable construction of the phrase "under this act" contained within the minority

> tolling provision, MCL 600.5851(1), that best accomplishes the statute's purpose is that all civil actions are brought "under" the RJA, including plaintiff's breach of contract action. We discern no persuasive reason to ascribe a legislative intent to limit the application of MCL 600.5851(1) to causes of action arising from a purported violation of a specific statutory provision contained within the RJA or to causes of action for which the applicable statute of limitations is provided by the RJA. And, considering the RJA's remedial character, the protective purpose of the minority tolling provision, as well as the harm it was designed to remedy—the deprivation of legal rights—we conclude that whether the cause of action arises by statute, common law, or contract, the minority tolling provision is applicable. To deny minors whose cause of action accrues during their disability the opportunity to pursue their otherwise unasserted legal rights would be the antithesis of the firmly-rooted public policy that such minors are to be protected until one year after they reach the age of majority. Such persons would be denied their legal rights simply because they labored under a legal disability. [*Klida*, 278 Mich App at 74-75 (citation omitted).]

Accordingly, because there is no dispute that plaintiff's action is a civil action, the minority/insanity tolling provisions of MCL 600.5851(1) are applicable.

We must next consider whether the minority/insanity tolling provisions of MCL 600.5851(1) apply to the one-year statute of limitations and the one-year-back rule in MCL 500.3145(1). Defendant argues that the tolling provisions cannot apply to the limitations provided in the first sentence of MCL 500.3145(1) because they are notice provisions, not statutes of limitations. But as discussed already in this opinion, "MCL 500.3145(1) contains two limitations on the time for commencing an action . . . ." *Cameron*, 476 Mich at 61. Accordingly, the first sentence is considered a "statute of limitations," to which MCL 600.5851(1) applies. See *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 207-208,

214; 815 NW2d 412 (2012). However, MCL 500.3145(1) also contains a limitation on "the period for which benefits may be recovered." *Cameron*, 476 Mich at 61. Specifically, the third sentence of MCL 500.3145(1) provides that a claimant "may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced." MCL 500.3145(1). This limitation on damages is commonly referred to as the "one-year-back rule." See *Cameron*, 476 Mich at 62; *Joseph*, 491 Mich at 214.

Unlike the statute of limitations, the one-year-back rule is not subject to the minority/insanity tolling provisions of MCL 600.5851(1). *Joseph*, 491 Mich at 203, 222. Further, the one-year-back rule "must be enforced by the courts of this state as our Legislature has written it . . . ." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005); see also *Henry Ford Health Sys v Titan Ins Co*, 275 Mich App 643; 741 NW2d 393 (2007).

The trial court nevertheless ruled that the one-year-back rule of MCL 500.3145(1) did not apply to a plaintiff seeking PIP benefits under an assigned claims plan because MCL 500.3174 does not contain a one-year-back rule. Defendant, relying on *Bronson Methodist Hosp v Allstate Ins Co*, 286 Mich App 219; 779 NW2d 304 (2009), argues that the trial court erred. Plaintiff responds that *Bronson Methodist Hosp* did not actually decide whether the one-year-back-rule applies to claims under an assigned claims plan because the parties implicitly assumed that it applied. Contrary to plaintiff's contention, we conclude that *Bronson* squarely decided this issue. The Court, citing *Henry Ford Health Sys*, 275 Mich App at 646-647, noted that "[c]laims filed through the MACF remain subject to the one-year-back rule found in MCL 500.3145(1)." *Bronson Methodist*

Hosp, 286 Mich App at 225. The Court reasoned that the Legislature's "omission of language in MCL 500.3174 extending the recovery limitation was intentional" and, therefore, "recovery of benefits remains subject to the one-year-back rule." *Id*. at 228. Thus, the Court explicitly held that "MCL 500.3174 does not extend the recovery limitation found in MCL 500.3145(1) because the language used by the Legislature in MCL 500.3174 unambiguously describes only an extension of the statute of limitations period." *Bronson Methodist Hosp*, 286 Mich App at 229. Thus, the trial court erred by not applying the one-year-back rule on the basis of MCL 500.3174.

Lastly, defendant argues that the trial court erred by concluding that the equitable doctrine of *contra non valentem* precluded all time limitations of MCL 500.3145(1) from running against plaintiff. We agree.

Black's Law Dictionary (9th ed) defines the "doctrine of *contra non valentem*" as follows: "The rule that a limitations or prescriptive period does not begin to run against a plaintiff who is unable to act, usu. because of the defendant's culpable act, such as concealing material information that would give rise to the plaintiff's claim."

Plaintiff has failed to establish that the doctrine of *contra non valentem* is recognized and applied in Michigan. Plaintiff asserts that the doctrine of *contra non valentem* is a venerable common-law principle that has been recognized in this Court for at least 25 years and that it precludes all time limitations in MCL 500.3145(1) from running against plaintiff. In support of this assertion, plaintiff cites one published decision, *Kalakay v Farmers Ins Group*, 120 Mich App 623; 327 NW2d 537 (1982), nonbinding under MCR 7.215(J)(1), in which this Court referred to the doctrine but stated

that it did not apply under the circumstances, and two unpublished decisions similarly ruling that the doctrine did not apply under the circumstances.

Moreover, our Supreme Court has held that courts may not use their equitable powers to disregard the one-year-back rule on the basis that the statute itself is unfair.[4] In *Devillers*, 473 Mich at 589, the Court rejected the view that "judges are omniscient and may, under the veil of equity, supplant a specific policy choice adopted on behalf of the people of Michigan by their elected representatives in the Legislature." The Court explained the danger of such an approach under our constitutional system of separation of powers:

> Indeed, if a court is free to cast aside, under the guise of equity, a plain statute such as § 3145(1) simply because the court views the statute as "unfair," then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. Instead, an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. While such an approach might be extraordinarily efficient for a particular litigant, the amount of damage it causes to the separation of powers mandate of our Constitution and the overall structure of our government is immeasurable. [*Id.* at 591.]

While acknowledging that "courts undoubtedly possess equitable power," the Court stated that "such power has traditionally been reserved for 'unusual circumstances' such as fraud or mutual mistake." *Id*. at 590.

In this case, plaintiff has not alleged any unusual circumstance, such as fraud or mutual mistake, that would provide a basis for invoking judicial equitable

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[4] In *Devillers*, Justice CAVANAGH would have applied "equitable tolling," which he considered another name for the doctrine of *contra non valentem*, to the one-year-back rule. *Devillers*, 473 Mich at 594 n 1 (CAVANAGH, J., dissenting).

powers as a means to disregard the plain language of MCL 500.3145(1). Although plaintiff's circumstances are unfortunate, this Court is bound to enforce the one-year-back rule as the Legislature has written it. *Devillers*, 473 Mich at 586.

We affirm in part, reverse in part, and remand for proceedings consistent with this opinion. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

WILDER, P.J., and FITZGERALD and MARKEY, JJ., concurred.

HOFFENBLUM v HOFFENBLUM

Docket No. 317027. Submitted October 14, 2014, at Detroit. Decided November 18, 2014, at 9:00 a.m. Leave to appeal denied 498 Mich 866.

Rachel, Robyn, and Jared Hoffenblum brought an action for conversion in the 52-4 District Court, alleging that their father, Harvey Hoffenblum, had wrongfully exerted dominion over trust accounts that were established on their behalf when they were minors under the Michigan Uniform Transfers to Minors Act (UTMA), MCL 554.521 *et seq*. Defendant was the custodian of the accounts. When defendant and plaintiffs' mother, Sheila Waldman, had divorced, the judgment of divorce had required defendant to pay 52% of plaintiffs' unreimbursed medical expenses. Defendant maintained health insurance for plaintiffs, but a dispute arose regarding medical bills from out-of-network providers that the insurance company refused to pay. The court eventually entered an order providing that Waldman alone would pay for the out-of-network medical expenses and defendant would pay for network expenses. When defendant experienced financial difficulties, his financial advisor suggested that he withdraw the money from plaintiffs' UTMA accounts to reimburse himself for plaintiffs' medical expenses that he had previously paid. Defendant withdrew the money and used it to pay an attorney to seek parenting time. When the withdrawal of the funds was discovered by plaintiffs, Waldman allegedly had her attorney request that the funds be returned. Defendant alleged that he was not asked to return the money. The money was not returned. The court, Kirsten Nielsen Hartig, J., entered a judgment of no cause of action on the basis of a determination that plaintiffs had failed to prove the elements of the conversion claim. The court held that plaintiffs had an enforceable right to the money, defendant did not wrongly convert the money, plaintiffs failed to ask for the return of the money before filing the suit, and plaintiffs failed to prove that defendant knew that what he was doing was not authorized. Plaintiffs appealed in the Oakland Circuit Court. The circuit court, Daniel P. O'Brien, J., reversed the district court's holdings that defendant did not wrongly convert the money and that scienter was required and remanded for reconsideration of the determination that plaintiffs never asked for the money to be returned in

light of Waldman's testimony. On remand, the district court, Kirsten Nielsen Hartig, J., affirmed its original holding that plaintiffs did not reasonably request that the funds be returned and ordered that treble damages were not appropriate. Plaintiffs appealed again in the circuit court, Daniel P. O'Brien, J., which affirmed the judgment of the district court. The Court of Appeals granted plaintiffs' application for leave to appeal the circuit court order. Defendant cross-appealed.

The Court of Appeals *held*:

1. The plain language of MCL 554.539(3) requires the expenditures of custodial property to be "in addition to" and "not in substitution for . . . an obligation of a person to support the minor." MCL 554.539(1) provides that payments to the minor or for the minor's benefit should be made without regard to the duty or ability of the custodian personally or of any other person to support the minor.

2. The reimbursement taken by defendant substituted for or took the place of an obligation of a person to support the minor, contrary to MCL 554.539(3). Defendant or Waldman, or both defendant and Waldman, were obligated to pay for plaintiffs' out-of-network medical expenses and defendant used the UTMA money to reimburse himself for those expenses. Defendant wrongfully exerted dominion over plaintiffs' UTMA money. The circuit court properly reversed the district court's finding that defendant properly withdrew the money to reimburse himself for medical expenses.

3. Had UTMA money been withdrawn and paid to the plaintiffs' medical providers directly, the payments would still have taken the place of an obligation of defendant or Waldman, or both, contrary to MCL 554.539(3). Because defendant had an obligation to pay plaintiffs' medical expenses, he was not authorized to use UTMA money to satisfy those expenses or to reimburse himself from the UTMA accounts for payments he made for those expenses from his own separate funds.

4. A demand for the return of the UTMA money was not required because defendant wrongfully acquired possession of the money for his own use and benefit. The circuit court erred by affirming the district court's finding that plaintiffs failed to demand the return of their money because, as a matter of law, no demand was required by plaintiffs.

5. The district court's decision to not award treble damages was within the range of principled outcomes and was not an abuse of discretion. The circuit court did not err by affirming that decision.

6. The portion of the circuit court's order that reversed the portion of the district court's decision that held that defendant did not wrongfully exert dominion over the money in the UTMA accounts and the portion of the circuit court's subsequent order regarding treble damages was affirmed. The portion of the circuit court's order affirming the district court's ruling regarding plaintiffs' demand for the return of the money was reversed. The matter is remanded to the district court for entry of a judgment for plaintiffs.

Affirmed in part, reversed in part, and remanded.

1. UNIFORM TRANSFERS TO MINORS ACT — EXPENDITURES OF CUSTODIAL PROPERTY.

The Michigan Uniform Transfers to Minors Act requires the expenditures of custodial property to be in addition to, and not as substitution for, an obligation of a person to support the minor; payments to the minor or for the minor's benefit are to be made without regard to the duty or ability of the custodian personally or of any other person to support the minor (MCL 554.539(1) and (3)).

2. CONVERSION — DEMAND FOR RETURN OF PROPERTY.

A demand for the return of property wrongfully acquired or appropriated by the defendant for his or her own use and benefit is unnecessary to support an action for conversion of the property.

Donald L. Bramlage, Jr., for plaintiffs.

Mark E. Crane, PLLC (by *Mark E. Crane* and *Ryan M. O'Neil*), for defendant.

Before: FITZGERALD, P.J., and WILDER and OWENS, JJ.

WILDER, J. Plaintiffs, Rachel Hoffenblum, Robyn Hoffenblum, and Jared Hoffenblum, appeal by leave granted, and defendant, Harvey Hoffenblum, cross-appeals, the circuit court order that affirmed the judgment of the district court of no cause of action in this case alleging conversion. We affirm in part and reverse in part.

I

This case arises out of plaintiffs' assertion that defendant, their father, wrongfully exerted dominion over the money in their trust accounts. At trial the parties stipulated that when plaintiffs were minors, financial accounts were established on their behalf at some point before October 2004 under the Michigan Uniform Transfers to Minors Act (UTMA), MCL 554.521 *et seq*., that defendant was the custodian of the accounts, and that in October and November 2004, defendant was financially unstable and removed a total of $18,305.43 from the children's accounts.[1]

Plaintiffs' mother, Sheila Waldman, testified that she and defendant divorced on September 3, 1997, after a "bitter" proceeding. Defendant claimed that, after the divorce, Waldman attempted to poison plaintiffs' opinion of him.

According to the parties' pleadings, under the judgment of divorce, defendant was required to pay 52% of any of plaintiffs' unreimbursed medical expenses. Defendant testified that he maintained health insurance for plaintiffs. But, according to defendant, Waldman unilaterally sent plaintiffs to out-of-network providers, resulting in over $20,000 in medical bills from 1997 to 2004, which defendant's insurance company refused to pay.

The certified record includes many requests for health care expense payments by Waldman to defendant through the friend of the court from about 1999 to 2001. Defendant testified that the court ordered him to pay these medical bills, with the exception of expenses for out-of-network providers. An October 18, 2001 order

[1] Statements showing plaintiffs' empty UTMA accounts are in the certified record.

admitted at trial provided that Waldman, alone, would pay for out-of-network medical expenses and defendant would pay for network expenses. A September 19, 2006 order also provided: "The parties shall not use out-of-network providers."

Defendant testified that, when he discussed his tenuous financial situation with his financial advisor (Harvey Markzon), Markzon suggested that he utilize plaintiffs' UTMA accounts. As a result, defendant testified that, in the fall of 2004, he withdrew money from the accounts and reimbursed himself for medical expenses that he had previously paid. He did not remember when he had paid the medical expenses, but testified that he used the money withdrawn from the UTMA accounts to pay an attorney to seek parenting time.

In August 2005, Rachel attempted to withdraw money from her UTMA account for books for college and learned the account was empty. Waldman testified that she subsequently instructed her attorney to demand the money be returned to plaintiffs' UTMA accounts. According to Waldman, her attorney wrote a letter, but defendant did not return the money. Defendant testified that no one ever asked him to return the money.

Following the bench trial, the district court addressed four issues it found applicable to the conversion claim: (1) plaintiffs had an enforceable right to the money, (2) defendant did not wrongly convert the money—

> I don't care legally whether Mr. Hoffenblum paid a fee and then reimbursed or whether he paid a doctor specifically. . . . I don't care whether [defendant] was ordered by a Judge to pay for his children's care or whether he was morally required to pay for their care as a parent. . . . I do believe that $20,000.00 for psychological care . . . was ab-

> solutely necessary . . . . And I don't question whether or not they needed to go to the psychiatrist. However, I do believe that that . . . would be an extraordinary expense covered by UTMA.

(3) plaintiffs failed to ask for the money back before filing a claim—

> The third [requirement for conversion] is did the plaintiffs ever ask for it back. Plaintiffs' counsel described that as a silly requirement. I would more — I would describe it as a technical requirement, but a requirement nonetheless. A conversion is a very strong allegation to make and you can't say we asked for it back once we filed. So I do believe that the plaintiffs failed to ask for the money back prior to filing the claim.

and (4) defendant consulted his financial advisor before taking the money, who opined that all the withdrawals were appropriate, so plaintiffs failed to prove that defendant knew that what he was doing was wrong. The district court entered a judgment of no cause of action on the basis of the determination that plaintiffs had failed to prove the elements of their conversion claim.

Plaintiffs appealed in the circuit court, which reversed the district court's finding that defendant did not wrongly convert the money, ruling that the amount withdrawn from the UTMA accounts did not benefit plaintiffs because they had already received the benefit of the medical services. The circuit court also reversed the district court's ruling that scienter was required and remanded for reconsideration of the district court's finding that plaintiffs never asked for the money to be returned in light of Waldman's testimony.

The district court held a hearing on remand and found:

> The failure to produce the actual letter sent by Ms. Waldman's own attorney or a letter rejecting the request

> weighs heavily on this Court's decision. The Plaintiff failed to call her previous attorney. The Plaintiff has the burden of proof to prove at trial that the request was made. . . . I found then and I find now, that Ms. Waldman's testimony did not satisfy her burden that the letter was actually sent. Plaintiff did not confirm receipt of the letter.

The district court inquired of the parties whether a ruling on the question of treble damages was desired, and plaintiffs requested the district court's ruling, so that both issues would be eligible for consideration on appeal. The district court then ruled:

> I do find and I will note that the Plaintiff did not brief this issue in his brief to this Court. What I asked is whether [MCL] 600.2915 [sic] requires treble damages or if it is discretionary. Treble damages in my opinion, is used to penalize a party. I find that the Defendant was acting on advice from his financial planner, and that he did not act with malice. Therefore, I would not issue treble damages.

The district court entered the followed order on remand:

> IT IS HEREBY ORDERED that the original finding of this Court to the effect that the plaintiffs did not reasonably request for the funds to be returned is reaffirmed.
>
> IT IS FURTHER ORDERED that treble damages are not appropriate.

Plaintiffs appealed again in the circuit court, arguing that the district court exceeded the scope of the circuit court's remand order by considering (1) whether Waldman "reasonably" demanded the money be returned and (2) treble damages. The circuit court concluded that the district court acted within the scope of its authority and affirmed the order entered by the district court on remand.

This Court granted plaintiffs' application for leave to appeal and ordered the parties to also address whether

the district court erred as a matter of law by ruling that a demand was required under the circumstances of this case. *Hoffenblum v Hoffenblum*, unpublished order of the Court of Appeals, entered February 19, 2014 (Docket No. 317027).

II

Defendant argues that the circuit court erred by ruling on appeal that he wrongfully exerted dominion over plaintiffs' money in the UTMA accounts and by reversing the district court's finding that defendant properly withdrew the money to reimburse himself for medical expenses. We disagree.

To the extent that this case involves the interpretation and application of a statute, specifically the provision for delivery, payment, or expenditure by a custodian in MCL 554.539, our review is de novo. *Aroma Wines & Equip, Inc v Columbian Distrib Servs, Inc*, 303 Mich App 441, 451; 844 NW2d 727 (2013). 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).

"Conversion, both at common law and under the statute, is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or inconsistent with the rights therein.' " *Aroma*, 303 Mich App at 447, quoting *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (quotation marks and citation omitted). The act is wrongful when it is inconsistent with the ownership rights of another. *Check Reporting Servs, Inc v Mich Nat'l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991).

Gifts made pursuant to the UTMA are irrevocable and property placed in a UTMA account is "indefeasibly vested in the minor . . . ." MCL 554.536(2); see also *People v Couzens*, 480 Mich 240, 248; 747 NW2d 849 (2008). MCL 554.539 provides:

> (1) A custodian may deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor without court order, without regard to the duty or ability of the custodian personally or of any other person to support the minor, and without regard to other income or property of the minor that may be applicable or available for that purpose.
>
> (2) On petition of an interested person or the minor if the minor is at least 14 years of age, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.
>
> (3) A delivery, payment, or expenditure under this section is in addition to, is not in substitution for, and does not affect an obligation of a person to support the minor.

"[A] parent's duty to support a minor child requires the parent to furnish all necessaries essential to the health

and comfort of the child, including, for example, medical care." *Manley v Detroit Auto Inter-Ins Exch*, 127 Mich App 444, 453; 339 NW2d 205 (1983).

Defendant claims that any obligation of defendant or Waldman to pay for the out-of-network medical expenses was irrelevant to the expenditure of custodial property for those expenses. But the plain language of MCL 554.539(3) requires the expenditures of custodial property to be "in addition to" and "not in substitution for . . . an obligation of a person to support the minor." In *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374; 280 NW2d 793 (1979), our Supreme Court explained that when the Legislature defined the offense of possession of a firearm during the commission of a felony as a "felony" and required its two-year sentence to be served "in addition to" the sentence for the underlying felony, it demonstrated an intent "to make the carrying of a weapon during a felony a separate crime . . . ." *Id*. at 391. Here too, the Legislature's use of the phrase "in addition to" dictates that the expenditures should be separate from any obligation of a person to support the minor. Moreover, the term "substitute" is defined as "a person or thing that takes the place or function of another." *Merriam Webster's Collegiate Dictionary* (2003); see *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011) (explaining that where a statute does not define a term, a dictionary may be consulted to define it). Therefore, the Legislature's use of the phrase "not in substitution for" dictates that the expenditures should not take the place of any obligation of a person to support the minor.

Our interpretation of the plain language of MCL 554.539(3)—that expenditures should be separate from, and not take the place of, any obligation of a person to support the minor—is consistent with the income tax

consequences applied to UTMA accounts by the Internal Revenue Service. Gifts to minors have been recognized as beneficial for purposes of income-tax savings because income from the gifts is taxed at a minor's rate, which is often lower than that of an adult donor. See *Watling v Watling*, 127 Mich App 624, 630; 339 NW2d 505 (1983). But where a parent donor uses the income from a gift to support a child, the income is taxable to the parent. *Garriss Investment Corp v Comm'r of Internal Revenue*, 43 TCM (CCH) 396 (1982).[2]

Further, MCL 554.539(1) provides that payments should be made "without regard to the duty or ability of the custodian personally or of any other person to support the minor[.]" The term "regard" is defined by *Random House Webster's College Dictionary* (2001) as "to take into account; consider." Thus, the plain language of Subsection (1) dictates only that the custodian make expenditures without considering the duty or ability of the custodian or another person to support the minor. Unlike Subsection (3), Subsection (1) does not address whether those expenditures can or cannot be used to support the minor.

The record demonstrates that defendant and Waldman were obligated to pay plaintiffs' medical expenses, first as parents of plaintiffs, *Manley*, 127 Mich App at 453, and then by court order following their divorce.

[2] We note that *Garriss* interpreted the Uniform Gifts to Minors Act (UGMA), which preceded the UTMA. In Michigan and the applicable statute in *Garriss*, the UGMA did not expressly require expenditures to be "in addition to" and "not in substitution for" an obligation of a person to support the minor. MCL 554.454(2), repealed by 1998 PA 433. Rather, before the UTMA was enacted, § 4 of the Michigan UGMA, MCL 554.454(2), provided, in relevant part: "The custodian shall . . . expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education, and benefit of the minor . . . ."

The 1997 judgment of divorce obligated defendant to pay 52% of plaintiffs' medical expenses, making no distinction between network or out-of-network expenses. The 2001 order required Waldman, alone, to pay for out-of-network medical expenses. Because defendant, Waldman, or both defendant and Waldman were obligated to pay for plaintiffs' out-of-network medical expenses, and the district court found that defendant used the UTMA money to reimburse himself for those expenses, we conclude that the reimbursement substituted for or took the place of an obligation of a person to support the minor, contrary to MCL 554.539(3). Defendant therefore wrongfully exerted dominion over plaintiffs' UTMA money, and the circuit court properly reversed the district court's finding that defendant properly withdrew the money to reimburse himself for medical expenses.

We note that the fact that defendant personally paid the children's medical expenses, subsequently reimbursed himself for those payments with money from the UTMA accounts, and then used that money to pay his legal fees, is not the defining principle of our decision. Had UTMA money been withdrawn and paid to the children's medical providers directly, the payments would still have taken the place of an obligation of defendant, Waldman, or both defendant and Waldman, contrary to MCL 554.539(3). We emphasize that because defendant had an obligation to pay the children's medical expenses, under MCL 554.539, defendant was neither authorized to use UTMA money to satisfy those expenses nor to reimburse himself from a UMTA account for payments he made from his own separate funds. To the extent that the circuit court reversed the district court's finding that defendant did not wrongfully exert dominion over plaintiffs' money in the UTMA accounts because plaintiffs had already received

the benefit of the medical services (i.e., reimbursed defendant instead of paying providers directly), we conclude that the circuit court reached the right result for the wrong reason. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

III

Plaintiffs argue that the circuit court erred by affirming the district court's finding that plaintiffs failed to demand the return of their money because, as a matter of law, no demand was required. We agree.

"MCL 600.2919a(1) provides in part, 'A person damaged as a result of . . . the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees: (a) Another person's stealing or embezzling property or converting property to the other person's own use.' " *Aroma*, 303 Mich App at 446-447.

1 Restatement, Torts, § 223, addresses the ways in which a conversion may be committed:

> A conversion may be committed by
>
> (a) intentionally dispossessing another of a chattel,
>
> (b) intentionally destroying or altering a chattel in the actor's possession,
>
> (c) using a chattel in the actor's possession without authority so to use it,
>
> (d) receiving a chattel pursuant to a sale, lease, pledge, gift or other transaction intending to acquire for himself or for another a proprietary interest in it,
>
> (e) disposing of a chattel by a sale, lease, pledge, gift or other transaction intending to transfer a proprietary interest in it,
>
> (f) misdelivering a chattel, or
>
> (g) refusing to surrender a chattel on demand.

> However, liability for conversion does not arise under terms of this section if the actor is privileged to dispose of the chattel. 1 Restatement, Torts, § 222. [*Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960).]

In Prosser & Keeton, Torts (5th ed), § 15, pp 93-99, the authors distinguish between acquiring possession and withholding possession:

> The defendant may, first of all, wrongfully acquire possession of the plaintiff's chattel. The defendant may, without legal justification, take it out of the plaintiff's possession, or that of a third person. . . . In all such cases the taking itself is wrongful, and the tort is complete without any demand for the return of the goods. . . .
>
> * * *
>
> Where there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort.

In *Trail Clinic, PC v Bloch*, 114 Mich App 700, 703-704; 319 NW2d 638 (1982), a medical clinic advised an insurance company to send payments owed to a doctor to the clinic, but the record showed that the doctor had already stopped working for the clinic. The clinic then endorsed and deposited checks from the insurance company, which the doctor was owed for services rendered at a new employer. *Id.* This Court explained: "A demand is unnecessary . . . where the property has been wrongfully appropriated by the defendant for his own use and benefit." *Id.* at 706. Under the facts of *Trail Clinic*, the doctor's new employer was not required to prove that a demand for the checks was made. *Id.* at 706-707.

In *Hank v Lamb*, 310 Mich 81, 84-85; 16 NW2d 671 (1944), the plaintiff furnished bottles to the defendants to bottle wine for the plaintiff. The plaintiff never demanded the return of the bottles, and the defendants never refused to furnish them. *Id.* at 91. Absent a demand, the plaintiff could not establish conversion and the defendants were not liable for the value of the bottles. *Id.* at 91-92. See also *Gum v Fitzgerald*, 80 Mich App 234, 235-236; 262 NW2d 924 (1977) (where the defendant landlords gave the plaintiff tenants an eviction notice and testified that the tenants said they planned to leave immediately, and the landlords subsequently changed the lock on the rental, the landlords' withholding of the tenants' property inside the rental constituted a conversion because the tenants demanded the property and the landlords refused).[3]

The facts here establish that defendant acquired, and did not just withhold, possession of the money in the UTMA accounts. Prosser & Keeton, § 15. Like the clinic in *Trail Clinic*, which deposited another's payment into its own account, defendant intentionally withdrew the money in plaintiffs' UTMA accounts and then used it to pay his attorney. We conclude that the circuit court erred by affirming the district court's finding that plaintiffs failed to demand the return of their money because, as a matter of law, no demand was required.

IV

Next, plaintiffs argue that the circuit court erred by affirming the district court's ruling that declined to award treble damages. We disagree. We first reject plaintiffs' claim that the district court's decision was beyond the

[3] *Gum* is not binding on this Court because *Gum* was issued before November 1, 1990, MCR 7.215(J)(1).

scope of its authority on remand on the basis that, at the remand hearing, plaintiffs requested the district court to issue a ruling on treble damages. "A party may not claim as error on appeal an issue that the party deemed proper in the trial court because doing so would permit the party to harbor error as an appellate parachute." *Bates Assoc, LLC v 132 Assoc, LLC*, 290 Mich App 52, 64; 799 NW2d 177 (2010). We further reject plaintiffs' claim of error on this issue because an award of treble damages is within a court's discretion, *Aroma*, 303 Mich App at 449, and in this case, plaintiffs cannot demonstrate that the district court's ruling was outside the range of principled outcomes. The district court ruled that it would not award treble damages, which are designed to penalize or punish "dishonest defendants," *Alken-Ziegler, Inc v Hague*, 283 Mich App 99, 104; 767 NW2d 668 (2009), because defendant's action in withdrawing funds from the accounts, rather than being rooted in dishonest motives, was instead in reliance on advice defendant received from his financial planner. We find the district court's decision to be within the range of principled outcomes and, thus, hold that the circuit court did not err by affirming the district court's decision.

V

Last, defendant argues that this Court should dismiss plaintiffs' entire appeal under MCR 7.109(B)(1)(a) because plaintiffs failed to provide transcripts for the hearings on November 16, 2011, and May 21, 2012. First, although MCR 7.109(B)(1)(a) applied to plaintiffs' appeal in the circuit court, the applicable court rule in this appeal is MCR 7.210(B)(1)(a), which provides:

> The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases gov-

> erned by MCR 3.977(J)(3) or MCR 6.425(G)(2), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

Second, the November 16, 2011 transcript was provided. We therefore reject that portion of defendant's argument.

Third, defendant claims that, at the May 21, 2012 hearing, plaintiffs waived their argument that the district court's treble damages decision exceeded the scope of the remand order and argues that dismissal is required because this Court cannot review defendant's waiver claim because plaintiffs failed to provide the transcript for the May 21, 2012 hearing. We agree that plaintiff failed to provide a transcript dated May 21, 2012, but it is unclear from the register of actions whether any proceedings occurred on the record that day. Moreover, dismissal is not appropriate because this Court generally only declines to consider an issue when the appellant has failed to provide a relevant transcript. See *People v Dunigan*, 299 Mich App 579, 587-588; 831 NW2d 243 (2013); *PT Today, Inc v Comm'r of Fin & Ins Servs*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006). We need not decline to address the argument regarding treble damages and the scope of the remand order, however, because we concluded earlier in this opinion that plaintiffs waived the argument at the hearing on remand, which was transcribed for the appeal. Any additional waiver by plaintiffs on May 21, 2012, would be cumulative.

VI

We affirm the portion of the circuit court's order reversing the portion of the district court's decision that held that defendant did not wrongfully exert dominion over the money in the UTMA accounts, we reverse the portion of the circuit court's order affirming the district court's ruling regarding plaintiffs' demand for the return of the money, and we affirm the portion of that same circuit court order regarding treble damages. We remand to the district court for entry of a judgment for plaintiffs. We do not retain jurisdiction. No costs, as none of the parties prevailed in full. MCR 7.219.

FITZGERALD, P.J., and OWENS, J., concurred with WILDER, J.

WOLF v MAHAR

Docket No. 310479. Submitted June 4, 2014, at Detroit. Decided November 18, 2014, at 9:05 a.m.

Janet Wolf filed an action in the Macomb Circuit Court, seeking a divorce from Michael J. Mahar. The case was submitted to arbitration before a referee. On November 16, 2009, a consent judgment of divorce was entered by the court, Antonio P. Viviano, J. The judgment awarded each party 50% of the marital portion of the other party's pension. A qualified domestic relations order (QDRO) or eligible domestic relations order (EDRO), as appropriate for each pension, was to be prepared and incorporated by reference in the judgment. The judgment provided that the alternate payee would be allowed to elect or to begin receiving his or her benefits at the participant's earliest retirement age and that the parties would split equally all costs for reviewing or administering a QDRO or EDRO. Subsequently, two QDROs covering defendant's pension with Chrysler were entered. On October 13, 2010, an EDRO covering plaintiff's pension with the state of Michigan was entered. Although plaintiff had not yet retired, defendant, under the earliest-retirement-age provision in the consent judgment and the EDRO, applied for and began receiving benefits through plaintiff's pension on February 1, 2011. On March 31, 2011, plaintiff learned that her share of her pension would be reduced as a result of the application by the state of a policy known as "recoupment." The policy was designed to prevent a loss to the retirement system from administering and paying benefits to both participants and alternate payees. Under the policy, when an alternate payee elects to receive benefits before the participant retires, the alternate payee receives a set monthly payment and when the participant retires, the participant receives a reduced monthly benefit to account for the alternate payee's early receipt of benefits. On April 28, 2011, plaintiff filed a motion for relief from judgment, seeking to set aside the judgment's earliest-retirement-age provisions. The motion was referred to a referee, who found that the issue of recoupment had not been considered by the parties and that they had made a mutual mistake. Defendant objected to the referee's report and argued that the motion was untimely under the one-year limit provided in MCR 2.612(C)(1)(a) and (2). The parties filed a stipulation of facts in the trial court that provided that they had been

unaware of the recoupment issue when they placed their property settlement on the record. The trial court, Kathryn A. Viviano, J., granted defendant's objections to the referee's report and denied plaintiff's motion for relief from judgment, ruling that the motion was timely, but that relief was not warranted. The court did not accept the parties' stipulation that the issue of recoupment had been unknown to the parties because it determined that information regarding recoupment was easily accessible on the state's website. The court also held that no extraordinary circumstances justified the requested relief. The Court of Appeals granted plaintiff's application for leave to appeal.

The Court of Appeals *held*:

1. The trial court erred by refusing to accept the parties' stipulation of facts about recoupment. Stipulations of fact are sacrosanct. Had the parties known about recoupment, they would have expected it to be split equally. Because the parties were under a mistake of fact about recoupment, they could not understand the inequitable effect the recoupment policy would have on the division of plaintiff's pension.

2. Because the EDRO concerning plaintiff's pension was not entered until October 13, 2010, the trial court properly determined that that date was the starting point for calculating the one-year time limit under MCR 2.612(C)(2). The motion for relief from judgment was timely because it was filed within a reasonable time of learning about recoupment and within one year of the entry of the EDRO. The trial court abused its discretion by failing to grant plaintiff's motion for relief from judgment. The order denying the motion is reversed and the matter is remanded to the trial court for reformation of the consent judgment and the EDRO to account for the parties' mutual mistake.

Reversed and remanded.

Haas & Associates, PLLC (by *Trish Oleksa Haas*), for Janet Wolf.

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

WILDER, P.J. Plaintiff appeals by leave granted[1] an order denying a motion for relief from a pension provision in a divorce judgment. We reverse and remand.

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[1] *Wolf v Mahar*, unpublished order of the Court of Appeals, entered February 22, 2013 (Docket No. 310479).

I

The parties were married in 1993. Plaintiff filed for a divorce from defendant in March 2009. The case was submitted to arbitration before a referee. A consent judgment of divorce was entered by Judge Antonio P. Viviano on November 16, 2009. The judgment awarded each party 50% of the marital portion of the other party's pension, i.e., plaintiff's pension with the state of Michigan (Lakeview Public Schools) and defendant's pension with Chrysler. A qualified domestic relations order (QDRO) or eligible domestic relations order (EDRO), as appropriate for each pension, was to be prepared and incorporated by reference in the judgment. The judgment provided that the alternate payee "will be allowed to elect or begin receiving his/her benefits at the Participant's earliest retirement age." In addition, it provided: "To the extent that the Plan charges an administrative or actuarial cost for reviewing or administering the QDRO/EDRO, the Plaintiff and Defendant agree to split this cost equally."

Subsequently, two QDROs covering defendant's pension with Chrysler were entered, and an EDRO was entered concerning plaintiff's state of Michigan pension. Plaintiff's EDRO, which is at issue in this case, contained the following provisions:

> **6. AMOUNT OF ALTERNATE PAYEE'S BENEFIT:**
>
> It is the parties' intention, and the order of this Court, that the Alternate Payee receive a monthly benefit from the Plan of Fifty (50%) percent of the Participant's retirement allowance, including a pro-rata share of any post-retirement increases, which has accrued as of the date of divorce . . . and which percentage takes into account the years of service that have accrued from the date of marriage.

> **7. COMMENCEMENT DATE AND FORM OF PAYMENT TO ALTERNATE PAYEE:**
>
> The benefits payable to the Alternate Payee will begin when the Participant begins to receive benefits under the Plan (or will begin early pursuant to this Section 7) and will be in the form of a single life annuity payable during the lifetime of the Alternate Payee.
>
> However, the Alternate Payee will have the right to elect to receive benefit payments under the Plan at any time beginning when the Participant reaches the earliest retirement date as defined in Section 2(d) of the Eligible Domestic Relations Order Act (MCL 38.1701 et seq.). . . . If the Participant elects to receive an early-reduced retirement benefit, the Alternate Payee's benefit shall also be reduced by the same early retirement factor.
>
> * * *
>
> **10. ACTUARIAL FEES:**
>
> The Participant and Alternate Payee agree to share any additional costs for actuarial services incurred by the Plan due to the review and implementation of the terms of this Order. The Alternate Payee's share of said costs shall be in proportion to the Alternate Payee's share of the Participant's retirement allowance awarded to the Alternate Payee in Section 6 of this Order, above.

Even though plaintiff had not yet retired, defendant, under the earliest-retirement-age provision in the consent judgment and EDRO, applied for and began receiving benefits through plaintiff's state of Michigan pension on February 1, 2011. On March 31, 2011, plaintiff learned that her share of the pension would be reduced by a state policy known as recoupment. The recoupment policy was designed to prevent a loss to the retirement system from administering and paying benefits to both participants and alternate payees, as opposed to just participants. In its simplest terms, an alternate payee who elects to receive benefits before the

participant retires receives a set monthly payment and the participant, when he or she retires after age 60, receives a recouped or reduced monthly benefit to account for the alternate payee's early receipt of payments. Applied here, if defendant began receiving his share of plaintiff's benefits in 2011 and plaintiff did not retire until 2016 (at age 65), when she plans to retire, plaintiff's monthly benefit would be reduced by $712.65 to offset the payments defendant received from 2011 to 2016.

In a motion for relief from judgment, plaintiff argued that the recoupment policy, triggered by the earliest-retirement-age provision, was contrary to the pension provisions in the consent judgment and EDRO, which were intended to split the pensions equally. Plaintiff moved to set aside the earliest-retirement-age provisions.

Plaintiff's motion was referred to the referee, who found that when the parties entered into their consent judgment of divorce, "the fact of recoupment was not considered," and recoupment could reduce plaintiff's equal share if she continued working. "The parties made a mutual mistake as a 50/50 division of each pension appears impossible with recoupment attached to Plaintiff's pension." The referee ordered an evidentiary hearing for expert testimony concerning recoupment. But the parties instead chose to submit the matter on their briefs. Both plaintiff's and defendant's experts opined that plaintiff would receive less than 50% of her pension because of recoupment. According to defendant's expert, however, an earliest-retirement-age provision is contained in nearly all EDROs and QDROs.

In a report and recommendation, the referee again found that, when the parties entered into the divorce

consent judgment, the issue of recoupment was not considered and they made a mutual mistake with regard to an equal division of each pension before plaintiff's retirement, and "as such a division appears to be an impossibility with recoupment."

Defendant objected to the referee's report and recommendation. Defendant argued, *inter alia*, that plaintiff's motion was untimely under the one-year limit of MCR 2.612(C)(1)(a) and (2). Plaintiff countered that the motion was timely because she was not informed of recoupment until after the EDRO was entered and defendant received payments. Moreover, plaintiff argued that it was inequitable for defendant to receive a larger payment under her pension than she received.

Following defendant's objection to the referee's report and recommendation, the trial court ordered an evidentiary hearing regarding recoupment, but again, the parties stipulated to adjourn the hearing and filed a stipulation of facts. The stipulation provided that "[t]he issue of recoupment was not known to the parties or considered by them at the time the property settlement was placed on the record on July 14, 2009." The stipulation also quoted the following statements from the referee's report and recommendation:

> "[W]hen Defendant began drawing his portion of Plaintiff's State of Michigan pension, recoupment was put in place thereby potentially reducing Plaintiff's current 50% position in her pension should she elect to continue working . . . . Based on the preceding, it was found that the parties made a mutual mistake as to a 50/50 division of each pension before Plaintiff's retirement, as it appears to be an impossibility with recoupment attached to Plaintiff's pension."

The trial court granted defendant's objections to the referee's report and denied plaintiff's motion for relief

from judgment. The trial court ruled that plaintiff's motion was timely, but that relief from judgment was not warranted. The trial court found that the unambiguous settlement agreement allowed defendant to begin receiving benefits at plaintiff's earliest retirement age. The trial court did not accept the parties' stipulation that "the issue of recoupment was not known to the parties" because it found that the information was easily accessible on the state of Michigan website. Further, the trial court found no extraordinary circumstances to justify the requested relief and that it would detrimentally affect defendant's substantial rights to set aside the provisions permitting defendant to begin receiving plaintiff's benefits at plaintiff's earliest retirement age.

II

On appeal, plaintiff argues that, in deciding whether to reform the consent judgment, the trial court erred by refusing to accept the parties' stipulation of facts about recoupment. We agree. Issues of law are reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

A mistake of fact is "an erroneous belief, which is shared and relied on by both parties, about a material fact that affects the substance of the transaction." *Ford Motor Co v Woodhaven*, 475 Mich 425, 442; 716 NW2d 247 (2006). A mistake of law is "a mistake by one side or the other regarding the legal effect of an agreement . . . ." *Casey v Auto-Owners Ins Co*, 273 Mich App 388, 398; 729 NW2d 277 (2006). Stipulations of fact are "sacrosanct," *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 277 (1963); *Signature Villas, LLC v City of Ann Arbor*, 269 Mich App 694, 706; 714 NW2d 392 (2006),

whereas stipulations of law do not bind a court, *Gates v Gates*, 256 Mich App 420, 426; 664 NW2d 231 (2003); *Staff v Johnson*, 242 Mich App 521, 535; 619 NW2d 57 (2000).

We conclude that the trial court erred when it failed to accept the parties' stipulation that they did not know about the state's recoupment policy. Although the trial court found that definitions and explanations of the recoupment policy were available on the state's website, the parties were not aware of them—or informed about them by counsel—at the time the consent judgment, which incorporated by reference the EDRO, was entered. Similarly, the parties were not aware or informed of the recoupment policy when the EDRO was drafted by a pension specialist months later. Plaintiff first learned of the recoupment policy after defendant elected to receive his share of plaintiff's pension under the EDRO. The parties clearly and unambiguously intended to split each pension equally, relying on the word "equal" and its derivations (equally, equalize, equalized, equalization) repeatedly in the property settlement and pension and retirement sections of the consent judgment. They also agreed to "split equally" the costs of administering the EDRO. Because recoupment is a cost imposed by the retirement system for administering and paying benefits to both the participants and alternate payees, had they known about recoupment, the parties would have expected it to be split equally. But because the parties were under a mistake of fact about recoupment, they could not understand the inequitable *effect* the recoupment policy would have on their division of plaintiff's pension in the consent agreement and the EDRO when defendant elected to receive benefits at plaintiff's earliest retirement age—a closely related legal question under *Casey*.

The trial court should have accepted the parties' stipulation that they did not know about the state's recoupment policy.

III

Next, on appeal, plaintiff argues that because a mutual mistake existed, reformation of the consent judgment and EDRO—particularly the provisions allowing the alternate payee to receive benefits at the participant's earliest retirement age, thereby triggering the inequitable recoupment policy—was required under MCR 2.612(C)(1). We agree. Decisions on motions to set aside a judgment under MCR 2.612(C) are reviewed for an abuse of discretion. *Rose v Rose*, 289 Mich App 45, 49; 795 NW2d 611 (2010); *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 404; 651 NW2d 756 (2002). A court abuses its discretion when its decision is outside the "range of principled outcomes." *Sherry v East Suburban Football League*, 292 Mich App 23, 31; 807 NW2d 859 (2011) (citation and quotation marks omitted). Interpretation and application of a court rule is a question of law, reviewed de novo. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009).

A

At the outset, we note that defendant argued below that plaintiff's motion for relief from judgment under MCR 2.612(C)(1) was untimely because it was not filed within one year of the consent judgment. We disagree. MCR 2.612(C)(1)(a) allows a court to relieve a party from "a final judgment, order, or proceeding" on the basis of "[m]istake, inadvertence, surprise, or excusable neglect." MCR 2.612(C)(2) provides: "The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year

after the judgment, order, or proceeding was entered or taken. Except as provided in MCR 2.614(A)(1), a motion under this subrule does not affect the finality of a judgment or suspend its operation."

The consent judgment was entered on November 16, 2009. But because the EDRO created to effectuate the terms of the consent judgment with respect to plaintiff's pension was not entered until October 13, 2010, the trial court property determined that October 13, 2010, was the starting point for calculating the one-year time limit under MCR 2.612(C)(2). Plaintiff's April 28, 2011 motion was filed within a reasonable time of learning about recoupment on March 31, 2011, and within one year of the entry of the EDRO, and was therefore timely.[2]

B

Generally, a court may not change or rewrite plain and unambiguous contract language under the guise of interpretation. *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 130-131; 743 NW2d 585 (2007). But

> [a] court of equity has power to reform the contract to make it conform to the agreement actually made. To obtain reformation, a plaintiff must prove a mutual mistake of fact, or mistake on one side and fraud on the other, by clear and convincing evidence. A unilateral mistake is not sufficient to warrant reformation. A mistake in law . . . is not a

[2] We note that MCL 38.1710(4) provides, in relevant part: "The EDRO cannot be amended, vacated, or otherwise set aside after the retirement system has made the first payment under the EDRO or after the participant dies, whichever occurs first." Although the retirement system has made the first payment under the EDRO, under these facts, MCL 38.1710(4) conflicts with the provisions of MCR 2.612(C)(1) and (2) allowing for relief from the EDRO within one year. In resolving the conflict, the court rule prevails because it governs practice and procedure. See *Staff*, 242 Mich App at 530.

> basis for reformation. [*Casey*, 273 Mich App at 398 (quotation marks and citations omitted).]

In *Smith v Smith*, 292 Mich App 699; 823 NW2d 114 (2011), the parties to a property settlement agreed that the husband would retain an individual retirement account (IRA) and the wife would retain all other retirement accounts and receive a cash payment from the husband. Together, the wife received half the total fixed value of the retirement accounts. When the value of the husband's IRA subsequently increased, the wife claimed she was entitled to a share of the increase in value. But this Court noted that the parties used fixed values for all the retirement accounts, as opposed to dividing the accounts "evenly in kind," for example. *Id*. at 703-704. This Court determined that the parties knew that stocks fluctuated daily and could have accounted for market fluctuations in the property settlement, but they did not. *Id*. at 705. Therefore, this Court declined to "rewrite the agreement to [the wife's] advantage . . . ." *Id*.

Unlike the parties in *Smith*, who knew that stocks fluctuated but failed to account for those fluctuations in the property settlement, plaintiff and defendant did not know about the retirement system's recoupment policy designed to prevent a loss to the retirement system from administering and paying benefits to both participants and alternate payees. The contract plaintiff and defendant negotiated, to each receive 50% of the other's pension and "split equally" any costs of administering the EDRO, reflected the parties' intention to achieve an equal pension settlement. But despite these efforts, as a result of the provision allowing the alternate payee to receive benefits at the participant's earliest retirement age, defendant's election to receive benefits before plaintiff retired, and the parties' mutual mistake about

recoupment, the EDRO as drafted permits defendant to receive from plaintiff's pension an amount substantially higher than plaintiff will receive.

The trial court abused its discretion by failing to grant plaintiff's motion for relief from judgment. We reverse the order denying the motion for relief from judgment and remand for reformation of the consent judgment and EDRO to account for the parties' mutual mistake regarding the recoupment policy and its inequitable effect on defendant's receipt of benefits before plaintiff's retirement.[3]

Reversed and remanded. We do not retain jurisdiction. Plaintiff, as the prevailing party on appeal, may tax costs pursuant to MCR 7.219.

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

[3] In light of our decision, we decline to address plaintiff's arguments on appeal regarding res judicata and the law of the case, her request for relief from judgment under MCR 2.612(C)(1)(f), and her claim that the trial court abused its discretion by considering defendant's objections to the referee's decision.

TRADEMARK PROPERTIES OF MICHIGAN, LLC v FEDERAL NATIONAL MORTGAGE ASSOCIATION

Docket No. 313296. Submitted September 4, 2014, at Detroit. Decided November 18, 2014, at 9:10 a.m.

Trademark Properties of Michigan, LLC, brought an action to quiet title on a condominium in the Oakland Circuit Court against Federal National Mortgage Association (Fannie Mae), Mortgage Electronic Registration Systems, Inc. (MERS), and Bank of America. Earl Strickfaden obtained a loan from GMAC Mortgage Corporation in 2003. MERS was identified as the mortgagee on the security instrument and the lender's interest was subsequently transferred to MERS. Strickfaden defaulted. The MERS mortgage was foreclosed by advertisement and Fannie Mae purchased the property at a sheriff's sale on May 11, 2010. The sheriff's deed was recorded on May 20, 2010. The property was not redeemed, and the MERS mortgage was extinguished. On December 6, 2010, the condominium association filed a notice of lien for nonpayment of condominium assessments. The lien was not satisfied and the association foreclosed by advertisement. Plaintiff purchased the property at a sheriff's sale, recording the deed on February 22, 2011. Before the redemption period expired, an attorney for GMAC recorded an affidavit purporting to expunge the May 11, 2010 sheriff's sale to Fannie Mae. The parties filed cross-motions for summary disposition. The court, Colleen A. O'Brien, J., granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. When a party's standing is challenged in a case, the question is whether that person is a proper party to request adjudication of the issue, not whether the issue is justiciable. When a cause of action exists under law, or when the Legislature has expressly conferred standing, those circumstances are sufficient to establish standing. Plaintiff's assertion that defendants did not have standing because they could not establish a superior interest in the property was premised on the merits of the litigation. But whether a party can succeed on the merits is not an appropriate inquiry when reviewing standing. MCL 600.2932(1) reflects the Legisla-

ture's intent to confer standing on individuals claiming an interest in real property. This litigation involved an action to quiet title because the parties disputed their respective interests in the property. Accordingly, plaintiff's argument regarding standing had to be rejected.

2. The foreclosure of a mortgage extinguishes it, and the purchaser becomes the owner of an equitable interest in the mortgaged premises that ripens into legal title if not defeated by redemption as provided by law. In this case, the initial foreclosure extinguished the MERS mortgage, and because the property was not redeemed, all right, title, and interest in the property vested in Fannie Mae. Plaintiff then purchased the property. MERS subsequently filed an affidavit asserting that the initial foreclosure was void *ab initio*, but, in fact, the initial foreclosure was not void. MERS's affidavit relied on the Court of Appeals decision in *Residential Funding Co, LLC v Saurman*, 292 Mich App 321 (2011) (*Saurman I*), but that decision was reversed by the Michigan Supreme Court, *Residential Funding Co, LLC v Saurman*, 490 Mich 909 (2011) (*Saurman II*). In this case, plaintiff presented prima facie evidence of title in the trial court, and MERS's sole basis for asserting a continued interest in the property was no longer sustainable under *Saurman II*. The Supreme Court's decision in *Saurman II* compelled the trial court to conclude that there was no question of fact that the MERS mortgage had been extinguished and that plaintiff had the superior interest in the property. The trial court erred by ruling that the MERS affidavit revived the MERS mortgage and in ruling that plaintiff's interest in the property was subordinate to the revived mortgage interest.

3. Under MCL 559.208, a foreclosure proceeding based on a condominium assessment lien may not be commenced without recordation and service of the notice of lien. The notice of lien must be served on the delinquent coowner by first-class mail, postage prepaid, addressed to the last known address of the coowner at least 10 days in advance of commencement of the foreclosure proceeding. In this case, the condominium association complied with this statutory notice requirement. Actual notice was not required.

Reversed.

LIENS — CONDOMINIUM ASSESSMENTS — FORECLOSURE — NOTICE OF THE LIEN.

A foreclosure proceeding based on a condominium assessment lien may not be commenced without recordation and service of the notice of lien; the notice of lien must be served on the delinquent coowner by first-class mail, postage prepaid, addressed to the last

known address of the coowner at least 10 days in advance of commencement of the foreclosure proceeding; actual notice is not required (MCL 559.208).

Sotiroff & Bobrin, PC (by *Keith A. Sotiroff*), for Trademark Properties of Michigan, LLC.

Dykema Gossett PLLC (by *Thomas M. Schehr* and *Nasseem S. Ramin*) for Federal National Mortgage Association and Mortgage Electronic Registration Systems, Inc.

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. In this action to quiet title to a condominium unit, plaintiff, Trademark Properties of Michigan, LLC, appeals as of right an order granting summary disposition in favor of defendants, Federal National Mortgage Association (Fannie Mae), Mortgage Electronic Registration Systems, Inc. (MERS), and Bank of America (BOA). We reverse.

I. FACTS AND PROCEDURAL HISTORY

On August 16, 2003, Earl F. Strickfaden obtained a mortgage loan from GMAC Mortgage Corporation. MERS was the mortgagee under the security instrument (the MERS mortgage). The lender's interest was subsequently transferred to MERS. Strickfaden defaulted on his obligation. The MERS mortgage was foreclosed by advertisement and Fannie Mae purchased the property at a sheriff's sale on May 11, 2010. The sheriff's deed was recorded with the register of deeds on May 20, 2010. It is undisputed that the property was never redeemed. The MERS mortgage was extinguished.[1]

[1] A second mortgage was held by Standard Federal Bank, N.A., and its successors. That mortgage was foreclosed by advertisement and BOA

On December 6, 2010, the association where the condominium unit was located, Manor Homes of Troy Association (MHTA), filed a notice of lien for nonpayment of condominium assessments. The lien was not satisfied and MHTA foreclosed by advertisement. On February 15, 2011, plaintiff purchased the property at a sheriff's sale for $6,761.45, and then recorded the sheriff's deed with the register of deeds on February 22, 2011. The last day to redeem the property was August 15, 2011.

On August 9, 2011, before the redemption period for the MHTA foreclosure expired, an attorney for GMAC Mortgage Corporation, the lender for the MERS mortgage, recorded an affidavit purporting to expunge the May 11, 2010 sheriff's sale to Fannie Mae. The affiant averred that, by virtue of this Court's decision in an unrelated case, *Residential Funding Co, LLC v Saurman*, 292 Mich App 321; 807 NW2d 412 (2011) (*Saurman I*), the May 11, 2010 sheriff's deed was void *ab initio*, thereby leaving the MERS mortgage in full force and effect.[2]

Plaintiff thereafter filed this action to quiet title to the property, alleging that the MERS affidavit could not effectively revive the previously extinguished MERS mortgage and thereby invalidate plaintiff's interest in the property. The parties filed cross-motions for summary disposition. On October 31, 2012, the trial court denied plaintiff's motion and granted summary dispo-

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purchased that interest on May 25, 2010. See *Advanta Nat'l Bank v McClarty*, 257 Mich App 113, 124; 667 NW2d 880 (2003) ("[A] purchaser at a foreclosure sale of a second mortgage takes the property subject to the first mortgage . . . .").

[2] At the time the affidavit was recorded, this Court's decision in *Residential Funding* was binding law, but subsequently, our Supreme Court reversed that decision. *Residential Funding Co, LLC v Saurman*, 490 Mich 909 (2011) (*Saurman II*).

sition in favor of defendants under MCR 2.116(C)(10). The trial court reasoned that, by filing the affidavit before the redemption period for the MHTA foreclosure had expired, the MERS foreclosure was expunged and MERS's interest was superior to plaintiff's interest. The trial court also ruled that plaintiff failed to establish it was a bona fide purchaser, reasoning that plaintiff had notice because the affidavit was filed before the redemption period ended and plaintiff had failed to pay sufficient value. Plaintiff appealed this order.

II. ANALYSIS

A. STANDING

As an initial matter, plaintiff contends that defendants lack standing to assert an interest in the property. We disagree. Whether a party has standing presents a question of law that this Court reviews de novo. *Manuel v Gill*, 481 Mich 637, 642; 753 NW2d 48 (2008). "The purpose of the standing doctrine is to assess whether a litigant's interest in the issue is sufficient to 'ensure sincere and vigorous advocacy.' " *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 355; 792 NW2d 686 (2010), quoting *Detroit Fire Fighters Ass'n v Detroit*, 449 Mich 629, 633; 537 NW2d 436 (1995). That is, the objective of the standing requirement is to ensure that "only those who have a substantial interest" will be allowed to come in to court to complain. *White Lake Improvement Ass'n v City of Whitehall*, 22 Mich App 262, 273; 177 NW2d 473 (1970). When a party's standing is challenged in a case, the question is whether that person is a proper party to request adjudication of the issue, not whether the issue is justiciable. *Lansing Sch*, 487 Mich at 355; *White Lake Improvement Ass'n*, 22 Mich App at 273 n 13. "Standing in no way depends on the merits of the case." *Rogan v Morton*, 167 Mich App

483, 486; 423 NW2d 237 (1988); see also *Lansing Sch*, 487 Mich at 357. When a cause of action exists under law, or when the Legislature has expressly conferred standing, those circumstances are sufficient to establish standing. *Lansing Sch*, 487 Mich at 357.

In *Lansing Sch*, 487 Mich at 372, our Supreme Court delineated the following approach to determine whether a litigant has 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.

MCL 600.2932(1) reflects the Legislature's intent to confer standing on individuals claiming an interest in real property. The statute authorizes "suits to determine competing parties' respective interests in land[.]" *Republic Bank v Modular One LLC*, 232 Mich App 444, 448; 591 NW2d 335 (1998), overruled in part on other grounds in *Stokes v Millen Roofing Co*, 466 Mich 660; 649 NW2d 371 (2002). This litigation involves an action to quiet title filed by plaintiff because the parties dispute their respective interests in the condominium unit. Plaintiff's assertion that defendants cannot establish a superior interest in the property is premised on the merits of the litigation. Whether a party can succeed

on the merits of the substantive claim is not the appropriate inquiry when reviewing standing. *Lansing Sch*, 487 Mich at 357, 359. Accordingly, we reject plaintiff's argument regarding standing.

B. EFFECT OF THE MERS AFFIDAVIT

Plaintiff maintains its claim to the property was superior to any claim of defendants, and contends that the trial court erred by ruling that the MERS affidavit expunged the prior sheriff's sale to Fannie Mae and revived the previously extinguished MERS mortgage. We agree.

Questions of law, actions to quiet title in equity, as well as decisions to grant or deny summary disposition, are reviewed de novo. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014); *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013); *Beach v Lima Twp*, 489 Mich 99, 106; 802 NW2d 1 (2011). Summary disposition is proper under MCR 2.116(C)(10) when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." "[T]he plaintiff in a quiet-title action has the initial burden of establishing a prima facie case of title, [but] summary disposition in favor of the defendant is properly entered if the plaintiff fails to carry this burden." *Special Prop VI LLC v Woodruff*, 273 Mich App 586, 590; 730 NW2d 753 (2007) (citations omitted).

Foreclosure of a mortgage containing a power of sale is permissible by advertisement, provided the proceedings are instituted in accordance with the foreclosure statutes. See *Masella v Bisson*, 359 Mich 512, 515; 102 NW2d 468 (1960). "A foreclosure of a mortgage extinguishes it. . . . [A]nd the purchaser becomes the owner of an equitable interest in the mortgaged premises

which ripens into a legal title if not defeated by redemption as provided by law." *Dunitz v Woodford Apartments Co*, 236 Mich 45, 49; 209 NW 809 (1926); see also *Senters v Ottawa Savings Bank, FSB*, 443 Mich 45, 50; 503 NW2d 639 (1993), and MCL 600.3236. "Statutory foreclosures should not be set aside without some very good reasons therefor." *Markoff v Tournier*, 229 Mich 571, 575; 201 NW 888 (1925). A "strong case of fraud," irregularity, or "some peculiar exigency" is required to set aside a statutory foreclosure sale. *Kubicki v Mtg Electronic Registration Sys*, 292 Mich App 287, 289; 807 NW2d 433 (2011) (citations and quotation marks omitted).

It is undisputed that the MERS mortgage was foreclosed by advertisement, that Fannie Mae purchased the property at a foreclosure sale and received a sheriff's deed for the property, and that the property was never redeemed. The foreclosure extinguished the MERS mortgage and, because the property was not redeemed, all right, title, and interest in the property vested in Fannie Mae. *Dunitz*, 236 Mich at 49-50; MCL 600.3236. Afterward, plaintiff purchased and recorded Fannie Mae's interest in the property. Months later, in an affidavit recorded under MCL 565.451a, MERS claimed the foreclosure by advertisement of its mortgage interest was void *ab initio* following *Saurman I*. MCL 565.451a, in part, provides:

> An affidavit stating facts relating to any of the following matters that may affect the title to real property in this state and made by any person having knowledge of the facts and competent to testify concerning those facts in open court, may be recorded in the office of the register of deeds of the county where the real property is situated:
>
> (a) Birth, age, sex, marital status, death, name, residence, identity, capacity, relationship, family history, heirship, homestead status and service in the armed forces of

> parties named in deeds, wills, mortgages and other instruments affecting real property.
>
> (b) Knowledge of the happening of any condition or event that may terminate an estate or interest in real property.
>
> (c) Knowledge of surveyors registered under the laws of this state with respect to the existence and location of monuments and physical boundaries, such as fences, streams, roads, and rights of way of real property.
>
> (d) Knowledge of surveyors registered under the laws of this state reconciling conflicting and ambiguous descriptions in conveyances with descriptions in a regular chain of title.
>
> (e) Knowledge of facts incident to possession or the actual, open, notorious, and adverse possession of real property.
>
> (f) Knowledge of the purchaser, if the purchaser is a corporation, of its president, vice president, secretary, or other authorized representative acting in a fiduciary or representative capacity, of real property sold upon foreclosure or conveyed in lieu of foreclosure of a trust mortgage or deed of trust securing an issue of bonds or other evidences of indebtedness, or of any mortgage, land contract, or other security instrument held by a fiduciary or other representative, as to the authority of the purchaser to purchase the real property and as to the terms and conditions upon which the real property is to be held and disposed of.

MERS claims that the mere filing of an affidavit by a mortgagee attesting that a foreclosure sale was void *ab initio* establishes the mortgagee's interest in the foreclosed property. But we need not decide the effect of the filing of an affidavit when a foreclosure sale was void *ab initio* because, here, the foreclosure sale was not void.[3]

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[3] The recent case of *Connolly v Deutsche Bank Nat'l Trust Co*, 581 F Appx 500 (CA 6, 2014), is not binding on this Court. See *Abela v Gen Motors Co*, 469 Mich 603, 607; 677 NW2d 325 (2004). Moreover, unlike

Again, in attesting that the foreclosure sale was void *ab initio*, MERS's affidavit relied on this Court's decision in *Saurman I*, 292 Mich App 321. In *Saurman I*, the defendants purchased and obtained financing for their respective properties from a financial institution. The mortgage instruments designated MERS as the mortgagee. *Id*. at 325-326. This Court held that MERS, because it was a mortgagee but not a noteholder, had no interest in the indebtedness secured by the mortgage under the foreclosure-by-advertisement requirements in MCL 600.3204(1)(d) and, therefore, MERS could not exercise a contractual right to foreclose by advertisement. *Id*. at 329-332. Because MERS lacked the ability to comply with the statutory requirements for foreclosure by advertisement, the foreclosure proceedings were void *ab initio*. *Id*. at 342. Just as in *Saurman I*, in this case MERS was a mortgagee but not a noteholder and would have had no interest in the indebtedness under this Court's decision in that case. This Court's decision in *Saurman I* was short-lived, however. On November 16, 2011, our Supreme Court reversed this Court's *Saurman I* decision and held that MERS's ownership of a security lien on the properties constituted an interest in the indebtedness that authorized it to foreclose by advertisement. *Saurman II*, 490 Mich 909.

Even if the filing of the affidavit regarding *Saurman I* had some effect on the interest in the property here, plaintiff promptly filed the quiet title action to challenge that affidavit. "[T]he purpose of an action to quiet title is to determine the existing title to property by

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this case, in which the foreclosure sale was not void despite the subsequently filed affidavit that stated otherwise, *Connolly* involved a sheriff's sale that was inadvertently held, a mortgage that continued to encumber the property, and an affidavit that accurately provided notice of that continued encumbrance to interested persons.

removing any cloud therefrom." *Ingle v Musgrave*, 159 Mich App 356, 365; 406 NW2d 492 (1987). When the trial court resolved cross-motions for summary disposition, plaintiff presented a prima facie case of title based on the MHTA foreclosure and plaintiff's purchase at the sheriff's sale for $6,761.45. The sole basis for MERS's assertion of a continued mortgage interest in the property—that the MERS foreclosure sale was void *ab initio* under this Court's decision in *Saurman I*—was no longer sustainable because our Supreme Court had reversed that decision nearly a year before. A trial court is bound by the doctrine of stare decisis to follow the decisions of our Supreme Court. See *Guerra v Garratt*, 222 Mich App 285, 293; 564 NW2d 121 (1997). Our Supreme Court's decision in *Saurman II* compelled the trial court to conclude that there was no question of fact that the MERS mortgage had been extinguished and plaintiff had the superior interest in the property.[4] Thus, the trial court erred by ruling that the MERS affidavit was effective in reviving the MERS mortgage and in ruling that plaintiff's interest in the property was subordinate to the revived mortgage interest.

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[4] We note that resolution of the parties' competing property interests does not depend on plaintiff's status as a bona fide purchaser for value. A party's status as a bona fide purchaser for value is relevant only when there has been a previously unrecorded conveyance. MCL 565.29. None of the alleged property interests at issue in this case were unrecorded. Further, to the extent that MERS asserts a superior interest in the property pursuant to its affidavit, that affidavit was recorded *after* plaintiff recorded its sheriff's deed. Because plaintiff's sheriff's deed was recorded first, and because a party's status as a bona fide purchaser for value is relevant only when there has been a prior unrecorded conveyance, an examination of the parties' competing property interests does not depend on plaintiff's status as a bona fide purchaser for value. Accordingly, we decline to address Fannie Mae's argument that, because plaintiff allegedly did not pay "adequate value" for the property, it is not a bona fide purchaser.

C. NOTICE

We reject Fannie Mae's alternative argument for affirmance of summary disposition in its favor. Fannie Mae asserts that the foreclosure by advertisement proceeding commenced by MHTA to foreclose on its lien for unpaid condominium assessments was invalid because MHTA did not provide notice of the lien in accordance with MCL 559.208(3)(c), or because MHTA did not properly calculate the amount of the lien. MCL 559.208 governs foreclosure of condominium assessment liens and provides, in relevant part:

> (3) A foreclosure proceeding may not be commenced without recordation and service of notice of lien in accordance with the following:
>
> * * *
>
> (c) *The notice of lien* shall be recorded in the office of register of deeds in the county in which the condominium project is located and *shall be served upon the delinquent co-owner by first-class mail, postage prepaid, addressed to the last known address of the co-owner at least 10 days in advance of commencement of the foreclosure proceeding*. [Emphasis added.]

Although Fannie Mae asserts that it did not receive "actual notice" of the MHTA lien, the statute does not require a showing of actual notice, but instead provides that notice must be sent by first-class mail "to the last known address of the co-owner at least 10 days in advance of commencement of the foreclosure proceeding." The MHTA complied with this requirement by sending notice of the lien to the address listed in the sheriff's deed that was issued to Fannie Mae. *Smith v Cliffs on the Bay Condo Ass'n*, 463 Mich 420, 429; 617 NW2d 536 (2000).[5]

[5] We note that our Supreme Court's decision in *Smith* was partially

Fannie Mae's contention that the amount of the lien was improperly calculated is based on its position that it could not be held responsible for any condominium assessments that arose after it was issued the sheriff's deed, but before the redemption period expired. Given this Court's recent decision rejecting the same argument in *Wells Fargo Bank v Country Place Condo Ass'n*, 304 Mich App 582, 590-594; 848 NW2d 425 (2014) (holding that a purchaser at a foreclosure sale is liable for assessments arising after issuance of the sheriff's deed), this claim of error fails.

In light of our decision, it is unnecessary to address plaintiff's remaining issues on appeal.

Reversed. Plaintiff, as the prevailing party on appeal, may tax costs pursuant to MCR 7.219.

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

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abrogated by the United States Supreme Court's decision in *Jones v Flowers*, 547 US 220, 225; 126 S Ct 1708; 164 L Ed 2d 415 (2006), which held that in order to satisfy constitutional due process requirements, "when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." But unlike *Smith* and *Jones*, the present case does not involve state action in a foreclosure by a governmental entity. Therefore, it is questionable whether the same due process concerns apply. Regardless, the guiding principle of *Jones* is "that notice must be 'reasonably calculated' to apprise interested parties of the action and to provide them an opportunity to be heard." *Sidun v Wayne Co Treasurer*, 481 Mich 503, 515; 751 NW2d 453 (2008) (citations omitted). In this case, the MHTA sent the notice of lien to the address that Fannie Mae listed in its sheriff's deed, and there is no evidence that the MHTA had knowledge of any facts suggesting that this notice was not reasonably calculated to reach Fannie Mae. Accordingly, defendants failed to establish a question of fact regarding the MHTA's compliance with the statutory notice requirement.

PENROSE v McCULLOUGH

Docket No. 316435. Submitted November 13, 2014, at Grand Rapids. Decided November 18, 2014, at 9:15 a.m.

Anthony C. Penrose brought an action in the Van Buren Circuit Court against Todd A. and Amy S. Sanford and Frank V. and Linda L. McCullough, seeking to render void an easement that the McCulloughs had granted the Sanfords over a portion of the McCulloughs' property on the ground that the McCulloughs had previously granted an exclusive easement over the same area to Penrose's predecessors in interest, William and Susan Gleeson. The court, Paul E. Hamre, J., granted Penrose's motion for summary disposition, and the Sanfords appealed.

The Court of Appeals *held*:

1. The court properly granted plaintiff summary disposition. Because the Gleesons' easement was recorded before the Sanfords purchased their lot and acquired the purported easement from the McCulloughs, the Sanfords had constructive notice of the Gleesons' preexisting exclusive easement appurtenant. As a result, under MCL 565.29, plaintiff's exclusive claim to the easement as a successor in interest to the Gleesons was superior to the Sanfords' claim, and the McCulloughs' attempt to expand the easement, which the deed specified was exclusive, was ineffective.

2. The doctrine of laches did not apply to bar plaintiff's claim because only three months had passed between plaintiff's acquisition of the easement and his attempt to enforce his rights and the Sanfords did not demonstrate how any delay, including any caused by plaintiff's predecessor in interest, resulted in prejudice.

Affirmed.

George S. Dunn for Anthony C. Penrose.

Kreis, Enderle, Hudgins & Borsos, P.C. (by *Stephen J. Hessen* and *Jeffrey D. Swenarton*), for Todd A. and Amy S. Sanford.

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM. Defendants Todd Sanford and Amy Sanford appeal as of right an order granting summary disposition in favor of plaintiff, Anthony Penrose, in this property easement dispute. Because plaintiff possessed an exclusive easement over the property in question, the Sanfords' later acquisition of an easement over that same property was ineffective, and we affirm.

I. BASIC FACTS

This case arises out of a dispute over real property located in the Monroe Park Subdivision, in the city of South Haven. Lots 9, 10, and 11 were originally owned by William and Susan Gleeson. The Gleesons sold Lot 11 to defendants Frank and Linda McCullough, who already owned Lot 6. The McCulloughs, in turn, granted the Gleesons an "exclusive" easement over a portion of their Lot 6. Even though the easement was granted *after* the Gleesons transferred their interest in Lot 11 to the McCulloughs, the easement document stated that the easement was being granted to the Gleesons as "title holder to Lots 9, 10, and 11."

The McCulloughs subsequently sold Lot 11 to the Sanfords and included an easement over Lot 6, covering the same area as noted in the easement granted to the Gleesons. Plaintiff, Anthony Penrose, purchased Lots 9 and 10 from the Gleesons and is their successor in interest to those parcels.

Plaintiff filed suit, alleging that he had an exclusive right to the easement, which precluded the Sanfords from using it. The Sanfords answered and asserted that they were entitled to rely on a valid easement over Lot 6. Plaintiff moved for summary

disposition under MCR 2.116(C)(10), contending that when the McCulloughs sold Lot 11 to the Sanfords, the McCulloughs could not transfer an easement over Lot 6. The Sanfords countered by affirmatively moving for summary disposition in their favor under MCR 2.116(I)(2), contending that plaintiff's arguments ignored the plain language of the easement over Lot 6 to Lot 11. The trial court agreed with plaintiff and granted summary disposition in his favor.

II. STANDARDS OF REVIEW

"This Court reviews de novo a trial court's ruling on a motion for summary disposition." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). A motion for summary disposition under 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). The motion is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012).

Furthermore, because deeds are contracts, the interpretation of their language is an issue of law, which this Court reviews de novo. *In re Rudell Estate*, 286 Mich App 391, 402-403; 780 NW2d 884 (2009).

III. ANALYSIS

The Sanfords argue that the trial court erred by granting plaintiff's motion for summary disposition because the Sanfords satisfied their burden by producing documentary evidence showing that a genuine issue of material fact existed regarding the parties' respective

rights over the easement parcel. Furthermore, the Sanfords maintain that the trial court also erred when it denied their request for summary disposition because their evidence affirmatively proved that they had permanent easement rights over it.

"An easement is the right to use the land of another for a specified purpose." *Schadewald v Brulé*, 225 Mich App 26, 35; 570 NW2d 788 (1997). " '[A]n easement may be created by express grant, by reservation or exception, or by covenant or agreement.' " *Rossow v Brentwood Farms Dev, Inc*, 251 Mich App 652, 661; 651 NW2d 458 (2002), quoting *State Hwy Comm v Canvasser Bros Bldg Co*, 61 Mich App 176, 181; 232 NW2d 351 (1975). Michigan courts recognize two types of easements: easements appurtenant and easements in gross. See *Collins v Stewart*, 302 Mich 1, 4; 4 NW2d 446 (1942). An appurtenant easement attaches to the land and is incapable of existence apart from the land to which it is annexed. *Schadewald*, 225 Mich App 35. "An easement in gross is one 'benefiting a particular person and not a particular piece of land.' " *Dep't of Natural Resources v Carmody-Lahti Real Estate, Inc*, 472 Mich 359, 379 n 41; 699 NW2d 272 (2005), quoting *Black's Law Dictionary* (7th ed). Michigan law favors easements appurtenant over easements in gross, and "an easement will never be presumed to be a mere personal right where it can fairly be construed to be appurtenant to some other estate." *Von Meding v Strahl*, 319 Mich 598, 610; 30 NW2d 363 (1948). In other words, if the easement in question relates in some way to a particular parcel of property, it is nearly always deemed appurtenant. *Myers v Spencer*, 318 Mich 155, 162; 27 NW2d 672 (1947).

Initially, the Gleesons owned Lots 9, 10, and 11, and the McCulloughs owned Lot 6. On May 9, 2007, the

McCulloughs purchased Lot 11 from the Gleesons. Approximately a week after Lot 11 was transferred to the McCulloughs, the McCulloughs granted an easement over Lot 6 in favor of the Gleesons. This deed stated, in pertinent part:

> Grantee is the title holder to Lots 9, 10, and 11 . . . Block 8, Monroe Park Subdivision, according to the recorded Plat thereof, City of South Haven, County of Van Buren and State of Michigan[.]
>
> For $10 and other good and valuable consideration receipt of which is hereby acknowledged, the Grantor hereby grants, bargains, sells, and conveys to the Grantee, its successors and assigns an exclusive perpetual easement across the 10 feet along the North of the South 29 feet of Lot 6, Block 8, Monroe Park Subdivision. *The easement is for parking, storage, a right of way, and for sanitary and other sewer and water lines and other utilities* . . . .
>
> *The Grantee may use the easement for the benefit of any or all of the Lots*.
>
> * * *
>
> *This instrument shall run with the land* . . . and shall be binding upon and inure to the benefit of the Grantor, Grantee, and their respective . . . assigns. [Emphasis added.]

It is clear that even if Michigan did not strongly favor easements appurtenant over easements in gross, the easement here is appurtenant. The deed establishes that the grantee's use of the servient estate is tied to the land and is for the express benefit of "any or all of the Lots." Furthermore, the deed recognizes that the easement will "run with the land," which is a trait of an easement appurtenant. *Charles A Murray Trust v Futrell*, 303 Mich App 28, 42; 840 NW2d 775 (2013).

The trial court ruled that as a matter of law no easement was created with Lot 11 as the dominant estate. Even assuming that the McCulloughs intended to create an easement with Lot 11 being the dominant estate,[1] we agree with the trial court because when the easement was granted on May 15, 2007, the McCulloughs already owned both Lot 6 and Lot 11.[2] It is well established that " '[o]ne cannot have an easement in one's own land.' " *Von Meding*, 319 Mich at 605, quoting *Dimoff v Laboroff*, 296 Mich 325, 328; 296 NW 275 (1941). This is because " '[t]he union of dominant and servient estates in the same owners extinguishes prior easements.' " *Von Meding*, 319 Mich at 605, quoting *Dimoff*, 296 Mich at 328. Therefore, any attempt by the McCulloughs to create an easement with Lot 11 being the dominant estate and Lot 6 being the servient estate ultimately failed as a matter of law once they owned both lots. But there is no question that the easement was successfully created with respect to Lots 9 and 10 being the dominant estates. The two deeds for the conveyance of Lot 11 and the granting of the easement were later recorded on the same day—June 5, 2007.

Then, in April 2008, the McCulloughs conveyed Lot 11 and an easement over Lot 6 to the Sanfords. The deed specified that interest in two different "parcels" were being conveyed:

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[1] We are aware that the deed granting the easement arguably is ambiguous in this respect because it states that it is granting an easement for the Gleesons, who were described as being the "title holder to Lots 9, 10, and 11," when it is clear that the Gleesons no longer held the title to Lot 11 after conveying that interest to the McCulloughs.

[2] We also note that whether the transfer of Lot 11 occurred before or after the grant of the easement makes no difference. Regardless of the order, after both transfers had been completed, the McCulloughs would be the owner of the dominant estate (Lot 11) and the servient estate (Lot 6).

> Parcel 1
>
> Lot 11, Block 8, Monroe Park Subdivision, according to the Plat thereof as recorded in Liber 1 of Plats, Page 2, Van Buren County Records.
>
> Parcel 2
>
> TOGETHER WITH:
>
> An easement over the North 10 feet of the South 29 feet of Lot 6, Block 8, Monroe Park Subdivision, according to the Plat thereof as recorded in Liber 1 of Plats, Page 2, Van Buren County records as recorded in Liber 1484, Page 570.

The fact that an easement was expressly granted is significant. While easements appurtenant need not be mentioned in deeds in order to be transferred when a dominant estate is transferred, *Myers*, 318 Mich at 166, as discussed earlier, no easement appurtenant attached to Lot 11 previously. So, the express grant in this deed is the first time that the easement purportedly attached to Lot 11. Thus, on its face, the Sanfords were given an easement over Lot 6 in April 2008.

Then, in December 2012, the Gleesons conveyed their interest in Lots 9 and 10, which included the easement over Lot 6, to plaintiff.

Plaintiff argues, as the trial court concluded, that because his easement was "exclusive," the McCulloughs were precluded from allowing anyone else to use the same easement. The May 2007 deed, which created the easement initially, conveyed "an *exclusive* perpetual easement" in favor of the Gleesons (the owners of Lots 9 and 10 at the time). (Emphasis added.)

In determining the scope of an "exclusive easement," we find the Idaho Supreme Court's discussion in *Latham v Garner*, 105 Id 854, 856; 673 P2d 1048 (1993), helpful.

> We begin with the observation that an exclusive easement is an unusual interest in land; it has been said to

> amount to almost a conveyance of the fee. The grant of an exclusive easement conveys unfettered rights to the owner of the easement to use that easement for purposes specified in the grant to the exclusion of all others. . . . [E]xclusive easements are not generally favored by the courts. Nevertheless, if parties agree to do so, exclusive easements can be created. [Citations omitted.]

In the instant case, even though disfavored by courts, the language of the deed conveying the easement to the Gleesons makes it clear that the easement, indeed, is an "exclusive" easement. Thus, only the Gleesons and any subsequent owners of Lots 9 and 10 were entitled to use the easement on Lot 6.

Importantly, the Gleesons' interest was recorded with the Van Buren County Register of Deeds in May 2007. Michigan is a race-notice state. *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 256; 827 NW2d 379 (2012). "Under MCL 565.29, the holder of a real estate interest who first records his or her interest generally has priority over subsequent purchasers." *Id*. (quotation marks and citation omitted). MCL 565.29 provides that

> [e]very conveyance of real estate within the state hereafter made, which shall not be recorded as provided in this chapter, shall be void as against any subsequent purchaser in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded.

"Thus, a later interest holder may take priority over a prior conveyed interest only if the later interest holder takes in 'good faith.' " *Coventry Parkhomes Condo Ass'n*, 298 Mich App at 256. And a good-faith purchaser is one who purchases without notice of any defect in the vendor's title. *Oakland Hills Dev Corp v Lueders Drainage Dist*, 212 Mich App 284, 297; 537 NW2d 258 (1995). "A person who has notice of a

possible defect in a vendor's title and fails to make further inquiry into the possible rights of a third-party is not a good-faith purchaser . . . ." *Royce v Duthler*, 209 Mich App 682, 690; 531 NW2d 817 (1995). The term "notice of a defect" has been defined as follows:

> Notice is whatever is sufficient to direct attention of the purchaser of realty to prior rights or equities of a third party and to enable him to ascertain their nature by inquiry. Notice need only be of the possibility of the rights of another, not positive knowledge of those rights. Notice must be of such facts that would lead any honest man, using ordinary caution, to make further inquiries in the possible rights of another in the property. [*Id*., quoting *Schepke v Dep't of Natural Resources*, 186 Mich App 532, 535; 464 NW2d 713 (1990).]

Furthermore, notice can be actual or constructive. *Richards v Tibaldi*, 272 Mich App 522, 539; 726 NW2d 770 (2006). Constructive notice "is notice that is imputed to a person concerning all matters properly of record." *Id*. at 540 (quotation marks and citation omitted).

In the instant case, because the Gleesons' easement was recorded before the Sanfords purchased Lot 11, the Sanfords had constructive notice of the Gleesons' pre-existing, *exclusive* easement on Lot 6. As a result, plaintiff's exclusive claim, as a successor in interest to the Gleesons, to the easement is superior to the Sanfords' claim, and the McCulloughs' attempt to expand the usage of the easement was ineffective. Therefore, the trial court properly granted summary disposition in favor of plaintiff.

The Sanfords also argue that the doctrine of laches and the "equities of the case" also required the preservation of the Sanfords' rights over the easement parcel.

> Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a

> dilatory plaintiff. The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right. But it has long been held that the mere lapse of time will not, in itself, constitute laches. The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created. The defendant bears the burden of proving this resultant prejudice. [*Attorney General v Powerpick Player's Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010) (quotation marks, brackets, and citations omitted).]

The doctrine of laches does not apply here because its application is founded upon "long inaction to assert a right." *Id*. Plaintiff bought Lots 9 and 10 from the Gleesons on December 20, 2012. Plaintiff initiated this lawsuit against the Sanfords on March 22, 2013, after the Sanfords had parked their car on the Lot 6 easement and prevented plaintiff's construction crew from bringing job materials to the site of his new home. The passage of a mere three months between plaintiff's purchase of Lots 9 and 10 and his attempt to enforce his rights to the Lot 6 easement can hardly be characterized as "long inaction" to enforce those rights. *Id*. Moreover, the Sanfords did not demonstrate how any delay, including any caused by plaintiff's predecessor in interest, resulted in prejudice. Therefore, the circuit court did not err when it "disregarded" the doctrine of laches.

Affirmed. Plaintiff, as the prevailing party, may tax costs pursuant to MCR 7.219.

BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ., concurred.

ROCK v CROCKER

Docket No. 312885. Submitted September 3, 2014, at Grand Rapids. Decided November 18, 2014, at 9:20 a.m. Leave to appeal granted 497 Mich 1034.

Dustin Rock brought a medical malpractice action in the Kent Circuit Court, against K. Thomas Crocker, D.O., and K. Thomas Crocker, D.O., PC (hereafter collectively referred to as "defendant"), alleging that he suffered injury resulting from violations of the appropriate standard of care by defendant during a surgical procedure and the postsurgical care of plaintiff. The court, James Robert Redford, J., ruled on motions in limine, holding that one of plaintiff's expert witnesses, Dr. David Viviano, could not testify regarding the standard of care applicable to the treatment provided by defendant, precluding any reference to plaintiff's receipt of no-fault motor vehicle insurance benefits, and denying defendant's motion to strike certain allegations of malpractice. The Court of Appeals granted plaintiff's interlocutory application for leave to appeal and defendant cross-appealed.

The Court of Appeals *held*:

1. The trial court erred by holding that Viviano could not offer expert standard-of-care testimony at trial on the basis that, although he was a board-certified specialist at the time of the alleged malpractice, his board certification had lapsed on its expiration date and it was likely that he would not be board-certified at the time of trial. The first sentence of MCL 600.2169(1)(a) provides that if the defendant is a specialist, the testifying expert must have been a specialist in the same specialty at the time of the occurrence that is the basis for the action. The second sentence of the statute provides that, if the party against whom or on whose behalf the testimony is offered is a specialist who is board-certified, the expert witness must have been board-certified in the same specialty at the time of the occurrence that is the basis for the action. It is undisputed that both Viviano and Crocker were board-certified orthopedic specialists at the time of the occurrence that is the basis for the action. The trial court erred by excluding Viviano's testimony. The part of the trial court's order providing that Viviano may not testify regarding the standard of care is reversed.

2. Plaintiff may not seek damages for two alleged particular breaches of the standard of care because plaintiff presented no evidence that the particular breaches caused him injury. The trial court, insofar as it did not so rule, erred. The trial court did not err by stating that evidence of the course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury, may be relevant evidence. The evidentiary ruling granting defendant's motion to strike those allegations is reversed. On remand, the trial court must exercise its discretion to determine, under MRE 403, whether the probative value of the evidence is outweighed by its prejudicial effect and, if it finds the evidence admissible, what limiting jury instruction must be given.

3. The trial court did not abuse its discretion when it determined that, although there was evidence to support defendant's theory that plaintiff was malingering, evidence of collateral source payments, in the form of plaintiff's receipt of no-fault benefits, was not admissible because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. The part of the trial court's order that granted plaintiff's motion to exclude the evidence is affirmed.

Affirmed in part, reversed in part, and remanded.

MEDICAL MALPRACTICE — EXPERT WITNESSES — SPECIALTIES — BOARD CERTIFICATIONS.

The first sentence of MCL 600.2169(1)(a) provides that, in an action alleging medical malpractice, if the party against whom or on whose behalf expert testimony on the appropriate standard of practice or care is offered is a specialist, a testifying expert must also have been a specialist in the same specialty at the time of the occurrence that is the basis for the action; the second sentence of MCL 600.2169(1)(a) provides an additional requirement that, if the party against whom or on whose behalf the testimony is offered is a specialist who is board-certified, the testifying expert witness must also have been board-certified in the same specialty at the time of the occurrence that is the basis for the action.

Mark Granzotto, PC (by *Mark Granzotto*), and *S. Schreier, PC* (by *Sherwin Schreier*), for Dustin Rock.

Aardema Whitelaw, PLLC (by *Brian W. Whitelaw*), and *Collins Einhorn Farrell PC* (by *Noreen L. Slank* and *Geoffrey M. Brown*), for K. Thomas Crocker, D.O., and K. Thomas Crocker, D.O., P.C.

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

SHAPIRO, P.J. Defendant, K. Thomas Crocker, D.O.,[1] performed orthopedic surgery on plaintiff's ankle on September 28, 2008, and for some time thereafter provided plaintiff postsurgical care. Plaintiff later filed the instant medical malpractice action, alleging that he suffered injury resulting from violations of the standard of care by defendant during surgery and during postsurgical care. Shortly before the scheduled trial date, the trial court ruled on several motions in limine. We granted plaintiff's interlocutory application for leave to appeal one of these pretrial rulings.[2] Defendant then cross-appealed the trial court's rulings on two other motions in limine.

Plaintiff appeals the trial court's ruling that one of plaintiff's proffered expert witnesses may not testify regarding the standard of care applicable to the treatment provided by defendant to plaintiff. Defendant cross-appeals two other rulings: the trial court's grant of plaintiff's motion to preclude any reference to plaintiff's receipt of no-fault motor vehicle insurance benefits and the trial court's denial of defendant's motion to "strike allegations of malpractice." In plaintiff's appeal, we reverse on the basis of the text of the controlling statute. In defendant's cross-appeal, we affirm the trial court's ruling regarding plaintiff's receipt of no-fault benefits, but reverse, in part, the trial court's denial of defendant's request to strike allegations.

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[1] Although his professional corporation is also a defendant in this action, in the interests of clarity, this opinion will refer to Dr. Crocker and his corporation as "defendant."

[2] *Rock v Crocker*, unpublished order of the Court of Appeals, entered September 12, 2013 (Docket No. 312885).

I. PLAINTIFF'S APPEAL

In a medical malpractice case, a plaintiff must establish that the medical care provided by the defendant fell below the standard of medical care applicable at the time the care was provided. This is set forth in MCL 600.2912a(1): "[I]n an action alleging [medical] malpractice, the plaintiff has the burden of proving that in light of the state of the art *existing at the time of the alleged malpractice* . . . ." (Emphasis added.)

By way of example, if a doctor is sued for malpractice alleged to have occurred on September 1, 2010, the question of whether the doctor was professionally negligent turns on whether he or she complied with the standard of care as it existed on September 1, 2010. Medicine is a constantly evolving science, but a physician's conduct and decision-making must be judged against the standard of care that applied when the physician acted, not against some standard that developed thereafter. Put simply, changes in the standard of care do not apply retroactively in medical malpractice suits.

Consistent with this principle, a physician who testifies regarding the standard of care at issue must have possessed, on the date of the alleged malpractice, the same relevant specialty qualifications as the defendant. This is set forth in MCL 600.2169(1)(a), which provides:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the

> testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.

The trial court concluded that one of plaintiff's expert witnesses, Dr. David Viviano,[3] cannot satisfy MCL 600.2169(1)(a) and so may not testify regarding the standard of care. This was error. Because Viviano and defendant were both board-certified orthopedic specialists at the time of the alleged malpractice (i.e., "at the time of the occurrence that is the basis for the action"), Viviano meets the requirements of the statute and so may testify with regard to standard of care issues.

At the time of the alleged malpractice, defendant was a board-certified specialist in orthopedic surgery. And, at the time of the alleged malpractice, Viviano was also a board-certified specialist in orthopedic surgery. Both defendant and Viviano have continued to practice as orthopedic specialists. However, after the time of the alleged malpractice, Viviano's board certification lapsed and he has not renewed it.[4] Defendant argued, and the trial court agreed, that under MCL 600.2169(1)(a), Viviano could not offer expert standard-of-care testimony at trial because, although he was a board-certified specialist at the time of the alleged malpractice, it was likely that he would not be board-certified at the time of trial.

This case involves the interpretation of a statute, which presents a question of law subject to review de

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[3] Viviano was plaintiff's treating physician after plaintiff discontinued treatment with defendant.

[4] It appears that Viviano's board certification lapsed on its expiration date and that he did not seek recertification. There is no evidence that his board certification was revoked or that he was denied recertification and we do not address such alternative scenarios.

novo. *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). As our Supreme Court has instructed,

> the 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. [*Bush v Shabahang*, 484 Mich 156, 166-167; 772 NW2d 272 (2009) (quotation marks and citations omitted).]

The statute refers to two different individuals: the defendant and the expert.[5] It also refers to two different, but interrelated, qualifications: medical specialty[6] and board certification.[7] If the defendant is a specialist, the testifying expert must have been a specialist in the same specialty at the time of the occurrence that is the

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[5] The statute also concerns an expert offering testimony on behalf of a health professional. That is not the factual situation present in this case but our analysis would apply to such a situation.

[6] "[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified." *Woodard*, 476 Mich at 561. To be a testifying "specialist," the statute "requires a proposed expert [witness] physician to spend greater than 50 percent of his or her professional time practicing the relevant specialty the year before the alleged malpractice." *Kiefer v Markley*, 283 Mich App 555, 559; 769 NW2d 271 (2009).

[7] "[T]o be 'board certified' within the meaning of § 2169(1)(a) means to have received certification from an official group of persons who direct or supervise the practice of medicine that provides evidence of one's medical qualifications." *Woodard*, 476 Mich at 564.

basis for the action. If the defendant is board-certified in a specialty, then the testifying expert must have been board-certified in the same specialty. We are tasked with determining *when* the testifying expert must have been board-certified. Contrary to defendant's argument, which was adopted by the trial court, we conclude that an expert testifying against a board-certified defendant must have been board-certified in the same specialty as the defendant at the time of the occurrence that is the basis for the action.

Defendant's primary argument is that the second sentence of MCL 600.2169(1)(a) employs the present tense and, therefore, must refer to the time when the testimony is delivered. However, this argument is belied by the first sentence of MCL 600.2169(1)(a), which employs the same present-tense verbs yet plainly refers to a past time period, i.e., the time of the occurrence that is the basis for the action. That is, the first sentence provides: "If the party against whom or on whose behalf the testimony *is* offered *is* a specialist, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony *is* offered." (Emphasis added.) Thus, despite employing the word "is," i.e., the present-tense form of the verb "to be," the first sentence still requires that the time at which the expert witness must so specialize be a time in the past in relation to the trial, i.e., at the time of the occurrence that is the basis for the action. The second sentence employs nearly identical present-tense verbs: "if the party against whom or on whose behalf the testimony *is* offered *is* a specialist who *is* board certified, the expert witness must *be* a specialist who *is* board certified in the specialty." (Emphasis added.) Accordingly, defendant's argument that the present-tense verbs employed by the second sentence of the statute require that they be read

to apply to the "present," i.e., the time of the testimony, is belied by the sentence directly before it and ignores our mandate to read the statute as a whole. *Bush*, 484 Mich at 166-167.

Defendant's present-tense argument is also defeated by reading the statute in its grammatical context. Removing the clauses related to the defendant, and considering only those relevant to the testifying expert, the statute reads:

> In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) . . . specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered . . . [or] the expert witness must be a specialist who is board certified in that specialty.

This reading more clearly demonstrates that the plain language of the second sentence of MCL 600.2169(1)(a) is an extension of the first. If the defendant is a board-certified specialist, the statute requires that a testifying expert must "specialize[] at the time of the occurrence that is the basis for the action in the same specialty . . . [and be] board certified in that specialty." This statute, indeed the relevant subsection itself, provides that the time when an expert must be similarly qualified as the defendant is the time of the occurrence that is the basis for the action. There is no indication, explicit or implied, that the Legislature intended that a wholly different time, i.e., the time when the testimony is delivered, is to apply when a defendant is a board-certified specialist, as opposed to merely a specialist.

As our Supreme Court has stated, the second sentence of MCL 600.2169(1)(a) provides an "additional" requirement. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004) (emphasis omitted). That requirement provides that an expert testifying against a board-certified defendant must also be board-certified in that same specialty. By imposing an "additional" requirement, the second sentence adds to, rather than contradicts, the first. Defendant offers no basis to conclude that the Legislature intended that a "specialist" must specialize at the time of the occurrence that is the basis for the action, but that a "board-certified specialist" must be board-certified at a completely different time, i.e., the time when his or her testimony is delivered. In the absence of any reference to a specific and different time period by the Legislature, we must conclude that the time period for board-certified specialists under MCL 600.2169(1)(a) is the time of the occurrence that is the basis for the action. See *King v Reed*, 278 Mich App 504, 515; 751 NW2d 525 (2008) ("This Court will not read anything into a statute that is not within the manifest intent of the Legislature, as gleaned from the language of the statute itself.").

Our interpretation is also consistent with the Legislature's most recent amendment of the statute. "[C]ourts must pay particular attention to statutory amendments, because a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute." *Bush*, 484 Mich at 167. Before it was amended in 1993, 1993 PA 78, to its current version, the statute provided:

> (1) In an action alleging medical malpractice, if the defendant is a specialist, a person shall not give expert testimony on the appropriate standard of care unless the person *is or was* a physician licensed to practice medicine

> or osteopathic medicine and surgery or a dentist licensed to practice dentistry in this or another state and . . . :
>
> (a) *Specializes, or specialized at the time of the occurrence* which is the basis for the action, in the same specialty or a related, relevant area of medicine or osteopathic medicine and surgery or dentistry as the specialist who is the defendant in the medical malpractice action. [Emphasis added.]

With the removal of these two emphasized phrases, the Legislature made clear that it intended to remove an "either/or" determination from the statute. That is, under the previous version of the statute, an expert witness was qualified to testify against a specialist defendant if the expert specialized at the time of trial and/or at the time of the occurrence. Under the amended statute, the relevant qualifications must be met only at the time of the occurrence that is the basis for the action.

Like the plain language of the statute, caselaw also requires that if the defendant was a board-certified specialist at the time of the occurrence that is the basis for the action, any expert testifying regarding the applicable standard of care must also have been a board-certified specialist at the time of the occurrence that is the basis for the action. In *Woodard*, 476 Mich at 560, our Supreme Court explained the statute as follows:

> [T]he plaintiff's expert witness must match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice, and, if the defendant physician is board certified in that specialty, the plaintiff's expert must also be board certified in that specialty.

The Supreme Court, consistent with the language of the statute, did not specify that an expert testifying against

a board-certified defendant must have been board-certified at any other time than the time of the occurrence that is the basis for the action. *Woodard* also provides that

> if a defendant physician has *received* [board] certification from a medical organization . . . , the plaintiff's expert witness must also have *obtained* the same certification in order to be qualified to testify concerning the appropriate standard of medical practice or care. [*Id*. at 564 (emphasis added).]

It is undisputed that Viviano *obtained* (past tense) the relevant board certification; that he no longer possesses the certification does not alter the fact that it had been obtained and was in effect at the time of the occurrence that is the basis for the action. Moreover, *Woodard* specified that if a defendant physician has *received* (again, using the past tense) board certification, the testifying expert must have obtained the same certification. Accordingly, *Woodard* is consistent with our interpretation of MCL 600.2169(1)(a).

We reject defendant's argument that a different result is dictated by a passage from *Halloran*, 470 Mich at 578-579, wherein the Supreme Court interpreted MCL 600.2169(1)(a) as follows:

> [Our] interpretation is supported by the use of the word "however" to begin the second sentence. Undefined statutory terms must be given their plain and ordinary meanings, and it is proper to consult a dictionary for definitions. *Donajkowski v Alpena Power Co*, 460 Mich 243, 248-249; 596 NW2d 574 (1999); *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). *Random House Webster's College Dictionary* (2d ed) defines "however" as "in spite of that" and "on the other hand." Applying this definition to the statutory language compels the conclusion that the second sentence imposes an *additional* requirement for expert witness testimony, not an optional one. In

> other words, "in spite of" the specialty requirement in the first sentence, the witness must also share the same board certification as the party against whom or on whose behalf the testimony is offered.

Defendant cites this passage for the proposition that the second sentence of MCL 600.2169(1)(a) imposes a separate and independent evidentiary requirement that must be read separately from the rest of the statute. This argument is not only contrary to the canons of statutory interpretation, *Bush*, 484 Mich at 166-167, but also mischaracterizes the Supreme Court's statement. As a preliminary matter, the instant case concerns different operative facts than did *Halloran*; that is, we do not consider the two sentences of MCL 600.2169(1)(a) as applied to this case, other than to interpret the second sentence with reference to the first. Substantively, we do not reject *Halloran*'s mandate that the second sentence imposes a requirement that must be applied to board-certified standard-of-care expert witnesses in medical malpractice cases. *Halloran* mandates that "the witness must . . . share the same board certification as the party against whom or on whose behalf the testimony is offered." *Halloran*, 470 Mich at 579. We merely address at what time the witness must share that board certification, a question not addressed in *Halloran*, therefore rendering that opinion inapplicable in this case.

Defendant's suggested interpretation would also have additional confounding consequences when the defendant physician was board-certified at the time of the occurrence but had retired, died, or allowed his or her certification to lapse before trial. In such cases, testing board certification at the time of trial, rather than the occurrence, would permit testimony from an expert who had *never* been board-certified. Even if a defendant retained his or her board certification

throughout the litigation, defendant's interpretation would allow for standard-of-care testimony by a specialist who was not board-certified at the time of the occurrence but became board-certified during the pendency of the litigation.

In accordance with the plain language of the statute, its most recent amendment, the relevant caselaw, and common sense, we hold that, under MCL 600.2169(1)(a), an expert witness seeking to offer standard-of-care testimony against or on behalf of a board-certified specialist must himself or herself have been board-certified in the same specialty at the time of the occurrence that is the basis for the action. Thus, in this case, the trial court erred by granting defendant's motion in limine to exclude Viviano's standard-of-care testimony.

II. DEFENDANT'S CROSS-APPEAL

A. MOTION TO STRIKE ALLEGATIONS

Plaintiff's complaint alleges that defendant committed medical malpractice in treating a trimalleolar fracture of plaintiff's right ankle. The complaint alleges 10 specific instances of professional negligence on the part of defendant. The two specific alleged breaches of the applicable standard of care relevant to defendant's cross-appeal are plaintiff's claims that (1) defendant improperly employed screws and a plate in the surgery he performed on plaintiff's ankle and (2) defendant improperly told plaintiff that he could bear weight on his ankle. One of plaintiff's expert witnesses, Dr. Antoni Goral, was deposed regarding defendant's treatment of plaintiff. Goral testified that defendant's placement of the plate, and the number of screws employed, violated the applicable standard of care. However, Goral did not

dispute defendant's counsel's assertion that, based on the evidence available, this specific alleged breach of the standard of care did not cause damage to plaintiff. Goral also testified that defendant's postsurgery advice to plaintiff that he could bear weight on his ankle violated the applicable standard of care. However, he similarly testified that this alleged improper advice, on the evidence available, did not cause damage to plaintiff.

Defendant filed a motion in limine to "strike allegations of malpractice" and to preclude plaintiff from offering any evidence regarding these two alleged breaches of the standard of care at trial. Defendant argued that, considering Goral's testimony, plaintiff could not establish a causal link between these two alleged breaches and plaintiff's claimed injuries and damages and that, therefore, any reference to the acts must be excluded. In response, plaintiff acknowledged that Goral's statements, on their own, were insufficient to establish that the two alleged breaches caused plaintiff injury. However, plaintiff asserted that evidence of the two alleged breaches was nonetheless relevant to his argument that, "notwithstanding [defendant's] claim that he has performed a hundred of [sic] ankle fracture repairs, [he] does not have the requisite skill or ability to properly fixate a trimalleolar fracture" and that the evidence "still goes to his overall knowledge and skill in the repair of these type of fractures."

The trial court denied defendant's motion, holding as follows:

> The Court is satisfied beyond peradventure that there is sworn testimony that the witnesses endorsed by the plaintiff will allege aspects of the treatment provided by the defendant to the plaintiff fell below the standard of care. The defense has argued that because certain aspects of the specifically identified breaches of the standard of care did not result in damages to the plaintiff that they *ipso facto*

must be excluded as evidence. Defendant argues at Page 3 of their brief that the Affidavit of Merit which suggests that the defendant was professionally negligent by allowing the plaintiff to bear weight on his right leg beginning on October 6, 2008, as well as providing a fixation method using an inadequate number of screws and metal plate that was too short, while falling below the standard of care, that because these violations of the standard of care do not specifically result in injuries to the plaintiff that the evidence must be excluded and the claims must be excluded.

The difficulty with this analysis is that it looks at the conduct which is alleged to be deficient in the treatment provided by the defendant in a complete vacuum. This is inappropriate and it does not give the jury an adequate opportunity to review in its entirety the quality of treatment provided by the defendant. It is certainly reasonable for a reasonable finder of fact to examine all the claims of the plaintiff and if satisfied that in addition to the difficulties of treatment that actually caused injuries if they believe the Defendant Doctor also breached the standard of care in a variety of multiple other ways then it provides evidence which is relevant because it makes a question of fact more likely than not, that is, that the doctor did not perform his duties as is required by the standard of care and that injuries he did suffer were a result of his breaches and that the claims of the plaintiff are meritorious and should be compensated. It is also possible that the jury will reject this evidence and find it has no bearing or credibility; however, it should not be excluded.

The Court further finds the conduct by the defendant sought to be excluded is all part of the *res gestae* of the claims before the Court.

As relates to the MRE 403 test, the Court does not believe that the prejudice of this information substantially outweighs its probative value. To the contrary, the prejudicial impact is *de minimis* if any and it is in the Court's assessment highly probative of whether or not that which was provided in medical care to the plaintiff in the time in question fell below the appropriate standards.

Defendant's artfully titled "motion to strike allegations" actually presents two distinct issues. First, in what is effectively a request for partial summary disposition, defendant argues that because there is no evidence that these two particular breaches caused injury, plaintiff may not seek damages for those violations. Whether a plaintiff's claim of medical malpractice fails in whole or in part as a matter of law is an issue of law that we review de novo. *King*, 278 Mich App at 520. After conducting review de novo, we agree with defendant that plaintiff may not seek damages for those violations and that the trial court, insofar as it did not so rule, was in error. See *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995).

The second issue raised in defendant's motion is the request that the trial court exclude all evidence that defendant violated the standard of care in these two respects. This aspect of the motion goes to the admission of evidence, which we review for an abuse of discretion. *Albro v Drayer*, 303 Mich App 758, 760; 846 NW2d 70 (2014). We agree with the trial court that evidence of the course of defendant's violations of the standard of care, even if the violations did not directly cause plaintiff's eventual injury, may be relevant to the jury's understanding of the case.[8] But, because we have ruled that plaintiff may not seek damages for those alleged violations, the trial court's view of the calculus of probative value and prejudicial effect may change. See MRE 403. Accordingly, we reverse the evidentiary ruling so that the trial court may exercise its discretion

[8] In addition to proving proximate causation, plaintiff must prove that defendant's treatment of him was negligent. And, as the trial court noted, whether defendant understood the proper use of the surgical plates and screws and whether he understood when plaintiff could safely bear weight on his ankle, are relevant to his competency in treating this injury.

in that context and consider what limiting jury instruction to give in the event it finds the evidence admissible.

B. EXCLUSION OF EVIDENCE OF NO-FAULT BENEFITS

Defendant also argues that the trial court abused its discretion by granting plaintiff's motion to exclude evidence of any no-fault insurance benefits plaintiff received. We disagree.

In the present case, plaintiff fractured his ankle while changing a tire on a motor vehicle; therefore, he received no-fault insurance benefits from his motor vehicle insurance carrier after the accident. Plaintiff moved to exclude from trial any evidence of his no-fault benefits, including the reimbursement of his medical expenses and payment of wage loss benefits. He argued that under MCL 600.6303, the amount of any medical malpractice judgment would be reduced by the amount of these no-fault payments after trial[9] and so introduction of evidence of those payments during trial could result in a double-reduction or other prejudice.

In response, defendant argued that he wished to introduce evidence regarding the existence and amount of no-fault benefits paid to plaintiff as support for defendant's claim that plaintiff was malingering and not actually seriously injured. Evidence of insurance coverage may not be introduced for the purpose of mitigating damages. *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 58; 457 NW2d 637 (1990). However, this rule is not an absolute bar to the admission of such evidence.

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[9] MCL 600.6303 permits "the presentation of evidence to a trial court *after* the verdict but before judgment to show that a plaintiff's claimed 'expense or loss was paid or is payable, in whole or in part, by a collateral source,' " and requires a trial court to reduce the amount of the judgment by that amount. *Greer v Advantage Health*, 305 Mich App 192, 208; 852 NW2d 198 (2014) (emphasis added).

An exception to the general rule of exclusion exists "where the evidence is sought to prove malingering or motivation on the plaintiff's part not to resume employment or to extend the disability." *Id*.

Certainly, defendant may assert at trial that plaintiff is a malingerer. And, defendant has significant evidence upon which to base this argument. Another physician who treated plaintiff opined that plaintiff was "a noncompliant, unmotivated patient who has exaggerated his injuries and/or pain" and that plaintiff's "current status is best explained by his lack of motivation to improve his medical condition, secondary gain, and lack of compliance with his healthcare providers." Defendant also points to evidence that doctors other than defendant had cleared plaintiff to return to work and plaintiff's deposition testimony, in which he stated that shortly before his injury he learned that he was going to be fired from his job and that he remained capable of attending school.

The trial court granted plaintiff's motion, holding as follows:

> The Court is satisfied that the Collateral Source Rule bars the admission of this evidence. See *Kurta v Probelske*, 324 Mich 179; 36 NW2d 889 (1949). The Court does not believe that the introduction of the existence of PIP benefits in any way leads to further clarification of the issues at bar and it will be excluded. Even if there were any modest probative value of such evidence, the Court believes that any probative value of PIP benefits would be substantially outweighed by the probative value[10] and would confuse the jury.
>
> This conclusion, however, does not in any way restrict the defendants from being able to call witnesses or treating

[10] Presumably, the trial court intended the preceding phrase to read "prejudicial effect."

> physicians to provide testimony that they believe that Plaintiff is malingering, motivated by financial compensation or any other rationale that they believe exists to demonstrate why that which the plaintiff represents is not correct.
>
> The defense is excluded from introducing evidence of no-fault benefits. They are not excluded from introducing evidence of medical providers that tend to suggest that the plaintiff is fabricating or exaggerating the injuries for ulterior motives.

When there is evidence other than insurance coverage to suggest malingering, admission of evidence of insurance coverage is left to the discretion of the trial court. *Nasser*, 435 Mich at 59-60. In exercising this discretion, the trial court must undertake an analysis under MRE 403. *Id*. The court must weigh the probative value of the evidence against "the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

The trial court recognized the applicability of MRE 403 and made findings consistent with the language of the rule. There was no abuse of discretion. First, the evidence of plaintiff's no-fault insurance benefits is cumulative in light of the other evidence available to defendant to support his claim of malingering. Second, since plaintiff's no-fault wage loss benefits must, by statute, have terminated in 2011, their probative value is limited. See MCL 500.3107(1)(b). Moreover, presentation of evidence of plaintiff's no-fault benefits has the potential to mislead and confuse the jury so that it might conclude that it should reduce plaintiff's damages by the amount of his insurance benefits, which is a matter solely left to the trial court after the verdict. See MCL 600.6303. Perhaps more important in terms of judicial efficiency, allowing introduction of this margin-

ally probative evidence would result in a minitrial on the question of whether plaintiff was legally and factually entitled to no-fault benefits. If evidence of the receipt of the benefits is admitted to show that plaintiff was wrongly seeking financial gain, plaintiff would be entitled to respond with proofs that his receipt of these benefits was proper. This process could include the calling of more physician witnesses, insurance company adjustors and other personnel, and the review of internal insurance company documents, among additional otherwise extraneous proofs.

In sum, the trial court did not abuse its discretion when it determined that, although there was evidence to support defendant's theory of malingering, evidence of collateral source payments, in the form of plaintiff's no-fault benefits, was not admissible because the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403.

We reverse the trial court's ruling that Dr. Viviano may not testify regarding the applicable standard of care. We reverse the trial court's denial of defendant's motion to strike allegations insofar as it denied defendant's request to bar an award of damages for the two alleged violations of the standard of care on which plaintiff has not offered evidence of causation, and instruct the trial court on remand to reconsider defendant's request to exclude evidence of those two alleged violations of the standard of care. We affirm the trial court's grant of plaintiff's motion to exclude evidence of no-fault insurance benefits. This case is remanded to the circuit court for proceedings consistent with this opinion. We do not retain jurisdiction.

WHITBECK and STEPHENS, JJ., concurred with SHAPIRO, P.J.

PEOPLE v GONZALEZ-RAYMUNDO

Docket Nos. 316744 and 319718. Submitted October 14, 2014, at Detroit. Decided November 18, 2014, at 9:25 a.m. Leave to appeal denied 497 Mich 998.

Elias Gonzalez-Raymundo was convicted by a jury of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), on the basis of charges that he had engaged in sexual activity with a minor. The court, Edward Ewell, Jr., J., sentenced defendant to 5 to 15 years' imprisonment for each conviction. In Docket No. 316744, defendant appealed his convictions and also moved that the case be remanded for a hearing under *People v Ginther*, 390 Mich 436 (1973), to determine whether his trial counsel had been ineffective for waiving defendant's right to an interpreter at trial despite the fact that defendant was not fluent in English. The Court of Appeals granted the motion, and, after a *Ginther* hearing, the trial court granted defendant's motion for a new trial, ruling that it had erred by accepting defense counsel's waiver of defendant's right to an interpreter and that its failure to provide an interpreter violated defendant's constitutional rights. In Docket No. 319718, the prosecutor appealed the order granting a new trial by delayed leave granted, and the cases were consolidated.

The Court of Appeals *held*:

1. Defense counsel's decision to waive defendant's right to an interpreter did not preclude appellate review of the issue. While a defendant may waive the right to simultaneous translation by an interpreter at the trial, this waiver must be an informed decision made by the defendant personally, and defendant apparently made no such waiver in this case.

2. The trial court did not abuse its discretion by granting defendant's motion for a new trial. Defendant had a statutory and a constitutional right to simultaneous translation of the trial proceedings, and the trial court had a duty to appoint an interpreter in light of the evidence indicating that defendant was not capable of understanding English well enough to effectively participate in his defense. It was unnecessary to decide whether the trial court's error in failing to do so was structural because the error was not harmless and it prejudiced defendant.

Docket No. 319718 affirmed; Docket No. 316744 dismissed as moot.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — TRIAL — INTERPRETERS — WAIVER.

The constitutional right to simultaneous translation of trial proceedings for a criminal defendant who is not capable of understanding English well enough to effectively participate in his or her defense may only be waived by the defendant personally.

2. CONSTITUTIONAL LAW — CRIMINAL LAW — TRIAL — INTERPRETERS — DUTY TO APPOINT.

A trial court has a statutory and constitutional duty to appoint an interpreter when there is evidence to indicate that a criminal defendant is not capable of understanding English well enough to effectively participate in his or her defense unless the defendant has effectively waived the right to simultaneous translation of the trial proceedings (US Const, Ams V and XIV; Const 1963, art 1, § 17; MCL 775.19a).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Julie A. Powell*, Assistant Prosecuting Attorney, for the people.

James E. Czarnecki II for defendant.

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

BOONSTRA, P.J. Defendant was convicted, following a jury trial, of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 years of age but less than 16 years of age).[1] Defendant was sentenced to 5 to 15 years' imprisonment for each conviction. In Docket No. 316744, defendant appeals as of right, arguing that (1) his defense counsel was

[1] Defendant was also acquitted of a fifth count of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 years of age but less than 16 years of age).

ineffective for failing to use an interpreter at trial and for failing to properly investigate the case, and (2) the trial court violated his constitutional right to due process by failing to provide him with an interpreter. After filing his claim of appeal, defendant moved this Court to remand the case to the trial court for a *Ginther*[2] hearing on his claim of ineffective assistance of counsel. This Court granted defendant's motion to remand on September 5, 2013.[3] After the *Ginther* hearing, the trial court granted defendant's motion for new trial on the grounds that it had erred by accepting defense counsel's waiver of defendant's right to an interpreter and that its failure to provide an interpreter violated defendant's constitutional rights. In Docket No. 319718, the prosecutor appeals by delayed leave granted[4] the trial court's grant of defendant's motion for new trial. The two cases were consolidated by this Court on February 19, 2014.[5] For the reasons specified below, we affirm the trial court's order granting defendant a new trial in Docket No. 319718, and dismiss as moot defendant's appeal in Docket No. 316744.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a series of alleged sexual encounters between defendant and his stepnephew, IR, in Lincoln Park, Michigan. IR was born on September 11, 1997, and was approximately seven or eight years old when he first met defendant. Defendant lived in a house directly across the street from the Lincoln

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

[3] *People v Gonzalez-Raymundo*, unpublished order of the Court of Appeals, entered September 5, 2013 (Docket No. 316744).

[4] *People v Gonzalez-Raymundo*, unpublished order of the Court of Appeals, entered February 19, 2014 (Docket No. 319718).

[5] *Id*.

Park home of IR's stepfather, Jose Gonzalez, and mother, Rosalba Llamas, where IR also lived.

IR testified that defendant is his stepuncle. When IR was 10 or 11 years old, numerous members of defendant's family came to town for Christmas and stayed at defendant's home. To accommodate the number of visitors, some people from defendant's home, including defendant, stayed with IR's family in the home where IR, Llamas, and Gonzalez lived. IR testified that, at Llamas' instruction, he and defendant slept in the same room, and the same bed, during the Christmas holiday season.[6] Gonzalez disagreed with IR's testimony, claiming that no two men had to sleep together during this Christmas holiday and that he did not recall any instance in which defendant and IR had to share a bed. According to IR, he and defendant woke up early in the morning because IR had accidentally touched defendant's penis, which was erect at the time, in his sleep. IR claimed that he and defendant both "felt something," and defendant asked IR if he would give him "head," meaning oral sex. IR agreed and performed oral sex on defendant. This encounter was the culmination of a "crush" that IR had developed for defendant over the years prior.

Frequently, defendant would cross the street to use the Internet at IR's house, because defendant's home did not have wireless Internet access. IR testified that on one of these occasions, shortly after the first sexual encounter, he was lying on a couch on the main floor of the house, watching cartoons. IR was "acting asleep," but then began to signal to defendant, by poking or touching him, that he wanted to engage in sex. Once

[6] On cross-examination at trial, IR admitted that he had previously testified that he had crawled into defendant's bed in the morning, and had not slept in the same bed as defendant.

defendant accepted his "signals," the two went into a bathroom located in the basement of the home. IR testified that he again performed oral sex on defendant, and that after this second act of oral sex, defendant told him that their sexual activity had to stay secret. IR agreed not to tell anyone.

A few months later, in May, IR saw defendant getting ready for a soccer game that he was going to play at a nearby park. IR testified that he was "tired of being in [his] house," so he asked Llamas if he could go to the park with defendant. Llamas told him it was fine as long as defendant did not mind. IR went across the street to defendant's house to ask if he could accompany him to the park. When IR entered defendant's bedroom, defendant was lying in bed. IR testified that he and defendant began engaging in their "usual ritual," in which IR would perform oral sex on defendant, and that the encounter ended in anal sex, with defendant's penis penetrating IR's anus. IR was not yet 13 years old. IR testified that, after these initial encounters, the two would sporadically engage in either oral sex or anal sex, generally every few weeks or so.

IR turned 13 years old shortly before he began eighth grade. He testified that he remembered sneaking out of his parents' house late at night on a school night, sometime in the winter after he had turned 13. On that night, IR waited approximately 30 minutes after he heard the television turn off in his parents' bedroom, put on some pants, and then snuck downstairs, being extremely quiet because his mother was a very light sleeper. Using his mother's cell phone, IR sent defendant a text message stating that he was in the mood to have sex and asking whether defendant wanted him to come over. Defendant responded that he did want IR to come over. IR then deleted the text messages from his

mother's cell phone. IR walked across the street and let himself into defendant's home, where the two engaged in both oral and anal sex.

IR testified that, between the ages of 13 and 14, he snuck out of his parents' house on numerous occasions to engage in oral and anal sex with defendant. On some nights, IR would watch defendant's home, and if defendant flicked his bedroom light on and off, IR knew that to mean that defendant was interested in having sex that night. IR testified that the last time he and defendant engaged in sexual relations was in January of 2012. Overall, IR estimated the two had engaged in oral sex approximately 30 times and anal sex approximately five times.

IR testified that he never told any of the adults in his family about his relationship with defendant, but that his mother and some other family members had "suspicions." For example, when the family would have large barbeques, IR and defendant would act strangely toward each other, and IR believed other people could tell that something sexual was occurring. In the middle of February of 2012, IR's biological father, David Rivera, discovered the relationship between defendant and IR. It was a Sunday afternoon and IR was asleep when he awoke to hear Rivera yelling, telling Llamas that someone "was gonna die, that he was really gonna pay for what he did." He had discovered IR's iPod, on which IR had sent a message to a friend regarding his sexual relationship with defendant. Rivera then walked to IR's room and asked him if defendant had ever touched IR in an inappropriate way or if they had ever had sex. IR was unable to answer and hung his head low, and Rivera "just knew" at that point. Rivera, who was employed as a firefighter, threw his firefighter's axe into his car, but never actually attacked defendant.

Before his father discovered the relationship, IR had already told his brother and two friends about it. After Rivera found out about the relationship, he required IR to report the sexual acts to the Lincoln Park police, even though IR did not want to press charges against defendant. IR also participated in "Kids-Talk,"[7] to explain what had happened with defendant. He also went to a doctor to be examined for evidence of sexual activity, but no such evidence was found. IR testified that after he reported the incident and spoke to "Kids-Talk," his mother, Llamas, called him a liar and did not believe the things he claimed regarding his relationship with defendant.

On March 28, 2013, the parties appeared before the trial court for an evidentiary hearing regarding text messages found on IR's iPod. An interpreter was provided for defendant at this hearing.[8] At the conclusion of the hearing, the trial court ruled that all the text messages found on IR's iPod, apart from those that mentioned defendant, were protected by the rape shield law, MCL 750.520j, and were therefore inadmissible.

The parties appeared for trial on April 1, 2013. Before voir dire, the following colloquy occurred:

> *Defense Counsel*: Final matter of housekeeping, Your Honor, is as a Hispanic I know that sometimes folks can take offense to people speaking Spanish rather than English.

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[7] Although the record provided to this Court does not further identify "Kids-Talk," from context it appears that IR was referring to the Kids-TALK Children's Advocacy Center, which provides investigation and treatment for child victims of physical and sexual abuse, neglect, and psychological trauma. These services include forensic interviewing. See Guidance Center, Kids-TALK Children's Advocacy Center <http://www.guidance-center.org/kids-talk> (accessed October 21, 2014) [http://perma.cc/4V6E-RSK4].

[8] Defendant was also provided with an interpreter at his preliminary examination.

> And I want to avoid the chance of any prejudice, so we'd like to preserve the right to waive the interpreter during the course of the proceedings and explain things to the defendant on break. And you can hear straight from the defendant's mouth if you like, Your Honor, that this is indeed our wish.
>
> We will accept any prejudice that might be done for his minimal lack of understanding during the course of the proceedings in order, in exchange for the safeguard against any potential prejudice amongst jury members or folks who don't look too kindly upon those who don't speak English as a first language.
>
> And, again, I do say that with -- as one with experience.
>
> *The Court*: You don't have any objection to that?
>
> *The Prosecutor*: I think that's a very strange thing that they are going to think, so I think that they are making that decision that they shouldn't be questioned as ineffective because they have also indicated that he has -- it sounds to me, based on what defense counsel's indicating, is that the client could, for the most part, could understand, with minimal exception they would need the interpreter. And certainly that's something that he could also voir dire on.

Following a recess, the case proceeded to trial without the trial court's having further addressed the issue. At the conclusion of the prosecution's case in chief, defendant moved for a directed verdict. The trial court found that there was sufficient evidence to allow the case to go to the jury, and denied defendant's motion. At the conclusion of trial, defendant was found guilty of four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 years of age but less than 16 years of age), and was acquitted of a fifth count of third-degree criminal sexual conduct, MCL 750.520d(1)(a).

The parties appeared for sentencing on May 6, 2013. Defendant used an interpreter during the sentencing

proceedings. Defendant did not make a statement on his own behalf. At the conclusion of sentencing, defendant was sentenced as described earlier.

Defendant appealed his convictions by right on June 12, 2013. On August 7, 2013, defendant moved to remand the case to the trial court for a *Ginther* hearing. Defendant argued that he had been denied his state and federal rights to the effective assistance of counsel because defense counsel had (1) failed to conduct a jury voir dire to determine whether the jury would have been prejudiced by defendant's need for an interpreter, (2) waived defendant's right to an interpreter at trial despite defendant's need for one, (3) failed to investigate and meet with exculpatory witnesses, and (4) failed to properly inform defendant of his right to testify at trial. Defendant supported his motion with affidavits from Llamas and Gonzalez. In her affidavit, Llamas stated that defendant barely speaks any English, that defendant needed a translator at trial, that she did not believe that defendant committed the crimes alleged, and that she would have testified had she been called by defendant's trial counsel. Gonzalez stated in his affidavit that defendant barely speaks any English, that defendant needed a translator at trial, and that trial counsel only prepared him on the day of trial and only for five minutes. This Court granted defendant's motion on September 5, 2013.

The parties appeared before the trial court for a *Ginther* hearing on October 28, 2013. Defendant's trial counsel testified that he had been an attorney for 18 years, approximately 10 to 15 percent of his practice involved criminal matters, and defendant's trial had been his second as first-chair criminal defense attorney. Trial counsel also testified that

defendant's primary language was Spanish and that he had primarily spoken with defendant in Spanish because defendant's English proficiency was limited. Trial counsel also testified that an interpreter had been present for the entire trial and on breaks the interpreter would "catch [defendant] up" on anything that had occurred during the trial proceedings about which defendant was confused. Trial counsel further testified that, to his recollection, defendant had known and understood why counsel had declined the assistance of an interpreter during trial, and that defendant was "okay" with that. Trial counsel had explained to defendant that he thought that having an interpreter would look bad not only because of possible jury prejudice against non-English speakers, but also because having someone whisper in defendant's ear could look bad to the jury. Finally, trial counsel testified that he had decided not to call Llamas as a witness because IR had already testified on cross-examination that his mother did not believe that defendant had had sexual relations with IR and Llamas could not add much to that, and additionally, because she was a conflicted witness, as the victim was her son. An associate in trial counsel's firm, Stephanie Labelle (known during the trial as Stephanie Judd), also testified that an interpreter was not used during trial because of fears of jury bias against a non-English speaking defendant.

Llamas testified at the *Ginther* hearing that defendant's primary language was Spanish, that he had lived in Mexico before moving to the United States approximately seven years before the hearing, and that he did not speak English either at work or socially. Additionally, the only conversation Llamas had with defendant's trial counsel was in the hallway outside the courtroom on the first day of trial, and the conversation only lasted

about five minutes. Llamas wanted to testify because she "wanted the truth to come out," and she did not believe IR's allegations against defendant.

The parties returned for the court's ruling on defendant's motion for a new trial on November 22, 2013. The trial court ruled that it had erred when it did not have defendant personally waive simultaneous translation, instead accepting trial counsel's word on the subject. On that basis, the trial court granted defendant's motion for a new trial. When asked to clarify, the court noted that its error was structural, and held that, even if it were not, trial counsel had been ineffective and defendant had been prejudiced by not "getting [the cross-examination of the victim] in real time and able to respond to that in a timely fashion to be able to ask questions." An order was entered that same day to reflect the trial court's ruling.

The prosecution filed with this Court its delayed application for leave to appeal on December 23, 2013. The prosecution argued that the trial court had erred by granting defendant a new trial because trial counsel's strategic decision regarding simultaneous translation was not a structural error, and because defendant did not meet his burden of showing prejudice. This Court granted the prosecution's application for leave to appeal on February 19, 2014. Further, this Court consolidated the prosecution's appeal with defendant's pending appeal, in the same order, on February 19, 2014.

II. MOTION FOR NEW TRIAL

As this issue is dispositive of the case before this Court, we address the prosecution's appeal first. The prosecution contends on appeal in Docket No. 319718

that the trial court abused its discretion by granting defendant's motion for new trial on remand. We disagree.

A. STANDARD OF REVIEW

MCL 770.1 provides:

> The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

"This Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Constitutional errors are classified as either structural or nonstructural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001), affirmed but criticized on other grounds 468 Mich 233 (2003). Generally, all other errors are nonstructural. See *People v Carines*, 460 Mich 750, 765; 597 NW2d 130 (1999). When a structural error occurs, reversal is required without any showing of prejudice. *People v Cook*, 285 Mich App 420, 424; 776 NW2d 164 (2009). In contrast, a nonstructural constitutional error is subject to analysis for harmless error. See *Carines*, 460 Mich at 774.

B. WAIVER

As a threshold issue, although the prosecution argues that defendant waived his right to an interpreter and has thus waived appellate review of this issue, we do not find that defendant's trial counsel's statements operated to affirmatively waive defendant's rights. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 762 n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quotation marks omitted). A defendant may generally waive a constitutional right. See *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000) ("It is presumed that waiver is available in a broad array of constitutional and statutory provisions . . . . While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel.") (quotation marks and citations omitted). This includes the waiver of the right be present at trial. *People v Buie (On Remand)*, 298 Mich App 50, 56-57; 825 NW2d 361 (2012).[9] However, such waiver must be personal and informed. See *People v Kammeraad*, 307 Mich App 98, 117; 858 NW2d 490 (2014).[10] Courts must "indulge

[9] As discussed in Part C, the lack of simultaneous translation implicates defendant's "presence" at his trial, despite the fact that he was physically present.

[10] In *Kammeraad*, this Court found that the defendant, despite his express statements that he wished to be removed from the courtroom during his trial, had not been "specifically informed of his constitutional right to be present at trial, even though the circuit court's exhaustive efforts certainly made it implicitly clear that defendant had a right to be present." *Kammeraad*, 307 Mich App at 117. This Court therefore was forced to conclude that defendant had not waived his right to be present.

every reasonable presumption against the loss of constitutional rights" in assessing a waiver of such rights. *Illinois v Allen*, 397 US 337, 343; 90 S Ct 1057; 25 L Ed 2d 353 (1970).

The lack of simultaneous translation implicated defendant's rights to due process of law guaranteed by the United States and Michigan Constitutions. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. Specifically, a defendant has a right to be present at a trial against him, see *Drope v Missouri*, 420 US 162, 171; 95 S Ct 896; 43 L Ed 2d 103 (1975), and a defendant's lack of understanding of the proceedings against him renders him effectively absent, see *People v Cunningham*, 215 Mich App 652, 654-655; 546 NW2d 715 (1996). In addition, lack of simultaneous translation impairs a defendant's right to confront witnesses against him and participate in his own defense. *Cunningham*, 215 Mich App at 654-655. The right at issue is thus not merely statutory as codified by MCL 775.19a, but constitutional, and thus subject to every reasonable presumption against its loss.

Defense counsel, at the *Ginther* hearing, stopped well short of indicating that defendant made a personal and informed decision to waive his right to an interpreter, saying only that "this was the strategy I recommended to him and he went along with it to the point that I don't recall him making any objection" and that defendant "wasn't opposed to it." Counsel also described defendant as "very deferential" to his experience and status as a defense attorney. Under these circum-

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Id. at 118. In that case, the trial court made extensive efforts, in the face of an extremely obstinate and uncooperative defendant, to secure the defendant's constitutional rights; that this Court was forced reluctantly to find those efforts inadequate indicates the strength of the dictate that courts must indulge every reasonable presumption against the loss of constitutional rights. *Allen*, 397 US at 338, 343.

stances, and given that the trial court apparently never asked defendant personally whether he was aware of his constitutional and statutory right to an interpreter, we decline to find that defendant made an informed waiver of his right to receive simultaneous translation during his trial.

C. THE TRIAL COURT'S NONCOMPLIANCE WITH MCL 775.19a

MCL 775.19a provides in relevant part:

> If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter.

Further, a trial court should appoint an interpreter when it appears from the record that a witness is not understandable, comprehensible, or intelligible, and the absence of an interpreter would deprive the defendant of some basic right. See *People v Warren (After Remand)*, 200 Mich App 586, 591-592; 504 NW2d 907 (1993).

In this case, the trial court, prosecution, and defense counsel all were aware that defendant was incapable of understanding English at a level necessary to effectively participate in his defense without simultaneous translation of the trial proceedings. Therefore, having failed to secure defendant's personal and knowing waiver of his right to simultaneous translation, the trial court erred by allowing defendant to proceed to trial without simultaneous translation of the trial proceed-

ings. See *People v Sepulveda*, 412 Mich 889 (1981) ("Notwithstanding the failure of the defendant to request an interpreter, it was error to fail to appoint an interpreter where the record clearly shows that the defendant spoke no English whatsoever."). The trial court had an affirmative duty to establish defendant's proficiency in English or appoint an interpreter in light of the record evidence concerning his limited understanding of English. Compare *People v Atsilis*, 60 Mich App 738, 739; 231 NW2d 534 (1975) ("[A] trial judge is not under a duty to affirmatively establish a defendant's proficiency in the English language when no evidence is presented to him that could put the issue in doubt."), with *Kammeraad*, 307 Mich App at 120 ("[D]efendant . . . needlessly demanded an interpreter, as it is quite evident that defendant is fluent in the King's English . . . ."). We conclude that the trial court erred by failing to satisfy this duty, and that this error effectively prevented defendant from being truly present at his trial and arguably interfered with his ability to assist in his defense, including in the cross-examination of witnesses.

Defendant asserts that the trial court correctly determined that the error in this case was structural. The United States District Court for the Eastern District of Michigan, in granting a petition for habeas corpus, has described the violation of a defendant's right to be present at his trial as a "structural defect" and suggested that denial of simultaneous translation was such a defect, although the court also addressed prejudice to the defendant. *Gonzalez v Phillips*, 195 F Supp 2d 893, 902-903 (ED Mich, 2001).[11] The prosecution argues, in contrast, that the failure to provide a full and simultaneous

[11] Decisions of lower federal courts are not binding on this Court. *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

translation is a nonstructural error. It cites an unpublished decision of this Court[12] that indeed found nonstructural error, but did so in the context of deficient, rather than nonexistent, simultaneous translation. In this case, by contrast, defendant received no simultaneous translation during the trial at all. This Court also has stated that "[a]lthough occasional lapses [in simultaneous translation] will not render a trial fundamentally unfair, adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear." *Cunningham*, 215 Mich App at 655. The Court in *Cunningham* thus considered whether lapses in translation rendered the defendant's trial fundamentally unfair; however, while not directly addressing whether the error was a structural one, it remanded for further proceedings on the basis of its inability to determine whether the error was harmless beyond a reasonable doubt. The parties have therefore presented us with authority that is both arguably conflicting and distinguishable from the instant case; neither party has presented binding authority to this Court on the precise issue of whether the complete lack of simultaneous translation during a trial is a structural error that would require us to affirm the trial court's grant of a new trial even absent a showing of prejudice.

We conclude, however, that we need not decide whether the complete lack of simultaneous translation in the instant case is a structural error, because even if we were to subject the trial court's error to harmless-error analysis, we would conclude in this case that the error was not harmless and that it prejudiced defendant. The trial court found that defendant was specifi-

[12] Unpublished decisions of this Court are not binding on future panels of this Court. MCR 7.215(C)(1).

cally prejudiced by the lack of translation of IR's testimony. In *Cunningham*, 215 Mich App at 657, this Court noted that *inadequate* (rather than absent) translation of the complainant's cross-examination responses was subject to harmless-error analysis, with the burden of proof resting on the prosecution to prove that the error was harmless beyond a reasonable doubt. This Court was unable to determine in that case whether the error prejudiced defendant because the record was inadequate. *Id*. Further, this Court has implied that exact translation of witness testimony is more important than translation of attorney colloquy. *People v Truong (After Remand)*, 218 Mich App 325, 333; 553 NW2d 692 (1996).

In this case, defendant's trial was essentially a credibility contest between himself and IR. Defendant lacked the ability, because of the denial of simultaneous translation, to assist his counsel in cross-examining IR. Defendant asserts, for example, that he could have refuted IR's testimony that he had signaled IR using the lights from his house, refuted IR's testimony that Llamas had instructed IR to share a bed with defendant, and refuted IR's characterization of him as a homosexual, had he been aware that IR had so testified. Further, defendant asserts that his waiver of his right to testify was not made knowingly because he did not understand what IR had testified to at trial. At the *Ginther* hearing, trial counsel described defendant's communication with him during trial as "not much" and said "we might have passed one note [in Spanish]." Although defense counsel also indicated at the hearing that defendant was able, prior to trial, to communicate his version of events sufficiently for defense counsel to prepare a trial strategy, it does not appear that defense counsel was able to modify that strategy with input from defendant in response to answers received during

either direct examination or cross-examination of IR. On the record before this Court, we therefore conclude that the trial court did not err by determining that the lack of simultaneous translation was prejudicial to defendant.

We share the prosecution's concern that defendants may waive their right to an interpreter and later claim error on appeal resulting from it, thereby harboring error in the form of an "appellate parachute." However, we note that in this case the trial court primarily based its grant of a new trial on *its own* failure to follow the dictates of MCL 775.19a, which requires the appointment of an interpreter if "it appears *to the judge* that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language[.]" *Id*. (emphasis added). While a trial court is not required to inquire into a defendant's ability to comprehend English when no evidence of any limitation is presented to it, see *Atsilis*, 60 Mich App at 739; *Kammeraad*, 307 Mich App at 120, it should, when presented (as in this case) with indications that a defendant may lack sufficient comprehension of the English language, either satisfy itself of the defendant's proficiency, provide for simultaneous interpretation, or, if the defendant wishes to waive the right to an interpreter, secure the defendant's personal, informed waiver. *Id*.; *Carter*, 462 Mich at 217-218. This approach should alleviate concerns that a defendant might harbor appellate error.

Because we affirm the trial court's grant of a new trial in Docket No. 319718, we decline to address as moot the issues presented in defendant's appeal in Docket No. 316744, as there is no relief this Court can grant. *In re Contempt of Dudzinski*, 257 Mich App 96,

112; 667 NW2d 68 (2003). In light of our affirmance of the trial court's grant of a new trial, we do not reach the issue of the effectiveness of defendant's counsel under *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[13]

We affirm in Docket No. 319718 and remand for further proceedings consistent with this opinion, and in Docket No. 316744 we dismiss the appeal as moot. We do not retain jurisdiction.

MARKEY and K. F. KELLY, JJ., concurred with BOONSTRA, P.J.

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[13] We note that we have found no cases in which a defense counsel's failure to request an interpreter, or affirmative waiver of an interpreter, under circumstances in which the record evidence satisfies MCL 775.19a, has been deemed objectively reasonable conduct on the part of the defense attorney.

BUTLER v SIMMONS-BUTLER

Docket No. 321445. Submitted November 5, 2014, at Detroit. Decided November 18, 2014, at 9:30 a.m.

Christopher Butler brought a divorce action in the St. Clair Circuit Court against Sherry Lynn Simmons-Butler. The parties had two minor children. The court, Cynthia A. Lane, J., granted sole legal and physical custody of the children to plaintiff, awarded plaintiff the marital home, evenly split the marital portion of plaintiff's pension, and awarded two cars to plaintiff and one to defendant. The court did not award spousal support, but ordered defendant to pay child support. The court also required the parties to file amended joint tax returns for the 2011 and 2012 tax years. Defendant appealed.

The Court of Appeals *held*:

1. Under MCL 722.26a(1)(b), when determining if joint custody is appropriate, the court must consider whether the parents will be able to cooperate and generally agree concerning important decisions affecting the welfare of the child. In this case, the court found that defendant was unable and unwilling to communicate and cooperate with plaintiff and, in accordance with MCL 722.26a(1)(a), it set forth detailed findings regarding the best-interest factors enumerated in MCL 722.23. Together, these findings were more than adequate to support the court's decision awarding plaintiff sole legal custody.

2. 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. In this case, the court found that there was no established custodial environment for the children given the turmoil in their lives before the divorce proceedings began and given the repeated custody changes after the divorce proceedings began. The evidence supported the court's determination that there was no established custodial environment. The court's findings with regard to the best-interest factors of MCL 722.23, which were made in support of its ultimate physical custody award, similarly were adequate and not against the great weight of

the evidence. The decision awarding sole physical custody to plaintiff was not an abuse of discretion.

3. Parenting time should be granted in accordance with the best interests of the child. In this case, the court awarded defendant two hours of supervised parenting time per week. The court found particular facts that mitigated against granting defendant greater parenting time, including unsupported abuse allegations that she had made against plaintiff, her failure to address the older child's behavior issues, and that she had willfully violated an earlier parenting-time order and hid the children from plaintiff. The court's findings were not against the great weight of the evidence.

4. The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of the property in light of all the circumstances. In this case, the trial court's findings regarding property and debt were supported by the evidence. Although defendant only received a car, personal property items, and her marital share of plaintiff's defined benefit plan, while plaintiff was additionally awarded the house and the full marital portion of his retirement savings account, plaintiff was saddled with more than $256,000 in debt (not including the tax liability he paid), while defendant essentially walked away free from marital debt. The property distribution was fair and equitable given the property available.

5. Michigan law grants the trial court in a divorce case broad discretion to do equity regarding the disposition of property. Under federal law, a husband and wife may file a joint tax return, and Michigan trial courts often take tax consequences into consideration when fashioning the distribution of marital property. Courts from states across the Union have come to differing conclusions, however, regarding whether a state court has the power to order a party to sign a joint tax return for the benefit of the marital estate. The approach of *Bursztyn v Bursztyn*, 379 NJ Super 385 (2005), is most consistent with Michigan law. In accordance with *Bursztyn*, it is within the broad discretion of a Michigan trial court to compel a party to sign a joint tax return when, under all the circumstances, it is in the best interests of the marital estate and (1) there is no ability for the court to make up the difference in tax liability through an allocation of property, (2) there is no history of tax problems with the requesting spouse, (3) the parties have a history of filing joint tax returns during the marriage, and (4) the court orders the spouse (absent an agreement to do so) to indemnify and hold harmless the reluctant spouse for any resulting tax liability. As a result, the general default rule is for a court to redistribute

the property at its disposal to make up any additional tax liability incurred as a result of an individual filing. But, if that is not possible because of insufficient property available for the court to use as compensation for the additional taxes or because of some other exceptional circumstance, as a last resort a trial court has the discretion to order the signing of a joint tax return. In this case, the record was insufficient for the Court of Appeals to determine whether it was appropriate for the trial court to order defendant to sign the joint tax returns, so that portion of the divorce judgment had to be vacated for reconsideration.

6. An award of spousal support is in the trial court's discretion. A strict formula is not used, and the award should reflect what is just and reasonable under the circumstances of the case. In this case, the trial court considered the relevant factors, noting the short duration of the marriage, the ability of both parties to work, defendant's employment history and her expenses. The court's findings were not clearly erroneous, and the court acted within its discretion in denying defendant's request for spousal support.

7. Under MCL 552.505(1)(h), one of the duties of the Friend of the Court is to make written reports and recommendations regarding child support using formulas developed by the Friend of the Court Bureau. In this case, the trial court acted within its discretion by referring the matter of child support to the Friend of the Court for computation.

8. A trial judge is presumed to be unbiased, and a party moving for disqualification bears the burden of proving that the motion is justified. A trial judge has the authority to manage the proceedings in order to achieve the orderly disposition of the case. In this case, the judge's challenged comments comported with her authority to manage the proceedings, and the fact that the court ruled against defendant's interests several times could not be used to establish bias. Based on a complete review of the record, the trial court did not err by denying defendant's motion for disqualification and recusal was not necessary on remand.

Portion of the judgment of divorce ordering defendant to sign amended joint tax returns vacated; judgment affirmed in all other respects; case remanded for further proceedings.

DIVORCE — PROPERTY DISTRIBUTION — TAXES — FILING OF JOINT TAX RETURNS.

It is within the broad discretion of a Michigan trial court to compel a party in a divorce action to sign a joint tax return when, under all the circumstances, it is in the best interests of the marital estate and (1) there is no ability for the court to make up the difference in tax liability through an allocation of property, (2)

there is no history of tax problems with the requesting spouse, (3) the parties have a history of filing joint tax returns during the marriage, and (4) the court orders the spouse (absent an agreement to do so) to indemnify and hold harmless the reluctant spouse for any resulting tax liability.

Law Offices of Steven A. Heisler, Esq., PLLC (by *Steven A. Heisler*), for plaintiff.

Law Office of David K. Sucher (by *David K. Sucher*) for defendant.

Before: WHITBECK, P.J., and FITZGERALD and MURRAY, JJ.

MURRAY, J. Defendant, Sherry Lynn Simmons-Butler, appeals as of right a divorce judgment entered by the St. Clair Circuit Court. On appeal, defendant generally argues that the trial court erred in (1) its custody and parenting-time determinations with respect to the parties' two minor children, (2) its division of the marital property and debt, and (3) its determinations regarding child support and spousal support. Intermixed in these general issues are several discrete ones, including whether the trial court had the authority to compel defendant to sign joint tax returns with plaintiff. Defendant further argues that the trial judge should be disqualified from any and all subsequent postjudgment proceedings. For the reasons outlined below, we affirm in part, vacate in part, and remand for further proceedings consistent with this opinion.

I. FACTS AND PROCEEDINGS

It is an understatement to say that this marriage went downhill quickly. The parties "met" through an Internet-based dating company and were married in October 2007. Plaintiff, a border patrol agent, was the

main income source throughout the marriage, as defendant mostly stayed at home (with the children who were born soon after the marriage) until just prior to the divorce. Living in Arizona, just a year into the marriage, both parties allegedly engaged in domestic violence, leading defendant in 2010 to seek a personal protection order and a divorce from plaintiff in the Arizona courts. Ultimately the parties reconciled and moved to Michigan in 2011. By that time the parties had two young sons. The turmoil, unfortunately, did not end once they arrived on Michigan soil.

In fact, less than two years after moving to this state, defendant took the children without plaintiff's knowledge, and plaintiff almost immediately filed for divorce. Defendant repeatedly accused plaintiff of inappropriate behavior with the older child, but nothing was ever verified or confirmed. With the court now involved, the parties filed numerous motions (and defendant fired a good number of her attorneys) and engaged in significant discovery and counseling. The court twice temporarily changed the children's custody, with the last order awarding plaintiff temporary custody. Defendant was held in contempt of court for failing to comply with an order to return the children after parenting time, which ultimately led to her incarceration just prior to trial.

Trial occurred in late 2013, and after hearing all the evidence (much of which was presented by plaintiff), the court issued a very thorough, well-written and -reasoned opinion granting sole legal and physical custody to plaintiff, awarding plaintiff the marital home and all of its accompanying debt, evenly splitting the marital portion of plaintiff's main pension, and awarding two cars to plaintiff and the latest model to defendant. Spousal support was not awarded, defendant was

ordered to pay child support, and miscellaneous other economic matters were decided by the court.

The final judgment of divorce was consistent with these rulings. Defendant now appeals that judgment as of right.

II. ANALYSIS

The first part of our analysis addresses defendant's challenge to the trial court's awarding both legal and physical custody of the children exclusively to plaintiff. As detailed below, successful appellate challenges to custody decisions are very difficult to come by, mostly because of the very deferential appellate standard of review. What makes this challenge even more difficult for defendant is that the trial court provided a complete written analysis on each of the relevant statutory best-interest factors.

A. CUSTODY ISSUES

A custody order "shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28. Under the great weight standard, the trial court's factual determinations will be affirmed unless the evidence clearly preponderates in the other direction. *Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010); *Mitchell v Mitchell*, 296 Mich App 513, 519; 823 NW2d 153 (2012). In reviewing the findings, this Court defers to the trial court's credibility determinations. *Shann v Shann*, 293 Mich App 302, 305; 809 NW2d 435 (2011). We apply the abuse of discretion standard to the trial court's discretionary rulings such as to whom custody is granted. *Fletcher*

v Fletcher, 447 Mich 871, 879-880; 526 NW2d 889 (1994); *Shann*, 293 Mich App at 305. An abuse of discretion, for purposes of a child custody determination, exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Fletcher*, 447 Mich at 879-880; *Mitchell*, 296 Mich App at 522. Questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets or applies the law. *Fletcher*, 447 Mich at 881; *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

1. LEGAL CUSTODY

Defendant argues that in awarding sole legal custody to plaintiff the court did not articulate with any specificity why it was doing so. The trial court's opinion belies this assertion. As defendant admits, in making this ruling the trial court specifically found that "[t]hrough her behavior, Defendant has demonstrated that she is both unwilling and unable to communicate and cooperate with Plaintiff in a manner that is in the children's best interests." This is squarely in line with what is required to be considered under MCL 722.26a(1)(b). And in conjunction with its detailed findings under the best-interest factors outlined in MCL 722.23, the court also complied with the other necessary finding prior to deciding legal custody. MCL 722.26a(1)(a). These findings were more than adequate to comply with the statute and to support the court's decision awarding plaintiff sole legal custody.[1]

[1] Defendant's argument that plaintiff agreed on the record that the parties should have joint legal custody of the children is based upon an

2. PHYSICAL CUSTODY

Defendant also takes issue with the adequacy of the trial court's best-interest findings made in support of its physical custody award, as well as its findings on an established custodial environment.[2] We hold that the trial court's findings, which were supportive of its custody order, were not against the great weight of the evidence and the trial court did not abuse its discretion in ruling that plaintiff should be granted sole physical custody of the children.

Whether an established custodial environment exists is a question of fact that the trial court must address before it determines the child's best interests. *Brausch v Brausch*, 283 Mich App 339, 356 n 7; 770 NW2d 77 (2009). A custodial environment is established if:

> [O]ver 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).]

An established custodial environment is one of significant duration, both physical and psychological, in which the relationship between the custodian and child is

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isolated reading of the transcript. Plaintiff's remarks were made in the context of attempting to make an agreement with defendant, an offer that defendant flatly rejected.

[2] In support of its decision to change the temporary custody order during pretrial proceedings, the trial court cited *Thompson v Thompson*, 261 Mich App 353, 357; 683 NW2d 250 (2004), which held that a trial court is not required to make a finding of proper cause or change in circumstances before modifying a temporary custody order entered during pretrial proceedings. Despite the trial court explicitly citing this authority, defendant fails to address this case in making her challenge to the change in temporary custody. *Thompson* controls and compels rejection of defendant's challenge.

marked by security, stability, and permanence. *Baker v Baker*, 411 Mich 567, 579-580; 309 NW2d 532 (1981); *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008). The provisions of a parenting-time order do not alone establish a custodial environment. *Pierron*, 486 Mich at 87 n 3.

The trial court found that there was no established custodial environment with either parent, and the evidence does not clearly preponderate against that decision. Essentially the evidence shows that there was repeated turmoil in these children's lives from birth to the time of the divorce proceedings, and once the divorce proceedings commenced, there were repeated custody changes. The children lived with both parties from birth until August 12, 2012, when defendant left the marital home with them. The children then lived with defendant until the trial court granted plaintiff temporary custody in July 2013. Defendant took the children for a period of time in November 2013 in violation of the custody order, but the children otherwise remained in plaintiff's care until the issuance of the trial court's March 2014 opinion and decision. During this time there was also significant turmoil in the relationships the children had with their parents. The record evidence—not to mention the caselaw—firmly supports the trial court's finding that no established custodial environment existed between the children and either parent. See *Hayes v Hayes*, 209 Mich App 385, 387-389; 532 NW2d 190 (1995); *Bowers v Bowers*, 198 Mich App 320, 323-327; 497 NW2d 602 (1993).

The trial court then properly went on to determine the appropriate custody arrangement for the children, turning to the best-interest factors set forth in MCL 722.23. Those factors require consideration of:

(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.]

"A court need not give equal weight to all the factors, but may consider the relative weight of the factors as

appropriate to the circumstances." *Sinicropi v Mazurek*, 273 Mich App 149, 184; 729 NW2d 256 (2006).

Defendant argues that the trial court failed to set forth sufficient reasoning concerning its custody determination. However, the trial court's written opinion unquestionably reveals that the trial court made the necessary detailed factual findings regarding each relevant best-interest factor. Specifically, the trial court found the parties equal on the factor involving love, affection, and emotional ties between the parties and the children. It found that plaintiff prevailed on the factor involving parental guidance and religion, that both parties had the ability to provide the children with basic necessities, but that defendant lacked the disposition to do so and, therefore, plaintiff prevailed on that factor. The trial court further found that the children would gain stability and maintain continuity by staying in plaintiff's Port Huron residence, again favoring plaintiff. It found the parties equal on the factor involving the permanency of a family unit, but found that plaintiff had greater moral fitness, citing evidence that defendant continually accused plaintiff of abuse without support, whereas plaintiff showed a sense of right and wrong that he would impart to the children.

The parties were judged equal in their physical health. The trial court found that the factor involving home, school, and community records favored plaintiff because the evidence showed that defendant was overwhelmed and unable to deal with the older child's anger issues. Plaintiff was judged more willing to facilitate and encourage a close and continuing relationship between the children and the other parent. The trial court cited evidence that plaintiff abided by orders concerning parenting time and made efforts to encourage contact between the children and defendant, whereas

defendant did the exact opposite, lodging baseless charges of abuse and ignoring court orders. The trial court noted that defendant engaged in assaultive conduct with respect to plaintiff, sometimes in the children's presence, in finding that the domestic violence factor favored plaintiff. These findings applied the relevant statutory factors, were supported by the record evidence, and thus were not clearly erroneous. The decision awarding sole physical custody to plaintiff was therefore not an abuse of discretion.

We next turn our attention to defendant's challenge to the parenting-time portion of the judgment. In particular, defendant argues that the parenting time she received—supervised for two hours per week until further order of the court—was grossly insufficient, and that the trial court should have ordered increased parenting time.

Parenting time should be granted in accordance with the best interests of the child. MCL 722.27a. As previously discussed, trial testimony supported the trial court's findings regarding the best-interest factors and the granting of custody to plaintiff. The trial court found particular facts that mitigated against granting defendant greater parenting time, including that defendant continually accused plaintiff of abuse without factual support, that defendant subjected the children to multiple forensic interviews in an effort to bolster her baseless allegations of abuse, that defendant's behavior rendered her "morally unfit" and lacking the disposition to provide proper care for the children, that defendant did little to address the older child's behavioral issues, that defendant actively discouraged a close and continuing relationship between plaintiff and the children, that defendant willfully violated the trial court's parenting-time order and hid the children, and

that defendant engaged in domestic violence against plaintiff.

Other than to argue that she was justified in reporting the issues to CPS and that she loved and cared for the children, defendant has done little by way of argument to demonstrate that the trial court erred in determining parenting time. Trial evidence supported the factors mitigating against greater parenting time, and the trial court's findings with respect to parenting time were not against the great weight of the evidence. MCL 722.28. Importantly, defendant has not been removed from the children's lives as she has weekly parenting time, and the trial court's order—as it must—left open the possibility that she can be granted more time in the future.

B. PROPERTY ISSUES

Defendant raises several challenges to the trial court's property decisions. First, she argues that the trial court's property award greatly favored plaintiff, and the inequitable award resulted from the trial court's desire to punish defendant. Within this argument, defendant also takes issue with the trial court's award of partial attorney fees to plaintiff. Second, defendant argues that the trial court lacked the power to order the parties to file joint tax returns for the last two years of their marriage.

1. DISTRIBUTION OF MARITAL PROPERTY

In deciding issues on appeal involving division of marital property, this Court first reviews the trial court's findings of fact. *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992); *Hodge v Parks*, 303 Mich App 552, 554-555; 844 NW2d 189 (2014). Findings of

fact, such as a trial court's valuations of particular marital assets, will not be reversed unless clearly erroneous. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010). A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with the definite and firm conviction that a mistake was made. *Id*. If the trial court's findings of fact are upheld, this Court must decide whether the dispositive ruling was fair and equitable in light of those facts. The dispositional ruling is discretionary and will be affirmed unless this Court is left with a firm conviction that the division was inequitable. *Sands v Sands*, 442 Mich 30, 34; 497 NW2d 493 (1993).

For the reasons set forth below, we hold that the trial court's findings in connection with the parties' property were not clearly erroneous, and that the trial court's ultimate rulings concerning the division of marital property were fair and equitable.

"The goal in distributing marital assets in a divorce proceeding is to reach an equitable distribution of property in light of all the circumstances." *Berger*, 277 Mich App at 716-717. The division need not be mathematically equal, but any significant departure from congruence must be clearly explained. *Id.* at 717. To reach an equitable division, the trial court should consider the duration of the marriage, the contribution of each party to the marital estate, each party's station in life, each party's earning ability, each party's age, health and needs, fault or past misconduct, and any other equitable circumstance. *McDougal v McDougal*, 451 Mich 80, 89; 545 NW2d 357 (1996); *Sparks*, 440 Mich at 158-160; *Berger*, 277 Mich App at 717. The determination of relevant factors will vary with the circumstances of each case, and no one factor should be

given undue weight. "The trial court must make specific findings regarding the factors it determines to be relevant." *Woodington*, 288 Mich App at 363-364.

The trial court's findings regarding property and debt were supported by the evidence and were not clearly erroneous. Plaintiff testified regarding the mortgage and value of the marital home, the parties' three cars, and his retirement account and pension. Plaintiff and his mother, Beverly Butler, testified regarding a $30,000 outstanding loan to the parties from plaintiff's parents. The trial court awarded the home, which it determined to have no equity, to plaintiff and ordered plaintiff to be responsible for the balance of the $220,000 mortgage. Plaintiff was also made solely responsible for repaying the $30,000 loan owed to his parents, as well as the $6,000 outstanding credit card debt. The trial court awarded plaintiff the 2001 Hyundai and 1995 Explorer while defendant received the 2011 Toyota, each of which carried no debt. The parties each received half of the marital portion of plaintiff's defined contribution plan proceeds, while plaintiff was awarded the full amount of his other retirement account (the court found the marital portion to be worth approximately $24,500 or less), reasoning that plaintiff was made responsible for the bulk of the marital debt.

That distribution does not leave us with a firm conviction that the division was inequitable.[3] Although

[3] Contrary to her argument, defendant was not denied the opportunity to present evidence or argument concerning marital property and debt. The trial court did not deny her the ability to cross-examine plaintiff, as defendant chose not to do so despite several invitations by the trial court. In fact, defendant later called plaintiff in her case in chief, but did not question him regarding the property or debt. She also provided the trial court with listings and arguments concerning property and debt in her written closing arguments, and there is nothing to suggest that the trial court refused to consider her closing argument submission.

defendant only received a car, personal property items, and her marital share of plaintiff's defined benefit plan, while plaintiff was additionally awarded the house and the full marital portion of his retirement savings account, plaintiff was saddled with more than $256,000 in debt (not including the tax liability he paid), while defendant essentially walked away free from marital debt. Given the property available, this was a fair and equitable distribution. And the trial court's opinion reflects that in rendering this award it carefully considered and relied upon the appropriate *Sparks* factors, not on any desire to punish defendant.

2. ATTORNEY FEES

To the extent that defendant claims that the trial court erred in awarding plaintiff attorney fees, defendant did not include this argument in her statement of questions presented on appeal. Ordinarily, an issue presented in this manner will not be considered. *Mich Ed Ass'n v Secretary of State*, 280 Mich App 477, 488; 761 NW2d 234 (2008), aff'd 489 Mich 194 (2011). Because the propriety of an attorney fee award is distinctly different from defendant's articulated challenge to the distribution of marital property, the attorney fee issue is not preserved.

In any event, there was no error. The determination of the reasonableness of an attorney fee award is within the trial court's discretion and is reviewed for an abuse of discretion. *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008). The trial court ordered both parties to pay attorney fees; plaintiff to pay $2,000, and defendant to pay $1,278.15. The fees that defendant was ordered to pay related to tasks that plaintiff's counsel engaged in as a consequence of de-

fendant's refusal to comply with the trial court's parenting-time order, specifically her refusal to return the children to plaintiff's custody in November 2013. See MCR 3.206(C)(2)(b) (allowing attorney fees where a party refuses to comply with a court order). Defendant does not provide any argument challenging the propriety of fees under that court rule, nor does she assert that any part of the fees were not actually related to her refusal to comply with the trial court's order. The trial court acted within its discretion in ordering that defendant pay attorney fees.

3. JOINT TAX RETURN

The trial court entered an order amending its divorce judgment, requiring the parties to file amended joint tax returns for tax years 2011 and 2012, stating, in pertinent part:

> [T]he parties shall file amended joint tax returns for the 2011 and 2012 tax year[s], divide any tax refunds equally, and be equally responsible for any tax deficiencies for [those] years. In the event either or both parties received a tax refund(s) as a result of filing separately, the party who received that refund shall be responsible for re-paying that refund from his or her one-half share of the total tax refund, if any, to which the parties would have otherwise have been entitled to had they filed jointly. In the event a refund a party received as a result of filing separately exceeds that party's one-half share of the total joint refund, that party shall pay the other party the difference between the other party's half of the total joint refund (to which the party would have been entitled had they filed jointly) and the refund that was actually received from filing an amended joint tax return. In the event either or both parties incurred and/or paid an income tax deficiency as a result of filing separately, then he or she shall first be reimbursed that deficiency from any joint tax refund(s)

> before they are divided. The Defendant shall cooperate in the filing and signing of the amended tax returns for 2011 and 2012.

Defendant argues that the trial court lacked the authority to order her to file amended joint returns, and that she should not have been compelled to sign joint returns under penalty of perjury, as in doing so she would be affirming that the facts plaintiff states on the returns were true.

In considering this issue, we first recall that "Michigan law grants the trial court in a divorce case broad discretion to do equity regarding the disposition of property," so long as it conforms with *Sparks*. *Licavoli v Licavoli*, 292 Mich App 450, 454; 807 NW2d 914 (2011). See, also, *Beckett v Beckett*, 186 Mich App 151, 153; 463 NW2d 211 (1990) ("The trial court has great discretion in the adjustment of property rights upon divorce."). One could say that when granting a divorce, a circuit court has more discretion to fashion relief than it does in any other case, particularly when addressing the division of property. See *Greene v Greene*, 357 Mich 196, 202; 98 NW2d 519 (1959) (recognizing the trial court's "traditional broad discretion" in divorce cases); *Smith v Smith*, 113 Mich App 148, 150; 317 NW2d 324 (1982) (noting that in divorce cases trial courts have "wide discretion" in dividing property). Indeed, the court's guiding principle in distributing property upon divorce is—within the confines of statutory and caselaw—to reach the broad goal of "a fair and equitable division in light of all the circumstances." *Beckett*, 186 Mich App at 153.

The parties have not cited any Michigan law—and we have likewise found none—that addresses whether a trial court can order a party to sign and file an amended joint tax return for a tax year occurring during the

marriage. There are Michigan cases highlighting the fact that trial courts often take tax consequences into consideration when fashioning the ultimate equitable distribution of marital property. See, e.g., *Friend v Friend*, 486 Mich 1035 (2010) (recognizing that uniform spousal support orders take into consideration the tax consequences of payments); *Clarke v Clarke*, 297 Mich App 172, 188; 823 NW2d 318 (2012) (stating that trial courts can order which parent may claim the federal dependency tax exemption); *Nalevayko v Nalevayko*, 198 Mich App 163, 164; 497 NW2d 533 (1993) (generally recognizing that courts may consider the effects of taxation in distributing assets so long as it is not speculative); *Everett v Everett*, 195 Mich App 50, 55; 489 NW2d 111 (1992) ("[T]he trial court erred in valuating the [stock] options without taking into consideration the tax consequences."). Clearly, then, circuit courts often consider tax implications in a variety of contexts so as to ensure that they are accurately determining the value of assets and equitably distributing marital estates. But it is one thing to take into account the tax consequences that affect the marital estate. It is quite another to force a party to sign a tax filing that comes with potential legal ramifications.

Pursuant to the federal Internal Revenue Code, husband and wife have the option to file a joint tax return. 26 USC 6013. It is generally understood that a husband and wife obtain a much more advantageous tax rate when filing a joint tax return. *Bock v Dalbey*, 283 Neb 994, 996-997; 815 NW2d 530 (2012). Along with potential tax benefits, however, comes potential liability for both signers. *Id.*; *Sanders v United States*, 509 F2d 162, 165 (CA 5, 1975). Because of these considerations, and oftentimes because divorcing parties will not agree on anything—let alone what tax forms to file—a court is confronted with the issue raised

in this case: in order to gain a tax advantage to one or both parties on income earned during the marriage, with the result likely being additional marital assets available for distribution, does a circuit court have the power to order a party to sign a joint tax return (or an amended one) for the benefit of the marital estate?

Courts from states across the Union that have addressed this issue[4] have come to differing conclusions. Defendant relies in large part on the Nebraska Supreme Court decision in *Bock*. That case involved a marriage dissolution proceeding that included the trial court's division of marital property. At issue was the trial court's order that the parties file joint tax returns for the years 2008 and 2009. The parties filed jointly in 2007, but had not filed any subsequent returns. *Bock*, 283 Neb at 995. The defendant appealed the order, arguing that the trial court did not have the "discretion to order the parties to file a joint return to preserve assets for the marital estate or to equalize its division of the estate." *Id*. at 996. The court cited caselaw from several other states holding that a trial court cannot compel a party to file a joint tax return. *Id*. at 997 n 10. The *Bock* court particularly relied on *Leftwich v Leftwich*, 442 A2d 139 (DC App, 1982), one of the first cases to hold that in a divorce proceeding a trial court could not override a party's right to select his or her filing status under the Internal Revenue Code:

> To sanction the trial court's effectively ordering a spouse to cooperate in filing a joint return would nullify the right of election conferred upon married taxpayers by the Internal Revenue Code. Such a right is not inconsequential; its exercise affects potential criminal and/or civil

[4] Where there is a lack of controlling Michigan precedent, it is appropriate to look to cases from other jurisdictions for guidance. See *Oxley v Dep't of Military Affairs*, 460 Mich 536, 544; 597 NW2d 89 (1999).

> liabilities of taxpayers. . . . Married individuals filing a joint return expose themselves to joint and several liability for any fraudulent or erroneous aspect of the return. [*Bock*, 283 Neb at 998, quoting *Leftwich*, 442 A2d at 145 (ellipsis in original).]

To foreclose the right to be free from potential liability exposure as a joint filer was unacceptable to the *Leftwich* court, particularly where the trial court—instead of ordering the filing of joint returns—could have remedied any perceived tax disadvantage by altering the disposition of other marital property. See *Bock*, 283 Neb at 998, quoting *Leftwich*, 442 A2d at 146.

The *Bock* court set forth additional policy considerations militating against allowing a trial court to order a party to file tax returns with a specific status (joint or individual). It reasoned that because federal tax courts look at the parties' intent in filing jointly, "a trial court cannot know with certainty whether its equitable division of the marital estate based on consideration of a joint tax return will be given effect by federal authorities or courts" if the parties are compelled to file jointly. *Bock*, 283 Neb at 1000. The *Bock* court also viewed the trial court's order to file joint returns as a mandatory injunction which, under the circumstances, was too harsh a remedy in light of the ability to make up the tax difference through property adjustments. *Id*. Additionally, the court noted that Internal Revenue Code filing deadlines create practical hurdles to a trial court compelling the filing of joint returns, as a joint tax return is not revocable after the passing of the filing deadline. *Id*. at 1003. As a result, the *Bock* court held:

> We conclude that the Court of Appeals erred in holding that a district court has discretion to compel the parties to a marital dissolution proceeding to file a joint income tax return. Because a trial court can equitably adjust its division of the marital estate to account for a spouse's

> unreasonable refusal to file a joint return, resort to a coercive remedy that carries potential liability is unnecessary. [*Id*. at 1004.]

Several other decisions followed *Leftwich* without much additional analysis or rationale. See *Teich v Teich*, 240 AD2d 258; 658 NYS2d 599 (1997) (concluding that a spouse has an unqualified right to decide whether to file a joint return, and the court can separately address any adverse consequences of the decision not to file jointly); *In re Marriage of Lewis*, 81 Or App 22, 25; 723 P2d 1079 (1986) (following *Leftwich* without much discussion); *Matlock v Matlock*, 1998 Okla Civ App 1; 750 P2d 1145 (1988) (citing *Leftwich* for its conclusion that a court cannot compel the filing of joint return, but can take the consequences into account when dividing property); *In re Marriage of Butler*, 346 NW2d 45, 47 (Iowa App, 1984), overruled in part on other grounds by *In re Marriage of Hoffman*, 493 NW2d 84 (Iowa App, 1992) (same holding as *Teich*, *Lewis*, and *Butler*). Although *Kane v Parry*, 24 Conn App 307, 315-316; 588 A2d 227 (1991), held, without any discussion, that a court could not order parties to file a joint tax return in the absence of a prior agreement to do so, it did not rely upon *Leftwich* or its progeny.

As noted earlier in this opinion, other courts have concluded that it is within a trial court's discretion to order a party to sign and file a joint tax return. One of the more frequently cited cases coming to this conclusion is *Bursztyn v Bursztyn*, 379 NJ Super 385; 879 A2d 129 (2005). Though recognizing that "[t]here are good arguments on both sides of the issue," the court ultimately concluded that "trial courts should have discretion to compel the filing of joint tax returns." *Id*. at 397. Considering many of the same factors as the Nebraska Supreme Court did years later in *Bock*, the *Bursztyn*

court recognized that because compelling a party to sign and file a joint tax return has some potential adverse tax implications, courts should consider the tax consequences to the marital estate of filing a joint or individual return and, where appropriate, *first* attempt to "compensate the parties for the adverse tax consequences of filing separately." *Id*. at 398. But, if that is not feasible, the court ultimately held that the power to compel exists to "preserve the marital estate by compelling joint returns." *Id*. at 397.

Other courts have held that divorce courts *do* have the discretion to order parties to sign a return, or to amend a return. For instance, in *In re Marriage of Lafaye*, 89 P3d 455, 461 (Colo App, 2003), the court held that the federal tax code does not "deprive the dissolution court of jurisdiction to enter orders as between the parties," and consequently the trial court could preclude the wife from amending joint returns. The Ohio Court of Appeals similarly held that, because a trial court is required by Ohio law to consider the tax consequences of a division of property, a divorce court has the jurisdiction and authority to order a spouse to amend a tax return as part of a property division. *Bowen v Bowen*, 132 Ohio App 3d 616, 636-637; 725 NE2d 1165 (1999). In dicta, the Arkansas Court of Appeals stated that because a trial court in divorce proceedings "may mould any remedy that is justified by the proof," it was within a trial court's discretion to order a party to sign a joint tax return. *Cox v Cox*, 17 Ark App 93, 95; 704 SW2d 171 (1986). And, without too much elaboration, the New Hampshire Supreme Court suggested that whether to compel the signing of a joint tax return is within a divorce court's discretion. *Wheaton-Dunberger v Dunberger*, 137 NH 504, 511; 629 A2d 812 (1993). Kentucky courts have likewise held it to be a discretionary decision, *Schmitz v Schmitz*, 801

SW2d 333, 336 (Ky App, 1990), while the Minnesota Court of Appeals held that a divorce court has the discretion to order the parties to file joint tax returns to avoid the depletion of funds available for distribution, *In re Theroux v Boehmler*, 410 NW2d 354, 356 (Minn App, 1987).

The articulated reasons in support of not affording a trial court the discretion of ordering parties to sign a joint tax return are worthy of serious consideration. As we read those cases, none of the courts has concluded that 26 USC 6013 *by itself* precludes a state trial court from taking away the discretion normally given to a married taxpayer by ordering the filing of a joint tax return. Instead, those courts have recognized the federal policy in that statute, and the potential liability consequences attendant to both joint filers. In deference to those concerns, and recognizing that typically a divorce court can compensate for any detrimental tax consequences resulting from an individual filing through redistribution of the parties' property, those courts held that it is preferable not to allow a court the discretion to order a reluctant spouse to file a joint tax return.

We believe that the *Bursztyn* approach is most consistent with Michigan law and the broad discretion historically afforded to trial judges disposing of marital (and at times, separate) property. As noted, there are no restrictions placed on trial courts by the Michigan Legislature or Michigan courts relative to compelling joint tax returns. And circuit courts in divorce actions, through the exercise of their broad equitable powers, routinely issue orders compelling the parties to do, or refrain from doing, certain actions regarding their personal property. See, e.g., *Kasben v Hoffman*, 278 Mich App 466, 474-475; 751 NW2d 520 (2008) (noting

that a court can order the transfer of personal property between the parties); *Korth v Korth*, 256 Mich App 286, 293-294; 662 NW2d 111 (2003) (stating that a court has equitable power to order the sale or abandonment of dilapidated property); *Yeo v Yeo*, 214 Mich App 598, 602; 543 NW2d 62 (1995) (holding that a court has equitable power to compel the sale of the marital home). Nor, as we just mentioned, have any courts concluded that federal law precludes such an order. Absent any such prohibition, and because tax consequences are routinely considered by Michigan courts when exercising their broad discretion in resolving property issues, we hold that it is within the broad discretion of a trial court to compel a party to sign a joint tax return when, under all the circumstances, it is in the best interests of the marital estate and, as discussed below, there is (1) no ability for the court to make up the difference in tax liability through an allocation of property, (2) there is no history of tax problems with the requesting spouse, (3) the parties have a history of filing joint tax returns during the marriage, and (4) the court orders the spouse (absent an agreement to do so) to indemnify and hold harmless the reluctant spouse for any resulting tax liability. There are several reasons for this holding.

First, like the *Bursztyn* court, we too recognize that there is some potential risk involved to a spouse who signs a joint return. As we have said, the statute itself provides for joint and several liability on any tax deficiencies and other liabilities. *Callaway v Comm'r of Internal Revenue*, 231 F3d 106, 111 (CA 2, 2000) (noting that if a joint return is made, liability with respect to the tax shall be joint and several), citing 26 USC 6013(d)(3). But somewhat tempering this potential liability is that a spouse compelled to sign a joint return during the course of a divorce proceeding may very well obtain the benefit of the "innocent spouse" rule, should

any issues arise from the other spouse's filing information. See 26 USC 6015; *Friedman v Internal Revenue Comm'r*, 53 F3d 523, 528-529 (CA 2, 1995) (recognizing that because the innocent spouse rule is remedial in nature, "it is construed and applied liberally in favor of the person claiming its benefits"); *Purcell v Internal Revenue Comm'r*, 826 F2d 470, 475 (CA 6, 1987) ("The purpose of the innocent spouse rule is to protect one spouse from the overreaching or dishonesty of the other."); see also *Manella v Internal Revenue Comm'r*, 631 F3d 115, 117-118 (CA 3, 2011); *Henson v Internal Revenue Comm'r*, unpublished memorandum opinion of the United States Tax Court, issued October 10, 2012 (Docket No. 14304-10) (explaining the threshold requirements a spouse must prove to obtain relief under the innocent spouse rule). However, at the time divorce proceedings occur it is generally unlikely that either the parties or the trial court will know if the IRS has determined there to be any tax deficiencies, additional liabilities, etc., with regard to any recent tax filing. So, whether the reluctant spouse would obtain the benefit of the innocent spouse rule could be unclear at the time of entry of the judgment of divorce. But the existence of the rule does in some measure counter the risks of being ordered to sign a joint tax return with a former—or soon to be former—spouse.

Second, in order to protect a reluctant spouse from exposure to liability for any tax deficiencies resulting from the other spouse's information, a trial court should order (absent an agreement between the parties) that the reluctant spouse be indemnified and held harmless by the other spouse. See, e.g., *In re Marriage of Lafaye*, 89 P3d at 461. In this way the reluctant spouse can know with certainly that no additional funds will be required to satisfy the other spouse's desire to file jointly.

Finally, as almost all the courts addressing this issue have noted, and it is just as true here in Michigan, trial courts adjudicating a divorce are already empowered to shift marital (and in some cases, separate) property and debt between the parties in order to reach a fair and equitable result. In many cases *where there is property available* to address potential tax deficiencies resulting from an individual filing, it will be more practical[5] to make up the tax difference by providing additional property to the spouse who has to make up the tax liability difference resulting from filing an individual return. See *Bursztyn*, 379 NJ Super at 398.

As a result, and in light of all the foregoing considerations, the general default rule is for a court to redistribute the property at its disposal to make up any additional tax liability incurred as a result of an individual filing. But, if that is not possible because of insufficient property available for the court to compensate for the additional taxes or because of some other exceptional circumstance, as a last resort a trial court has the discretion to order the signing of a joint tax return. In other words, compelling a party to sign a joint tax return should be limited to cases (1) where the parties do not have sufficient assets available for the court to shift in order to make up the difference in tax liability, (2) where there is no history of tax problems with the other spouse, (3) where the parties have a history of filing joint tax returns during the course of the marriage, and (4) where the parties either agree, or the court orders, that the reluctant spouse be indemnified and held harmless by the other spouse for any tax liability. See *id*. at 398-399.

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[5] Practical in the sense of being less complicated, without potential adverse tax implications, and providing finality to the distribution of property.

Turning now to the decision in this case, we conclude a remand is necessary for the trial court to reconsider its decision ordering defendant to sign amended joint tax returns. Defendant has argued that she should not have been compelled to sign the amended joint returns because of the risk of future liability. Although some level of risk exists until such time as a return is accepted by the IRS, the limited record does not contain evidence that plaintiff had prior tax problems, that he has or had any intention to engage in tax fraud, or that he otherwise exhibited an inability to have a proper tax return prepared. Additionally, there appears to be little marital property to divide between the parties, so the trial court may be limited in its ability to make up any tax deficiency without taking it directly from defendant. But the record is not sufficient for us to make any conclusions, and this decision is in the first instance one relegated to the trial court's discretion. Accordingly, we vacate that portion of the judgment ordering defendant to sign amended joint tax returns, and remand this issue to the trial court for reconsideration in light of the factors outlined in this opinion.

C. SPOUSAL SUPPORT

Defendant also takes issue with the trial court's decision not to award her spousal support at the conclusion of a seven-year marriage. On appeal, the trial court's factual findings regarding spousal support are reviewed for clear error. *Loutts v Loutts*, 298 Mich App 21, 26; 826 NW2d 152 (2012). If the trial court's findings are not clearly erroneous, this Court must then decide whether the dispositional ruling was fair and equitable in light of the facts, *Sparks*, 440 Mich at 151-152; *Loutts*, 298 Mich App at 26, or constituted an abuse of discretion, *Woodington*, 288 Mich App at 355.

An abuse of discretion occurs (except, as noted, in custody decisions) when the result is outside the range of reasonable and principled outcomes. *Id.* The trial court's decision regarding spousal support will be affirmed unless this Court is firmly convinced that it was inequitable. *Sparks*, 440 Mich at 152; *Berger*, 277 Mich App at 727.

An award of spousal support is in the trial court's discretion. *Loutts*, 298 Mich App at 25. A strict formula is not used, and the award should reflect what is just and reasonable under the circumstances of the case. *Id.* at 30. Among the factors a trial court should consider are:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id.* at 31 (quotation marks and citations omitted).]

Factual findings regarding the relevant factors are necessary. *Myland v Myland*, 290 Mich App 691, 695; 804 NW2d 124 (2010).

The trial court considered the relevant factors, stating:

> The parties were married in October of 2007 and separated in August of 2012. They have filed for divorce and separated in the past. In total, they have been married slightly more than six (6) years, a marriage of short duration. Both parties are in good health and are able to work. As recently as late 2012[,] Defendant earned $18 per

> hour working for Home Depot, a position she left voluntarily in February of 2013. Defendant stated in earlier court filings that, before she married Plaintiff, she earned $47,000 per year. She is currently paid $12 per hour and anticipates she will be paid more (which she will be negotiating) when she manages her employer's racetrack in Ohio. Her landlord (who is also her employer) recently reduced her monthly rent. Upon entry of the Judgment of Divorce, Defendant will have a car that is free and clear and will carry little, if any, debt. Beyond basic living expenses, her only continuing monthly obligation will be child support.
>
> In the judgment of the Court, Defendant should not be awarded spousal support. That issue, as to both parties, will be forever barred.

The trial court's findings on these points were not clearly erroneous, and its dispositional ruling was within the range of reasonable and principled outcomes. The trial testimony revealed that defendant was employed, healthy, and pursuing further education. She had a fully-paid-for mode of transportation and reasonably priced housing. As late as 2012, she had earned $18 per hour in a slightly less than full-time position. She had little debt under the divorce judgment, while plaintiff was responsible for virtually all the marital debt. The parties had a relatively short-term marriage. The trial court acted within its discretion in denying defendant's request for spousal support, as it was a reasonable and principled outcome under these facts.

D. CHILD SUPPORT

For her next argument, defendant attacks the method used by the trial court in calculating her child support obligation. Generally, this Court reviews child support orders for an abuse of discretion, *Fisher v Fisher*, 276 Mich App 424, 427; 741 NW2d 68 (2007),

which as with our consideration of spousal support, occurs when the outcome is not within the range of principled outcomes, *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). The determination of whether a trial court has operated within the statutory framework for child support calculations is a question of law reviewed de novo. *Peterson v Peterson*, 272 Mich App 511, 516; 727 NW2d 393 (2006).

Contrary to defendant's argument, the trial court did not err in referring the matter of child support to the Friend of the Court for computation. During the January 21, 2014 posttrial hearing, the trial court stated that it would be referring the matter of child support to the Friend of the Court. In its opinion, the trial court stated the bases for its calculation of support:

> The Court has reviewed the testimony of Defendant concerning her employment history, past rates of pay, her current employment, and her current rate of pay. Plaintiff's 2013 W-2 form is now available.
>
> Defendant shall pay support for the two (2) minor children, effective July 29, 2013, using the following incomes: For Defendant, 1099 income of 40 hours per week at the rate of $12 per hour; for Plaintiff, his 2013 W-2 income.

These circumstances do not evidence an improper delegation of authority to the Friend of the Court. MCL 552.505(1)(h) provides that one of the duties of the Friend of the Court is to make written reports and recommendations regarding child support using formulas developed by the Friend of the Court Bureau. Here, the trial court was simply utilizing that service, supplying the necessary figures to fit into the formula. The Friend of the Court performed the computation and generated a recommendation. The trial court entered

its final child support order on May 27, 2014, and the trial court acted within its discretion in following this procedure.[6]

E. RECUSAL

The final argument presented for our resolution is whether the trial judge should be disqualified from any further postjudgment proceedings. Before trial, defendant moved for the trial judge's recusal, but the trial judge—and on appeal the chief judge of the circuit court—denied the motion.

The factual findings underlying a ruling on a motion for disqualification are reviewed for an abuse of discretion, while application of the facts to the law is reviewed de novo. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996); *In re Contempt of Henry*, 282 Mich App 656, 679; 765 NW2d 44 (2009). An abuse of discretion occurs when the decision is outside the range of reasonable and principled outcomes. *In re MKK*, 286 Mich App 546, 564; 781 NW2d 132 (2009).

Based on our complete review of the record, we hold that the trial court did not err in denying defendant's motion to disqualify the trial judge. MCR 2.003(C) provides the following grounds for disqualifying a judge:

> (1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:
>
> (a) The judge is biased or prejudiced for or against a party or attorney.

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[6] The trial court did not impute income to defendant. Defendant testified at trial that she was employed, making $12 an hour, working 24 to 32 hours a week, and expected her hours to increase. The trial court's opinion stated that child support was based on defendant earning $12 an hour, working 40 hours a week. Given defendant's trial testimony, the trial court's determination was within the range of principled outcomes.

> (b) The judge, based on objective and reasonable perceptions, has either (i) a serious risk of actual bias impacting the due process rights of a party as enunciated in *Caperton v* [AT] *Massey* [Coal Co, Inc], 556 US 868; 129 S Ct 2252; 173 L Ed 2d 1208 (2009), or (ii) has failed to adhere to the appearance of impropriety standard set forth in Canon 2 of the Michigan Code of Judicial Conduct.
>
> (c) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> (d) The judge has been consulted or employed as an attorney in the matter in controversy.
>
> (e) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.
>
> (f) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has more than a de minimis economic interest in the subject matter in controversy that could be substantially impacted by the proceeding.
>
> (g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have more than de minimis interest that could be substantially affected by the proceeding; or
>
> (iv) is to the judge's knowledge likely to be a material witness in the proceeding.

A trial judge is presumed to be unbiased, and the party moving for disqualification bears the burden of proving that the motion is justified. *Mitchell*, 296 Mich App at 523; *Coble v Green*, 271 Mich App 382, 390; 722 NW2d 898 (2006).

The record does not support defendant's argument that the trial judge held such personal disdain for defendant that she could not be unbiased in the event of a remand. The trial judge has authority to manage proceedings to achieve orderly disposition of cases. MCL 600.611; *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006). The trial judge's comments to defendant during trial comported with that authority. That the trial judge told defendant, for example, that she could not read a statement in place of cross-examining Yvonne Babin, a neighbor, did not indicate bias on the part of the trial judge. The trial judge repeatedly instructed defendant that she could cross-examine witnesses or present additional evidence. To the extent that defendant chose not to do so, defendant's decisions regarding how to present her case do not indicate bias on the part of the trial judge. Notably, the trial judge provided defendant a month between the close of plaintiff's case in chief and the start of defendant's case in which to secure new counsel if defendant so chose.

Insofar as defendant argues that the trial judge was biased because she ruled against defendant's interests several times during the proceedings below, a party cannot establish disqualification based on bias or prejudice merely by repeated rulings against the party, even if the rulings are erroneous, *In re Contempt of Henry*, 282 Mich App at 680; *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Also, defendant intentionally violated the court's parenting order, hid the children from plaintiff, and refused to appear for a show cause hearing. On these facts, that defendant was found in contempt and was ordered to jail does not indicate bias.

The parties agreed that the trial judge would select a person to perform mental health examinations of the

parties if the parties were unable to agree on an examiner. The parties came to a stalemate, and the trial judge informed them that she had contacted an examiner. The trial judge informed the parties that she was going to contact the proposed therapist and, at that time, no one objected. The trial judge's actions showed no bias or impropriety.[7]

III. CONCLUSION

For the foregoing reasons, we vacate that portion of the judgment of divorce ordering defendant to sign amended joint tax returns, and remand for the trial court to reconsider this issue under the principles articulated in this opinion. In all other respects we affirm. No costs are awarded, neither party prevailing in full. MCR 7.219(A). We do not retain jurisdiction.

WHITBECK, P.J., and FITZGERALD, J., concurred with MURRAY, J.

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[7] Defendant cites no authority for her contention that the trial judge's Facebook "friendships" established a level of disqualifying bias. Once the issue was raised, the judge deleted the two "friend" designations, and informed the parties that she could handle the case in an unbiased fashion, and it is presumed to be so. *Mitchell*, 296 Mich App at 523.

FULICEA v STATE OF MICHIGAN

Docket No. 317283. Submitted November 14, 2014, at Lansing. Decided November 25, 2014, at 9:00 a.m.

Felix Fulicea and Kenneth Allen filed a class-action complaint in the Court of Claims against the state of Michigan and the Department of Corrections, alleging that defendants' denial of overtime compensation for services plaintiffs had performed outside normal work hours violated the Fair Labor Standards Act, 29 USC 201 *et seq*. Defendants moved for summary disposition under MCR 2.116(C)(4) on the ground that the court lacked subject-matter jurisdiction over the claims under MCL 600.6419(1)(a), and the court, James S. Jamo, J., granted the motion. Plaintiffs appealed.

The Court of Appeals *held*:

The Court of Claims has subject-matter jurisdiction over plaintiffs' statutory claims under MCL 600.6419(1)(a) as amended by 2013 PA 164, which applies retroactively.

Reversed and remanded.

JURISDICTION — COURT OF CLAIMS — SUBJECT-MATTER JURISDICTION — STATUTORY CLAIMS — RETROACTIVITY.

The amendment of MCL 600.6419(1)(a) that expanded the Court of Claims' jurisdiction to include statutory claims against the state applies retroactively to matters pending on appeal (MCL 600.6404(3)).

Lippitt O'Keefe, PLLC (by *Norman L. Lippitt* and *Daniel J. McCarthy*), for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jeanmarie Miller*, Assistant Attorney General, for defendants.

Before: K. F. KELLY, P.J., and SAWYER and METER, JJ.

PER CURIAM. Plaintiffs appeal as of right from the Court of Claims' order granting defendants summary disposition for lack of subject-matter jurisdiction under MCR 2.116(C)(4). For the reasons stated below, we reverse and remand.

Plaintiffs, as employees of defendants, filed a class-action complaint for violations of the Fair Labor Standards Act (FLSA), 29 USC 201 *et seq.*, alleging that defendants denied them overtime compensation for services they were forced to perform outside their normal work hours. Defendants moved for summary disposition under MCR 2.116(C)(4), arguing that the court lacked subject-matter jurisdiction over plaintiffs' statutory claims under MCL 600.6419(1)(a), which provided that the Court of Claims had power and jurisdiction "[t]o hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments . . . ." The Court of Claims agreed that it did not have jurisdiction over plaintiffs' statutory claims and granted defendants' motion in June 2013.

After plaintiffs filed their claim of appeal in this Court, the Legislature enacted 2013 PA 164,[1] which amended several statutes affecting the Court of Claims, including MCL 600.6419(1)(a). MCL 600.6419(1)(a) now provides that the Court of Claims has power and jurisdiction "[t]o hear and determine any claim or demand, *statutory* or constitutional, liquidated or unliquidated, ex contractu or ex delicto, . . . against the state or any of its departments . . . ." (Emphasis added.) Plaintiff argues on appeal that the Court of Claims' order granting defendants summary disposition should be reversed and remanded under the current and previous version of MCL 600.6419(1)(a).

[1] 2013 PA 164 was given immediate effect on November 12, 2013.

We review de novo matters of statutory interpretation, as well as the decision to grant or deny a motion for summary disposition. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012).

> When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. When the Legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself, and judicial construction is not permitted. Because the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute. [*Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002) (citations omitted).]

"Jurisdictional questions under MCR 2.116(C)(4) are questions of law," which are reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001).

" '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.' " *Detroit Mayor v Arms Technology, Inc*, 258 Mich App 48, 65; 669 NW2d 845 (2003), quoting *Plaut v Spendthrift Farm, Inc*, 514 US 211, 227; 115 S Ct 1447; 131 L Ed 2d 328 (1995) (discussing Congress's power to reverse the judgments of Article III courts). "In determining whether a statute should be applied retroactively or prospectively only, '[t]he primary and overriding rule is that legislative intent governs. All other rules of construction and operation are subservient to this principle.' " *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 583; 624 NW2d 180 (2001) (citation omitted).

The Legislature clearly manifested its intent that the jurisdictional amendments be applied retroactively to

pending cases. Specifically, in the Legislature's simultaneous amendment to MCL 600.6404(3), it provided as follows:

> Beginning on the effective date [November 12, 2013] of the amendatory act that added this subsection [2013 PA 164], any matter within the jurisdiction of the court of claims described in section 6419(1) *pending* or later filed *in any court* must, upon notice of the state or a department or officer of the state, be transferred to the court of claims described in subsection (1). [MCL 600.6404(3) (emphasis added); 2013 PA 164.]

Because this case remains pending in this Court, in that a final decision on appeal has not been reached, and is "within the jurisdiction of the court of claims as described in section 6419(1)," as amended by 2013 PA 164, we conclude that plaintiffs' claims may not be dismissed for lack of subject-matter jurisdiction on the ground that they are statutory in nature, as the Court of Claims plainly possesses the power and jurisdiction to hear statutory claims under MCL 600.6419(1)(a). See MCL 600.6404(3); *Arms Technology, Inc*, 258 Mich App at 66.

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

K. F. KELLY, P.J., and SAWYER and METER, JJ., concurred.

DETROIT PUBLIC SCHOOLS v CONN

Docket Nos. 317007 and 317050. Submitted October 14, 2014, at Detroit. Decided November 25, 2014, at 9:10 a.m. Leave to appeal sought.

Stephen Conn and three other teachers who are members of the Detroit Federation of Teachers (DFT) employed by the Detroit Public Schools (DPS) filed complaints with the Michigan Department of Licensing and Regulatory Affairs, Wage and Hour Division (the wage & hour division), asserting that a deduction from or reduction of their pay under a provision known as the Termination Incentive Plan (TIP) contained in a collective-bargaining agreement (CBA) between the DPS and the DFT violated several provisions of the payment of wages and fringe benefits act (PWFBA), MCL 408.471 *et seq*. The wage & hour division rejected the complaints on the basis that the CBA authorized the deductions under the TIP provision and, therefore, the deductions did not violate the provisions of § 7(1) of the act, MCL 408.477(1). The teachers appealed and the appeal proceeded to a hearing before a hearings officer. The hearings officer issued a decision that determined that the TIP deductions were being made for the benefit of the DPS and violated MCL 408.477(2) because the teachers had not given their written consent for the deductions. The hearings officer reversed the wage & hour division's dismissal of the teachers' complaints and ordered the DPS to pay the teachers the amount that had been deducted from their pay under the TIP program. The hearings officer denied a request for a rehearing by the DPS. The DPS appealed in the Wayne Circuit Court. The circuit court remanded the matter to the hearings officer for reconsideration. The hearings officer reached the same determination on remand. The DPS appealed again. The circuit court, Wendy M. Baxter, J., affirmed the hearings officer's July 13, 2012 decision. The Court of Appeals granted applications for leave to appeal by the DPS (Docket No. 317007) and the wage & hour division (Docket No. 317050) and consolidated the appeals.

The Court of Appeals *held*:

1. The plain and unambiguous language of MCL 408.481(1) to (3) provide that the wage & hour division had the jurisdiction, the power and authority, to make the investigation and determination

that it made regarding the teachers' complaints under the PWFBA. The clear and unmistakable language of the PWFBA confers the power and authority of the wage & hour division to interpret and apply the PWFBA on the hearings officer to review the wage & hour division's determination of complaints filed under the PWFBA.

2. The circuit court and the hearings officer erred by not applying the clear and unambiguous provisions of MCL 408.477(1) and by reading MCL 408.477(2) as a limitation on MCL 408.477(1) that is not within the manifest intent of the Legislature as derived from the act itself. This substantial and material misinterpretation of the act regarding § 7(1) and § 7(2) led the hearings officer and the circuit court to reach the erroneous and unsupported conclusion that the deductions or reduction at issue violated other provisions of the PWFBA. A reasonable reading of the two subsections is that when a wage deduction is required by law or expressly permitted by a CBA, the deduction is exempted from the written consent requirements of both subsections. The order of the circuit court is reversed, the July 13, 2012 decision of the hearings officers is vacated, and the matter is remanded to the hearings officer for the entry of an order or orders dismissing the teachers' complaints.

3. The longstanding interpretation of the wage & hour division that a deduction from or reduction of wages authorized by a CBA comes within the exception of § 7(1) and is therefore not subject to the individual written consent requirements of § 7(2) is entitled to respectful consideration by the Court of Appeals.

4. The hearings officer's conclusion that § 7(2), the more general provision in this case, controls over § 7(1), the more specific provision in this case, violates the settled rule of statutory construction that where two statutory subsections address the same subject, the more specific subsection controls over the more general subsection.

5. Section 7(1) permits a deduction or reduction for any lawful purpose when it is part of a CBA. The parties to the CBA agreed to the TIP provision and, as DFT members, the teachers are bound by its terms.

6. The hearings officer erred as a matter of law by concluding that the TIP deduction or reduction violated MCL 408.472(3), MCL 408.476(1), and MCL 408.478(1).

Order of the circuit court reversed, decision of the hearings officer vacated, and case remanded to the hearings officer for entry of order dismissing the complaints.

Miller, Canfield, Paddock and Stone, PLC (by *Leonard D. Givens*, *Charles T. Oxender*, and *Brian M. Schwartz*), for the Detroit Public Schools.

Scheff, Washington & Driver, PC (by *George B. Washington*), for Stephen Conn, Christal Bonner, Enid Childers, and Regina Dixon.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Thomas D. Warren* and *Emily A. McDonough*, Assistant Attorneys General, for the Department of Licensing and Regulatory Affairs.

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. Detroit Public Schools (DPS) (Docket No. 317007) and the Department of Licensing and Regulatory Affairs, Wage and Hour Division (the wage & hour division or agency) (Docket No. 317050) appeal separately by leave granted the Wayne Circuit Court order of June 12, 2013, affirming the July 13, 2012 decision of the hearings officer, Tyra Wright. The hearings officers ruled that a deduction from or reduction of appellee-teachers' pay, which was authorized by a collective-bargaining agreement (CBA) between the DPS and the Detroit Federation of Teachers (DFT), violated several provisions of 1978 PA 390, the payment of wages and fringe benefits act (PWFBA or the act), MCL 408.471 *et seq*. This Court subsequently consolidated the two appeals for the efficient administration of the appellate process. *Detroit Pub Sch v Conn*, unpublished order of the Court of Appeals, entered February 12, 2014 (Docket Nos. 317007 and 317050).

For the reasons discussed in this opinion, we find no merit to appellants' arguments that the hearings officer lacked jurisdiction to consider the complaints of appellee-teachers (hereafter "appellees") of violations of the PWFBA. But we also conclude that the hearings officer and the circuit court erred in their interpretation of the PWFBA and by finding that its provisions were violated. These conclusions render moot the other issues raised in these appeals; therefore, we reverse the circuit court's order affirming the July 13, 2012 decision of the hearings officer, vacate that decision, and remand this matter to the hearings officer for entry of an order or orders dismissing appellees' complaints.

I. SUMMARY OF FACTS AND PROCEEDINGS

Appellees are teachers and members of the DFT employed by the DPS. The DPS and the DFT entered into a CBA on December 18, 2009, that contains a provision known as the Termination Incentive Plan (TIP), which provided, in part:

> Beginning January 12, 2010 and ending with the fourth . . . pay of the 2011-2012 school year (for a total of 40 payments), all salaried members of the bargaining unit (except assistant attendance officers, accompanists and members who work less than .50 FTE) shall have $250 per pay deducted from their pay and deposited into a [TIP] account. . . .
>
> Bargaining unit members who retire or resign from the District following ratification of the 2009-2012 Agreement shall receive a Termination of Service Bonus of [$1000] for each year of service with the District up to ten . . . years of service, with a cap of $10,000. Bargaining unit members on layoff status shall not be entitled to this Bonus until such time as they are removed from the layoff list . . . . However, no member's Termination of Service Bonus shall exceed the amount he/she contributed to his/her TIP account . . . .

> Members may elect to have their Termination of Service Bonus paid as a lump sum, deposited into an annuity, or deposited into a Tax Deferred Plan (TDP). [Underlining and paragraph headings omitted.]

Appellees[1] initiated this action by filing complaints with the wage & hour division. They asserted that the TIP provision violates the PWFBA. The wage & hour division rejected the complaints on the basis of § 7(1) of the act, MCL 408.477(1), which states, in part:

> *Except for those deductions required or expressly permitted* by law or *by a collective bargaining agreement*, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount . . . without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. [Emphasis added.]

The agency reasoned that a CBA between the DPS and the DFT authorized the TIP deductions; therefore, they were within the exception of § 7(1). The appellees also asserted claims in the administrative proceedings that the CBA was improperly adopted, but the agency ruled that it lacked authority to address such allegations.

Appellees appealed the wage & hour division's rejection of their claims, and the appeal proceeded to a hearing before the hearings officer. Appellees argued that the TIP provision violated § 7(2) of the act, MCL 408.477(2), which provides, in pertinent part:

> Except as provided in this subsection and subsection (4), a deduction for the benefit of the employer requires written consent from the employee for each wage payment subject to the deduction, and the cumulative amount of the deduc-

[1] The claims of the four appellee-teachers in this case are representative of those of many DFT members who challenged the TIP provisions and represent "test cases" for all employees who have filed complaints.

> tions shall not reduce the gross wages paid to a rate less than minimum rate as defined in the minimum wage law . . . .

The DPS asserted that deductions for any purpose are permitted when authorized by a CBA and that DFT members are deemed to have consented to the terms of a CBA. Appellees disagreed, arguing that deductions under the CBA exception of § 7(1) must be for dues and other union fees.

On April 22, 2011, the hearings officer issued her decision, which agreed with appellees' arguments that the TIP deductions were being made for the DPS' benefit and violated § 7(2) of the act because appellees had not given written consent for the deductions. She concluded:

> DPS is withholding a portion of [appellees'] wages resulting in [appellees] failing to receive a portion of their wages in a timely manner. The $250 deduction from each paycheck is being withheld until some future time–weeks, months or years–depending on when a teacher retires or resigns; never, in those cases where a teacher is terminated. In short, there is no approval under the statute of an I.O.U. or option to not pay full wages to an employee who has worked his or her full schedule.
>
> . . . I find [appellees] met the burden of proving that the Wage & Hour Division should not have dismissed their claims on the grounds the deductions were allowed by a collective bargaining agreement. Furthermore, I find that the employer violated Sections 2(3), 6(1), 7(2) and 8(1) of Act 390.

The other sections of the act the hearings officer referred to are, respectively, § 2(3), MCL 408.472(3) (requiring regular weekly or biweekly payment of wages); § 6(1), MCL 408.476(1) (specifying that the methods of paying wages are restricted to United States currency, electronic deposit at a financial institution,

and debit cards meeting certain criteria); and § 8(1), MCL 408.478(1) (prohibiting an employer from demanding a fee, gift, tip, gratuity, or other remuneration as a condition of employment or continued employment). She did not explain how these other provisions of the act applied apart from her determination that the CBA exception of § 7(1) did not apply and that the TIP provision violated § 7(2) of the act. On the basis of this reasoning, the hearings officer reversed the wage & hour division's dismissal of appellee's complaints and ordered the DPS to pay each appellee the amount deducted from their wages under the TIP program.

The DPS moved for a rehearing and to stay the enforcement of the April 22, 2011 decision, submitting "new evidence" in the form of a February 2010 letter of agreement between it and the DFT that clarified the intent of the parties regarding the TIP provision in the CBA. The letter of understanding modified the wording of the TIP from saying "shall have $250 per pay *deducted* from their pay" to saying "shall have their pay *reduced* by $250 per pay." In essence, the revised language relabeled the $250 *deduction* per pay period to constitute a $250 *reduction* of pay per pay period. The hearings officer ruled that the new evidence did not justify granting a rehearing and denied the DPS' motions. The DPS then filed its appeal of the hearings officer's final decision in the Wayne Circuit Court. The circuit court remanded the matter to the administrative agency for reconsideration of the letter of agreement.

The hearings officer rejected the DPS' arguments that the letter of agreement established that the TIP provision provided for a reduction in wages rather than a deduction from wages and that respondents' challenge to the TIP presented a claim of an unfair labor practice that was within the exclusive jurisdiction of the

Michigan Employment Relations Commission (MERC). The hearings officer concluded that the letter of agreement had not changed the substance of the TIP provision. The hearings officer also concluded that the argument that appellees' complaint was really an unfair labor practice charge within the jurisdiction of MERC was "nonsensical."

On appeal again in the circuit court, the DPS argued that the CBA authorizes the TIP; therefore, it was valid under § 7(1) of the PWFBA. It also argued that appellees have, in essence, asserted an unfair labor practice claim within the exclusive jurisdiction of MERC under the public employment relations act (PERA), MCL 423.201 *et seq*.

In a June 12, 2013 opinion and order, the circuit court agreed with the hearings officer's conclusion that the TIP provision violates the PWFBA. The court affirmed the hearings officer's decisions and entered a judgment against appellants. As noted, the DPS (Docket No. 317007) and the wage & hour division (Docket No. 317050) appeal by leave granted the circuit court's opinion and order. Appellants argue that because the TIP provision was part of a CBA, the hearings officer and the circuit court erred by finding that it violated the PWFBA. Appellants also argue that appellees' claims are an unfair labor charge within the exclusive jurisdiction of MERC under PERA.

II. ANALYSIS

A. JURISDICTION

1. STANDARD OF REVIEW

As presented in this case, the question concerning the hearings officer's jurisdiction is one of law that this Court reviews de novo. *Michigan's Adventure, Inc v*

Dalton Twp, 287 Mich App 151, 153; 782 NW2d 806 (2010). Because an administrative agency has only the power that the Legislature has conferred on it, *Oshtemo Charter Twp v Kalamazoo Co Rd Comm*, 302 Mich App 574, 584; 841 NW2d 135 (2013), the issue becomes one of statutory construction, which is also reviewed de novo. *In re Harper*, 302 Mich App 349, 352; 839 NW2d 44 (2013); see also MCL 24.306(1)(b) (providing for judicial review of an agency decision to determine if it is "[i]n excess of the statutory authority or jurisdiction of the agency").

2. DISCUSSION

Although we conclude that the hearings officer erred as a matter of law in her interpretation and application of the PWFBA under the facts and circumstances presented in this case, as discussed in the next issue, she possessed subject-matter jurisdiction to do so.

Subject-matter jurisdiction presents the question whether the agency and the hearings officer have "the power to hear and determine a cause or matter." See *Bowie v Arder*, 441 Mich 23, 36; 490 NW2d 568 (1992) (citation and quotation marks omitted). As noted, administrative agencies and their administrative appellate branches are creatures of the Legislature, limited to the power and authority conveyed by statute. *Oshtemo Charter Twp*, 302 Mich App at 584. "Administrative agencies have no common-law powers." *Herrick Dist Library v Library of Mich*, 293 Mich App 571, 582; 810 NW2d 110 (2011). But the Legislature may confer on an administrative agency the power to enact rules regarding details, to conduct hearings to find facts, and to exercise some discretion in administering a statute. *Id*. This authority, however, must be clearly expressed in the enabling statute and will not be

extended by inference. *Id*. at 582-583. Thus, the general rule "is that the power and authority of an agency must be conferred by clear and unmistakable statutory language." *Id*. at 583.

In this case, appellee DFT members filed complaints with the wage & hour division alleging that the DPS was violating certain provisions of the PWFBA. MCL 408.481(1), § 11(1) of the act, provides, in pertinent part: "An employee who believes that his or her employer has violated this act may file a written complaint with the department[2] within 12 months after the alleged violation." The act further provides that the department shall "investigate the claim and shall attempt to informally resolve the dispute." MCL 408.481(2). If unable to resolve the matter, the department "shall notify the employer and employee within 90 days after the complaint is filed" of its "determination of the merits of the complaint . . . ." MCL 408.481(3). In this case, the wage & hour division notified appellees by letter that their complaints would be dismissed. After stating the provisions of § 7(1) of the act, the wage & hours division wrote:

> The Termination Incentive Plan (TIP) account deduction(s) that were agreed upon by The Detroit Federation of Teachers on December 3, 2009 (see collective bargaining agreement Article 98) allowed Detroit Public Schools to make the deductions claimed. The allegation that "Illegal Contract Negotiations" took place during this period is not an issue the Wage & Hour Division has authority to address. As a result, no further action will be taken and the above-referenced complaint will be dismissed.

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[2] MCL 408.471(a) defines "department" as the "department of labor." It is undisputed that the authority of the former Department of Labor regarding the act has devolved by executive orders to the wage and hour division of the Department of Licensing and Regulatory Affairs.

By the plain and unambiguous language of MCL 408.481(1) to (3), the wage & hour division had jurisdiction—the power and authority—to make the investigation and determination that it made regarding appellees' complaints under the PWFBA.

After the wage & hour division made its decision and notified the parties, both the employer and the employees were afforded 14 days to request a review of the decision, or it would become final. MCL 408.481(4). Appellees filed timely requests for review. Section 11 of the act provides the following with respect to review of the agency's decision:

> (6) The employee, employer, and the department shall be parties to a proceeding before a hearings officer brought pursuant to this section.
>
> (7) The director shall appoint hearings officers to make determinations in proceedings brought pursuant to this section. All proceedings in a hearing shall be conducted pursuant to the procedures applicable to the trial of contested cases under Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws. The hearings officer shall affirm, modify, or rescind the order of the department and may assess costs as provided in section 18(3).
>
> (8) The hearings officer shall issue a determination which constitutes a final disposition of the proceedings to each party within 30 days after the conclusion of the hearing. The determination of the hearings officer shall become the final agency order upon receipt by the parties.
>
> (9) A party to the proceeding may obtain judicial review of the determination of the hearings officer pursuant to Act No. 306 of the Public Acts of 1969, as amended. Venue for an appeal under this act shall only be in the circuit where the employee is a resident, where the employment occurred, or where the employer has a principal place of business. [MCL 408.481(6) to (9).]

Thus, the statute plainly provides for the appointment of a hearings officer to hear and decide an appeal of a decision by the wage & hour division regarding a complaint alleging violation of the PWFBA. This review occurs in accordance with trial-like procedures of a contested case under the Administrative Procedures Act (APA), MCL 24.201 *et seq*. At the conclusion of the contested case proceedings, the hearings officer "shall affirm, modify, or rescind the order of the department . . . ." MCL 408.481(7). Thus, the statute "by clear and unmistakable statutory language" confers the power and authority of the wage & hour division to interpret and apply the PWFBA on the hearings officer to review the agency's determination of complaints filed under the act. *Herrick Dist Library*, 293 Mich App at 583.

B. THE STATUTE

1. STANDARD OF REVIEW

Our Constitution provides the minimum standard of review applicable to "final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights . . . ." Const 1963, art 6, § 28. That minimum standard includes reviewing the agency's or officer's decision to determine whether it is "authorized by law." *Id*. "An agency's decision is not authorized by law if it violates a statute or constitution, exceeds the statutory authority or jurisdiction of the agency, is made after unlawful procedures that result in material prejudice, or is arbitrary and capricious." *Oshtemo Charter Twp*, 302 Mich App at 583-584.

An agency's findings of fact are reviewed to determine if "the same are supported by competent, material and substantial evidence on the whole record."

Const 1963, art 6, § 28; see also *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497; 813 NW2d 763 (2011). Deference must be accorded an agency's findings of fact, especially when made on the basis of credibility determinations or conflicting evidence. *Dep't of Community Health v Anderson*, 299 Mich App 591, 598; 830 NW2d 814 (2013).

Administrative decisions are also subject to review "as provided by law." Const 1963, art 6, § 28. MCL 408.481(9) instructs that the hearings officer's decision be reviewed "pursuant to" the APA, MCL 24.201 *et seq*. Section 106 of the APA provides that a decision or order of an administrative agency affecting substantial rights of an appellant may be set aside where it is: "(a) In violation of the constitution or a statute [or] (b) In excess of the statutory authority or jurisdiction of the agency [or] . . . (f) Affected by other substantial and material error of law." MCL 24.306(1); see also *Huron Behavioral Health*, 293 Mich App at 496.

In this case, essentially, the determination whether the hearings officer's decision is "authorized by law," Const 1963, art 6, § 28, or in violation of or in excess of statutory authority, MCL 24.306(1)(a) and (b), turns on statutory interpretation. The interpretation and application of a statute in particular circumstances is a question of law this Court reviews de novo. *Autodie LLC v Grand Rapids*, 305 Mich App 423, 427; 852 NW2d 650 (2014); *United Parcel Serv, Inc v Bureau of Safety & Regulation*, 277 Mich App 192, 202; 745 NW2d 125 (2007).

2. DISCUSSION

We conclude that the circuit court and the hearings officer erred by not applying the clear and unambiguous provisions of § 7(1), MCL 408.477(1), and by reading

§ 7(2), MCL 408.477(2), as a limitation on § 7(1) that is "not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194, 218; 801 NW2d 35 (2011) (citation and quotation marks omitted). This substantial and material misinterpretation of the act regarding § 7(1) and § 7(2) led the hearings officer and the circuit court to reach the erroneous and unsupported conclusion that the deduction or reduction at issue violated other provisions of the PWFBA. Consequently, we reverse the circuit court's order, vacate the decision of the hearings officer, and remand this matter to the hearings officer for entry of an order or orders dismissing appellees' complaints.

The critical and pertinent language of MCL 408.477 at issue provides:

> (1) *Except for those deductions required or expressly permitted* by law or *by a collective bargaining agreement*, an employer shall not deduct from the wages of an employee, directly or indirectly, any amount . . . without the full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction. . . .
>
> (2) Except as provided in this subsection and subsection (4), a deduction for the benefit of the employer requires written consent from the employee for each wage payment subject to the deduction, and the cumulative amount of the deductions shall not reduce the gross wages paid to a rate less than minimum rate as defined in the minimum wage law of 1964, 1964 PA 154, MCL 408.381 to 408.398. [Emphasis added.]

In *Autodie*, 305 Mich App at 428, the Court laid the framework for statutory construction:

> When interpreting a statute, our goal is to give effect to the intent of the Legislature. The language of the statute itself is the primary indication of the Legislature's intent.

> If the language of the statute is unambiguous, we must enforce the statute as written. This Court reads the provisions of statutes reasonably and in context, and reads subsections of cohesive statutory provisions together. [Citations and quotation marks omitted.]

Another pertinent rule for construing a statute provides that nothing may be read into a statute that is not within the intent of the Legislature apparent from the language of the statute itself. See *United Parcel Serv*, 277 Mich App at 202, 206, citing *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). " 'Courts may not speculate regarding legislative intent beyond the words expressed in a statute. Hence, nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself.' " *Mich Ed Ass'n*, 489 Mich at 217-218, quoting *Omne Fin, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999) (opinion by KELLY, J.).

We also consider pertinent to our review of the hearings officer's decision the principle that an appellate court must afford some deference to an agency's administrative expertise. See *Dep't of Community Health*, 299 Mich App at 598; *Huron Behavioral Health*, 293 Mich App at 497 ("great deference should be given to an agency's administrative expertise"). Our Supreme Court has explained:

> "[T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought not to be overruled without cogent reasons. However, these are not binding on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the

> indicated spirit and purpose of the legislature." [*In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008), quoting *Boyer-Campbell Co v Fry*, 271 Mich 282, 296-297; 260 NW 165 (1935) (citations and quotation marks omitted).]

Thus, appellate courts must give " 'respectful consideration' and 'cogent reasons' for overruling an agency's interpretation." *Rovas*, 482 Mich at 103; see also *Monroe v State Employees' Retirement Sys*, 293 Mich App 594, 606-607; 809 NW2d 453 (2011). But, "the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue." *Rovas*, 482 Mich at 103; see also *United Parcel Serv*, 277 Mich App at 202-203. In this case, the longstanding interpretation of the wage & hour division that a deduction from or reduction of wages authorized by a CBA comes within the exception of § 7(1) and is therefore not subject to the individual written consent requirements of § 7(2), is entitled to " 'respectful consideration.' " *Rovas*, 482 Mich at 103, 106; *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23-24; 678 NW2d 619 (2004).

Section 7(1) plainly states the general rule that any deduction that an employer makes from an employee's wages must be authorized by the "full, free, and written consent of the employee, obtained without intimidation or fear of discharge for refusal to permit the deduction." But this subsection by its plain terms also provides two exceptions to the general rule requiring written consent for employer deductions from an employee's wages: (1) "deductions required or expressly permitted by law" and (2) "deductions required or expressly permitted . . . by a collective bargaining agreement . . . ." MCL 408.477(1). The Legislature's intent with respect to these two exceptions is plainly evident. Written consent

is unnecessary in the first instance because the employer is required as a matter of law to make the deductions regardless of whether the employee consents. With respect to the collective bargaining agreement exception, the Legislature recognized that the employee's representative, the union, has already consented to the employer's deduction from the employee's wages through a written CBA. No language in § 7(1) specifically subjects the CBA exception to the benefit analysis and individual consent requirements of § 7(2). Similarly, no language in § 7(2) specifically applies its terms to § 7(1). Nothing may be read into a statute that is not within the manifest intention of the Legislature as gathered from the statute itself. *United Parcel Serv*, 277 Mich App at 202. A reasonable reading of the two subsections in context is that when a wage deduction is required by law or expressly permitted by a CBA, the deduction is exempted from the written consent requirements of both subsections. *Autodie*, 305 Mich App at 428. On the other hand, when neither of the exceptions of § 7(1) applies and the deduction could be considered "for the benefit of the employer," the individual "written consent from the employee for each wage payment subject to the deduction" is required. MCL 408.477(2).

The hearings officer does not provide cogent reasons for rejecting the wage & hour division's longstanding interpretation of MCL 408.477(1). Instead, without providing cogent reasons, the hearings officer determined that the TIP deductions benefited the DPS and, because they were not authorized by written consents, the CBA could not be used to violate § 7(2). The hearings officer also determined, again without providing clear reasons, that the TIP deductions were an illegal fee, gift, tip, or gratuity under § 8(1), resulted in earned wages not being regularly paid contrary to

§ 2(3), and somehow violated § 6(1) regarding the manner and method of paying wages.

The hearings officer's conclusion that § 7(2) controls over § 7(1) also violates the settled rule of statutory construction that where two statutes (here subsections) address the same subject (deductions from wages), the more specific statute, in this case § 7(1) permitting deductions authorized by a CBA, controls over the more general provision, in this case § 7(2). See *In re Harper*, 302 Mich App at 358, citing *Slater v Ann Arbor Pub Sch Bd of Ed*, 250 Mich App 419, 434-435; 648 NW2d 205 (2002) (opining that "where two statutes or provisions conflict and one is specific to the subject matter while the other is only generally applicable, the specific statute prevails").

A more fundamental flaw in the hearings officer's reasoning stems from ignoring the purpose of collective bargaining and the result when a collective bargaining agreement is reached. Under § 15 of PERA, MCL 423.201 *et seq*., public employers must bargain in good faith with the representatives of public employees regarding mandatory subjects of bargaining that include "wages, hours, and other terms and conditions of employment . . . ." MCL 423.215(1); *Detroit Police Officers Ass'n v Detroit*, 391 Mich 44, 54-56; 214 NW2d 803 (1974). When the bargaining parties reach a collective bargaining agreement, the parties have determined the public employees "wages, hours, and other terms and conditions of employment" and placed that determination into a written contract. When interpreting a contract, a court must ascertain and enforce the parties' intent as expressed in its plain terms. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003); *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). Also, courts must "read contracts as a

whole, giving harmonious effect, if possible, to each word and phrase." *Wilkie*, 469 Mich at 50 n 11; see also *Perry v Sied*, 461 Mich 680, 689 n 10; 611 NW2d 516 (2000) ("contracts are to be interpreted and their legal effects determined as a whole," citing 3 Corbin, Contracts, § 549, pp 183-186). Thus, a contract should be read as a whole, with meaning given to all of its terms. *Century Surety Co v Charron*, 230 Mich App 79, 82; 583 NW2d 486 (1998).

The fact that the hearings officer believed the TIP program benefited the DPS is not material to whether its required deduction or reduction of wages violates the PWFBA. First, because the deduction or reduction is part of a CBA, § 7(1) permits the deduction or reduction, by whatever name, for any lawful purpose.[3] The parties to the CBA have agreed to the TIP provision and, as DFT members, appellees are bound by its terms. See *Port Huron Ed Ass'n v Port Huron Area Sch Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dep't of the Navy v Fed Labor Relations Auth*, 295 US App DC 239, 248; 962 F2d 48 (1992) (" 'When parties bargain about a subject and memorialize the results of their negotiation in a collective bargaining agreement, they create a set of enforceable rules—a new code of conduct for themselves—on that subject.' "). To the extent that the CBA is subject to review as part of appellees' complaint filed under the PWFBA, we note that reading

[3] Appellants and appellees assert that *Mich Ed Ass'n*, 489 Mich at 226-227, favors their interpretation of § 7(1). But that case held merely that a school district—a "public body" under the Michigan Campaign Finance Act (MCFA), MCL 169.201 *et seq*.—cannot lawfully administer a payroll deduction plan authorized by a CBA when the school district's activity in doing so is, in fact, an illegal campaign contribution under § 55 of the MCFA, MCL 169.255. Consequently, the holding of *Mich Ed Ass'n*, 489 Mich 194, is not directly applicable to the facts and circumstances of the present case.

it as a whole reveals that it divides employee compensation into current wages and a contingent future bonus or a "fringe benefit" under MCL 408.471(e). An employer may "withhold a payment of compensation due an employee as a fringe benefit to be paid at . . . termination" when "the withholding is agreed upon by written contract . . . ." MCL 408.474.

Finally, we find that the hearings officer's analysis ascribing the "benefit" of one portion of the CBA to the DPS is very problematic. The very nature of collective bargaining involves give and take and compromise based on each of the bargaining parties' desire to maximize what they value most. The result may not be pleasant to either side, and a determination made by an outsider is fraught with value judgments that may not be the same as those of the negotiating parties. Indeed, to ascribe "benefit" to one party from one portion of a CBA is merely an exercise in speculation. Further, allowing disgruntled members of a public employee union to collaterally attack a CBA on the basis of a claimed "benefit" supposedly conferred on the public employer would imperil the policy of this state to resolve public employer-public employee strife through collective bargaining. See *Port Huron Ed Ass'n*, 452 Mich at 311 ("A primary goal of the public employees relations act is to resolve labor-management strife through collective bargaining.").

For many of the same reasons, the hearings officer erred as a matter of law by concluding that the TIP deduction or reduction violated §§ 2(3), 6(1), and 8(1) of the PWFBA. Under § 2(1)(a), MCL 408.472(1)(a), "wages earned" during the first 15 days of a month must be paid on or before the first day of the next month. Under § 2(1)(b), MCL 408.472(1)(b), "wages

earned" from the sixteenth day through the last day of a month must be paid on or before the fifteenth day of the next month. Section 2(3) authorizes payment of wages earned under a biweekly payment schedule. MCL 408.472 is not violated in this case because the PWFBA must be read as a whole and the provisions of § 2 are subject to other provisions of the act. As discussed, because a CBA authorized the deduction or reduction, it is permitted by § 7(1). Furthermore, the deduction concerns a fringe benefit bonus that is not "earned" until an employee retires or resigns and is authorized by MCL 408.474. Consequently, the hearings officer and the circuit court erred by concluding that the TIP deduction or reduction violated § 2(3) of the PWFBA, MCL 408.472(3).

For similar reasons, there is no basis to conclude that the TIP deduction or reduction constitutes a violation of § 6(1), MCL 408.476(1), regarding the manner and method of paying wages. And similarly, § 8(1), MCL 408.478(1), prohibiting an employer from demanding a fee, gift, tip, or gratuity, or other remuneration as a condition of employment or continued employment, has not been violated. The TIP deduction or reduction involves a deferred bonus, not an illegal fee, gift, tip, or gratuity as consideration for employment or continuation of employment.

For all the reasons discussed, we conclude that the hearings officer and the circuit court erred as a matter of law by ruling that the TIP deduction or reduction violated the PWFBA. We therefore reverse the order of the circuit court, vacate the decision of the hearings officer, and remand this matter to the hearings officer for entry of an order or orders dismissing appellees' complaints. These conclusions and resolution render the other issues appellants raise moot.

We reverse the circuit court's order, vacate the decision of the hearings officer, and remand this matter to the hearings officer for entry of an order or orders dismissing appellees' complaints. Because these appeals presented questions of public policy, we award no taxable costs pursuant to MCR 7.219. We do not retain jurisdiction.

BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

PEOPLE v BURKS

Docket No. 314579. Submitted April 1, 2014, at Lansing. Decided December 2, 2014, at 9:00 a.m. Leave to appeal sought.

Yumar A. Burks was convicted by a jury in the Ingham Circuit Court of felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). The convictions arose from the death of defendant's infant son, Antonio Burks. After the close of proofs at trial, defense counsel requested that the jury be instructed on the offense of second-degree child abuse, MCL 750.136b(3). The court, Clinton Canady, III, J., denied the request. Following his convictions, defendant appealed.

The Court of Appeals *held*:

1. A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b), including first-degree child abuse. A person is guilty of first-degree child abuse if the person knowingly or intentionally causes serious physical or serious mental harm to a child. In this case, there was a plethora of evidence from which the jury could have found that defendant knowingly or intentionally caused serious harm to Antonio when he was in defendant's sole care and custody, including evidence of defendant's emotional state and the nature and extent of Antonio's injuries. The fact that defendant offered contrary testimony, indicating that he only struck Antonio while performing cardiopulmonary resuscitation on him, did not render the evidence insufficient.

2. A trial court must instruct the jury on all relevant issues, defenses, and theories if they are supported by the evidence. When a person is charged with an offense that consists of different

degrees, the jury may find the defendant guilty of a degree of that offense inferior to that charged in the information or indictment. Generally, a lesser offense is necessarily included when the elements of the lesser offense are subsumed within the elements of the greater offense. A requested instruction on a necessarily included lesser offense should be given if the charged greater offense requires the jury to find a disputed factual element that is not part of the included lesser offense, and a rational view of the evidence would support it. But it is only when there was substantial evidence to support the requested instruction that an appellate court should reverse a conviction on the basis that the requested instruction was not given. Substantial evidence exists when, upon review of the entire cause, the Court determines that the failure to provide the instruction resulted in a miscarriage of justice. Second-degree child abuse can be proved by showing a person acted knowingly and intentionally, MCL 750.136b(3)(b), or by showing that the person acted recklessly, MCL 750.136b(3)(a). Under either theory, second-degree child abuse is a necessarily included lesser offense of first-degree child abuse. In this case, defendant's statements to the police and his testimony at trial, if believed by the jury, could have supported a jury verdict finding defendant guilty of second-degree child abuse. Therefore, the trial court erred by refusing to instruct the jury on second-degree child abuse as requested by defendant. Reversal was not warranted, however, because defendant failed to sustain his burden of demonstrating that, if properly instructed, it was more probable than not that the jury would have convicted him of second-degree child abuse rather than first-degree child abuse.

Affirmed.

MARKEY, J., concurring in part and dissenting in part, agreed with the majority that the trial court erred by refusing to instruct the jury on second-degree child abuse, but disagreed with the majority's conclusion that the error was harmless. On the facts of the case, the only difference between first- and second-degree child abuse was defendant's state of mind. At trial, defendant testified that he acted without the requisite state of mind. It is the responsibility of the jury to determine the weight and credibility of the testimony. The majority misapplied the "substantial evidence" test by sanctioning a judicial assessment regarding the probability of outcomes. It was error warranting reversal for the trial court to refuse to instruct on second-degree child abuse because substantial evidence supported convicting on that offense if the jury either believed defendant's testimony or harbored reasonable doubt regarding his mental state.

1. CRIMINAL LAW — NECESSARILY INCLUDED LESSER OFFENSES — JURY INSTRUCTIONS — SUBSTANTIAL EVIDENCE TO SUPPORT THE INSTRUCTION.

When a person is charged with an offense that consists of different degrees, the jury may find the defendant guilty of a degree of that offense inferior to that charged in the information or indictment; generally, a lesser offense is necessarily included when the elements of the lesser offense are subsumed within the elements of the greater offense; a requested instruction on a necessarily included lesser offense should be given if the charged greater offense requires the jury to find a disputed factual element that is not part of the included lesser offense, and a rational view of the evidence would support it; but it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse a conviction on the basis that a requested instruction on a necessarily included lesser offense was not given; substantial evidence exists when, upon review of the entire cause, the Court determines that the failure to provide the instruction resulted in a miscarriage of justice.

2. CRIMINAL LAW — FIRST-DEGREE CHILD ABUSE — NECESSARILY INCLUDED LESSER OFFENSES.

Second-degree child abuse can be proved by showing a person acted knowingly and intentionally, MCL 750.136b(3)(b), or by showing that the person acted recklessly, MCL 750.136b(3)(a); under either theory, second-degree child abuse is a necessarily included lesser offense of first-degree child abuse, MCL 750.136b(2).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Stuart J. Dunnings, III*, Prosecuting Attorney, *Joseph B. Finnerty*, Appellate Division Chief, and *Susan Hoffman Adams*, Assistant Prosecuting Attorney, for the people.

Daniel J. Rust for defendant.

Before: WILDER, P.J., and FITZGERALD and MARKEY, JJ.

WILDER, P.J. Defendant appeals as of right his convictions by a jury of felony murder, MCL 750.316(1)(b), and first-degree child abuse, MCL 750.136b(2). The convictions stem from the death of defendant's infant son, Antonio Burks. On the felony-murder conviction,

the trial court sentenced defendant to life imprisonment. Defendant was sentenced to 50 to 180 months in prison on the first-degree child abuse conviction. We find that while the trial court erred by refusing to instruct the jury regarding second-degree child abuse, MCL 750.136b(3), the error was harmless. Accordingly, we affirm.

I

The evidence at trial demonstrated that defendant had been feeling stress and frustration because he could not find a job that would provide for his family. Sheretta Lee, who is defendant's ex-wife and Antonio's mother, testified that several weeks before Antonio's death, when defendant drove her to work with two of their children, he threatened to drop her and the children off and then drive off a cliff. Lee was frightened because of defendant's statements and his erratic driving, and when she got to work, defendant drove away with the children at such a high rate of speed that the tires on the car left skid marks. Lee called the police, who later confirmed the children were not harmed. While Lee never saw defendant slap or punch Antonio, when Antonio was three months old, defendant began giving the baby hickeys on his cheeks. Lee also testified that Antonio cried a lot and that defendant would get frustrated trying to calm the baby down.

Lee further testified that, on the morning of March 24, 2011, defendant expressed frustration with his temporary employment agency, punched several holes in the walls, and told her "that could have been you." When Lee thought that defendant had calmed down, she left to take the couple's two older children to daycare and to go to work, leaving Antonio in defendant's sole care and custody.

Travis Parris, defendant's friend and neighbor, testified that defendant came over to play video games at around 5:00 p.m. A few hours later, Parris told defendant to go home and check on Antonio. Parris called defendant several times after he left, but defendant did not answer. When Lee returned home with the older children around midnight, defendant put one of the children to bed while the child was still fully clothed with his coat and shoes. Defendant also instructed Lee not to wake Antonio.

Lee testified that she went to bed, while Parris testified that defendant again visited his house. However, Parris said that on this visit, instead of playing video games, defendant just sat on the couch, which was not normal for him. Lee testified that she woke up at around 3:00 a.m., when she heard defendant pacing the room, and again, at around 10:00 a.m., when she got up for the day. When she touched Antonio, she discovered that he was very cold, and that he had bruising all over his body that had not been there the previous day. Lee called 911, and relayed instructions to defendant on how to perform cardiopulmonary resuscitation (CPR) on a baby by using only two fingers.[1]

Upon arriving on the scene, the police found defendant performing adult CPR on the infant. A responding officer pulled defendant off the baby so that he could perform infant CPR, but the baby was cold and lifeless. Officer Scott Sexton observed injuries on the baby's body, but significantly, there was no bruising in the area where defendant was performing CPR. A firefighter who had

[1] A police officer testified at trial that the method for performing CPR on an adult differs from the method for performing CPR on a child or an infant. Chest compressions for an adult involve both hands, but only two fingers for a small child or an infant. Moreover, to perform mouth-to-mouth resuscitation on a small child or infant, both the mouth and nose should be covered to create a seal.

responded to the scene testified that, when he removed the baby's diaper, he noticed that the diaper was dry and the baby had been freshly powdered. He found this unusual because the bowels and bladder release upon death. In the aftermath of the police arrival at the scene, defendant was observed punching holes in the drywall.

The baby was then taken to the hospital by paramedics. The treating emergency physician, Dr. Martin Romero, declared the baby dead and opined that he had been dead for between 4 and 24 hours. Dr. Romero observed multiple bruises and abrasions on the baby's face, abdomen, and legs, healing bruises on his arms, a torn frenulum,[2] and "Cullen's sign," a purple discoloration of the abdomen that indicates internal bleeding. Dr. Romero also observed that Antonio's diaper was clean and testified that stool and urine are expelled at the time of death.

The forensic pathologist, Dr. John Bechinski, who performed the autopsy on the baby, testified that Antonio had died as a result of multiple blunt force trauma. The doctor's internal examination revealed two areas of bleeding under the scalp, a full thickness tear of the superior vena cava, bleeding in the cavity next to the heart, bruises to the surface of the lungs, bleeding within the lungs, four liver lacerations, two spleen lacerations, bleeding in the abdominal cavity, a thick hemorrhage around the left testicle, bruising on the diaphragm, thymus, colon, and duodenum, bleeding around the right adrenal gland, and pulpification of that same adrenal gland. Dr. Bechinski opined that the number, location, and severity of the internal injuries were inconsistent with improperly performed CPR and were possibly caused by squeezing, punching, shaking, or being struck against a wall. Dr.

[2] Dr. Romero testified that the frenulum is a tag of skin under the upper lip.

Bechinski equated the force required to cause the injuries to Antonio's vena cava and the cavity next to his heart to the force involved with a high-speed vehicle collision. Dr. Bechinski testified that the photos of Antonio's injuries resembled those in forensic pathology textbooks of battered children.

Defendant made several conflicting statements to the police. When first interviewed, defendant only admitted giving Antonio hickeys on the cheek and occasionally pinching and slapping Antonio when he was fussy. In a second interview, defendant stated that he did not slap Antonio and that he was always gentle with him. Defendant further stated that Antonio had fallen off of the bed five different times in the past and that was how he had become so bruised. In a third interview, defendant stated that Antonio must have been injured by his three-year-old sibling who had pulled him off the bed and punched him. Defendant later changed his story again and said that he had fallen asleep next to Antonio and had accidently rolled on top of him. When he awoke, Antonio was gasping for air. Defendant said he shook Antonio and punched his sides in an effort to revive him. Defendant also said he put Antonio in the bath to revive him and that he dropped Antonio onto the side of the tub when he attempted to lift him out. Defendant further stated that he cleaned the baby and put him to bed, intending to take him to an urgent care facility in the morning.

At trial, defendant admitted that he had not been completely truthful in his interviews with the police, but asserted that his third statement to the police had been the most truthful. Defendant testified that around 10:00 p.m., he lay down on the bed with Antonio to take a nap and that he rolled over onto Antonio for roughly a minute. When he awoke, Antonio was having diffi-

culty breathing. Defendant testified that he performed CPR on Antonio, who appeared to be all right afterward. Defendant further testified that he then gave Antonio a bath, and that he stepped out of the bathroom momentarily, at which time Antonio became partially submerged in the bathtub. Defendant claimed he pulled Antonio out of the water and again successfully performed CPR. But defendant also admitted that he had struck Antonio while performing CPR to get the baby to breathe. Defendant testified that Antonio appeared to be breathing fine and went to sleep. Defendant further testified that he went to bed around 3:00 a.m. When he woke up in the morning, he learned that his son had died. Defendant denied that he had intended to hurt or to harm Antonio, or that he knew his actions would harm Antonio.

After the close of the proofs, defense counsel requested that the jury be instructed on the offense of second-degree child abuse, arguing that the jury could find defendant's actions had only been reckless. The trial court denied the request, finding that, according to the pathologist's testimony, blunt force trauma caused Antonio's death, that defendant admitted intentionally striking the baby, and that therefore, defendant's act resulting in death was intentional. The trial court further concluded that, given these findings, there was no evidence that any reckless act by defendant resulted in serious injury to Antonio, and that, therefore, the jury should not be instructed on second-degree child abuse. The jury subsequently convicted defendant of felony murder and first-degree child abuse.

II

Defendant first argues that there was insufficient evidence to support his convictions, arguing that he

struck Antonio but he did not intend to cause serious physical or mental harm to the baby. We disagree.

"A challenge to the sufficiency of the evidence in a jury trial is reviewed de novo, viewing the evidence in the light most favorable to the prosecution, to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Gaines*, 306 Mich App 289, 296; 856 NW2d 222 (2014). Under MCL 750.136b(2), "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child."

> The elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b) [including first-degree child abuse]. [*People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009).]

Although defendant claims that he only struck the baby when performing CPR and that he lacked the necessary intent to cause serious physical harm, a reasonable trier of fact could conclude that defendant knowingly or intentionally caused serious physical harm to Antonio. The record demonstrated that defendant was under stress, which he had demonstrated by recently threatening suicide, driving erratically with his children in the car, and expressing frustration when Antonio would not stop crying. On the morning of March 24, defendant was so angry that he punched holes in the walls of the family home, and when Lee left for work, Antonio was in defendant's sole care and custody. That evening, defendant played videogames at Parris's home for several hours

without checking on Antonio, and when Lee arrived home around midnight, defendant instructed her to not wake the baby up. Defendant behaved uncharacteristically afterward—just sitting on the couch when he returned to Parris's house and pacing the couple's bedroom at 3:00 a.m. Lee found the baby cold and covered with bruises about seven hours later, but Officer Sexton observed that none of the bruises were in the area where defendant performed CPR on Antonio. Further, Dr. Bechinski opined that the baby's injuries were caused by squeezing, punching, shaking, or being struck against a wall, and that some of the injuries would have required force comparable to a high-speed vehicle collision. And Officer Sexton and a responding firefighter observed that Antonio's diaper was clean, not soiled as would be expected after death, indicating that Antonio may have died earlier and defendant had put a clean diaper on Antonio after he died. This would be consistent with expert testimony that Antonio could have been dead up to 24 hours before arriving at the hospital.

From this plethora of evidence, the jury could properly infer that defendant knowingly or intentionally caused serious harm to Antonio when he was in defendant's sole care and custody on March 24. The fact that defendant claimed he merely struck the baby while performing CPR, and that this testimony conflicts with the other testimony in the case, does not render the evidence insufficient to convict defendant of felony murder and first-degree child abuse. Rather, we must resolve all conflicts in the evidence in favor of the prosecution and we will not interfere with the jury's determinations regarding the weight of the evidence or the credibility of witnesses. *People v Stevens*, 306 Mich App 620, 628; 858 NW2d 98 (2014).

III

Defendant next argues that the trial court committed error requiring reversal when it refused to instruct the jury on second-degree child abuse. Although we agree that the trial court erred by refusing to provide the instruction, we conclude that the error does not require reversal.

We review de novo issues of law arising from jury instructions, but a trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). The trial court abuses its discretion when its decision is outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

When issuing jury instructions, a trial court must instruct on all relevant issues, defenses, and theories if they are supported by the evidence. *People v McGhee*, 268 Mich App 600, 606; 709 NW2d 595 (2005).

Under the Code of Criminal Procedure, when a person is charged with an offense that consists of different degrees, the jury, or the judge in a trial without a jury, may find the defendant guilty of a degree of that offense inferior to that charged in the indictment or information. MCL 768.32(1); *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). Generally, a lesser offense is necessarily included when the elements of the lesser offense are subsumed within the elements of the greater offense. *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010); *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). A requested instruction on a necessarily included lesser offense should be given if the charged greater offense requires the jury to find a disputed factual element that is not part of the included lesser offense, and a rational view of the evidence would

support it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).[3] If the trial court does not instruct the jury on a necessarily included lesser offense, this Court must review the error for harmless error. *Id*. at 361-362, citing *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). To prove that the error is harmful rather than harmless, "a defendant must persuade the reviewing court that it is more probable than not that the error . . . was outcome determinative. An error is deemed to have been 'outcome determinative' if it undermined the reliability of the verdict." *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000) (quotation marks and citations omitted). "In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction." *Cornell*, 466 Mich at 365.[4] Substantial evidence exists when, upon review

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[3] We note that many unpublished opinions of this Court cite *Cornell* as having been overruled in part by *Mendoza*, 468 Mich 527. See, e.g., *People v Giles*, unpublished opinion per curiam of the Court of Appeals, issued December 17, 2013 (Docket No. 309338), p 6. We read nothing in *Mendoza* as overruling any part of *Cornell*. In fact, the *Cornell* decision was the cornerstone of the Court's analysis in *Mendoza*. Perhaps this citation confusion arose from a statement in *People v Dixon*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2004 (Docket No. 249954), p 2, that *Mendoza* "overruled *Cornell* and [*People v*] *Van Wyck* [402 Mich 266; 262 NW2d 638 (1978)], holding that when a defendant is charged with murder, an instruction for manslaughter must be given if supported by the evidence because manslaughter is a necessarily included lesser offense of murder." While *Mendoza*, 468 Mich at 543-544, overruled *Van Wyck*, it did so by citing and relying on *Cornell*. At any rate, our Supreme Court does not cite *Cornell* as having been overruled even in part by *Mendoza*. See *Wilder*, 485 Mich at 41, nn 12 and 14; see also *People v Nyx*, 479 Mich 112, 114-115; 734 NW2d 548 (2007) (opinion by TAYLOR, C.J.).

[4] See also *People v Heft*, 299 Mich App 69, 73; 829 NW2d 266 (2012), holding that "[i]f the trial court [errs by failing to] instruct the jury on a lesser included offense, the error *requires* reversal if the evidence at trial *clearly supported* the instruction." (Emphasis added.) *Heft* cited *People v*

of the " 'entire cause,' " we determine that the failure to provide the instruction resulted in a miscarriage of justice. *Id*., quoting MCL 769.26.

A

Second-degree child abuse can be proved by showing a person acted knowingly and intentionally, or by showing that the person acted recklessly. We conclude that either theory of second-degree child abuse is a necessarily included lesser offense of first-degree child abuse, and that a rational view of the evidence in this case would have supported a jury instruction on second-degree child abuse.

MCL 750.136b(2) provides that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." In *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004), our Supreme Court held that to be convicted of this offense the prosecution must prove and the jury must find "not only that [the] defendant intended to commit the act, but also that [the] defendant intended to cause serious physical harm or knew that serious physical harm would be caused by [his or] her act." Although the jury need not be instructed regarding "specific intent," it must be "instructed that it must find that [the] defendant either knowingly or intentionally caused the harm." *Id*. at 296.

MCL 750.136b(3) provides that a person is guilty of second-degree child abuse when any of the following apply:

Silver, 466 Mich 386, 388; 646 NW2d 150 (2002) (opinion by TAYLOR, J.), which notes that "[an] offense is 'clearly' supported when there is substantial evidence to support the requested lesser instruction."

> (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
>
> (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
>
> (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.[5]

The element distinguishing first-degree child abuse under MCL 750.136b(2) from second-degree child abuse under MCL 750.136b(3)(b) is harm. A person who knowingly or intentionally causes serious physical or serious mental harm to a child is guilty of first-degree child abuse whereas a person can be convicted of second-degree child abuse for an intentional act likely to cause serious harm, regardless of actual harm. MCL 750.136b(3)(b). In other words, second-degree child abuse as defined in Subsection (3)(b) is completely subsumed by the definition of first-degree child abuse set forth in Subsection (2).

In addition, the element distinguishing second-degree child abuse resulting from a reckless act under MCL 750.136b(3)(a) from first-degree child abuse under Subsection (2) is the offender's state of mind. Specifically, as the *Maynor* Court held, to be convicted of first-degree child abuse, the defendant must not only cause "serious physical or serious mental harm to a child" but must also either have acted intending to cause serious harm or knowing that his or her actions would cause serious harm. *Maynor*, 470 Mich at 291, 296. Absent proof of this necessary element of intent or

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[5] We list this form of second-degree child abuse only for completeness. Neither party asserts that Subdivision (c) applies to the facts of this case.

knowledge, a person is guilty of second-degree child abuse when his or her reckless act causes serious physical harm or serious mental harm to a child. MCL 750.136b(3)(a).

Consequently, the variants of second-degree child abuse in MCL 750.136b(3)(b) (involving an intentional act that is likely to cause serious harm) and MCL 750.136b(3)(a) (involving a reckless act) are necessarily included lesser offenses of first-degree child abuse. See *Wilder*, 485 Mich at 41; *Mendoza*, 468 Mich at 540.

B

As we noted earlier, the trial court reasoned, when it declined to grant defendant's request for a jury instruction regarding second-degree child abuse, that it was undisputed that defendant acted intentionally and that defendant's intentional act resulted in Antonio's death. But defendant's statements to the police and his testimony at trial that he rolled onto Antonio while they were sleeping could have supported a jury verdict finding defendant guilty of second-degree child abuse under MCL 750.136b(3)(a). And defendant's statements and testimony that he had momentarily left the baby alone in the bath, were evidence that, if believed, could have supported a jury verdict finding defendant guilty of second-degree child abuse under MCL 750.136b(3)(b). Likewise, defendant's testimony that he struck Antonio while performing CPR to try to get him to breathe, if believed by the jury, could have supported a jury verdict finding defendant guilty of second-degree child abuse under MCL 750.136b(3)(a). Therefore, the trial court erred by not instructing the jury on second-degree child abuse as requested by defendant.

C

Despite the trial court's error, however, reversal is not warranted. Defendant has not sustained his burden of demonstrating that, if properly instructed, it was more probable than not that the jury would have convicted him of second-degree child abuse under MCL 750.136b(3)(b) rather than first-degree child abuse. None of defendant's inconsistent depictions of his care of Antonio before his death explains the injuries Antonio sustained. In particular, Dr. Bechinski opined Antonio's injuries were caused by squeezing, punching, shaking, or being struck against a wall, and that some of the injuries would have required force comparable to a high-speed vehicle collision. In addition, contrary to defendant's testimony, the baby was *not* fine after being in defendant's care. Antonio's injuries after being in defendant's care were extensive, as he was covered with bruises and abrasions and had internal injuries described as "textbook" for battered children.

Similarly, defendant has not sustained his burden of demonstrating that it was more probable than not that the jury would have convicted him of second-degree child abuse under MCL 750.136b(3)(a) rather than first-degree child abuse. Despite defendant's testimony that he struck Antonio while performing CPR merely to try to get him to breathe, the evidence demonstrated the baby's injuries were inconsistent with improper CPR. Further, the jury was unlikely to believe defendant's inconsistent explanations for the baby's injuries in light of defendant's history of violence, the anger and violence he exhibited on the morning before he was entrusted to care for Antonio, and evidence that defendant grew frustrated when attempting to calm the baby who cried often.

A review of the entire cause does not show that defendant merely committed an act likely to cause serious harm, regardless of actual harm, or that defendant acted recklessly, not knowingly, in causing injury to Antonio. Accordingly, the trial court's failure to instruct the jury on the necessarily included lesser offense of second-degree child abuse did not undermine the reliability of the verdict, and that failure was harmless.

IV

For all the foregoing reasons, we affirm.

FITZGERALD, J., concurred with WILDER, P.J.

MARKEY, J. (*concurring in part and dissenting in part*). I concur with the majority's conclusion that the trial court erred by refusing to instruct the jury on the lesser-included offense of second-degree child abuse, MCL 750.136b(3). I do, however, respectfully disagree that the error was harmless. On the facts of this case, the only difference between first-degree child abuse, MCL 750.136b(2), and second-degree child abuse, was defendant's state of mind. See *People v Maynor*, 470 Mich 289, 291; 683 NW2d 565 (2004) (holding that a conviction for first-degree child abuse requires proof "not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act"). Defendant testified at trial that he acted without the requisite state of mind. Although the jury clearly rejected defendant's testimony on this point, they were faced with the prospect of finding defendant not guilty on these egregious facts or convict-

ing defendant of what in Michigan is a capital offense, felony-murder supported by first-degree child abuse.

In finding the error in this case harmless, the majority relies on *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002), which held that the harmless error analysis applies "to instructional errors involving necessarily included lesser offenses[.]" The Court applied MCL 769.26, which provides: "No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of resulted in a miscarriage of justice." See *Cornell*, 466 Mich at 362. The *Cornell* Court also discussed *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999), a case in which the Michigan Supreme Court applied MCL 769.26 to evidentiary error. *Cornell*, 466 Mich at 363-364. The Supreme Court held in that case that under MCL 769.26, "a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496. The majority applies this last formulation to conclude on review of the evidence at trial that defendant "has not sustained his burden of demonstrating that, if properly instructed, it was more probable than not that the jury would have convicted him of second-degree child abuse under MCL 750.136b(3)(b) rather than first-degree child abuse."

In my opinion, it is not the result that the jury reached in this case that is a miscarriage of justice, but rather the process by which the result was reached. In our system of criminal justice, in which the right to a

trial by jury is guaranteed by both the federal Constitution, US Const, Ams VI and XIV, and the Michigan Constitution, Const 1963, art 1, §§ 14 and 20, the jury and not judges decide the facts of the case. It is the responsibility of the jury alone to determine the weight and credibility of all testimony, including that of a defendant regarding his actions and intent. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). In this case, in refusing to instruct on second-degree child abuse, the trial court determined that defendant's testimony was not credible in light of the other evidence. But defendant's credibility was for the jury, not the judge, to determine. And, while the majority may be correct in finding that it is more probable than not that even if instructed regarding second-degree child abuse the jury would have reached the same result, this conclusion is based on a *judicial* assessment of defendant's credibility and the strength of the other evidence.

The *Cornell* Court opined that "the reliability of the verdict is undermined when the evidence 'clearly' supports the lesser included instruction, but the instruction is not given." *Cornell*, 466 Mich at 365. "In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction." *Id*. The Court further noted that in applying this "substantial evidence" test, an appellate court must consider the "entire cause," as MCL 769.26 requires. *Cornell*, 466 Mich at 365-366. Also, "more than an evidentiary dispute regarding the element that differentiates the lesser from the greater offense is required to *reverse* a conviction[.]" *Id*. at 366. But the Court cautioned that "substantial evidence in support of one offense does not necessarily preclude there also being substantial evidence in support of the other offense." *Id*. at 366 n 20.

"[T]here may be cases where both the lesser and the greater offenses are supported by substantial evidence." *Id*.

In my view, the majority misapplies the "substantial evidence" test by sanctioning a judicial assessment regarding the probability of outcomes on the basis of the evidence at trial, including the judicial assessment of defendant's credibility. Rather, in this case, in reviewing the "entire cause," MCL 769.26, I am compelled to conclude there was the requisite substantial evidence supporting both first- and second-degree child abuse. *Cornell*, 466 Mich at 366 n 20. The difference between the two offenses was whether defendant acted *intending* to commit the harm inflicted or knew that such harm would occur. *Maynor*, 470 Mich at 291, 296. Defendant's own testimony certainly supported his theory of the case; consequently, I conclude it was error warranting reversal for the trial court to refuse to instruct on second-degree child abuse because substantial evidence supported convicting on that offense if the jury either believed defendant's testimony or harbored reasonable doubt regarding his mental state. Accordingly, I would reverse and remand for a new trial.

ELHER v MISRA

Docket No. 316478. Submitted July 8, 2014, at Detroit. Decided December 2, 2014, at 9:05 a.m. Leave to appeal sought.

Paulette Elher brought a medical malpractice action in the Oakland Circuit Court against Dwijen Misra, Jr.; Murphy and Misra, M.D., P.C.; and William Beaumont Hospital for damages she suffered when Misra accidentally clipped her common bile duct while performing laparoscopic surgery on her gallbladder. Plaintiff sought to admit expert testimony from a surgeon with extensive experience in performing this procedure that clipping a patient's common bile duct during an otherwise uncomplicated operation was a breach of the applicable standard of care. Plaintiff also claimed that negligence could be inferred from the improperly clipped bile duct under the doctrine of res ipsa loquitur. Defendants moved to exclude plaintiff's proposed expert testimony on the ground that, because it was not supported by peer-reviewed literature or the opinions of other physicians, it did not meet the standard for reliability set forth in MRE 702 and MCL 600.2955. The court, Colleen A. O'Brien, J., excluded the expert testimony, ruled that the doctrine of res ipsa loquitur was inapplicable, and granted defendants' motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

1. The trial court abused its discretion by incorrectly applying MRE 702 to exclude the testimony of plaintiff's expert witness. The factors that the trial court considered were not relevant to this expert's testimony, which did not involve an unsound scientific methodology or questionable data. Whether injuring the common bile duct during uncomplicated laparoscopic surgery violates the applicable standard of care called for a value judgment derived from training and experience rather than a scientific pronouncement. The reliability of an opinion that cannot be tested, replicated, or objectively analyzed depends on whether the expert's qualifications create a foundation adequate to support the expert's statement of the standard of care. Once it is established that an expert's opinion rests on reliable scientific principles, MRE 702 does not empower trial courts to determine which of several competing expert opinions enjoys more support. Because the evidence indicated that the opin-

ions of plaintiff's expert were grounded in good science, the decision whether to credit his views rested with the jury.

2. The doctrine of res ipsa loquitur did not apply to plaintiff's claim because the manner in which a surgeon laparoscopically removes a gallbladder falls far outside the common knowledge of a layperson, as does the question whether an injury to the common bile duct qualifies as negligence or accident.

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

Judge HOEKSTRA, concurring in part and dissenting in part, agreed with the majority's analysis of whether the doctrine of res ipsa loquitur applied but would have held that the trial court did not abuse its discretion by excluding the expert's testimony regarding the standard of care because no basis had been offered for it apart from the expert's own personal views. Accordingly, he would have affirmed the trial court's grant of summary disposition.

1. EVIDENCE — EXPERT TESTIMONY — MEDICAL MALPRACTICE — STANDARD OF CARE — RELIABILITY.

An expert opinion regarding the standard of care in a medical malpractice action that cannot be tested, replicated, or objectively analyzed may be deemed reliable if it is based on sound scientific principles regardless of whether it is supported by peer-reviewed literature or the opinions of colleagues in the field (MRE 702; MCL 600.2955).

2. EVIDENCE — EXPERT TESTIMONY — MEDICAL MALPRACTICE — STANDARD OF CARE — RELIABILITY.

A trial court presented with competing expert opinions regarding the standard of care in a medical malpractice action is not empowered to determine which of these opinions enjoys more support when determining their admissibility if the opinions are grounded in good science (MRE 702; MCL 600.2955).

Ronald F. DeNardis for plaintiff.

Giarmarco, Mullins & Horton, PC (by *Donald K. Warwick*), for defendants.

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

GLEICHER, J. Before admitting expert medical testimony, a trial court must ensure that it is not infected

with junk science. MRE 702 and MCL 600.2955 provide trial courts with the general standards they need to fulfill this gatekeeping obligation. At issue in this medical malpractice case is how those standards apply to a difference of opinion among highly qualified experts concerning whether a surgical error constitutes a violation of the standard of care.

The underlying facts are simple. Defendant Dwijen Misra, Jr., a general surgeon, clipped the wrong bile duct during plaintiff Paulette Elher's laparoscopic gallbladder surgery. Plaintiff's expert, a general surgeon with extensive experience in the procedure, testified that clipping a patient's common bile duct during an otherwise uncomplicated operation is a breach of the standard of care. Defendants' expert opined that bile duct injuries frequently occur even absent professional negligence. Defendants insisted that plaintiff's expert's testimony did not qualify as reliable under MRE 702 because the expert could not specifically identify any peer-reviewed literature or other physicians who supported his viewpoint. The trial court agreed with defendants, excluded plaintiff's expert's testimony, and dismissed the case.

We hold that the trial court incorrectly applied MRE 702 and abused its discretion by excluding the testimony of plaintiff's expert witness, Dr. Paul Priebe. The reliability factors invoked by the trial court to reject Dr. Priebe's standard-of-care opinion lacked relevance to the testimony offered and the evidence received. Neither the soundness of a scientific methodology nor the legitimacy of underlying data plays a role here. Rather, the experts' disagreement focuses on scientifically sustainable and equally justifiable *conclusions*. MRE 702 requires that an expert's opinion rest on reliable scientific principles. Once that foundation has been estab-

lished, MRE 702 does not empower trial courts to determine which of several competing expert opinions enjoys more support. Here, the evidence validated that Dr. Priebe grounded his opinions in "good science." Accordingly, a jury must decide whether to credit his views.

I. FACTS AND PROCEEDINGS

Dr. Misra removed Elher's gallbladder laparoscopically. Technically called a laparoscopic cholecystectomy, this surgery is performed by passing long, narrow instruments and a magnification camera called a laparoscope through several small abdominal incisions. The laparoscope transmits images from the surgical site to video monitors in the operating room. The surgeon manipulates the specialized instruments while viewing the images on the monitors.

An initial step in the procedure involves careful identification of the cystic artery and the cystic duct. After locating these structures, the surgeon places clips above and below the point where each will be divided. The surgeon then cuts the tissue between the clips. Once the cystic artery and the cystic duct have been severed, the gallbladder is dissected away from the liver bed and removed from the abdomen. The cystic duct's continuity must be sacrificed to remove the gallbladder, but the patient's other bile ducts, in particular the common bile duct, are supposed to remain intact.

Dr. Misra clipped Elher's common bile duct. Elher's expert believes that when neither scarring nor inflammation obscures the surgeon's vision, it is a breach of the standard of care to injure the common bile duct. Defendants claim that injuries can happen even in the presence of due care because the laparoscope creates

optical "illusions" that may lead the surgeon astray. This debate frames the evidentiary issue presented to the trial court.

Approximately nine weeks after the operation, Elher presented at a hospital with abdominal pain, nausea, vomiting, and jaundice. A radiological study called an ERCP revealed that a clip was obstructing her common hepatic duct.[1] Surgery was performed to remove the clip and to reconstruct her biliary drainage system.

Elher subsequently filed this medical malpractice suit. Her complaint avers that the standard of care applicable to Dr. Misra required that he

> 1. Refrain from clipping or obstructing the common bile duct during the performance of a laparoscopic cholecystectomy that is identified as an uncomplicated procedure in the operative note.
>
> 2. . . . [U]nequivocally identify the cystic duct and ensure that no anatomic structures are clipped or cut without certain identification.
>
> 3. . . . [C]onvert to an open procedure if there is any doubt as to the proper anatomical identification of each element of the biliary tree.

Dr. Misra breached the standard of care, the complaint continues, by

> 1. Fail[ing] to refrain from clipping or obstructing the common bile duct during the performance of a laparoscopic cholecystectomy that is identified as an uncomplicated procedure.

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[1] The parties and their expert witnesses refer to the clip as having been placed on either the common hepatic duct or the common bile duct, using the anatomical terms interchangeably. Dr. Misra stated, "'The clip is on the common bile duct because of the surgery that I performed." Placement of the clip on either the hepatic or the common bile duct (which are essentially one continuous structure) was not part of the surgical plan, and the parties agree that this untoward event triggered Elher's illness and her need for additional surgery.

> 2. Failing to unequivocally refrain from clipping or obstructing the common bile duct during the performance of a laparoscopic cholecystectomy that is identified as an uncomplicated procedure.
>
> 3. Failing to convert to an open procedure if there was any doubt in Defendant's mind as to the proper anatomical identification of each element of the biliary tree . . . .

The complaint also stated a negligence claim that relied on the doctrine of res ipsa loquitur.

Elher filed an affidavit of merit signed by Dr. Priebe, a board-certified general surgeon. Dr. Priebe's affidavit reiterated the standard-of-care requirements and violations pleaded in the complaint.

Dr. Misra denied that he had violated the standard of care. At his deposition he explained that although "I don't want to clip the hepatic duct," "[t]he view from the laparoscope is not optimal and not recognized as optimal and illusions can be created in which the ducts could be clipped." He clarified: "[I]llusions can occur in a two-dimensional video image that can create an illusion that, according to standard anatomy, the cystic duct and cystic artery are what they appear to be, but the common bile duct in this case was in that illusion." In Dr. Misra's estimation, this complication occurs in 0.5 to 2 percent of all laparoscopic gallbladder surgeries. Dr. Misra has performed approximately 3,000 to 5,000 such procedures and twice clipped the wrong duct, Elher's surgery included. In the other case, he recognized the error during the operation.

Dr. Priebe, an associate professor of surgery at Case Western Reserve University, performs 50 to 80 laparoscopic gallbladder surgeries each year and has done so since learning the technique in 1990. He expressed that "absent extensive inflammation or scarring, . . . virtually every case of . . . major bile duct injury . . . , in my

opinion, would be malpractice." Dr. Priebe opined that regardless of a surgeon's particular operative approach, "the general rule is that everything should be identified before anything is cut, any major structure." He admitted to having personally injured a patient's common bile duct when "the anatomy couldn't be delineated because of the scarring and inflammation[.]" When asked whether he could "cite to any medical literature" supporting his standard of care opinion, Dr. Priebe replied: "Medical literature doesn't discuss standard of care," later reprising: "There is no authority that exists to do that[.]" Dr. Misra had violated the standard of care, Dr. Priebe submitted, "as it relates to delineating the anatomy as he performed the laparoscopic cholecystectomy."

Dr. John Webber, a general surgery expert proffered by defendants, admitted that bile duct injuries may result from medical negligence: "I'm saying there are instances where you can have an injury to the common [bile] duct and it could be malpractice and there are instances where it wouldn't be malpractice." He disagreed that bile duct injuries occurring during uncomplicated surgeries qualify as negligent per se. Dr. Webber partially premised his opinion on an editorial written by Dr. Josef E. Fischer in The American Journal of Surgery. According to Dr. Webber, the editorial stands for the proposition that "bile duct injuries can occur and is [sic] an inherent risk of the procedure without being below the standard of care."

Dr. Fischer's essay, a centerpiece of defendants' legal argument, is labeled by The American Journal of Surgery as an "Editorial Opinion."[2] The abstract states:

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[2] We note that the copy of the Fischer article provided to the trial court was so poorly reproduced that it was essentially unreadable, and appears not to include the heading "Editorial Opinion." Because we could not

> The author believes that injury to the common duct during laparoscopic cholocystectomy [sic] is not a result of . . . practice below the standard, but an inherent risk of the operation. This injury needs to be emphasized by the surgical community as an inherent risk of the operation, and patients should be fully informed of this potential complication. [Fischer, *Is Damage to the Common Bile Duct During Laparoscopic Cholecystectomy an Inherent Risk of the Operation?*, 197 Am J Surgery 829, 829 (2009).]

Because the Fischer editorial figures prominently in this case, we highlight several additional portions.

Dr. Fischer observed that bile duct injury occurs slightly more frequently in the laparoscopic gallbladder procedure than in conventional, open operations. *Id*. at 830. He reviewed various techniques for correctly identifying the bile duct anatomy, observing that "[a]ny or all of these together can help decrease the incidence of common duct injury, but the methods are not foolproof." *Id*. Despite precautions, Dr. Fischer opined, common duct injuries occur, and "[s]omehow the trial bar has converted a complication of a procedure that has remained stable, can seemingly occur to anyone, and can occur to acknowledged skilled surgeons, into 'practice below the standard.' " *Id*.

Dr. Fischer cited a study performed by Dr. Lawrence Way and several other surgeons concluding that " 'practice below the standard' is not a cause of 97% of bile duct injuries." *Id*. at 831. Two other published articles, Dr. Fischer claimed, "came close to declaring that common duct injury, after going through the usual drill of how to avoid it, might not be 'practice below the

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read the record version of the article, we obtained a copy directly from the journal. We have attached the first page of the article as an exhibit to this opinion.

standard.' " *Id*. Dr. Fischer concluded with the following pertinent paragraphs:

> One feels strange arguing that an acknowledged complication of a commonly performed procedure is not "practice below the standard." However, it would seem to me that if one persisted and tried to determine in 2 or 3 or even 4 ways what the anatomy was so as not to damage the common duct and the common duct was damaged nonetheless, that this is certainly not "practice below the standard." I know I may be opposed by some hepatobiliary surgeons who would argue that "if you don't know what you're doing, you shouldn't do it." But I have seen really excellent and highly experienced surgeons somehow damage the common duct inadvertently.
>
> Surgery is not a science. It is an art. It is not an arcane art. It can be learned by everybody and mentoring helps. However, it does appear that even the most experienced laparoscopic surgeon can sometimes fall afoul of the vagaries of the art of surgery.
>
> This article will draw howls undoubtedly not only from the legal bar but also from some experienced surgeons who are purists. I do not believe that that is appropriate. We put our egos and our skill on the line every time we enter the operating room and sometimes that skill is insufficient despite our best efforts. [*Id*.]

Defendants filed several additional medical articles with the trial court, including the article authored by Dr. Way. The articles generally discuss bile duct injuries and their causes. The Way article begins as follows: "Bile duct injuries are the main serious technical complication of laparoscopic cholecystectomy." Way et al., *Causes & Prevention of Laparoscopic Bile Duct Injuries*, 237 Annals Surgery 460, 460 (2003). In it, the authors analyze 252 operations involving bile duct injuries by applying "scientific principles from human factors research and cognitive psychology . . . ." *Id*. at

468.[3] The article posits that the authors considered some surgical errors resulting in bile duct injuries "to represent faulty decision-making or a knowledge error if the data indicated that . . . the surgeon had departed from the orthodox operative strategy for performing a laparoscopic cholecystectomy . . . ." *Id*. at 461. It continues: "We considered that the fault was at the action or skill level when there was evidence that the dissection was performed in a clumsy way; when an identified duct being cleared of connective tissue was accidentally cut or cauterized." *Id*. Many injuries, the authors concluded, were due to "misperception . . . at a subconscious level in response to certain uncommon anatomic illusions." *Id*. at 468. Misperception errors, the authors submitted, "do[] not meet the defining criteria of medical negligence." *Id*. The remaining articles filed by defendants do not discuss standard-of-care issues.[4]

Defendants sought summary disposition under MCR 2.116(C)(10) on three grounds. First, defendants asserted, Dr. Priebe's opinions lacked reliability under MRE 702. The crux of defendants' argument was that Dr. Priebe could not point to any peer-reviewed literature endorsing his view of the standard of care and that he disdained consideration of his colleagues' views. The Fischer editorial, defendants argued, supported that bile duct injuries are not the result of medical negligence. Defendants next alleged that because injury to

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[3] We note that the authors of the Way article are all physicians. The article does not describe their expertise, if any, in the science of human factors.

[4] Elher's counsel filed several articles with this Court in support of Dr. Priebe's standard-of-care testimony. Because the articles were not submitted to the trial court, we have not read or considered them. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002) ("This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal.").

the common bile duct is a recognized complication of laparoscopic cholecystectomy, the res ipsa loquitur doctrine did not apply. Defendants further argued that Elher failed to properly plead damages and did not have sufficient expert testimony with regard to causation. Elher filed a responsive brief, but failed to put forward any evidence buttressing Dr. Priebe's opinions.

The trial court ruled that Dr. Priebe's opinions were not reliable, summarizing:

> The problem here is that Plaintiff does not squarely address the issue of whether her expert's testimony is reliable under MRE 702 or even meets any of the requirements of MCL 600.2955. Plaintiff merely points to Dr. Priebe's experience and background arguing that his opinion is reliable and therefore admissible. However, Plaintiff must present more than his own opinions, his "stellar" credentials, and the number of procedures he has performed. Plaintiff cannot merely conclude without more that the opinion of Dr. Priebe is based on sufficient facts or data.

Dr. Priebe's testimony was deficient, the trial court found, because it did not conform to MRE 702:

> Here, there is no evidence that Dr. Priebe's opinion and its basis have been subjected to scientific testing and replication. There is no evidence that Dr. Priebe's opinion and its basis have been subjected to peer review publication. There is no evidence as to the degree to which the opinion and its basis are generally accepted within the relevant expert community. To the contrary, Dr. Priebe admits there is "no authority" that exists as to his standard of care opinion other than his "own belief system."
>
> Furthermore, Dr. Priebe cannot cite to any medical literature to support his self-definition and belief system. According to Dr. Priebe, medical literature does not discuss standard of care or otherwise support his opinion because the authority does not exist. He acknowledges that there are national and local colleagues who disagree with his

> exception for extensive inflammation or scarring, but discounts those opposing views as just others being entitled to their opinions. He is not aware of any General Surgery colleague at Case Western who agrees with that, other than extensive scarring or inflammation, it is always [a] breach of the standard of care to injure the common bile duct during a laparoscopic cholecystectomy. He does not know of any board-certified general surgeons who agree with him that it is always a breach of the standard of care to injure the common bile duct during laparoscopic cholecystectomy surgery, unless there is extensive scarring or inflammation.

The trial court next found the res ipsa loquitur doctrine inapplicable, as injury to the common bile ducts constitutes a risk of the procedure and the causes of this complication were not within the common understanding of lay jurors. After ruling the res ipsa loquitur doctrine inapposite and Dr. Priebe's testimony "unreliable and inadmissible," the trial court granted summary disposition in favor of defendants. The trial court did not address defendants' argument that plaintiff had failed to establish her claim for damages. Elher appeals.

II. ANALYSIS

The facts underlying this case are not in dispute. Dr. Misra mistook Elher's common bile duct for her cystic duct. He clipped both rather than just the cystic duct. The medical experts agree that the common bile duct should not have been clipped, and that the injury to Elher's common bile duct occasioned extensive repair surgery. The debate centers on whether Dr. Misra's error qualifies as surgical negligence or excusable error—a nonnegligent accident precipitated by perception problems produced by the equipment. Science cannot settle this dispute. Because the experts' disagreement boils down to a difference of opinion regard-

ing an issue outside the realm of scientific methodology, neither MRE 702 nor MCL 600.2955 stands in the way of Dr. Priebe's testimony.

We review for an abuse of discretion a circuit court's evidentiary rulings. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). When our inquiry concerns whether the trial court correctly applied a rule of evidence, our review is de novo. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). Therefore, we apply review de novo in assessing whether the trial court performed its gatekeeping role in conformity with the legal principles articulated in *Gilbert v Daimler-Chrysler Corp*, 470 Mich 749; 685 NW2d 391 (2004), in which our Supreme Court adopted the framework set forth in *Daubert v Merrell Dow Pharm, Inc*.[5] If the trial court correctly executed its gatekeeping role, we review its ultimate decision to admit or exclude scientific evidence for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). When a trial court excludes evidence based on an erroneous interpretation or application of law, it necessarily abuses its discretion. *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009).

A. MRE 702

We begin our analysis with MRE 702, which governs the admission of expert testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on

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

> sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The United States Court of Appeals for the Third Circuit has referred to the substantively similar FRE 702 as embodying "a trilogy of restrictions on expert testimony: qualification, reliability, and fit." *Schneider v Fried*, 320 F3d 396, 404 (CA 3, 2003). Here, the sole issue is reliability.

MRE 702 explicitly incorporates the standards of admissibility set forth in *Daubert*. *Gilbert*, 470 Mich at 782. *Daubert* focuses on evidentiary reliability. To assist judges in performing the requisite analysis, the Supreme Court outlined four factors that might assist judges in gauging reliability: (1) whether the expert's theory can be and has been tested, (2) whether the theory has been subjected to peer review or publication, (3) the theory's known or potential rate of error and the existence of standards controlling the technique's operation, and (4) the extent to which the methodology or technique employed by the expert is generally accepted in the scientific community. *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 593-594; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

This analysis does not hinge on discovering "absolute truth" or resolving "genuine scientific disputes." *Chapin v A & L Parts, Inc*, 274 Mich App 122, 127; 732 NW2d 578 (2007). "[I]t would be unreasonable to conclude that the subject of scientific testimony must be 'known' to a certainty; arguably, there are no certainties in science." *Daubert*, 509 US at 590. Rather, the trial court is tasked with filtering out unreliable expert evidence. "The inquiry is into whether the opinion is rationally derived from a sound foundation." *Chapin*, 274 Mich App at 139. "The standard focuses on the

scientific validity of the expert's methods rather than on the correctness or soundness of the expert's particular proposed testimony." *People v Unger*, 278 Mich App 210, 217-218; 749 NW2d 272 (2008). As the United States Supreme Court emphasized in *Daubert*:

> [t]he inquiry envisioned by Rule 702 is . . . a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate. [*Daubert*, 509 US at 594-595.]

In *Kumho Tire Co, Ltd v Carmichael*, 526 US 137, 152; 119 S Ct 1167; 143 L Ed 2d 238 (1999), the United States Supreme Court reviewed and clarified the reliability principles laid out in *Daubert* in the context of engineering. One question presented in *Kumho* was whether a trial court evaluating proposed expert testimony "*may* consider several more specific factors that *Daubert* said might 'bear on' a judge's gatekeeping determination." *Id*. at 149.

> These factors include:
>
> —Whether a "theory or technique . . . can be (and has been) tested";
>
> —Whether it "has been subjected to peer review and publication";
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> —Whether, in respect to a particular technique, there is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
>
> —Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community." [*Id*. at 149-150 (citation and some quotation marks omitted).]

The Supreme Court resolved the inquiry in the following manner: "Emphasizing the word 'may' in the question, we answer that question yes." *Id*. at 150.

The Court then expounded on its answer, accenting that the inquiry under Rule 702 is " 'a flexible one' " in which the factors cited "do *not* constitute a 'definitive checklist or test.' " *Id*., quoting *Daubert*, 509 US at 593-594. In some cases, the Court volunteered, "the relevant reliability concerns may focus upon personal knowledge or experience." *Id*. Using language especially relevant to the case before us, the Supreme Court continued: "And *Daubert* adds that the gatekeeping inquiry must be 'tied to the facts' of a particular case." *Id*., quoting *Daubert*, 509 US at 591 (citation and quotation marks omitted). This means that the *Daubert* factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of [the] testimony." *Id*. The Court stressed that the applicability of the *Daubert* factors necessarily varies case by case, expert by expert. "Too much depends upon the particular circumstances of the particular case at issue" to impose hard and fast rules. *Id*.

Our Supreme Court's opinion in *Edry v Adelman*, 486 Mich 634; 786 NW2d 567 (2010), is entirely consistent with this approach. In *Edry*, the Supreme Court reviewed a trial court's exclusion of causation testimony in a medical malpractice case arising from the delayed diagnosis of breast cancer. The challenged expert witness opined that the delay reduced the plaintiff's five-year survival chance to 20%. *Id*. at 637. The expert maintained this position even after being confronted with authoritative data reflecting a 60% five-year survival rate, and failed to substantiate his view with any countervailing literature or data. *Id*. The Supreme Court upheld the exclusion of his testimony, holding that it "failed to meet the cornerstone requirements of MRE 702." *Id*. at 640. The Court explained that his opinion "was not based on reliable principles or

methods; his testimony was contradicted by both the defendant's oncology expert's opinion and the published literature on the subject that was admitted into evidence, which even [he] acknowledged as authoritative." *Id*. The testimony was deficient, the Court summarized, because it lacked "some basis in fact," as well as a foundation demonstrating that it drew upon reliable principles or methods or that the witness had reliably applied his methods to the facts of the case. *Id*. at 641.

The Court took pains to point out that "peer-reviewed, published literature is not always a necessary or sufficient method of meeting the requirements of MRE 702[.]" *Id*. In that case, however, "the lack of supporting literature, combined with the lack of any other form of support" for the expert's risk calculation, rendered his testimony inadmissible. *Id*.

We draw from *Kumho* and *Edry* several important lessons. A court screening scientific evidence must ensure that proposed scientific or technical testimony is reliable as well as relevant. But the algorithm for this analysis cannot be scripted in advance or applied in a vacuum. Rather, a court must determine which factors reasonably measure reliability given the specific factual context and contours of the testimony presented.

Dr. Priebe's qualifications—his "knowledge, skill, experience, training, [and] education"—are not in dispute. Given the number of laparoscopic gallbladder surgeries he has performed (more than 2,000) and his board certification as a general surgeon, he is qualified to express opinions regarding the standard of care. See also MCL 600.2912a and MCL 600.2169. Moreover, Dr. Priebe's testimony elucidates the reasons that his particular experience qualifies him to opine regarding the standard of care. Dr. Priebe acknowledged that he

"keep[s] up to date with the American College of Surgeons' materials" regarding laparoscopic cholecystectomy, participates in Case Western's weekly morbidity and mortality committee meetings, and teaches a specific method described in the medical literature for avoiding common-bile-duct injuries. He expressed a fully accurate understanding of the meaning of the term "standard of care." He readily conceded that "multiple other highly regarded experts . . . disagree with any suggestion that it's always a breach of the standard of care" to injure the common bile duct during uncomplicated laparoscopic gallbladder surgery, stating, "yes, there are . . . experts on both sides of this." Given this testimony, an adequate foundation demonstrates Dr. Priebe's familiarity with the standard of care applicable to general surgeons performing laparoscopic gallbladder surgery.

Nor has the "fit" of Dr. Priebe's opinions to the case facts precipitated any "analytical gap" debate. In fact, the parties agree about the anatomy of the bile duct system, the manner in which the surgery is typically performed, the methods available to prevent injury, the consequences of erroneously severing the common bile duct, and that Dr. Misra believed he had an unobstructed, clear view of the surgical site.[6] Their opinions diverge only as to whether, in Elher's case, Dr. Misra violated the standard of care by clipping the common bile duct. The question before us is whether a jury should hear Dr. Priebe's view.

MRE 702, enhanced by *Daubert*, sets forth four familiar reliability guideposts focusing on testing, peer review, the known and potential error rate of the expert's methodology, and general acceptance of the

[6] At his deposition Dr. Misra agreed with the statement in his operative report that the cystic duct had been "well-identified."

technique in the relevant scientific community. As part of its "gatekeeper" role, a trial court must also consider the factors listed in MCL 600.2955(1). *Clerc v Chippewa Co War Mem Hosp*, 477 Mich 1067, 1068 (2007). The Legislature directed courts to analyze proposed expert testimony as follows:

> (1) In an action for the death of a person or for injury to a person or property, a scientific opinion rendered by an otherwise qualified expert is not admissible unless the court determines that the opinion is reliable and will assist the trier of fact. In making that determination, the court shall examine the opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider all of the following factors:
>
> (a) Whether the opinion and its basis have been subjected to scientific testing and replication.
>
> (b) Whether the opinion and its basis have been subjected to peer review publication.
>
> (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
>
> (d) The known or potential error rate of the opinion and its basis.
>
> (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
>
> (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
>
> (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

> (2) A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field.
>
> (3) In an action alleging medical malpractice, the provisions of this section are in addition to, and do not otherwise affect, the criteria for expert testimony provided in [MCL 600.2169]. [MCL 600.2955.][7]

Four of the seven factors identified in MCL 600.2955(1) (Subdivisions (a) through (d)) derive directly from *Daubert*, 509 US at 593-594, and overlap with the components of MRE 702. This Court has held that not all of these statutory factors must favor the proposed expert's opinion for it to be deemed reliable. *Chapin*, 274 Mich App at 137 (opinion by DAVIS, J.). It suffices that "the opinion is rationally derived from a sound foundation." *Id*. at 139. *Kumho* explained that a similar approach governs the application of FRE 703: "*Daubert* . . . made clear that its list of factors was meant to be helpful, not definitive. Indeed, those factors do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Kumho*, 526 US at 151.

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[7] According to the statute's plain terms, the trial court's task is to "consider" the factors in assessing reliability. To "consider" means to "1. to look at carefully; examine 2. to think about in order to understand or decide; ponder [to *consider* a problem] 3. to keep in mind; take into account . . . ." *Webster's New World Dictionary of the American Language* (2d college ed), p 303. We note that in other statutory schemes involving "factors," the Legislature has required more than mere consideration. For example, in child custody cases, a court must "consider[], evaluate[], and determine[]" the identified factors concerning the best interests of the child, MCL 722.23, and when arbitrating a public labor dispute, an arbitration panel "shall base its findings, opinions, and order upon the following factors . . . ." MCL 423.239. Although the trial court did not reference any factors other than (a), (b), and (e), defendants have not argued that any other factors also bear relevance.

Against this backdrop, we review the trial court's Rule 702 analysis.

The trial court rested its decision on three of the *Daubert* guideposts: the absence of "scientific testing and replication" for Dr. Priebe's standard-of-care view, the lack of evidence that "Dr. Priebe's opinion and its basis have been subjected to peer review publication," and Elher's failure to demonstrate "the degree to which [Dr. Priebe's] opinion and its basis are generally accepted within the relevant expert community."

As to the first—the absence of "scientific testing and replication"—we are unable to discern any "fit" between this guidepost and the case facts. When an expert testifies concerning his or her own scientific or technical research, comparable (or incomparable) results obtained through independent testing and attempts at replication supply valuable reliability measures. "That the testimony proffered by an expert is based directly on legitimate, preexisting research unrelated to the litigation provides the most persuasive basis for concluding that the opinions he expresses were 'derived by the scientific method.' " *Daubert v Merrell Dow Pharm, Inc*, 43 F3d 1311, 1317 (CA 9, 1995). Testing and replication assume central importance in product liability actions in which experts propose alternate designs, or in causation disputes. See *Bitler v A O Smith Corp*, 400 F3d 1227, 1235 (CA 10, 2004); *Cummins v Lyle Indus*, 93 F3d 362, 368 (CA 7, 1996) ("Our cases have recognized the importance of testing in alternative design cases.").

Here, however, no testing or "replication" underlies either side's expert opinions. And we fail to understand how standard-of-care opinions such as Dr. Priebe's could ever be tested or replicated. How does one scientifically "test" whether severing the wrong bile duct is a

breach of the standard of care? Physical recreation or reenactment of Elher's surgery is neither feasible nor helpful; some conclusions simply defy measurement or verification through randomized clinical trials. The Massachusetts Supreme Judicial Court has similarly concluded that "testing" lacks relevance in the standard-of-care context: "[B]ecause the standard of care is determined by the care customarily provided by other physicians, it need not be scientifically tested or proven effective: what the average qualified physician would do in a particular situation *is* the standard of care." *Palandjian v Foster*, 446 Mass 100, 105; 842 NE2d 916 (2006).[8] Because Dr. Priebe's opinion simply does not implicate any possible testing or replication, the trial court abused its discretion by using this factor to exclude his testimony.

Next, we consider peer-reviewed publication. In *Edry*, our Supreme Court noted that, "while not dispositive, a lack of supporting literature is an important factor in determining the admissibility of expert witness testimony." *Edry*, 486 Mich at 640. To buttress that statement the Court referred back to *Daubert*, in which the Supreme Court observed:

> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication. Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not

[8] "However, when the proponent of expert testimony incorporates scientific fact into a statement concerning the standard of care, that science may be the subject of a [*Daubert*] inquiry." *Palandjian*, 446 Mass at 108-109. For example, in *Palandjian*, the Massachusetts Supreme Judicial Court held that whether a patient was actually at increased risk of gastric cancer presented an issue subject to challenge by application of the *Daubert* guideposts. Similarly, whether a particular therapy likely would have prevented injury or death presents a testable question. The results of such testing may well dictate the standard of care or negate a causation claim.

> necessarily correlate with reliability and in some instances well-grounded but innovative theories will not have been published. Some propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantive flaws in methodology will be detected. The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised. [*Daubert*, 509 US at 593-594 (citations omitted).]

Dr. Priebe testified that there is no peer-reviewed literature addressing whether cutting the common bile duct during laparoscopic gallbladder surgery qualifies as a breach of the standard of care. Defendants' article submissions do not rebut that statement.

The Fischer article is an editorial expressing an opinion. It is not scientific or medical research, the report of an experiment, or an analysis of data. Instead, the editorial is directed in part at rebutting "the trial bar"—hardly a scientific endeavor. See Fischer, 197 Am J Surgery at 830. As an expression of Dr. Fischer's personal point of view, it is no more inherently trustworthy than Dr. Priebe's thesis. At best, both represent but one doctor's opinion. Although Dr. Fischer's views were published in a medical journal, the article shares none of the hallmarks of peer-reviewed research. Peer review subjects an article to critical, rigorous analysis. Peer-reviewed medical articles often include reviewers' comments, or at least some indication of peer review. And even assuming that the editors of The American Journal of Surgery read and approved publication of Dr. Fischer's editorial, we are hard pressed to conclude that this screening process qualifies as true peer review. "At its most basic level, true peer review occurs whenever a scientist replicates

and tests research results shared by another scientist." Note, *The "Brave New World" of Daubert: True Peer Review, Editorial Peer Review, and Scientific Validity*, 70 NYU L Rev 100, 113 (1995). "Neither courts nor scientists should blithely assume that publication in a purportedly 'peer-reviewed' journal is a seal of approval for a particular methodology or theory." Anderson, Parsons & Rennie, *Daubert's Backwash: Litigation-Generated Science*, 34 U Mich J L Reform 619, 637 (2001). See also *Valentine v Pioneer Chlor Alkali Co, Inc*, 921 F Supp 666, 675 (D Nev, 1996) ("Editorial peer review 'is not and cannot be an objective scientific process, nor can it be relied upon to guarantee the validity or honesty of scientific research, despite much uninformed opinion to the contrary.' ") (citations omitted).

Moreover, the Fischer article supports rather than refutes Dr. Priebe's thesis that common bile duct injuries can represent standard-of-care violations. The article quotes other literature representing that "practice below the standard" is not a cause of "97% of bile duct injuries" and indicating that "common [bile] duct injury . . . *might* not be 'practice below the standard.' " Fischer, 197 Am J Surgery at 831 (emphasis added). We take this to mean that in some cases, injury to the common bile duct *is* a standard-of-care violation. Dr. Fischer specifically addressed the conflicting views of other surgeons: "I know I may be opposed by some hepatobiliary surgeons who would argue that 'if you don't know what you're doing, you shouldn't do it.' " *Id*. Indeed, Dr. Fischer refers to proponents of this view as "purists," acknowledging that his standard-of-care argument would "draw howls" from both "experienced surgeons" and "the legal bar." *Id*. Similarly, Dr. Way's article acknowledges that some bile duct injuries are the product of "faulty decision making" or "knowledge error[s]," terms consistent with negligence concepts. Way, 237 Annals Surgery at

461. In other words, the record evidence demonstrates surgical experts' agreement that common bile duct injuries sometimes result from standard-of-care violations.[9]

We draw from Dr. Fischer's editorial and the Way article the obvious lesson that under some circumstances, a breach of the standard of care may constitute the proximate cause of a common-bile-duct injury. How to define those circumstances is a hot-button question among surgeons. But *Daubert* and MRE 702 focus "on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 US at 595. If an expert's reasoning is based on scientific principles, knowledge, experience, and training, the testimony might fulfill the reliability standards even in the presence of conflicting conclusions predicated on precisely the same data and an identical quantum of practical wisdom. This holds true even when a judge finds one side's approach more persuasive. The clashing standard-of-care opinions in this case are exactly the sort that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" is designed to resolve. *Id*. at 596.

Thus, the trial court abused its discretion by relying on a lack of "peer review" as a reason to exclude

[9] And according to Dr. Fischer, this entire discussion falls outside the realm of science: "Surgery is not a science. It is an art." Fischer, 197 Am J Surgery at 831. The Massachusetts Supreme Judicial Court concurred with this sentiment in *Palandjian*, 446 Mass at 108-109:

> We agree with the plaintiffs that expert testimony concerning the standard of care generally need not be subject to a [*Daubert*] analysis. Such testimony is based on the expert's knowledge of the care provided by other qualified physicians, not on scientific theory or research: "How physicians practice medicine is a fact, not an opinion derived from data or other scientific inquiry by employing a recognized methodology." However, when the proponent of expert testimony incorporates scientific fact into a statement concerning the standard of care, that science may be the subject of a [*Daubert*] inquiry. [Citations omitted.]

Dr. Priebe's testimony. No evidence supports that the standard-of-care issue debated by the parties' experts has been tested, analyzed, investigated, or studied in peer-reviewed articles. To the contrary, the supplied articles attest that well-qualified surgeons are enmeshed in vigorous debate about this question, and respect each others' views.[10] The experts disagree about the conclusions to be drawn from their collective experience, skill, and training, rather than about science or methodology of laparoscopic gallbladder surgery.

Finally, we turn to the trial court's concern that "[t]here is no evidence as to the degree to which the opinion and its basis are generally accepted in the relevant expert community." The "general acceptance" factor and its limitations are at the heart of the Supreme Court's opinion in *Daubert*.

Justice Blackmun's analysis in *Daubert* commences with a review of the "general acceptance" test for admissibility embodied in *Frye v United States*, 54 App DC 46;

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[10] The Way article may qualify as peer-reviewed. However, this article explicitly recognizes that "faulty decision-making or a knowledge error" accounted for some of the bile duct injuries studied. Way, 237 Annals Surgery at 461. This conclusion once again aligns with Dr. Priebe's opinion. Moreover, the "standard of care" definition used in the article is patently incorrect. The authors state:

> The theory underlying malpractice law rests on the principle that the physician has a fiduciary relationship to the patient, and as a consequence the patient can expect the physician's care to be of a certain high quality, defined as the standard of care. [*Id*. at 467.]

In Michigan, the applicable standard of care is that of the "ordinary" general surgeon. M Civ JI 30.01. "High quality" is not part of the equation. Given the article's implicit recognition that negligent errors sometimes cause common-bile-duct injuries and its definitional inaccuracy, we cannot conclude that it validates the proposition for which defendants have offered it: that bile duct injuries are never the product of surgical malpractice.

293 F 1013 (1923). *Frye* involved evidence derived from a "crude precursor to the polygraph machine." *Daubert*, 509 US at 585. The Supreme Court identified the following "famous (perhaps infamous) passage" as encapsulating the *Frye* rule:

> " 'Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs*.' " [*Id*. at 585-586, quoting *Frye*, 293 F at 1014.]

This test, the Supreme Court held, was superseded by FRE 702. And "[n]othing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility." *Daubert*, 509 US at 588. The Court continued: "Nor does respondent present any clear indication that Rule 702 or the Rules as a whole were intended to incorporate a 'general acceptance' standard." *Id*.

In addition to rejecting *Frye*'s "general acceptance" mandate on these grounds, the Supreme Court reasoned that *Frye* could not be reconciled with the letter or the spirit of the Federal Rules of Evidence:

> [A] rigid "general acceptance" requirement would be at odds with the "liberal thrust" of the Federal Rules and their "general approach of relaxing the traditional barriers to 'opinion' testimony." Given the Rules' permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention "general acceptance," the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made "general acceptance" the exclusive test for admitting scientific testimony. That austere

> standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials. [*Id*. at 588-589 (citations omitted).]

Despite having cast aside "general acceptance" as the sine qua non of admissibility, the Supreme Court reserved a place for consideration of this factor in a trial court's assessment of whether the reasoning or methodology underlying expert testimony is scientifically valid:

> A "reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community." Widespread acceptance can be an important factor in ruling particular evidence admissible, and "a known technique which has been able to attract only minimal support within the community" may properly be viewed with skepticism. [*Id*. at 594 (citations omitted).]

Dr. Priebe grounded his opinions in his own experience and training, and denied any awareness of whether his viewpoint was generally shared by other general surgeons. Aside from polling board-certified general surgeons on the question (which would raise a host of vexing methodology issues), we are unpersuaded that "widespread acceptance" of a standard-of-care statement can be found.[11] Moreover, the record reflects

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[11] The record contains no evidence of a widely accepted statement regarding whether clipping the common bile duct during uncomplicated laparoscopic cholecystectomy surgery qualifies as medical negligence. And even if such a statement existed, some courts have held that *Daubert*'s reliability factor simply does not contemplate "delegating to industry groups the gatekeeping duties of the courts." *Adams v Lab Corp of America*, 760 F3d 1322, 1334 (CA 11, 2014). See also *Marietta v Cliffs Ridge, Inc*, 385 Mich 364, 370; 189 NW2d 208 (1971). Employing a similar analysis, the Florida Supreme Court has held that experts in a medical malpractice action may not "bolster" their standard-of-care

no disagreement about the standard of care in this case: a surgeon performing laparoscopic gallbladder surgery must strive to avoid injury to the common bile duct. This standard remains unchallenged by defendants. The parties diverge only as to the circumstances that give rise to a *breach* of that standard.

The dissent blurs this critical distinction. According to our dissenting colleague, "Defendants maintain that a common-bile-duct injury is a known complication of laparoscopic cholecystectomies that may occur even when" the procedure has been executed "in a reasonable manner consistent with the governing standard of care." In contrast, the dissent asserts, Dr. Priebe "has opined that, in the absence of scarring or inflammation, the standard of care requires a physician performing a laparoscopic cholecystectomy not to clip the common bile duct under any circumstance." This comparison conflates the standard of care with the actions or inactions constituting a *breach* of that standard. The record evidence demonstrates that the parties agree that the standard of care is precisely what Dr. Priebe said it was: operating surgeons must endeavor to carefully identify the bile ducts to avoid cutting or clipping the common bile duct. Defendants' experts never challenged this proposition. Rather, the experts dispute whether a physician deviates from the care expected of a reasonable physician when, despite clear visibility of the anatomy, the physician clips the common bile duct.

Thus, Dr. Priebe's knowledge of standard of care, and that the standard of care flows from national norms, is a given. Nor does the record sustain the dissent's

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testimony by referring to consultations with other experts. *Linn v Fossum*, 946 So 2d 1032, 1039 (Fla, 2006).

contention that only Dr. Priebe's "personal views" buttress his opinion that clipping Elher's common bile duct constitutes a breach of the standard. The Fischer and Way articles verify that "purists" in the surgical world agree with Dr. Priebe, and consider injuries such as Elher's to be malpractice. Dr. Priebe echoes those "purists."

Dr. Priebe's opinion in this case, distilled to its essence, hardly qualifies as novel, groundbreaking, or even dubious. Relying on Dr. Misra's sworn testimony that Elher's gallbladder area was not scarred or inflamed and that, through the laparoscope, the cystic duct was "well-identified," Dr. Priebe opined that Dr. Misra breached the standard of care by clipping the wrong duct. Dr. Priebe's extensive experience in laparoscopic gallbladder surgery qualified him to opine as to what could and should have been seen when the anatomy is clearly delineated. In *Dickenson v Cardiac & Thoracic Surgery of Eastern Tennessee, PC*, 388 F3d 976 (CA 6, 2004), the United States Court of Appeals for the Sixth Circuit reached the same conclusion, holding that a physician's experience and training sufficed to render his opinion scientifically reliable. The Sixth Circuit expounded:

> *Daubert*'s role of "ensuring that the courtroom door remains closed to junk science" is not served by excluding testimony . . . that is supported by extensive relevant experience. Such exclusion is rarely justified in cases involving medical experts as opposed to supposed experts in the area of product liability. [*Id*. at 982 (citation and brackets omitted).]

Dickenson instructs that a physician need not " 'demonstrate a familiarity with accepted medical literature or published standards in [an area] of specialization in order for his testimony to be reliable in the sense contemplated by Federal Rule of Evi-

dence 702.' " *Id*. at 980 (citation omitted). Rather, " 'the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of *experience*.' " *Id*., quoting FRE 702 advisory committee note (2000 Amendments). The Third Circuit reached a similar conclusion in *Schneider*, 320 F3d at 406, finding the challenged expert's testimony reliable based on his experience. That experience, the Third Circuit explained, sufficed as "good grounds" for the expert's standard-of-care opinion. *Id*.

No objective, verifiable evidence presented to the trial court addresses whether Dr. Priebe's view lacks "general acceptance." This is not surprising given that, unlike many questions in medicine or science, the question is simply not an empirical one. Research, data collection, and testing cannot supply an answer. Accordingly, the "general acceptance" guidepost is not pertinent here. Whether injuring the common bile duct during uncomplicated laparoscopic gallbladder surgery is a standard-of-care violation calls for a value judgment derived largely from an expert's education training and experience, not a scientific pronouncement. Such opinions are not the product of "methodology" or "technique." Rather, the reliability of an opinion that cannot be tested, replicated, or objectively analyzed depends on "whether the expert's qualifications create a foundation adequate to support the expert's statement of the standard of care." *Palandjian*, 446 Mass at 108 n 12.

Moreover, holding Dr. Priebe's testimony inadmissible because it lacks "general acceptance" would fly in the face of *Daubert*: "Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility." *Daubert*, 509 US at 588. *Daubert* rejected *Frye*'s rigid and "austere" application of the

"general acceptance" test, and we perceive no reason to resurrect *Frye* in a case involving legal rather than scientific judgments.[12]

Defendants and the dissent make much of Dr. Priebe's concession that he has never discussed his view of the standard of care with "his colleagues" at Case Western. According to defendants and the dissent, Dr. Priebe improperly testified to the standard of care based only on his personal "belief system," thereby proving its outlier status. Here is the specific testimony at issue:

> *Q*. To reiterate, we're here at your deposition four months before trial. You've reviewed the materials that you felt were pertinent in this case, and you know you're here today to offer your final standard-of-care opinions, true?
>
> *A*. That's correct.
>
> *Q*. And as it relates to that opinion, you cannot cite to a shred of medical literature, a medical authority, to support that opinion other than your own belief system, true?
>
> *A*. There is no authority that exists to do that, so that's true. But there is no authority that does that. So the answer is true.

Once qualified as an expert, a witness expounds on that which the expert believes to be true, based on the expert's "knowledge, skill, experience, training or edu-

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[12] We note that MCL 600.2955(1)(c) mentions "general acceptance" as a factor for consideration: "The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards." The parties have not brought forward any "generally accepted standards" that would foreclose the experts' opinions. MCL 600.2955(2) states: "A novel methodology or form of scientific evidence may be admitted into evidence only if its proponent establishes that it has achieved general scientific acceptance among impartial and disinterested experts in the field." There is nothing "novel" about the scientific evidence presented here.

cation . . . ." MRE 702.[13] By applying available gatekeeping tools, the trial court determines whether the expert's testimony will assist the jury and derives from a reliable methodology. If medical or scientific literature defines a standard of care, that literature is certainly pertinent to the court's analysis. Here, however, the record supports Dr. Priebe's assessment that "no authority" and no literature define what constitutes a breach of the standard of care. Different doctors have different viewpoints on the subject. Contrary to defendants' argument, no rule of evidence and no caselaw requires that an expert's standard-of-care opinion be universally accepted, or that an expert affirmatively demonstrate that his or her standard-of-care view falls within "the mainstream." Gatekeeping courts are not empowered "to determine which of several competing scientific theories has the best provenance." *Ruiz-Troche v Pepsi Cola of Puerto Rico Bottling Co*, 161 F3d 77, 85 (CA 1, 1998). The test is whether the expert's *reasoning* is scientifically sound. Moreover, imposing a universal-acceptance test on testimony addressing a physician's breach of or adherence to the standard of care would effectively eliminate medical malpractice litigation. Obviously, whether the standard of care has been breached is the central point of disagreement in most malpractice cases. The opinions on this score, while flowing from medical experience, training, and literature, are not susceptible to proof by application of the scientific method, or objective verification, and therefore will vary based on the individual facts of each case.

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[13] MRE 702 permits a qualified expert to testify "in the form of an opinion[.]" *Webster's New World College Dictionary* defines "opinion" as "a belief not based on absolute certainty or positive knowledge but on what seems true, valid, or probable to one's own mind; judgment." Thus, an expert's view as expressed in a courtroom flows from personal beliefs.

Dr. Misra admitted to clipping the wrong duct despite having "well-identified" the cystic duct. Dr. Priebe concludes that Dr. Misra should have correctly identified the anatomy—including the common bile duct—before clipping anything. Defendants claim that sometimes "illusions" get in the way, preventing clear delineation of the anatomy. *Daubert* was not designed to close the courtroom door on reasonable disagreements among qualified experts regarding the scientifically supportable *conclusions* to be drawn from uncontested facts. Rather, such opinion clashes are for juries to resolve.

Ultimately, the gatekeeping inquiry asks whether the expert has reached his or her conclusions in a sound manner, and not whether the expert's conclusions are correct. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 590 US at 596. Alternatively stated, the trial judge is "a gatekeeper, not a fact finder." *United States v Sandoval-Mendoza*, 472 F3d 645, 654 (CA 9, 2006). Here, application of immaterial *Daubert* factors led the trial court to exclude expert testimony possessing none of the hallmarks of "junk science." "[N]o one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho*, 526 US at 156. Dr. Priebe demonstrated specialized knowledge regarding the subject type of surgery and the standards of care that would assist the jurors in deciding the central issue presented in the case. The trial court abused its discretion by excluding this testimony.

B. RES IPSA LOQUITUR

The trial court correctly concluded that the res ipsa loquitur doctrine does not apply to Elher's medical malpractice claims.

The doctrine of res ipsa loquitur "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Jones v Porretta*, 428 Mich 132, 150; 405 NW2d 863 (1987). The doctrine's central purpose "is to create at least an inference of negligence when the plaintiff is unable to prove the actual occurrence of a negligent act." *Id*. When applicable, res ipsa loquitur functions as an evidentiary shortcut, permitting proof by circumstantial inferences rather than direct evidence. Plaintiffs invoking the res ipsa loquitur doctrine must satisfy the following conditions:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
>
> (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
>
> (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff; and
>
> (4) evidence of the true explanation of the event must be more readily accessible to the defendant than to the plaintiff. [*Woodard v Custer*, 473 Mich 1, 6-7; 702 NW2d 522 (2005) (quotation marks, brackets, and citation omitted).]

The Supreme Court emphasized in *Woodard* that whether an event does not ordinarily occur in the absence of negligence " 'must either be supported by expert testimony or must be within the common understanding of the jury.' " *Id*. at 7, quoting *Locke v Pachtman*, 446 Mich 216, 231; 521 NW2d 786 (1994).

> Although res ipsa loquitur is a doctrine of common sense, expert testimony is required when the issue of care is beyond the realm of the layperson, that is, where a fact-finder cannot determine whether a defendant's conduct fell below the applicable standard of care without technical input from an expert witness. [*Maroules v Jumbo, Inc*, 452 F3d 639, 644 (CA 7, 2006).]

Such input is required here. The manner in which a surgeon laparoscopically removes a gallbladder falls far outside the common knowledge of a layperson. So does the question of whether injury to the common bile duct qualifies as negligence or accident. The doctrine does not apply.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

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

EXHIBIT

The American Journal of Surgery (2009) 197, 829–832

The American Journal of Surgery®

Editorial Opinion

Is damage to the common bile duct during laparoscopic cholecystectomy an inherent risk of the operation?

Abstract. Laparoscopic cholocystectomy has been practiced for close to 20 years. The rate of common duct injury remains somewhere between 0.4 to 0.7 percent and is approximately the same around the world. Recent papers have stressed ways in which laparoscopic common duct injury can be avoided, but none of the methods mentioned is foolproof. In addition, this complication can occur to even the most experienced laparoscopic surgeon. The author believes that injury to the common duct during laparoscopic cholocystectomy is not a result of the practice below the standard, but an inherent risk of the operation. This injury needs to be emphasized by the surgical community as an inherent risk of the operation, and patients should be fully informed of this potential complication.

While the advent and rapid spread of laparoscopic cholecystectomy is well known, for the purposes of this article it is probably best if the story is repeated. In the beginning academic medical centers did not recognize the speed, rapidity, and market forces that were to dominate cholecystectomy, how quickly it spread, the loss of open cholecystectomy, and the effect on the training of residents, which has hurt training programs ever since. The academic medical centers missed the boat. Open cholecystectomy, hernias, and breast biopsies were the 3 staple operations that postgraduate year 1 and 2 interns performed in academic medical centers. Open cholecystectomies with cholangiograms were the most complex surgeries that an intern did and were extremely valuable for the training of residents. The number of open cholecystectomies I performed as an intern made it possible for me as a first year resident (second year program) at the Massachusetts General Hospital to do a number of colectomies and gastrectomies in the first several months of my entering the program. For whatever reason, it is difficult to comprehend how the medical centers could have been so remiss on this amazingly popular procedure to which they paid almost no attention. The private sector, realizing the financial and practical implications, filled the void easily and quickly, leaving the academic centers out in the cold as it were, a lesson that has been learned and not forgotten. Weekend courses in laparoscopic cholecystectomy attracted hoards of surgeons. Rather than an orderly evaluation of laparoscopic cholecystectomy, the operation spread like wildfire to the extent that those who did not quickly learn it in academic medical centers were going to have to do without cholecystectomy as a commonly performed operation. The academic medical centers were helped by the companies that had a vested interest in the spread of minimally invasive surgery and turned to the academic medical centers in addition to the private sector to provide courses that were more rigorous and resulted in better trained laparoscopic surgeons, as well as improved course evaluations, etc. This partnership between the minimally invasive industries and the academic medical centers has continued to this day, although not with the original largesse that accompanied the generous funding of simulation centers. While some funding continues, it is on a diminished basis.

There have been a number of effects of the rapid growth of laparoscopic cholecystectomy. For one thing there had to be standards; thus standards were set for the percentage of "the lazy gallbladder," which in some laparoscopic series accounted for an inordinately large number of cholecystectomies to the extent that in some hospitals surgeons whose practice consisted largely of cholecystectomy without stones were threatened with loss of privileges if this did not change. The demography of the patient population also changed significantly, although I am not aware of any hard data because it would not be concurrent. It does appear as if patients in the early quintile of disease who an open operation would have frightened because of the painful incision

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HOEKSTRA, J. (*concurring in part and dissenting in part*). I concur in the majority's analysis of the res ipsa loquitur issue. However, I respectfully dissent from the majority's analysis regarding the admissibility of the testimony of plaintiff's expert because, in my judgment, the trial court did not abuse its discretion by excluding the expert testimony of Dr. Paul Priebe and, for this reason, I would affirm the trial court's grant of summary disposition.

To prevail in a medical malpractice action, a plaintiff must prove the following: "(1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation between the alleged breach and the injury." *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). See also MCL 600.2912a. Failure to prove any one of these elements " 'is fatal' " to a plaintiff's claim. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 10; 651 NW2d 356 (2002), quoting *Wischmeyer*, 449 Mich at 484. Expert testimony is required to establish the applicable standard of care and the breach of that standard. *Kalaj v Khan*, 295 Mich App 420, 429; 820 NW2d 223 (2012). The proponent of expert testimony bears the burden of establishing both its relevance and admissibility. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567.[1] See also MCL 600.2955; MRE 702. When seeking to offer expert testimony on the standard of care and a breach thereof, the proponent of the evidence must demonstrate the witness's knowledge of the applicable standard of care. *Decker v Rochowiak*, 287 Mich App 666, 685; 791 NW2d 507 (2010).

[1] The majority provides an exhaustive review of the law in this area. I do not necessarily take issue with the majority's general recitation of the law; rather, I disagree with its application of that law to this case and its ultimate conclusion that the trial court abused its discretion by excluding Priebe's testimony.

In the present case, the central dispute between the parties' experts is this: whether clipping of the common bile duct constitutes an inherent risk involved with undergoing a laparoscopic cholecystectomy, such that clipping this duct during the procedure is not a breach of the standard of care, or whether such action must always be regarded as a breach of the standard of care in the absence of scarring or inflammation. Defendants maintain that a common-bile-duct injury is a known complication of laparoscopic cholecystectomies that may occur even when—as in this case—the surgeon has performed the procedure in a reasonable manner consistent with the governing standard of care. Priebe, in contrast, has opined that, in the absence of scarring or inflammation, the standard of care requires a physician performing a laparoscopic cholecystectomy not to clip the common bile duct under any circumstance. Because Dr. Dwijen Misra clipped the common bile duct during plaintiff's procedure, Priebe opined that Misra breached the standard of care.

In reviewing Priebe's deposition testimony it becomes clear, however, that he provides no basis for his understanding regarding what the standard of care required or the manner in which it was breached. Rather than focus on the standard of care demanded by the medical community, he has conceded that his views regarding the breach he asserts in this case are rooted entirely in his own "belief system," for which he fails to provide any supporting authority. The following excerpts from Priebe's testimony illustrate this point.

> *Q*. So this [case] falls within your own self-definition of what the standard of care and breach would be in such a case; is that correct?
>
> *A*. Correct.
>
> *Q*. You cannot cite to any medical literature whatsoever that supports that opinion, true?

A. Medical literature doesn't discuss standard of care.

Q. So is that true, sir?

A. It's true. But medical literature does not discuss standard of care.

Q. Well, you know, there are a host of colleagues of yours, national and local, who would disagree with you in terms of the only caveats being a breach of the standard of care being extensive scarring or inflammation; isn't that correct?

A. They're entitled to their opinion. In my opinion, that is a breach of the standard of care and malpractice.

* * *

Q. Can you cite to one current general surgery colleague at Case Western University who agrees with your position, to your knowledge, that other than these caveats of extensive scarring or inflammation, it is always a breach of the standard of care to cause injury to the common bile duct during a laparoscopic cholecystectomy?

A. I've never discussed this with any of them. I have no idea what their opinions are.

* * *

Q. And as it relates to that opinion, you cannot cite to a shred of medical literature, a medical authority, to support that opinion other than your own belief system, true?

A. There is no authority that exists to do that, so that's true. But there is no authority that does that. So the answer is true.

* * *

Q. Do you know whether . . . any of your other colleagues in the Case Western system agree with that position?

A. I've never discussed it with them. I wouldn't know.

> *Q*. Can you cite to one colleague in the general surgery field, a board certified general surgeon, who agrees with your position that the only caveats to injury to the common bile duct with laparoscopic cholecystectomy would be extensive scarring or inflammation?
>
> *A*. I wouldn't know. I've never asked any of my other surgical colleagues, so I would have no idea what their opinion is.

In other words, apart from his own personal views on what should be required of a reasonable surgeon, Priebe offered absolutely no basis for his asserted knowledge of the standard of care, or, relatedly, his opinion that there was a breach thereof in this case. Cf. *Edry*, 486 Mich at 640-642. To ascribe a breach of the standard of care on the basis of one doctor's personal opinion of that standard runs afoul, however, of the notion that the standard of care is dictated by community standards, not by how a particular health care professional would act. See *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 493; 668 NW2d 402 (2003). See also *Cox*, 467 Mich at 17 n 17 ("[T]he standard of care for both general practitioners and specialists refers to *the community*.") (emphasis added). Indeed, it may well be that Priebe holds himself to a higher, or different, standard than that practiced by the medical community at large. See *Locke v Pachtman*, 446 Mich 216, 229; 521 NW2d 786 (1994); *id*. at 235 (LEVIN, J., dissenting).

Further, while Priebe's credentials may be impressive, it is well recognized that "it is generally not sufficient to simply point to an expert's experience and background to argue that the expert's opinion is reliable and, therefore, admissible." *Edry*, 486 Mich at 642. In other words, Priebe's experience on its own—without supporting literature or corroborating authority of any kind—does not equip him to opine in a court of law that Misra committed malpractice. See *id*. at 640

("[A] lack of supporting literature is an important factor in determining the admissibility of expert witness testimony.").[2] Absent some support, the underlying principle on which his opinion rests—the assertion that clipping the common bile duct is not a known risk of the surgery but malpractice in every instance where there is not scarring or inflammation—is simply supposition based on his own personal views, and his opinion therefore lacks the reliability required to merit admission. See MRE 702; MCL 600.2955.

On the unique facts of this case, given the unabashedly personal nature of Priebe's opinions as expressed at his deposition, I do not believe the trial court abused its discretion in excluding his testimony as unreliable and I would, therefore, affirm the trial court's grant of summary disposition.

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[2] On appeal, plaintiff for the first time attempts to support Priebe's position with medical literature. To the extent that this belated effort involves the presentation of new materials, it is an improper expansion of the record, meaning that, as the majority recognizes, these materials should not be considered. See *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002); MCR 7.210(A). And, even accepting for the sake of argument that these materials support Priebe's viewpoint, there is no indication that they informed the opinion he provided in the lower court. Cf. *Edry*, 486 Mich at 641 ("[The] plaintiff never provided an affidavit explaining how [the expert witness] used the information from the websites to formulate his opinion or whether [he] ever even reviewed the articles."). Likewise, while the majority characterizes Priebe's opinion as consistent with those of the surgical "purists" referred to in the Fischer and Way articles offered by defendants, there is no indication that these articles, or the thinking of other "purists," in any way informed Priebe's opinion. The fact thus remains that Priebe offered his opinion without underlying support.

FINGERLE v CITY OF ANN ARBOR

Docket No. 310352. Submitted June 5, 2013, at Lansing. Decided December 2, 2014, at 9:10 a.m. Leave to appeal sought.

Lawrence Fingerle brought an action in the Washtenaw Circuit Court against the city of Ann Arbor and American Fire and Casualty Company, seeking damages for flooding that occurred when rainwater entered the basement of his home through a large egress window after an intense rainstorm in June 2010. The neighborhood had been prone to flooding and Ann Arbor had built drainage infrastructure in the area in the early 1990s. Although the infrastructure helped to reduce the amount of rain-caused flooding, flooding continued to occur in the 1990s and 2000s. Plaintiff claimed that he was unaware of the risk of flooding. In 2002, plaintiff built a finished basement with a large egress window directly across from a private retention basin that had overflowed in past rain events. Although the city did not actually make any representation regarding the size of the sewer, the private engineering firm it hired in 1989 made representations about the sewer's capacity and size. Plaintiff's claim, reduced to its essence, is that, had the city built its drainage infrastructure the size it said it would, the rain would not have flooded and damaged his basement. Plaintiff claimed that the infrastructure, as built, can drain less than the amount of water indicated by the private engineering firm and that this is a "defect" under the provisions of MCL 691.1416 to MCL 691.1419 (the "Sewage Act"), which abrogates the immunity of the city under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. The court, Donald E. Shelton, J., denied the city's motion for summary disposition. The city appealed.

The Court of Appeals *held*:

1. The Sewage Act is inapplicable to this lawsuit. The Sewage Act provides very limited and strictly circumscribed tort liability for sewage-related events, not contract-based liability for natural rainwater flooding. Because the causative "event" in issue is rain, not sewage, and because the statute provides relief for claims that sound in tort, not contract, plaintiff has no claim under the Sewage Act.

2. Absent action by a governmental entity that somehow diverts the natural flow of rainwater onto private property that would otherwise not have experienced rain-caused flooding, the

Sewage Act does not address or apply to the consequences of severe weather such as rainstorms. The Sewage Act does not cover the event complained of, because it addresses sewage, not rain.

3. Nothing in the Sewage Act imposes liability or creates a duty premised on representations of the city. The Sewage Act abrogates all common-law theories of liability, including plaintiff's contract-based claim, and is the sole means of recovery for sewage-related events, regardless of the legal theory advanced by any plaintiff. Because plaintiff's entire theory of recovery is predicated on words and representations, his entire theory of recovery sounds in contract, not tort. Contract theories of liability are expressly abrogated by the act and prohibited by its clear definitions.

4. Ann Arbor did not take any affirmative action that led to plaintiff's damages. The city's actions actually helped plaintiff by lessening the damage plaintiff otherwise would have suffered during the rainstorm. As a matter of objective reality, the relief sewer cannot conceivably be the cause of the flooding at issue. The order denying Ann Arbor's motion for summary disposition is reversed and the claim is dismissed.

Reversed.

O'CONNELL, J., concurring with both the result and the reasoning of the majority opinion, wrote separately to address the provisions of the GTLA and to note that even if plaintiff's claim is analyzed as sounding in tort, plaintiff cannot make the requisite showing that the alleged defects were a substantial proximate cause of the overflow and of the rainwater in plaintiff's basement. Although reasonable minds might differ regarding whether the relief storm sewer was defective, no reasonable mind could conclude that the relief storm sewer was a substantial proximate cause of the rainwater in the basement.

BECKERING, P.J., dissenting, stated that the GTLA provides that a governmental agency that knows, or in the exercise of reasonable diligence should know, about a defect in a sewage disposal system (whether it be a defect in the design or a malfunction) must take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect. The failure to do so exposes the governmental agency to liability for damages proximately caused by the defect. Plaintiff produced evidence to establish that the relief storm sewer system at issue contained defects in its design and construction that caused it to back up during a rainstorm and flood plaintiff's basement and that the city knew about the defects and had plenty of time to fix them. The nature of the liability sought to be imposed in this case is tort liability grounded in MCL 691.1417, not contractual liability. Plaintiff alleged shortcomings in the

design and construction of the system and the GTLA expressly provides a cause of action for such claims. Although the city does not have a general duty to remove naturally collecting surface water and rainwater from private property, because it voluntarily assumed this function, it had a duty under the GTLA to take reasonable steps in a reasonable amount of time to repair, correct, or remedy a known defect or a defect that it should have known of through the exercise of reasonable diligence. The city's failure to correct any known design or construction defects exposed it to liability according to the GTLA. A sewage disposal system under the GTLA is not limited to instrumentalities dealing with sewage or waste matter. The GTLA applies to events involving rainwater. A storm water drain system is a sewage disposal system. Plaintiff presented evidence to either establish or create genuine issues of material fact concerning the elements set forth in MCL 691.1417(3)(a) to (e), which, if met, would entitle plaintiff to recovery. There is no merit to the city's unpreserved argument that plaintiff's flooding was not the result of a sewage disposal system event. The trial court properly determined that genuine issues of material fact existed. The denial of the city's motion for summary disposition should be affirmed.

Conlin, McKenney & Philbrick, P.C. (by *W. Daniel Troyka*), for Lawrence Fingerle.

Stephen K. Postema and *Robert W. West* for the city of Ann Arbor.

Before: BECKERING, P.J., and SAAD and O'CONNELL, JJ.

SAAD, J. Defendant city of Ann Arbor appeals the trial court's denial of its motion for summary disposition of plaintiff's claim under MCL 691.1416 to MCL 691.1419 (the "Sewage Act") of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*.[1] For the reasons set forth

[1] Our Court reviews de novo both the applicability of governmental immunity and a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2007). Motions for summary disposition under MCR 2.116(C)(7) are granted when a claim is barred by "immunity granted by law." The moving party may "support its motion for summary disposition

in this opinion, we reverse and dismiss plaintiff's claim.

I. ANALYSIS

Plaintiff's home is located in the Landsdowne Subdivision in Ann Arbor. The neighborhood has historically been prone to flooding, and Ann Arbor, without any legal duty to do so, built drainage infrastructure to service the area in the early 1990s.[2] Yet, despite the fact that Ann Arbor's infrastructure helped to reduce the amount of rain-caused flooding—a fact that plaintiff concedes[3]—flooding continued to occur during and after large rainstorms in the 1990s and 2000s. Plaintiff claims that he was unaware of the risk of flooding. In 2002, he built a finished basement and a large egress window directly across from a private retention basin that had overflowed in past rain events. In June 2010, an intense rainstorm caused substantial flooding in the Landsdowne Subdivision, and rainwater entered plaintiff's home through the egress window that faced the retention basin. Plaintiff's claim, reduced to its essence, is this: had Ann Arbor built its drainage infrastructure of the size it said it would,[4] the rain would not

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under MCR 2.116(C)(7) with 'affidavits, depositions, admissions, or other documentary evidence,' the substance of which would be admissible at trial." *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008), quoting *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Maiden*, 461 Mich at 119.

[2] In 1989, the city hired an engineering firm to investigate the water buildup in the neighborhood. According to the report and affidavit of plaintiff's expert witness, engineer Clif Seiber, the firm suggested construction of a relief storm sewer that could accommodate at least 3.25 inches of rainfall, the amount of water associated with a major, "10-year storm event."

[3] In his brief, plaintiff states that "*the Relief Sewer was able to handle only about one-fifth of the rainfall* generated by the June 2010 rain event . . . ." (Emphasis added.)

[4] As noted, the city did not actually make any representation regarding the size of the sewer—the private engineering firm it hired in 1989 made the

have flooded and damaged his basement.

Plaintiff's theory of recovery is deceptively simple, yet novel and problematic. If adopted by our Court, it would impose unlimited and unprecedented liability, and create the potential for financially crippling damage awards against cities—and ultimately, their taxpaying citizens—never seen in American or Michigan law.[5]

What makes plaintiff's radical claim even stranger is that it is brought against a governmental entity that the Michigan Legislature has protected with significant governmental immunity laws.[6] To further underscore the oddity of plaintiff's action, his specific claim is raised under a narrowly defined and strictly limited statutory exception[7] to

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representations about the sewer's capacity and size. Plaintiff bases his entire suit on the representation made by the private engineering firm.

[5] To our knowledge, American law has never imposed a duty or obligation on governmental entities to protect private property owners from extreme weather. See 1 Restatement Torts, 3d, Liability for Physical & Emotional Harm, § 3, comment *l*, p 37, and *Golden & Boter Transfer Co v Brown & Sehler Co*, 209 Mich 503, 510; 177 NW 202 (1920) (in an action alleging a private tort, the trial court defined an " 'act of God' " as " 'those events and accidents which proceed from natural causes and cannot be anticipated and provided against, such as unprecedented storms, or freshets, lightning, earthquakes, etc.,' " and noted that the defendants would not be liable for injuries caused by such an event).

[6] The GTLA provides blanket immunity from tort suit to governmental entities engaged in governmental functions, save for narrow, enumerated exceptions. MCL 691.1407 mandates that "[e]xcept as otherwise provided in this act, a governmental agency is immune from *tort* liability if the governmental agency is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1) (emphasis added); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003).

[7] "The judiciary's objective when interpreting a statute is to discern and give effect to the intent of the Legislature. Once the intent of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary." *Menard Inc v Dep't of Treasury*, 302 Mich App 467, 471; 838 NW2d 736 (2013) (citations omitted). Legislative intent is most reliably discerned by "examining the

governmental immunity.[8] Again, the Sewage Act[9] is intended to provide comprehensive and broad immunity, and limited tort liability,[10] to governmental entities, and any exceptions are interpreted narrowly and

language of the statute itself; '[i]f the language is clear and unambiguous, no further construction is necessary or allowed to expand what the Legislature clearly intended to cover.' " *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011) (quotation marks and citations omitted). Our Court is to "interpret th[e] words in [the statute in] light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *Johnson v Recca*, 492 Mich 169, 177; 821 NW2d 520 (2012) (citation omitted). "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." *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 212; 828 NW2d 459 (2012) (quotation marks and citation omitted).

[8] See *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 284; 745 NW2d 513 (2007) ("Plaintiffs can seek damages under the [Sewage Act] if they have stated valid claims with regard to its elements . . ."). Further, "[i]n construing [the Sewage Act], the one basic principle that must guide [the court's] decision is that the immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed." *Id*. at 282 (quotation marks and citations omitted).

[9] The Sewage Act governs liability for torts that arise from " '[s]ewage disposal system event[s],' " which are defined as: "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). The Legislature enacted these provisions in 2001 to abrogate the common-law trespass-nuisance doctrine, which the Legislature felt that the judiciary applied too freely. House Legislative Analysis, SB 109, December 11, 2001. The Sewage Act thus created a "more limited legal liability standard" that would make it more difficult for plaintiffs to prevail against governmental defendants in suits that involved sewage backups. *Id*., at 1. The aim of the statute is "[t]o afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event . . . ." MCL 691.1417(1).

[10] MCL 691.1417 abrogates "common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide[s] the *sole remedy* for obtaining any form of relief for damages . . . caused by a sewage disposal system event regardless of the legal theory." MCL 691.1417(2) (emphasis added).

strictly.[11] Plaintiff's attempt to shoehorn his cause of action into this statutory framework would radically expand governmental liability in a statute expressly designed to do just the opposite.

In other words, plaintiff has brought suit for recovery under a statute that is simply inapplicable to his lawsuit. The reason is clear. The Sewage Act provides very limited and strictly circumscribed *tort* liability for *sewage*-related events, not *contract*-based liability for *natural rainwater* flooding.[12] Stated differently, because the causative "event" in issue is rain, not sewage, and because the statute provides relief for claims that sound in tort, not contract, plaintiff has no claim under the Sewage Act.

That is, absent action by a governmental entity that somehow diverts the natural flow of rainwater onto

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In place of the common law, the Sewage Act makes "governmental agencies" liable for "the overflow or backup of a sewage disposal system" if the "overflow or backup is a sewage disposal system event" and the "governmental agency is an appropriate governmental agency." MCL 691.1417(2). The statute is careful to limit governmental liability through specific definitions of these terms, found in MCL 691.1416. And it creates no liability for mere statements or representations made by governmental entities or their agents. See MCL 691.1417(2).

[11] See note 8 of this opinion.

[12] Again, by its own terms, the GTLA is a tort statute. MCL 691.1407(1). Because all GTLA actions sound in tort, if a GTLA defendant asserts that he owed the plaintiff no duty or did not cause his injury, the plaintiff must demonstrate that the defendant owed the plaintiff a duty and caused his injury. MCL 691.1412. The Sewage Act was explicitly designed to limit governmental liability for "sewage disposal system events." House Legislative Analysis, SB 109, December 11, 2001, p 3. It abrogates all common-law theories for sewage-related claims, and provides the "sole remedy" for such actions. MCL 691.1417(2). A plaintiff therefore cannot use a common-law action to sue a governmental entity under the Sewage Act. The Sewage Act does not create liability for mere statements or representations made by governmental agencies or their agents. See *id*.

private property[13] that would otherwise not have experienced rain-caused flooding, the Sewage Act literally does not address or apply to the consequences of severe weather such as rainstorms.[14] Again, the reason is obvious. No law has ever imposed an obligation (and thus, liability) upon a governmental entity to protect private property owners from acts of God or conse-

[13] See *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 12l; 729 NW2d 883 (2006) (holding that the plaintiffs made a valid claim under MCL 691.1417 when the defendant road commission dumped tree branches into a public storm drainage ditch, obstructing water flow and forcing water onto the plaintiffs' property). We do not interpret *Linton* to say, as plaintiff's theory requires, that a governmental entity has an affirmative obligation and duty to protect citizens from the natural flow of rainwater. Instead, it holds that governmental entities that take affirmative action that causes flooding—i.e., dumping tree branches into a drainage ditch, which caused a water backup, which caused flooding, which caused damages—are liable under the Sewage Act. *Linton*, 273 Mich App at 121. For a pre-Sewage Act application of this "affirmative action" principle, see, for example, *Donaldson v City of Marshall*, 247 Mich 357, 359; 225 NW 529 (1929) ("The city of Marshall was under no obligation to drain the plaintiff's land, but when it established a drain in that vicinity it became its duty to maintain it in such a way as to carry off the natural flow of the water, and if by reason of its failure to do so water accumulated on plaintiff's land *which otherwise would not have been there*, the city would be liable for any damages sustained") (emphasis added).

[14] It is doubtful from the plain language of MCL 691.1416(j) that the Sewage Act applies to events involving rainwater at all. The listed types of sewers (including storm sewers) are all modified by the predicate "used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes . . . ." As such, the Sewage Act does not seem to apply to any events that exclusively involve rainwater, as here, which have nothing to do "with the collection, treatment, and disposal of sewage and industrial wastes . . . ." See *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013) ("[W]hen the language of the statute is unambiguous, it must be enforced as written.").

However, notwithstanding the statute's apparent total inapplicability to rainwater, we need not address this issue because plaintiff's claim fails for other reasons.

quences of severe weather.[15] Historically, this has been an issue for private property owners and their insurers, not an area of liability for cities and their taxpaying residents.[16] And there is nothing in this statute that remotely suggests that the Michigan Legislature made such a dramatic shift in public policy. We should think that if such a seismic change was intended, Michigan's Legislature would have made this very clear.[17] The Sewage Act strongly suggests the opposite result. Again, its expressed intent is to strictly limit liability for sewage-related events caused by governmental entities.[18]

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[15] See note 5 of this opinion.

[16] Governmental entities have no duty to construct drainage infrastructure to catch surface rainwater. See MCL 101.1 ("The council of any city *may* establish, construct and maintain sewers and drains . . .") (emphasis added); *Ashley v Port Huron*, 35 Mich 296, 299 (1877) (COOLEY, C.J.) ("[F]looding might result from a failure to construct any sewer whatever; but clearly no action could be sustained for a mere neglect to exercise a discretionary authority."); *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992) (holding against the plaintiffs for failing to show "that the township had an affirmative duty to construct a storm drainage system"); *McSwain v Redford Twp*, 173 Mich App 492, 500; 434 NW2d 171 (1988) ("Where . . . the governmental unit has no affirmative duty, by statute or otherwise . . . , to construct a sanitary sewer, we do not believe it can be held liable for damage which might not have occurred had the sewer been constructed.").

[17] "The Legislature is presumed to know the common law, and any abrogation of the common law must be explicit." *Hamed v Wayne Co*, 490 Mich 1, 22 n 57; 803 NW2d 237 (2011). As noted, governmental entities have never been held liable for failing to drain naturally occurring rainwater flooding from private property. Accordingly, if the Legislature wanted to expand governmental liability to encompass sewage- and rain-caused flooding, it would have enacted a statute that explicitly expressed such aims.

[18] To repeat: the Legislature enacted the Sewage Act with the explicit intent of further limiting the already narrow governmental liability for sewage- or rain-caused flooding. This intent is explicitly expressed in the statute's language, which states that the Sewage Act is the "sole remedy" for sewage- or rain-caused flooding, and abrogates all common-law claims related to such flooding. MCL 691.1417(2). The statute's plain language thus mandates immediate rejection of plaintiff's claim.

In brief, the city is not obliged by the Sewage Act to deal in any way with the consequences of rain that naturally flows from a higher to a lower elevation. In brief, the statute does not cover the event complained of, because it addresses sewage, not rain.

Because the Sewage Act does not create or impose the radical and dangerous theory advanced by plaintiff, and because plaintiff has no common-law cause of action against Ann Arbor, plaintiff cleverly couches his theory of recovery under a deceptively appealing contractual theory—"had the city built what it said it would,[19] my basement would not have flooded." But this is a tort statute, not a statute that addresses contract-based liability.[20] Nothing in the plain language of the statute imposes liability or creates a duty premised on representations of the city.[21]

Close examination of every paragraph, every sentence, and every word of the Sewage Act reveals nothing to support the idea that a city should be held liable for what it said or represented. To the contrary, the statute says expressly that it: (1) abrogates all common-law theories of liability (this would include plaintiff's

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[19] Again, plaintiff really means: had the city built drainage infrastructure that the private engineering firm said would be built. Were we nonetheless to allow plaintiff to plead his contract claim, it is unlikely he would prevail—the private engineering firm is at best an agent of the city, and principals are not always liable for the acts of their agents. See *Detroit v Corey*, 9 Mich 165, 184 (1861) ("When the relation of principal and agent, or master and servant exists, the rule of *respondeat superior* is applicable, but not when the relation is that of contractor only").

[20] See note 12 of this opinion.

[21] There is simply nothing in the Sewage Act about words, statements, or representations, much less anything that binds the governmental entity to act in a certain way based on mere words, statements, or representations.

contract-based claim)[22] and (2) is the sole means of recovery for *sewage*-related events, regardless of the legal theory advanced by any plaintiff.[23] And because plaintiff's entire theory of recovery is predicated on words and representations, his entire theory of recovery sounds in contract, not tort[24]—and contract theories of liability are expressly abrogated by the statute and prohibited by its clear definitions.[25]

This can be clearly demonstrated by simply removing the statement or representation on which plaintiff relies—"the city said it would build drainage infrastructure of a certain size." First, had the city built its infrastructure without saying a word, it would have no liability because it had no duty by law to do anything. Moreover, by plaintiff's own admission, Ann Arbor not only did not cause the flooding, or make it worse, but instead, reduced the amount of flooding.[26] Under these

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[22] Again, MCL 691.1417(2) abrogates "common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide[s] the *sole remedy* for obtaining any form of relief for damages . . . caused by a sewage disposal system event regardless of the legal theory." (Emphasis added.) MCL 691.1417(2) (emphasis added). See also note 8 of this opinion.

[23] MCL 691.1417(2). See also note 9 of this opinion.

[24] "[A] tort requires a 'wrong independent of a contract' . . . and 'the distinguishing feature of a tort [is] that it consists in the violation of a right given or neglect of a duty imposed by law, and not by contract'." *In re Bradley Estate*, 494 Mich 367, 383; 835 NW2d 545 (2013) (citation omitted) (second alteration in original). Said another way, "[a]s contract law rests upon obligations imposed by bargain, tort law rests upon obligations imposed by law." *Goossen v Estate of Standaert*, 189 Wis 2d 237, 250; 525 NW2d 314 (Wis App, 1994). Cases from foreign jurisdictions are not binding, but can be persuasive. *People v Campbell*, 289 Mich App 533, 535; 798 NW2d 514 (2010).

[25] As common-law claims, contract suits are therefore expressly abrogated by and cannot be brought under the Sewage Act. MCL 691.1417(2).

[26] Again, plaintiff states in his brief: "*the Relief Sewer was able to handle only about one-fifth of the rainfall* generated by the June 2010 rain event . . . ." (Emphasis added.)

facts, there has never been a court decision in Michigan holding that the government breached a duty to an owner of private property.

Thus, the only duty alleged in plaintiff's telling arises because the city said it would build drainage infrastructure of a certain size.[27] In other words, the city's duty, under plaintiff's theory, is to do what it said it would do. But this is a contract theory, not tort, and not to be found in the Sewage Act. And what of the breach or defect? There is none. Unless it is premised on words, because the city did not build drainage infrastructure of the size it said it would—the defect is created by the words, the defect is the representation. Of course, as mentioned, the city's infrastructure reduced the amount of rainwater that otherwise would have been involved in the flooding. And what of causation? Clearly, the severe rainstorm and plaintiff's inexplicable building of a basement and an egress window in a flood plain across from a private retention basin that had overflowed in the past, would appear to be the cause in fact and proximate cause of plaintiff's damage.[28] Yet again, in plaintiff's telling, the cause is premised on the representation—"had the city only built to the size it said it would, my basement would not have experienced rain damage."

What emerges from plaintiff's hybrid theory of recovery is a cause of action premised solely on words—a cause of action that sounds in contract, not tort. Remove the words, there is no duty. Remove the words,

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[27] Again, see note 4 of this opinion.

[28] The Sewage Act requires that the "defect" in the sewer be the "substantial proximate cause" of the plaintiff's injury. MCL 691.1417(3)(e). "Substantial proximate cause" is defined to mean: "a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury." MCL 691.1416(*l*).

there is no defect. Remove the words, there is no causation. We again emphasize that nothing in the Sewage Act even remotely suggests liability premised on representations, and for good reason. Contract law, with its own peculiar principles and order and allocation of proofs, has no place in a tort statute, much less a self-defined tort statute that advances a public policy of broad governmental immunity, with strictly limited exceptions. Moreover, a cause of action that sounds in contract, such as plaintiff's, is in reality a common-law theory of recovery that is expressly abrogated by the Sewage Act. And, again, for good reason.

First, if we examine plaintiff's claim, he says he knew nothing about the historic flooding in his own neighborhood and presumably, therefore, is unable to claim that he relied on the representation of the city when he built his basement and egress window. Indeed, perhaps this anomaly is what led plaintiff to attempt to shoehorn his contract, representation-based theory of recovery under the Sewage Act. Second and more importantly, were we to accept a contract-based theory of recovery, this would create an endless and unpredictable stream of questions and problems. For example, would a plaintiff have to prove reliance on the representations in order to state a cause of action for detrimental reliance or promissory estoppel?[29] This theory or cause of action cannot be found anywhere in the Sewage Act. Further, if one administration were to

[29] Here, plaintiff makes no allegation that he relied on anything the city (or the private engineering firm) said or did, which means that even his contractual claim would fail—he cannot show that the city "promised" him anything, or that he relied on anything the city "promised" him. "[T]he sine qua non of the theory of promissory estoppel is that the promise be clear and definite . . . ." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks and citations omitted).

make a statement of intent, would this bind a successor administration? The answer is certainly not in the Sewage Act. If the project is later judged to be too extravagant or expensive, or the city experiences financial crisis, can the project be modified, downsized, or abandoned, and when and by whom, and who could sue under such circumstances? Troubling questions with no answers in the Sewage Act, for obvious reasons.[30] This is a tort statute, not a statute that creates contractual-type liability.

II. RESPONSE TO THE DISSENT

We respectfully disagree with the dissent's view of this case. As an introduction, let's make clear what this case does not involve. It does not involve a governmental entity that caused a flood. Plaintiff makes no allegation that Ann Arbor, by its direct action, diverted naturally flowing water or rainwater onto property that otherwise would not have been flooded. Nor did it fail to remove an obstruction in its drainage system that then led to a flood. And this case does not involve a sewage backup.

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[30] If we were to adopt plaintiff's radical theory that the Sewage Act creates liability for mere statements made by governmental entities, the next step for enterprising plaintiffs would be to hold local governments liable for any statement they have made related to drainage infrastructure. Illinois is already sliding down this slippery slope, where Farmer's Insurance recently used an Illinois statute similar to the Sewage Act to demand compensation from local governments that had merely acknowledged potential flooding risks from climate change, but then had not expanded their drainage infrastructure to cope with the supposedly increased risk of flooding. If adopted, such a cause of action would result in massive liability for local governments—effectively crippling their ability to provide basic services to their residents. See Mica Rosenberg, Reuters, *U.S. insurer class action may signal wave of climate-change suits* <http://www.reuters.com/article/2014/05/16/usa-environment-insurance-idUSL1N0O11T620140516?feedType=RSS&feedName=everything&virtualBrandChannel=11563> (posted May 16, 2014) (accessed November 3, 2014) [http://perma.cc/9S6L-34EF].

Again, this case involves a heavy rainstorm that caused a flood in a low-lying area of Ann Arbor that had historically experienced rain-caused floods. By plaintiff's own admission, Ann Arbor, without any legal obligation to do so, built drainage infrastructure that helped *reduce* the amount of rainwater on his property. Nonetheless, plaintiff has brought suit against Ann Arbor because a large storm caused a flood of rainwater that broke through his basement window and caused him damages. To substantiate his action, plaintiff points to a 1990 statement made by the private engineering firm that designed the drainage infrastructure near his property, which indicated that the infrastructure could drain a specific amount of water. However, the drainage infrastructure, as built, can drain less than this specific amount of water. Plaintiff claims and the dissent insists this is a "defect" under MCL 691.1416(e), which abrogates governmental immunity, and that Ann Arbor should pay him money for the damages his property suffered during the flood.

There is a fatal flaw to this claim, of which the dissent is aware. As it admits, neither the Sewage Act, the wider GTLA, nor any common law has *ever* imposed a duty upon governmental entities to prevent damage to private property caused by extreme weather, such as flooding caused by a rainstorm. This state of affairs raises a serious problem and question for plaintiff and the dissent: If a city has no duty to provide drainage infrastructure to remove rainwater from private property, how can it have a duty to remove more rainwater than it said it would from plaintiff's property? In other words, if the city has no duty to capture *any* rain, how can it have a duty to capture *more* rain?

Simple, according to the dissent. Because Ann Arbor's relief sewer is "undersized"—i.e., it isn't as big as

the private engineering firm that designed it said it would be—it is "defective" by design under MCL 691.1416(e). The supposed "defects" cataloged by the dissent are merely restatements of the above sentence in new terms.

But the dissent's answer to our original question—"if the city has no duty to capture any rain, then how can it have a duty to capture more rain?"—isn't really an answer at all. Because its answer—"a relief sewer with an inadequate capacity is a defective relief sewer"—invites yet another question, which circles back to the first: on what does plaintiff base his assertion that the relief sewer is of "inadequate" capacity and thus "defective" under MCL 691.1416(e)? The answer, of course, is: plaintiff's entire suit, and the dissent's analysis, hinges on a single statement made by the private engineering firm about the capacity of the relief sewer.

To see how, let's deconstruct the dissent's argument. The dissent notes that the private engineering firm professed an intention to design a relief sewer that could collect 3.25 inches of rainfall. This statement provides the dissent with its point of entry to MCL 691.1417: because the relief sewer, as built, did not actually collect 3.25 inches of rainfall, it is "defective" under MCL 691.1416(e), and thus creates liability for Ann Arbor under MCL 691.1417(3)(b). The statement is also the root of Ann Arbor's supposed breach of duty, because Ann Arbor knew the relief sewer had not solved all the flooding problems in plaintiff's neighborhood. And it is the so-called "substantial proximate cause" of plaintiff's damages, because if the sewer had been able to accommodate 3.25 inches of rainfall, as the private engineering firm said it would be able to, plaintiff's basement would not have been flooded during the rainstorm.

Plaintiff's and the dissent's reliance on the private engineering firm's statement is their undoing. The less flattering corollary of "the dissent's entire analysis hinges on a single statement" is "without that single statement, the dissent's analysis is wrong." Indeed, under plaintiff's theory, it is—if the private engineering firm had said nothing regarding the intended capacity of the relief sewer, plaintiff would unquestionably have no cause of action under MCL 691.1417. The sewer would not be "defective" under MCL 691.1416(e), because governmental agencies have no duty to build drainage infrastructure, nor does MCL 691.1417 create any such duty. The fact that Ann Arbor did build infrastructure would be inconsequential, because plaintiff would have no frame of reference by which to claim that the relief sewer was "defective," or that the relief sewer's capacity "caused" him damages under MCL 691.1417(3)(e). Duty, breach, causation—the dissent provides no independent justification for any of these essential tort concepts and relates each back to the private engineering firm's statement.

The testimony of plaintiff's expert witness, engineer Clif Seiber, only serves to further illustrate this fatal flaw. Seiber's report is replete with references to what the private engineering firm stated it would build—how much water the relief sewer was supposed to accept, how much rainfall the sewer was intended to handle. Plaintiff's own statements at the April 2012 hearing on the motion for summary disposition and his appellate brief echo this analysis, stressing that the sewer was undersized based on the statement of the private engineering firm.

The singular importance of the private engineering firm's statement to plaintiff's claim, then, is relevant for two reasons. First, it reveals that plaintiff's claim

does not sound in tort. Insofar as it sounds anywhere, it sounds in contract. Again: "a tort requires a 'wrong independent of a contract' and . . . 'the distinguishing feature of a tort [is] that it consists in the violation of a right given or neglect of a duty imposed by law, and not by contract.' " *In re Bradley Estate*, 494 Mich 367, 383; 835 NW2d 545 (2013) (citation omitted). Plaintiff does not allege that Ann Arbor owes him any legal duty independent of the statement the private engineering firm made about the relief sewer's capacity.

Second, were plaintiff to do so—were he to claim that the private engineering firm's 1990 statement about the capacity of the relief sewer *created a duty* for Ann Arbor to build drainage infrastructure of exactly that capacity—his claim would contravene centuries of common law and statutory law, and radically expand the scope of municipal liability.[31] To repeat: governmental entities do not have a duty to build drainage infrastructure. Accordingly, they have never been liable under the Sewage Act or the common law for acts of God, such as rain-caused floods. The Sewage Act does not mandate that governmental entities prevent all harm caused by natural rainwater flooding of private property. Rather, it mandates that governmental entities *do no harm*, by making them liable for drainage backups that are "substantial[ly] proximate[ly] cause[d]"[32] by their affirmative actions.[33] The dissent does not recognize this distinction, which is crucially important when interpreting a statute that is explicitly intended to *limit*—not expand—governmental liability.[34]

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[31] See note 5 of this opinion.

[32] MCL 691.1417(3)(e).

[33] See note 13 of this opinion.

[34] *Bosanic*, 277 Mich App at 282 ("In construing [the Sewage Act], the one basic principle that must guide [the court's] decision is that the

The dissent also does not apply these legal principles to the factual background of this case. Again, the Sewage Act does not mandate that governmental entities prevent all harm—rather, it mandates that governmental entities do no harm. Here, Ann Arbor did not take any affirmative action that led to plaintiff's damages. In fact, its actions, which, again, it was not required to take, actually *helped* plaintiff by lessening the damage plaintiff otherwise would have suffered during the June 5-6, 2010 rainstorm.

The dissent devotes considerable energy to rehashing plaintiff's "evidence" of how the "defective"—i.e., undersized—nature of the relief sewer "caused" his injuries. But "undersized" means nothing legally if the city has no duty to collect any rain—or in plaintiff's telling, more rain—than the relief sewer actually did. The "evidence" of the relief sewer's "undersized" nature includes the (hardly scientific) statement of plaintiff's neighbor that the relief sewer "never made things better," in that it supposedly did not "solve" the problem of the rain-caused flooding in plaintiff's neighborhood. This statement is illogical. Whatever its alleged shortcomings (if any), the relief sewer had some capacity to remove water from the surface—it is an unobstructed hole in the ground, and unobstructed holes collect rain and surface water.[35] Again, plaintiff admits as much in his brief when he states, "Due to design defects, the Relief Sewer *was able to handle only about one-fifth of the*

immunity conferred upon governmental agencies is *broad*, and the statutory exceptions thereto are to be *narrowly* construed") (quotation marks and citations omitted).

[35] Plaintiff's expert witness stated in his report that the relief sewer was unobstructed and that "system obstructions were not the cause of the June, 2010 flooding."

rainfall generated by the June 2010 rain event . . . ." (Emphasis added.)[36]

The dissent's analysis misses this crucial point. To repeat: nothing Ann Arbor did made the flooding worse. Nothing Ann Arbor did diverted more water into plaintiff's basement. Again, Ann Arbor's actions actually *reduced* the amount of rainwater that would have been involved in the flood absent the relief sewer. Therefore, as a matter of objective reality, the relief sewer cannot conceivably be the cause of the flooding at issue.

Nor does the dissent address the obvious outcomes of adopting plaintiff's theory of liability as binding precedent. Ideas have consequences, and the dissent's refusal to grapple with the consequences of its ideas are indicative of the weakness of its ideas.

As noted, the adoption of plaintiff's legal theory will cause municipalities to face unprecedented liability for mere statements of intent related to drainage infrastructure. Under the dissent's interpretation of the Sewage Act, if a governmental entity says it is going to build drainage infrastructure of a specific capacity, and the infrastructure, as built, does not drain that exact amount of water, the drain will be "defective" and the governmental entity will be liable for damages.

Municipalities will move to eliminate such liability in two ways. First, they will refuse to be transparent about new storm-sewer infrastructure, and will not inform residents about the intended capacity or design specifications of the new projects. Or, worse, municipalities may simply refuse to build new drainage infrastructure altogether. If a municipality has no

[36] Ann Arbor's expert witness, Mark Pribak, noted the same, observing that the sewer "will accept a certain flow and provides a certain amount of relief to whatever that upstream flow is."

duty to help its citizens (read: future plaintiffs) with rain-caused floods, and will face potentially crippling liability if it seeks to alleviate the flooding (meaning its taxpayers would pay for suits and damage awards), why offer any assistance at all? Under such a legal regime, Michiganders would face more floods, more water damage, and more safety risks. This was certainly not the intent of the Legislature when it enacted the Sewage Act and we refuse to construe the statute in a way that will create that outcome.

III. CONCLUSION

For the reasons stated above, the Sewage Act simply provides no relief to plaintiff. Accordingly, his claim is hereby dismissed.

Reversed.

O'CONNELL, J., concurred with SAAD, J.

O'CONNELL, J. (*concurring*). I concur with both the result and the reasoning of Judge SAAD's well written majority opinion. I write separately to address the provisions of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., as it is applicable to the facts of this case.[1] This case presents a governmental immunity issue, which is a question of law under MCR 2.116(C)(7). Because the material facts are undisputed, and because reasonable minds could not differ regarding the legal effect of those facts, the trial court's decision must be reversed.

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[1] I agree with Judge SAAD that plaintiff's complaint sounds in contract, but the trial court, plaintiff, and the dissent analyze the complaint as if it were a tort claim. I note that even if plaintiff's claim is analyzed as sounding in tort, the alleged tort claim fails for the reasons stated in this opinion.

I. GOVERNMENTAL IMMUNITY FOR SEWAGE DISPOSAL SYSTEM EVENTS

As both the majority and the dissenting opinions correctly recognize, the city is immune from liability for plaintiff's claims unless plaintiff can establish an exception to immunity under the applicable provisions of the GTLA, see MCL 691.1417. Accordingly, to avoid summary disposition, plaintiff was required to show as a matter of law that during the June 2010 downpour:

> (a) The [city] was an appropriate governmental agency [to be sued].
>
> (b) The sewage disposal system had a defect.
>
> (c) The [city] knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The [city], having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury. [MCL 691.1417(3); accord *Willett v Waterford Charter Twp*, 271 Mich App 38, 49-50; 718 NW2d 386 (2006).]

The exception to governmental immunity applies only if plaintiff can show that at the time of the deluge, *all* of these factors existed. *Willett*, 271 Mich App at 50, 52.

II. NO SUBSTANTIAL PROXIMATE CAUSE

In this case, plaintiff cannot make the requisite showing of substantial proximate cause.[2] To establish substantial proximate cause under the GTLA, plaintiff must show that the alleged defect was "a substantial proximate cause of the event *and* the property damage . . . ."

[2] As fully explained in the majority opinion, plaintiff's claim fails for several other reasons.

MCL 691.1417(3)(e) (emphasis added). The GTLA defines "substantial proximate cause" as "a proximate cause that was 50% or more of the cause of the event *and* the property damage . . . ." MCL 691.1416(*l*) (emphasis added). In turn, the GTLA defines an "event" as "the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). According to these definitions, plaintiff was required to show that during the rainstorm on June 5-6, 2010, the alleged defects were 50% or more of the cause of the rainwater overflow, *and* the alleged defects were 50% or more of the cause of rainwater entering plaintiff's basement.

The undisputed facts in this case establish that there were multiple causes of the rainwater in plaintiff's basement on June 5-6, 2010. Those causes included the unusually intense rainstorm, the allegedly defective relief storm sewer, and the installation of plaintiff's basement egress window. The record confirms that both before and after the 1990 construction of the relief storm sewer, rainwater periodically flooded into basements in plaintiff's neighborhood. Plaintiff has provided no evidence to establish that the relief storm sewer exacerbated the flooding, or, for that matter, that the relief storm sewer failed to divert water. Instead, plaintiff contends that although the city had no duty to build any relief storm sewer, the city should nonetheless have built a bigger, better system than the one actually built. However, plaintiff provides no evidence to establish that bigger would be better in this case. Plaintiff's evidence establishes, at best, that on the night of the intense rainstorm, the relief storm sewer did not divert enough rainwater to prevent water from entering plaintiff's basement egress window. This evidence does not establish that the alleged defects were a substantial proximate cause of the overflow and of the rainwater in plaintiff's basement.

The trial court and the dissent conclude that there is a factual issue regarding whether the alleged defects were a substantial proximate cause of the overflow and the influx of rainwater. This conclusion is incorrect, for two reasons. First, the factual issues in the record, if any, are not material to substantial proximate cause. Plaintiff contends, and the trial court and the dissent accept, that the affidavit and report of plaintiff's expert create a factual issue on the substantial proximate cause of the overflow and the damage. This contention is misplaced, because plaintiff's expert does not address the multiple causes of the overflow and of the basement rainwater. Nothing in plaintiff's expert's report assesses the effect of the relief storm sewer on the degree of basement flooding that had historically occurred or that would have occurred without the relief storm sewer. Nor does plaintiff's expert assess the effect of plaintiff's decision to add a basement egress window in an area prone to flooding. Instead, plaintiff's expert addressed solely the alleged defects in the relief storm sewer. Given the multiple causes of plaintiff's basement rainwater, the expert's report does not establish that the alleged defects were 50% or more of the cause of the overflow, or of the basement rainwater.

Second, the trial court and the dissent assume that reasonable minds would overlook the multiple causes of plaintiff's basement rainwater. I disagree with this assumption. This Court must address the causation issue as a matter of law, unless reasonable minds could differ on the legal effect of the facts. See *Willett*, 271 Mich App at 45, 53-54. The facts in this case establish that plaintiff's basement flooded because an egress window failed to withstand historic flooding from an unusually heavy rainfall. Although reasonable minds might differ regarding whether the relief storm sewer was defective, no reasonable mind could conclude that

the relief storm sewer was a substantial proximate cause of the basement rainwater.

III. CONCLUSION

Rain happens. To my knowledge, the only faultless rain management system in history was constructed according to design specifications given in cubits, not in cubic feet.[3] The GTLA does not hold city governments to that historic standard of omniscience. In my view, to allow plaintiff's claim to go forward would be to open literal and figurative floodgates for litigation; our courts would be swamped in a torrent of sewage. Therefore, I concur in the majority decision to reverse the order of the trial court and to remand for entry of summary disposition in favor of the city.

BECKERING, P.J. (*dissenting*). With all due respect, I disagree with the analysis of my colleagues. The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provides a statutory framework that establishes when a governmental agency is liable for defects in its sewage disposal system. According to the express language of the GTLA, a governmental agency that knows, or in the exercise of reasonable diligence should know, about a defect in its sewage disposal system—whether it be a defect in the design or a malfunction—must take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect. Failure to do so exposes the governmental agency to liability for damages proximately caused by the defect. In this case, plaintiff, Lawrence Fingerle, produced evidence to establish that the relief storm sewer system at issue contained defects in its design and construction, which

[3] See Genesis 6:15.

defendant city of Ann Arbor[1] knew about and had plenty of time to fix, that caused it to back up during a rainstorm and flood his home. I agree with the trial court's finding that genuine issues of material fact exist, entitling plaintiff to a jury trial on the issues of defects and causation. Therefore, I would affirm the trial court's denial of defendant's motion for summary disposition under MCL 2.116(C)(7).

I. STANDARD OF REVIEW

This Court reviews de novo both the applicability of governmental immunity and a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7). *Roby v Mount Clemens*, 274 Mich App 26, 28; 731 NW2d 494 (2007). "When reviewing a motion under MCR 2.116(C)(7), a reviewing court must consider all affidavits, pleadings, and other documentary evidence submitted by the parties and construe the pleadings and evidence in favor of the nonmoving party." *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011). See also *Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010). "To overcome a motion brought under MCR 2.116(C)(7), the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Roby*, 274 Mich App at 28-29. "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law." *Pierce v City of Lansing*, 265 Mich App 174, 177; 694 NW2d 65 (2005).

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[1] Although there are two defendants, the city of Ann Arbor and American Fire and Casualty Company, the use of the word "defendant" in this opinion refers solely to the city of Ann Arbor.

II. ANALYSIS

Defendant argues that it was entitled to summary disposition under MCR 2.116(C)(7) because plaintiff failed to satisfy all of the elements of MCL 691.1416 through MCL 691.1419 in order to establish an exception to governmental immunity and that plaintiff failed to establish that defendant breached a duty under the circumstances presented in this case. I disagree.

A. APPLICABILITY OF THE GTLA TO THIS CASE AND EXISTENCE OF A STATUTORY DUTY

Absent the applicability of a statutory exception, the GTLA provides a broad grant of immunity from tort liability to governmental agencies that are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). "MCL 691.1417(2) provides an exception to governmental immunity for sewage disposal system events . . . ." *Linton v Arenac Co Rd Comm*, 273 Mich App 107, 114; 729 NW2d 883 (2006). The statute provides as follows, in pertinent part:

> A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory. [MCL 691.1417(2).]

Moreover, MCL 691.1417(3) states the following:

> If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or

> physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:
>
> (a) The governmental agency was an appropriate governmental agency.
>
> (b) The sewage disposal system had a defect.
>
> (c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.
>
> (d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.
>
> (e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

"To successfully bring an action, a plaintiff cannot merely satisfy subsection 2 but must, instead, establish all the requirements of subsection 3." *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 282; 745 NW2d 513 (2007), citing *Willett v Waterford Charter Twp*, 271 Mich App 38, 49-50; 718 NW2d 386 (2006). Moreover, the statute provides not only an exception to immunity if its requirements are satisfied, but also a cause of action. *Bosanic*, 277 Mich App at 282-284. *Bosanic* rejects the idea that the statute itself does not provide a cause of action:

> The drain commissioner relies on an extremely strained reading of MCL 691.1417 to contend that the statute does not itself provide plaintiffs any cause of action but, instead, some independent cause of action must be pleaded . . . . While the argument is difficult to comprehend or summarize, the contention is that the statute provides an exception to immunity if its requirements are satisfied, but only if there is some other legal theory upon which a claim for damages is based. In other words, defendant argues that the statute does not itself provide a cause of action.

> A plain reading of subsection 2 itself does not support that conclusion and, when subsection 3 is also considered, that conclusion becomes even less tenable. [*Id*. at 282-283.]

Thus, if plaintiff can establish the elements set forth in MCL 691.1417, he can recover for his losses.

The majority views plaintiff's action as being predicated on the idea that defendant did not build a storm water drainage system that would divert as much water as defendant said it would, amounting to an alleged breach of promise; thus, the majority concludes that plaintiff's claim sounds in contract law, not tort law. As such, the majority concludes that the GTLA is completely inapplicable under the circumstances. I do not agree with this characterization of plaintiff's case. Plaintiff has alleged, consistent with the plain language of the GTLA, defects in defendant's storm sewer system of which defendant was aware or should have been aware, and which, according to plaintiff, proximately caused damage to his home. For instance, plaintiff alleged that the storm sewer at issue suffered from a host of defects, including: (1) inadequate design capacity for regularly recurring peak flows leading to recurring collection of storm water outside the detention easement, (2) inadequate inlet capacity resulting in storm water backup and surface pooling, (3) drainage into the storm sewer from areas outside of the planned drainage area (including runoff from upstream development), (4) failure to increase capacity in response to increased load from upstream development, (5) inadequate or defective upstream detention, (6) misalignment in pipes and inlets, (7) inadequate capacity at downstream restrictions resulting in backup into the detention easement, and (8) failure to provide an adequate emergency storm water overflow route.

These defects, according to plaintiff, proximately caused his damages. When examining plaintiff's complaint, it is evident that the nature of the liability sought to be imposed is tort liability grounded in MCL 691.1417, not contract liability. See *In re Bradley Estate*, 494 Mich 367, 383-385; 835 NW2d 545 (2013) (explaining that the GTLA requires courts to look past the label of a claim to the nature of the liability sought to be imposed).

Defendant does not claim that plaintiff's case sounds in contract. Instead, defendant essentially argues that because it owed no duty to build a storm sewer system in the first place, once it undertakes to build one it cannot be held to owe a duty to design and build an adequate one. But the plain language of the GTLA expressly requires a governmental agency to repair any defects—including defects in the *design* of the system. In direct contrast to the limitations on liability set forth in the GTLA's public buildings exception, MCL 691.1406,[2] and the public high-

[2] In *Renny v Dep't of Transp*, 478 Mich 490, 500; 734 NW2d 518 (2007), our Supreme Court noted that "[t]he statutory language refers only to the governmental agency's duty to 'repair and maintain public buildings,' and does not refer to any duty to design a public building. Therefore, to hold that the language of the statute includes a design defect claim is inconsistent with its plain language." The Court further elaborated that

> "[d]esign" is defined as "to conceive; invent; contrive." By contrast, "repair" means "to restore to sound condition after damage or injury." Similarly, "maintain" means "to keep up" or "to preserve." Central to the definitions of "repair" and "maintain" is the notion of restoring or returning something, in this case a public building, to a prior state or condition. *"Design" refers to the initial conception of the building, rather than its restoration. "Design" and "repair and maintain," then, are unmistakably disparate concepts*, and the Legislature's sole use of "repair and maintain" unambiguously indicates that it did not intend to include design defect claims within the scope of the public building exception. [*Id*. at 500-501 (emphasis added) (citations omitted).]

way exception, MCL 691.1402(1),[3] wherein the Legislature did not include design defects among the exceptions for which a governmental agency may be held liable, the GTLA *expressly* holds governmental agencies accountable for design defects. MCL 691.1416(e), which defines the language used in MCL 691.1417 to MCL 691.1419, defines the word "defect" to mean "a construction, *design*, maintenance, operation, or repair defect."[4] (Emphasis added.) For purposes of MCL 691.1416(e), this Court has determined that a "defect" means " 'a fault or shortcoming; imperfection.' " *Willett*, 271 Mich App at 51, quoting *Random House Webster's College Dictionary* (1997).

Here, plaintiff alleges shortcomings in the storm sewer's design and construction, and the GTLA expressly provides a cause of action for such claims. MCL 691.1417. See also *Bosanic*, 277 Mich App at 283 ("[MCL 691.1417(3)] clearly provides that a 'claimant may seek compensation' if the listed requirements are satisfied. In sum, while some semantic challenges may exist, it is difficult to imagine a statutory scheme that more clearly provides a potential cause of action."). When the Legislature has made the policy choice to provide a theory of recovery in cases involving design defects in sewage disposal systems, this Court should not second-guess that decision. *Wells Fargo Bank, NA v Cherryland Mall Ltd Partnership (On Remand)*, 300

[3] In *Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492, 501-502; 638 NW2d 396 (2002), the Supreme Court noted that "[n]owhere in the statutory language is there a duty to *install*, to *construct* or to correct what may be perceived as a dangerous or defective '*design*.' Moreover, it is not the province of this Court to make policy judgments or to protect against anomalous results."

[4] The Legislature's decision to include design defects among those that a governmental agency must timely remedy or repair may be due to the fact that a defect in a sewage disposal system that is bad enough to cause damage to people or property, aside from being disgusting, can have serious health consequences to a significant number of people.

Mich App 361, 376; 835 NW2d 593 (2013) ("[T]he Legislature possesses superior tools and means for gathering facts, data, and opinion and assessing the will of the public") (quotation marks and citations omitted). Put simply, defendant's argument that it owed no duty to build a storm sewer system in the first place and, thus, it should not owe any duty to repair design defects in the system it builds, flies in the face of the plain language of the GTLA.

Defendant also argues that it does not owe plaintiff a duty under the GTLA because the GTLA does not impose a duty on defendant to remove all naturally collecting surface water and rainwater from private property. I agree that the GTLA does not impose such a duty on defendant. And so does plaintiff, because this is not the duty that plaintiff is alleging, expressly or implicitly. Indeed, plaintiff expressly states the following in his brief on appeal:

> There is no general duty "to capture all storm water run-off from private property" and Plaintiff has not alleged one. Liability arises when a public storm sewer has a defect, the City has notice of the defect, the City fails to take reasonable steps to correct the defect, and the defect causes the plaintiff's damages. MCL 691.1417(3). . . . [T]here is no need to consider abstract notions of "duty" that have not been alleged.

Although defendant does not have a general duty to remove naturally collecting surface water and rainwater from private property, it is well established that a duty may be imposed on a defendant that "voluntarily assumed a function that it was under no legal obligation to assume." *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 205; 544 NW2d 727 (1996). In this case, defendant voluntarily undertook to construct, assess the residents for, become the operator of, and

exert jurisdiction and control over the relief storm sewer system, which is a sewage disposal system under the GTLA. The documentary evidence submitted to the trial court illustrates that defendant implemented the relief storm sewer system to alleviate significant flooding, including basement flooding, by being able to accommodate a 10-year, 24-hour storm event. Because defendant voluntarily assumed this function, it had a duty under the GTLA to take reasonable steps in a reasonable amount of time to repair, correct, or remedy a known defect in the system or a defect in the system that it should have known of through the exercise of reasonable diligence. See MCL 691.1417(3). Defendant's failure to timely correct any known design or construction defects in the system exposed it to liability according to the plain language of the GTLA.

To the extent that the majority questions the applicability of the GTLA to sewage disposal events involving rainwater, I respectfully disagree. The majority suggests that defendant's storm sewer is not a sewage disposal system under the plain language of MCL 691.1416(j), which provides as follows:

> "Sewage disposal system" means all interceptor sewers, *storm sewers*, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, *and includes a storm water drain system under the jurisdiction and control of a governmental agency*. [Emphasis added.]

The majority construes the phrase "used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes" as modifying all the types of sewers and systems listed in MCL 691.1416(j).

Thus, the majority opines that an appropriate governmental agency only has a duty to repair, correct, or remedy defects in disposal systems that handle the collection, treatment, and disposal of sewage and industrial wastes. However, this Court has previously held, in a case involving flooding after heavy rainfall, that a "sewage disposal system" under the GTLA is not limited to instrumentalities dealing with sewage or waste matter. *Linton*, 273 Mich App at 121. Even if the majority were correct in construing the phrase "used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes" as modifying all the types of sewers listed before it, it fails to account for critical language in the remainder of the statute; MCL 691.1416(j) specifically includes "a storm water drain system under the jurisdiction and control of a governmental agency" within the meaning of a sewage disposal system. The phrase "used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes" does not modify this later inclusion of a storm water drain system. A storm water drain system undoubtedly serves events involving rainwater; after all, storm water is rainwater; and, thus, the GTLA applies to events involving rainwater. Had the Legislature not wanted the GTLA exception to apply to rainwater, it would not have included the words "storm water" in the statute. As this Court explained in *Linton*, 273 Mich App at 116, "if the Legislature had intended that the exception only apply to sewage, then it would . . . not have made a point of specifically clarifying that the exception applies to 'a *storm water* drain system.' " To interpret the statute otherwise would render nugatory the phrase "*and includes a storm water drain system*." Defendant's relief storm sewer system is "a storm water drain system under the

jurisdiction and control of a governmental agency" and, thus, it is a sewage disposal system. MCL 691.1416(j).

B. PLAINTIFF HAS PRESENTED EVIDENCE TO EITHER ESTABLISH OR CREATE GENUINE ISSUES OF MATERIAL FACT CONCERNING THE ELEMENTS SET FORTH IN MCL 691.1417(3)(a) THROUGH (e)

Upon review of the evidence presented in this case, I would find that plaintiff has produced sufficient evidence to either establish or create genuine issues of material fact with regard to the elements set forth in MCL 691.1417(3)(a) through (e), which, if met, would entitle plaintiff to recovery.

1. MCL 691.1417(3)(a), APPROPRIATE GOVERNMENTAL AGENCY

As already noted, MCL 691.1417(3)(a) requires plaintiff to establish that defendant was "an appropriate governmental agency." Defendant argues that it is not "an appropriate governmental agency" for purposes of MCL 691.1417. I disagree.

The Legislature defined the phrase "appropriate governmental agency" to mean "a governmental agency that, at the time of a sewage disposal system event, owned or operated . . . the portion of the sewage disposal system that allegedly caused damage or physical injury." MCL 691.1416(b). MCL 691.1416(j) defines a "sewage disposal system" to include "storm sewers" and "a storm water drain system under the jurisdiction and control of a governmental agency."

In this case, plaintiff alleges that the relief storm sewer system caused damage to his home during the June 2010 storm because the system was defective. The relief storm sewer system is a storm water drain system. See MCL 691.1416(j). There is evidence demonstrating that the relief storm sewer system is owned or

operated by and under the jurisdiction and control of defendant. MCL 691.1416(b); MCL 691.1416(j). Specifically, the pleadings and documentary evidence demonstrate that defendant commissioned the relief storm sewer study in 1989, constructed it in approximately 1991, and funded the construction through special assessments and improvement charges on its residents. A map submitted to the trial court by defendant indicates that the relief storm sewer system is a public storm main. Defendant admitted in interrogatories that it maintains, repairs, and cleans the system, and there was evidence identifying the system as being under defendant's jurisdiction and control.

Defendant contends that it is not an "appropriate governmental agency" because there is no record evidence that the flooding of plaintiff's basement was caused by an overflow of the relief storm sewer. This contention lacks merit. MCL 691.1416(b) includes as an appropriate governmental agency one that owned or operated a sewage disposal system that "allegedly" caused damage. Plaintiff's complaint alleges that the relief storm sewer system caused damage to his home during the June 2010 storm; thus, defendant is an "appropriate governmental agency" under the facts of this case.[5]

2. MCL 691.1417(3)(b), (c), AND (d), DEFECT IN SEWAGE DISPOSAL SYSTEM ABOUT WHICH DEFENDANT EITHER KNEW OR SHOULD HAVE KNOWN AND THAT DEFENDANT FAILED TO TAKE REASONABLE STEPS IN A REASONABLE AMOUNT OF TIME TO REPAIR, CORRECT, OR REMEDY

Subdivisions (b) through (d) of MCL 691.1417(3) collectively prescribe the duty imposed on governmental agencies when a defect exists in one of their sewage

[5] To the extent that defendant's argument challenges causation, that argument is relevant to MCL 691.1417(3)(e), discussed later in this opinion.

disposal systems. Specifically, a governmental agency that owns or operates a sewage disposal system must take reasonable steps in a reasonable amount of time to repair, correct, or remedy a defect in the system that the agency either knew about or should have known about through the exercise of reasonable diligence.

Here, as noted already, plaintiff identified a host of defects in defendant's storm sewer, including (1) inadequate design capacity for regularly recurring peak flows leading to recurring collection of storm water outside the detention easement, (2) inadequate inlet capacity resulting in storm water backup and surface pooling, (3) drainage into the storm sewer from areas outside of the planned drainage area (including runoff from upstream development), (4) failure to increase capacity in response to increased load from upstream development, (5) inadequate or defective upstream detention, (6) misalignment in pipes and inlets, (7) inadequate capacity at downstream restrictions resulting in backup into the detention easement, and (8) failure to provide an adequate emergency storm water overflow route. In support of his defect claims, plaintiff submitted evidence from Clif Seiber and Mark Pribak, civil engineers, and John and Nancy Yalonen, plaintiff's neighbors.

Seiber testified that the relief system was designed to accommodate a 10-year, 24-hour storm event, but that the system failed to do so during the June 2010 storm. He opined that unless something was wrong with the system's design, the amount of rainfall should not have caused flooding. Seiber identified several specific defects in the relief storm sewer system, including undercapacity catch basin covers and undersized piping. He explained that upstream water could not enter the relief storm sewer in sufficient rate flows. There was not capacity for 23 acres of runoff. He opined that the catch basin covers

restricted inlet capacity. And he explained that the design for the relief system included errors in the calculation of upstream runoff. Pribak testified specifically that the design of the relief sewer erroneously assumed a 4.4 cubic feet per second (cfs) peak flow for a 10-year, 24-hour storm, but that the actual expected peak rate of upstream flow is 35.7 cfs. Nancy Yalonen testified that defendant told her that the installation of the relief storm sewer system would "take care of your issue," i.e., take care of the flooding problem.[6] Yet the Yalonens testified that they received no benefit from the relief system that they paid for through a special assessment—according to Nancy, "it never made things better."

In addition, plaintiff presented evidence that defendant knew or should have known about the defect in the relief storm sewer system. See MCL 691.1417(3)(c) (requiring the plaintiff to prove that the governmental agency "knew, or in the exercise of reasonable diligence should have known, about the defect"). Notably, plaintiff's neighbors testified that they repeatedly notified defendant, over an eight-year period, of severe flooding in the area. In addition, Seiber opined that, based on the persistent flooding, defendant should have known about serious design defects. Pribak, who was defendant's expert witness, agreed that the repeated flooding "raises some indication that there's something different going on with the system" and that it was fair to say that the repeated flooding indicated a problem.

Supporting defendant's position that the relief storm sewer system did not contain a defect, Cresson Slotten, the manager of defendant's systems planning

[6] Additionally, Cresson Slotten, the manager of defendant's systems planning unit, testified that the relief storm sewer system was implemented in response to basement flooding and that the system was intended to alleviate flooding.

unit, testified that he was involved in the construction of the relief system and that he was not aware that it had any problems or that it was not operating as designed. Similarly, Gerald Hancock, defendant's storm water and floodplain programs coordinator, testified that he was not aware of any defects in the relief system. He also was not aware that the system could not handle the flow of northerly water from upstream. Hancock explained that the relief system was designed to handle a 10-year, 24-hour storm event. He testified that the June 2010 storm leading to the damage of plaintiff's home was less than a 10-year storm event over the course of 24 hours. Suggesting an explanation for why the relief system did not accommodate the June 2010 storm despite being designed to handle a 10-year, 24-hour storm event, Hancock explained that there were peaks during the storm that exceeded a 10-year storm event.

In light of this documentary evidence, I would find that reasonable minds could differ regarding whether the relief storm sewer system contained a fault, shortcoming, or imperfection, i.e., a defect, in design, particularly inadequate piping and inlet capacity, and whether defendant knew or should have known about such a defect. See MCL 691.1417(3); MCL 691.1416(e); *Willett*, 271 Mich App at 51. It is undisputed that nothing was done to repair the system or remedy the problem before plaintiff's flooding incident. Therefore, I would conclude that the trial court properly denied defendant's motion for summary disposition with regard to whether plaintiff submitted enough evidence to satisfy the elements set forth in MCL 691.1417(3)(b) though (d). See *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

3. MCL 691.1417(3)(e), DEFECT AS A SUBSTANTIAL PROXIMATE CAUSE OF THE EVENT AND PROPERTY DAMAGE

Although the trial court determined causation to be a genuine issue of material fact and defendant does not raise this issue on appeal, the majority concludes that there is no evidence of causation. The GTLA requires that the defect in the sewage disposal system be "a substantial proximate cause of the event and the property damage or physical injury." MCL 691.1417(3)(e). The GTLA defines a "substantial proximate cause" as "a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury."[7] MCL 691.1416(*l*). Causation is generally a question for the trier of fact. *Holton v A+ Ins Assoc, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003).

Here, plaintiff produced documentary evidence of an accumulation of storm water onto his property that was caused by inadequate piping and inlet capacity, i.e., defects in the storm sewer. Seiber opined that had the defects in the relief system not been present, the relief system would have adequately accommodated the storm event that caused plaintiff's flooding. Seiber opined that the predominant cause of plaintiff's flooding was the inadequate design of the relief storm sewer system. And he stated that he had a reasonable degree of professional certainty that the defects in the system were 50% or more of the cause of the flooding and damage. Defendant built the relief storm sewer system in response to flooding at Chaucer Court. And the documentary evidence illustrates that the system was intended to accommodate a 10-year, 24-hour storm event. It is undisputed that the June 2010 storm was less than a 10-year, 24-hour storm event. Thus, the

[7] Generally, proof of causation requires both cause in fact and proximate cause. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001).

evidence supports the conclusion that the June 2010 storm was reasonably foreseeable. An intervening cause is not a superseding cause if it was reasonably foreseeable. *McMillian v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). Given the evidence in this case, I would conclude that whether the defect in the relief storm sewer system was a proximate cause that was 50% or more of the cause of the sewage disposal system event and plaintiff's basement flooding, see MCL 691.1416(*l*), is a question for a jury to consider along with the fact that plaintiff built the basement window in an area with both a storm water detention basin and a history of flooding. Accordingly, I would conclude that the trial court properly denied defendant's motion for summary disposition on the basis that causation was a genuine issue of material fact.

C. MCL 691.1417(2), SEWAGE DISPOSAL SYSTEM EVENT

Finally, although not addressed by the majority, I note that defendant raises the additional, unpreserved argument that plaintiff's flooding was not the result of a "sewage disposal system event" under MCL 691.1417. See, generally, *In re Smith Trust*, 274 Mich App 283, 285; 731 NW2d 810 (2007) ("Because this argument was not raised in the trial court, it is not preserved."). Because this issue is unpreserved, I would decline to address it. See, generally, *Wiggins v City of Burton*, 291 Mich App 532, 574; 805 NW2d 517 (2011) ("We decline to address this issue for the first time on appeal."); *Bombalski v Auto Club Ins Ass'n*, 247 Mich App 536, 546; 637 NW2d 251 (2001) ("We decline to address this unpreserved issue, which the trial court did not expressly consider."). However, in the event this Court were to exercise its discretion to overlook the preservation requirements and review this issue, see, generally,

Smith v Foerster-Bolser Constr, Inc, 269 Mich App 424, 427; 711 NW2d 421 (2006), I would conclude that defendant's argument lacks merit.

A "sewage disposal system event," or simply an "event" as referred to in MCL 691.1417, "means the overflow or backup of a sewage disposal system onto real property." MCL 691.1416(k). The statute does not define the terms "overflow" or "backup." Therefore, this Court may refer to a dictionary to ascertain their plain meaning. See *Willett*, 271 Mich App at 51. See also *Coventry Parkhomes Condo Ass'n v Fed Nat'l Mtg Ass'n*, 298 Mich App 252, 259; 827 NW2d 379 (2012). "Overflow" is defined as "to flow or run over, as rivers or water," "to have the contents flowing over or spilling," "flood; inundate," "to flow over the edge or brim of," "something that flows or runs over," and "a portion crowded out of an overfilled place." *Random House Webster's College Dictionary* (2005). "Backup" means "an accumulation due to stoppage." *Id*.

In this case, Seiber concluded that upstream water could not enter the relief storm sewer system in sufficient rate flows because of inadequate design of the capacity of the inlets and piping. Seiber noted that there were errors in the calculation of upstream runoff during the system's design. During his deposition, Arthur Herold, another one of plaintiff's neighbors, described the flow of upstream water to the two relief storm sewer drains (beehives) on his property:

> *Q.* Now based on what you are saying, fair to say that when [the upstream water] hits your property it doesn't all go into that intake drain?
>
> *A.* My experience is that very little of it goes into the intake drain.

* * *

A. [A]nd so what happens is that the water hits the [first] drain, then as it can't go down in and more and more water collects it starts going on either side of the drain and over the drain until finally it's several feet on either side of the drain and the drain itself is buried under rushing water by several feet and then there is usually a huge vortex going on.

* * *

A. [B]y the time the water hits that second beehive very, very little of it, in fact, there is never a vortex there. Very, very little of it actually goes into that system because the system is maxed out at that point. In other words, it has taken all the water it can get. There is no reserve left over once the water that starts at the beginning of it enters into that pipe at the first beehive. So by the time that water rushed down and around the property and gets to the second beehive there is very little capacity for that system . . . . And so that beehive never really exhibits that real profound entry sucking, vortex kind of thing happening in the first one.

Q. And you are referring to the second?

A. The second beehive.

Q. The one that's basically downstream of the water flow.

A. Yeah, the pipe is filled is how it has been described.

Q. How is it filled at that point if the water wasn't getting in at the first beehive?

A. Maybe I said this clumsily. Water enters into the beginning beehive, whatever water and it's continually entering in, that's the vortex.

Q. Yes.

A. Whatever water cannot enter in through that action goes over the beehive and then starts the aboveground process.

* * *

> *A.* So it's sort of like it's a pipe that comes around which is already filled by this first action. By the time it gets [near] the second beehive there is not like not [sic] much capacity to drop more water into that system since the piping is already filled.

This documentary evidence illustrates that there was a "backup" of the relief storm sewer system, i.e., an accumulation of water onto real property because of a stoppage of the system, and, thus, a "sewage disposal system event" for purposes of MCL 691.1417. See MCL 691.1416(k). Specifically, there was a stoppage of storm-water intake into the relief storm sewer system because of the inadequate capacity of the system's inlets and piping, and the stoppage caused an accumulation of storm water. Therefore, defendant's unpreserved argument that plaintiff's flooding was not the result of a "sewage disposal system event" lacks merit.

For the reasons provided in this dissenting opinion, I would affirm the trial court's order denying defendant's motion for summary disposition under MCR 2.116(C)(7).

MIDAMERICAN ENERGY COMPANY v DEPARTMENT OF TREASURY

DETROIT EDISON COMPANY v DEPARTMENT OF TREASURY

CONSUMERS ENERGY COMPANY v DEPARTMENT OF TREASURY

Docket Nos. 316902, 317033, 317034, 317035, and 317037. Submitted October 8, 2014, at Lansing. Decided December 4, 2014, at 9:00 a.m. Leave to appeal sought.

MidAmerican Energy Company, Detroit Edison Company, and Consumers Energy Company (collectively "the electricity providers") and AT&T Mobility, LLC, and Michigan Bell Telephone Company (collectively "the telecommunications companies") brought separate actions in the Court of Claims against the Department of Treasury in connection with sales tax the telecommunications companies had paid on electricity they purchased from the electricity providers. The court, William E. Collette, J., consolidated the actions. Plaintiffs argued that the telecommunications companies' purchases of electricity were exempt from sales tax under the industrial-processing exemption of MCL 205.54t (part of the General Sales Tax Act, MCL 205.51 *et seq*.). The court held that plaintiffs were not eligible for the exemption and granted defendant summary disposition. Plaintiffs appealed separately, and the Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under MCL 205.54t(1)(a), the industrial-processing exemption applies to taxpayers engaged in industrial processing. A taxpayer engages in industrial processing under MCL 205.54t(7)(b) when it modifies tangible personal property for sale to consumers or uses tangible personal property to produce wholly new tangible personal property for sale to consumers. MCL 205.51a(q) defines "tangible personal property" as personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses. It includes electricity, water, gas, steam, and prewritten computer software.

2. Plaintiffs asserted that the telecommunications companies purchased electricity (which is tangible personal property) and either (1) modified it into telecommunications signals, which are another form of electricity and therefore a form of tangible

personal property, or (2) used the electricity to create telecommunications signals, which are a wholly new form of tangible personal property in their own right, and in either case sold the signals to consumers. Therefore, the purchases of electricity were entitled to the sales tax exemption. Telecommunications signals, however, are not electricity. The signals take different forms as they transfer data from one source to another, including alternating current, direct current, ultraviolet light, radio waves, and digital signals. Accordingly, telecommunications signals are different types of energy at various stages of the transmission process, and while they are electricity at some stages, they are not electricity at every stage. It would be illogical to suggest that the word "electricity" encompasses something that is manifestly not electricity at some stages of its transmission. The Legislature did not intend the term "electricity" in MCL 205.51a(q) to encompass telecommunications signals.

3. Telecommunications signals are also not tangible personal property. The absence of the term "telecommunications signal" from MCL 205.51a(q) and the presence of numerous other specific terms in the definition (such as "water," "steam," and "gas") indicates that the Legislature did not intend to include telecommunications signals in the definition of "tangible personal property." Plaintiffs presented no convincing evidence that telecommunications signals can be seen, weighed, measured, felt, or touched or that they are in any other manner perceptible to the senses. The signals are not visible to the naked eye, nor can they be felt or touched in any discernable way. While plaintiffs attempted to show that telecommunications signals can be weighed or measured, that evidence was completely inconsequential because the terms "weighed" and "measured" must be read in the broader context of the sentence in which they are used. Both are followed by the phrase "in any other manner perceptible to the senses," which indicates that the terms "weighed" and "measured" only apply to the weighing and measuring of something that is directly perceptible to the senses, which telecommunications signals are not. Plaintiffs' interpretation of MCL 205.51a(q) would make the definition of "tangible personal property" completely limitless because almost any form of energy or matter can be weighed or measured using the appropriate equipment.

Affirmed.

TAXATION — SALES TAX — INDUSTRIAL-PROCESSING EXEMPTION — TELECOMMUNICATIONS SIGNALS.

MCL 205.54t(1)(a) provides an exemption from the sales tax for taxpayers engaged in industrial processing; a taxpayer engages

in industrial processing under MCL 205.54t(7)(b) when it modifies tangible personal property for sale to consumers or uses tangible personal property to produce wholly new tangible personal property for sale to consumers; MCL 205.51a(q) defines "tangible personal property" as personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software; telecommunications signals are neither electricity nor tangible personal property, and a telecommunications company that purchases electricity from an electric utility and uses it to create telecommunications signals is not entitled to the industrial-processing exemption.

Honigman Miller Schwartz and Cohn LLP (by *June Summers Haas*, *John D. Pirich*, and *Daniel L. Stanley*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Zachary C. Larsen*, Assistant Attorney General, for defendant.

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

SAAD, P.J.

I. NATURE OF THE CASE

This tax appeal involves the applicability of the industrial-processing exemption[1] to the General Sales Tax Act (the Act).[2] In sum, the industrial-processing exemption to the sales tax, MCL 205.54t, can only be granted to taxpayers engaged in "industrial processing." A taxpayer is only engaged in industrial processing when it (1) modifies "tangible personal property"[3]

[1] MCL 205.54t.

[2] MCL 205.51 *et seq*.

[3] MCL 205.51a(q).

for sale[4] to consumers or (2) uses tangible personal property to produce wholly new tangible personal property for sale to consumers. For the taxpayer to receive the industrial-processing exemption, then, whatever the taxpayer eventually sells to consumers must be tangible personal property. Taxpayers that use tangible personal property to produce some other product that *is not* "tangible personal property" *are not* eligible for the industrial processing exemption under MCL 205.54t.

Here, plaintiffs[5] argue that their sales and purchases of electricity are eligible for the industrial-processing exemption to the sales tax. They assert that the telecommunications companies purchase electricity (which is tangible personal property) and either (1) modify the electricity into telecommunications signals, which are another form of electricity and thus a form of tangible personal property, and sell the signals to consumers; or (2) use the electricity to create telecommunications signals, which are a *new form* of tangible personal property in their own right. Accordingly, because plaintiffs' activity supposedly results in the ultimate sale of tangible personal property in the form of telecommunications signals to consumers, plaintiffs argue that this purchase of electricity is eligible for the industrial-processing exemption.

This argument is unconvincing for a simple reason: telecommunications signals are not tangible personal property. Plaintiffs' purchase of electricity to create telecommunications signals is thus not eligible for the

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[4] More precisely, the "sale, lease, or rental of tangible personal property" to consumers. See MCL 205.51(1)(b). Because plaintiffs only make mention of the *sale* of telecommunications services to consumers, we refer only to the "sale" of "tangible personal property" to consumers throughout the opinion.

[5] Throughout the opinion, plaintiffs are referred to either as "plaintiffs" or "the taxpayers."

industrial-processing exemption to the sales tax. The Court of Claims therefore properly granted defendant Department of Treasury[6] summary disposition, and its holding is affirmed.

II. FACTS AND PROCEDURAL HISTORY

The plaintiffs in this case are (1) electricity providers and (2) telecommunications companies that purchase electricity from the electricity providers. Plaintiffs brought these actions in the Court of Claims and argued that the telecommunications companies' purchase of electricity should be exempt from the sales tax under the industrial-processing exemption, MCL 205.54t. Again, to qualify for the industrial-processing exemption, the taxpayer's activity must result in the sale of tangible personal property to consumers.[7] The statute defines "tangible personal property" as

> personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software. [MCL 205.51a(q).]

Plaintiffs asserted that the telecommunications signals they produced were tangible personal property in two ways: (1) as electricity and (2) as property that can be "seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses." As such, plaintiffs stated that their activities qualified as industrial processing under MCL 205.54t(7)(a) because (1) they purchased tangible personal property (electric-

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[6] Throughout the opinion, defendant is referred to as "defendant" or "the Department."

[7] "Industrial processing" is defined at MCL 205.54t(7)(a). The precise definitional and statutory framework of the industrial-processing exemption under MCL 205.54t is highly complex, and is discussed in detail later in the opinion.

ity) and sold it in modified form (telecommunications signals) to consumers and (2) they purchased tangible personal property (electricity), used it to produce wholly new tangible personal property (telecommunications signals), and sold the wholly new tangible personal property (telecommunications signals) to consumers.

Defendant argued that plaintiffs were not eligible for the industrial-processing exemption under MCL 205.54t because plaintiffs were not engaged in industrial processing. Telecommunications signals, the Department claimed, are not tangible personal property, because they are (1) not electricity and (2) cannot be "seen, weighed, measured, felt, or touched" and are not "in any other manner perceptible to the senses." Because plaintiffs did not sell tangible personal property to consumers, they could not be engaged in industrial processing pursuant to MCL 205.54t(7)(a) and thus could not be eligible for the industrial-processing exemption under MCL 205.54t. Defendant also claimed that certain statutory definitions in the Use Tax Act, MCL 205.91 *et seq*., militated against classifying the telecommunications signals produced by plaintiffs as tangible personal property under the General Sales Tax Act's industrial-processing exemption.[8]

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[8] Specifically, defendant pointed to MCL 205.93a, which, among other things, governs the tax on the use of "intrastate telecommunications services." MCL 205.93a(1)(a). The statute defines "telecommunications service" as "the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point," which defendant argues includes the telecommunications signals at issue. MCL 205.93a(5)(s). The definition further goes on to note that the term

> [t]elecommunications service does not include any of the following:
>
> * * *
>
> (*iii*) Tangible personal property. [MCL 205.93a(5)(s)(*iii*).]

The Court of Claims heard exhaustive expert testimony from both sides on whether the telecommunications signals produced by plaintiffs are tangible personal property, either in that they are a modified form of electricity or are something that can be "seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses."

In a thorough written opinion, the Court of Claims rejected plaintiffs' arguments and held that plaintiffs were not eligible for the industrial-processing exemption. Specifically, it ruled that the telecommunications signals produced by plaintiffs are not tangible personal property, in that they are not electricity, nor are they something that can be "seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses." Because the telecommunications signals are not tangible personal property sold to consumers, the court ruled that plaintiffs were not engaged in industrial processing pursuant to MCL 205.54t(7)(a) and thus were not eligible for the industrial-processing exemption under MCL 205.54t. Accordingly, the court granted defendant's request for summary disposition under MCR 2.116(C)(10).

On appeal, plaintiffs argue that the Court of Claims erred when it held, as a matter of law, that they are ineligible for the industrial-processing exemption because (1) telecommunications signals are tangible personal property, in that they are both electricity and something that can be "seen, weighed, measured, felt, or touched or that is in any other manner perceptible to

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Defendant argued that the Legislature's use of this specific terminology and language in this section of the Use Tax Act indicates that it did not intend for the telecommunications signals at issue to be classified as "tangible personal property" for the industrial-processing exemption under the General Sales Tax Act.

the senses" and (2) plaintiffs are therefore engaged in industrial processing in the use of electricity to produce telecommunications signals for sale to consumers and thus eligible for the industrial-processing exemption.[9]

III. STANDARD OF REVIEW

A trial court's decision to grant summary disposition is reviewed de novo. *Malpass v Dep't of Treasury*, 494 Mich 237, 245; 833 NW2d 272 (2013). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, and we consider "the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion." *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005) (citation omitted). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id*.

Matters of statutory interpretation are reviewed de novo. *Malpass*, 494 Mich at 245. When it interprets statutes, a court's primary task is to discern and give effect to the intent of the Legislature. *Ford Motor Co v Dep't of Treasury*, 496 Mich 382, 389; 852 NW2d 786 (2014). The first step in that process is to examine "the language of the statute itself. If the language of the statute is unambiguous, the Legislature must have

[9] Plaintiffs, most likely in response to defendant's use-tax argument at trial, also claim that their activity is exempt under the industrial-processing exemption to the use tax pursuant to MCL 205.94o. Because plaintiffs did not raise this issue at trial, it is unpreserved, and we need not address it. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

intended the meaning clearly expressed, and the statute must be enforced as written." *Id*. (citations and quotation marks omitted).

"Statutory interpretation requires an holistic approach. A provision that may seem ambiguous in isolation often is clarified by the remainder of the statutory scheme." *SMK, LLC v Dep't of Treasury*, 298 Mich App 302, 309; 826 NW2d 186 (2012), aff'd in part and rev'd in part sub nom *Fradco, Inc v Dep't of Treasury*, 495 Mich 104, 118 (2014) (citation omitted). " 'When construing statutory language, [the court] must read the statute as a whole and in its grammatical context, giving each and every word its plain and ordinary meaning unless otherwise defined.' " *Book-Gilbert v Greenleaf*, 302 Mich App 538, 541; 840 NW2d 743 (2013) (citation omitted) (alteration in original). Doing so requires us to "avoid a construction that would render any part of a statute surplusage or nugatory, and '[w]e must consider both the plain meaning of the critical words or phrases as well as their placement and purpose in the statutory scheme.' " *People v Redden*, 290 Mich App 65, 76-77; 799 NW2d 184 (2010) (citation omitted) (alteration in original). And "[a] general principle of statutory construction is the doctrine of *expressio unius est exclusio alterius*, which means the express mention of one thing implies the exclusion of another." *Wayne Co v Wayne Co Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005).

IV. ANALYSIS

A. THE GENERAL SALES TAX ACT

The General Sales Tax Act imposes a 6% tax on "all

persons"[10] who sell "tangible personal property" "at retail." MCL 205.52(1). The Act defines "tangible personal property" as

> personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software. [MCL 205.51a(q).]

"Sale at retail" means

> a sale, lease, or rental of *tangible personal property* for any purpose other than for resale, sublease, or subrent. [MCL 205.51(1)(b) (emphasis added).]

Accordingly, for an item to be "[sold] at retail" under the Act, the item must be "tangible personal property" as defined in MCL 205.51a(q). In other words, whenever the term "sale at retail" is mentioned in the Act, it refers to the "sale, lease, or rental of tangible personal property." MCL 205.51(1)(b).

B. THE INDUSTRIAL-PROCESSING EXEMPTION

Much of the Act consists of statutory exemptions to the general tax levied by MCL 205.52(1). Among other things, the exemptions are "the product of a targeted legislative effort to avoid double taxation of the end product offered for retail sale or, in other terms, to avoid pyramiding the use and sales tax." *Elias Bros Restau-*

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[10] The Act defines "person" as

> an individual, firm, partnership, joint venture, association, social club, fraternal organization, municipal or private corporation whether organized for profit or not, company, estate, trust, receiver, trustee, syndicate, the United States, this state, county, or any other group or combination acting as a unit, and includes the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context. [MCL 205.51(1)(a).]

rants, Inc v Treasury Dep't, 452 Mich 144, 152; 549 NW2d 837 (1996) (citation and quotation marks omitted). "Because tax exemptions are disfavored, the burden of proving entitlement to an exemption" rests on the party seeking the exemption. *Id*. at 150. Any tax exemptions that apply to a specific taxpayer are strictly construed against the taxpayer. *Guardian Indus Corp v Dep't of Treasury*, 243 Mich App 244, 249; 621 NW2d 450 (2000).

One such exemption is the exemption for "industrial processors," which is codified at MCL 205.54t(1)(a). This section creates a tax exemption for the "sale of tangible personal property"[11] to "[a]n industrial processor for use or consumption in industrial processing." *Id*.

As used in the exemption, an "industrial processor" is "a person who performs the activity of converting or conditioning tangible personal property for ultimate *sale at retail* or use in the manufacturing of a product to be ultimately *sold at retail*." MCL 205.54t(7)(b) (emphasis added). "Industrial processing" means

> the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the *property for ultimate sale at retail* or for use in the manufacturing of a *product to be ultimately sold at retail*. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage. [MCL 205.54t(7)(a) (emphasis added).]

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[11] The definition of "tangible personal property" in MCL 205.51a(q) applies throughout the Act, including MCL 205.54t(1)(a). See also *Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008) (holding that a court interprets a statute's "words in their context and with a view to their place in the overall statutory scheme") (citations and quotation marks omitted).

Accordingly, the definition of "tangible personal property" is doubly important for any party that seeks to use the industrial-processing exemption. This is because, by definition, industrial processing involves either (1) the modification of "tangible personal property" for ultimate sale of the modified property at retail or (2) the use of "tangible personal property" in manufacturing "a product to be ultimately *sold at retail*"—i.e., the use of tangible personal property in manufacturing tangible personal property. *Id*. (emphasis added). Again, "sale at retail" is defined as "a sale, lease, or rental of *tangible personal property* for any purpose other than for resale, sublease, or subrent." MCL 205.51(1)(b) (emphasis added).[12]

Therefore, for a taxpayer to be engaged in industrial processing and thus be eligible for the industrial-processing exemption to the sales tax, the taxpayer must use tangible personal property to produce either a (1) modified or (2) new form of tangible personal property that will be sold to consumers. In other words, to qualify for the industrial-processing exemption, the taxpayer must ultimately sell consumers tangible personal property. Taxpayers that use tangible personal property to produce some other product that *is not* tangible personal property, then, *are not* eligible for the industrial-processing exemption under MCL 205.54t.[13]

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[12] The definition of "sale at retail" in MCL 205.51(1)(b) applies to MCL 205.54t(7)(a) and (b). See also *Manuel*, 481 Mich at 650.

[13] We note that the nested and intricate definitional system used throughout the General Sales Tax Act and its industrial-processing exemption is very similar to the definitional system in the industrial-processing exemption to the *Use Tax Act* (MCL 205.94o). MCL 205.94o makes the definition of "tangible personal property" doubly important as well because, under the Use Tax Act, the industrial-processing exemption can only be granted to tangible personal property involved in "converting or conditioning" of "tangible personal property." MCL 205.94o(7)(a). See

C. APPLICATION

1. PLAINTIFFS' ARGUMENT

Here, the taxpayers claim their purchase of electricity is exempt from the sales tax under the industrial-processing exemption. Their argument is based on a logic chain consistent with the integrated definitional framework of MCL 205.51 and MCL 205.54t described earlier.

Again, to be eligible for the industrial-processing exemption under MCL 205.54t, a taxpayer must be engaged in industrial processing. Plaintiffs say they are engaged in industrial processing for two reasons. First, they claim that they convert and modify electricity, which is tangible personal property, into telecommunications signals, which they assert are another form of electricity that is thus also tangible personal property. Second, in the event we reject the argument that telecommunications signals are a modified form of electricity, plaintiffs claim the telecommunications signals "can be seen, weighed, measured, felt, or touched" or are in some "other manner perceptible to the senses,"[14] making the telecommunications signals tangible personal property in their own right.

Because plaintiffs used tangible personal property (electricity) to produce (1) a modified form of tangible personal property (the telecommunications signals as electricity) or (2) a new form of tangible personal property (the telecommunications signals) and sell the modified or new forms of tangible personal property to consumers, they claim they are engaged in "industrial processing" pursuant to MCL 205.54t(7)(a). Because

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also *Detroit Edison Co v Dep't of Treasury*, 303 Mich App 612, 625 n 4; 844 NW2d 198 (2014), lv gtd 853 NW2d 380 (2014).

[14] MCL 205.51a(q).

they are engaged in industrial processing, they are industrial processors under MCL 205.54t(7)(b). And because they are industrial processors engaged in industrial processing, their purchase of electricity is eligible for the industrial-processing exemption to the sales tax under MCL 205.54t.

Plaintiffs' argument that they are eligible for the industrial-processing exemption, then, is entirely dependent on whether telecommunications signals can be classified as tangible personal property: (1) as a form of "electricity"; or (2) in their own right, as something that "can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses." Plaintiffs presented exhaustive expert testimony to support both propositions at trial, but their arguments are unconvincing.

2. TELECOMMUNICATIONS SIGNALS ARE NOT ELECTRICITY

Both parties submitted evidence to the Court of Claims that telecommunications signals take different forms as they transfer data from one source to another. Among other things, these forms include alternating current (AC) and direct current (DC) electricity, ultraviolet light, radio waves, and digital signals. Accordingly, the telecommunications signals are a different type of energy at each stage of the transmission process. Though the signals are electricity at some stages of the transmission process, they are not electricity at every stage of the transmission process.

It is illogical to suggest that the word "electricity" encompasses matter that is manifestly *not* electricity at various stages of its transmission. The plain language of the statutory definition mandates this common sense definition of the word "electricity." Again,

the General Sales Tax Act defines "tangible personal property" as

> personal property that can be seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses and includes electricity, water, gas, steam, and prewritten computer software. [MCL 205.51a(q).]

As the Court of Claims noted, "steam" is merely "water" in a different form. The presence of both terms in the definition demonstrates that plaintiffs' reading of MCL 205.51a(q) is incorrect, because the Legislature specifically included two different forms of the same matter in the definition. Under plaintiffs' reading—which reads "electricity" to include anything that is also electricity at some point in its existence—it would be sufficient to include the term "water," because that term would encompass water in all its forms, including its vaporous form (steam). This approach would render the term "steam" nugatory, which contravenes basic principles of statutory interpretation.[15] Because the Legislature did not draft the statute in this way, it is clear that the Legislature did not intend the term "electricity" to encompass telecommunications signals.

3. TELECOMMUNICATIONS SIGNALS ARE NOT TANGIBLE PERSONAL PROPERTY

Plaintiffs' argument that telecommunications signals are tangible personal property in their own right is also unavailing. Both the plain meaning of the statutory definition and common sense militate against classifying telecommunications signals as tangible personal property.

The first indication that something is amiss with plaintiffs' argument is that the statutory definition of

[15] *Redden*, 290 Mich App at 76.

"tangible personal property" in MCL 205.51a(q) does not include the term "telecommunications signal."[16] This bodes ill for plaintiffs, as we strictly construe all tax exemptions against the taxpayer,[17] and the term that is required for plaintiffs to receive the industrial-processing exemption is absent from MCL 205.51a(q). And not only is it absent—it is conspicuously absent, because the definition itself includes a number of very specific terms ("electricity," "water," "gas," "steam," and "prewritten computer software"), while nowhere mentioning the phrase "telecommunications signal." Again, the "express mention of one thing [in a statute] implies the exclusion of another." *Wayne Co*, 267 Mich App at 248. The absence of the term "telecommunications signal" from MCL 205.51a(q), and the presence of numerous other specific terms in the definition, indicates that the Legislature did not intend for telecommunications signals to be included in the definition of "tangible personal property."

Furthermore, as defendant notes, the Legislature explicitly mentions "signals" in its definition of "telecommunications service"[18] in the Use Tax Act[19]—a statute that is "complementary and supplementary" to the General Sales Tax Act.[20] *World Book, Inc v Dep't of Treasury*, 459 Mich 403, 406; 590 NW2d 293 (1999). We

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[16] "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." *Ford Motor*, 496 Mich at 389 (citations and quotation marks omitted).

[17] *Guardian Indus*, 243 Mich App at 249.

[18] MCL 205.93a(5)(s).

[19] MCL 205.91 *et seq*.

[20] See also *Devonair Enterprises, LLC v Dep't of Treasury*, 297 Mich App 90, 98 n 3; 823 NW2d 328 (2012) ("[T]he definitions set forth in the [Use Tax Act] are consistent with those set forth in the [General Sales Tax Act] . . . .").

note that the term "signals" also appears in the definition of "telecommunications service" in MCL 205.93c(4)(m) and that the term "telecommunication signal" appears in MCL 205.93c(3)(a). The presence of these terms in the Use Tax Act demonstrates that the Legislature is aware of the existence of telecommunications signals and would have chosen to include the phrase "telecommunications signal" in the General Sales Tax Act's definition of "tangible personal property" if it had wanted to do so.

Moreover, plaintiffs have presented no convincing evidence that telecommunications signals "can be seen, weighed, measured, felt, or touched or [are] in any other manner perceptible to the senses." They are not visible to the naked eye, nor can they be felt or touched in any discernable way. For this reason, plaintiffs spent a great deal of time at the Court of Claims attempting to show that telecommunications signals can be weighed or measured. Though this might be literally true, it is completely inconsequential because the terms "weighed" and "measured" must be read in the broader context of the sentence in which they are contained. Both terms are followed by the phrase "in any other manner perceptible to the senses," which indicates that the terms "weighed" and "measured" only apply to the weighing and measuring of something that is directly "perceptible to the senses." Again, telecommunications signals are not directly perceptible to the senses. Plaintiffs' interpretation of MCL 205.51a(q) would make the definition of "tangible personal property" completely limitless, because almost any form of matter or energy can be weighed or measured using the appropriate equipment.

Finally, for instances in which it is difficult or impossible to sensually perceive something, but the Legisla-

ture nonetheless wished to classify it as tangible personal property, the Legislature has made specific provision for it in MCL 205.51a(q). For example, the definition includes "electricity," which is rarely perceptible to the senses, and "prewritten computer software," which requires the aid of an external device (a computer) to perceive. Again, the absence of the phrase "telecommunications signal" from the definition—when combined with the other items specifically mentioned in the definition—indicates that the Legislature had no intention of classifying telecommunications signals as tangible personal property. *Wayne Co*, 267 Mich App at 248.

V. CONCLUSION

Because telecommunications signals are not "tangible personal property" under MCL 205.51a(q), in that they are neither electricity nor something that can be "seen, weighed, measured, felt, or touched or that is in any other manner perceptible to the senses," plaintiffs' purchase of electricity is not eligible for the industrial-processing exemption under MCL 205.54t. The Court of Claims thus properly granted summary disposition to the Department under MCR 2.116(C)(10), and its order is affirmed.

O'CONNELL and MURRAY, JJ., concurred with SAAD, P.J.

HARBOR WATCH CONDOMINIUM ASSOCIATION v
EMMET COUNTY TREASURER

Docket No. 316858. Submitted November 5, 2014, at Lansing. Decided December 4, 2014, at 9:05 a.m. Leave to appeal sought.

The Harbor Watch Condominium Association brought an action in the Emmet Circuit Court against the Emmet County Treasurer seeking payment of association assessments for common expenses, late fees, and interest under the association's bylaws. The court had previously entered a judgment of foreclosure vesting title in defendant to Harbor Watch condominium Units 40 through 42 and 67 through 100 because of delinquent payment of property taxes. The properties had not been redeemed, and defendant had sold them. Plaintiff and defendant filed cross-motions for summary disposition. The court, Charles W. Johnson, J., granted summary disposition in favor of defendant, concluding that defendant had been an involuntary owner of the units and that the requirement that condominium unit owners pay assessments was, therefore, not enforceable against defendant. Plaintiff appealed.

The Court of Appeals *held*:

Under MCL 559.165 of the Condominium Act, each unit coowner, tenant, or noncoowner occupant shall comply with the master deed, bylaws, and rules and regulations of the condominium project. Under the relevant bylaws, all the costs, fees, and expenses incurred or payable by plaintiff were to be paid to plaintiff by the owners of the condominium units in proportion to their percentage of value. Defendant, however, could not be held liable for assessments when it was simply performing its statutory obligation under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., to foreclose on the units at issue. Former MCL 211.78(5) stated that the foreclosure of forfeited property by a county is voluntary for purposes of the Headlee Amendment, Const 1963, art 9, § 29. But the Legislature only intended that subsection to serve to insulate the GPTA from any challenge that the act was an unfunded mandate under the Headlee Amendment. It did not otherwise render the mandatory foreclosure proceedings under the GPTA voluntary. Further, the GPTA provides no mechanism by which defendant could pay plaintiff's assessments. The

GPTA directs the county treasurer to deposit the proceeds from the sale of foreclosed properties into a restricted account. Those proceeds may then be used only for statutorily limited purposes that do not include the payment of assessments to a condominium association. Even if the assessments could have been considered maintenance costs under MCL 211.78m(8)(e), the assessments could not have been paid in this case because the sale proceeds were insufficient to cover items of higher priority, including reimbursement of the delinquent tax revolving fund and payment of the costs of foreclosure. An executory contract of a municipal corporation made without authority may not be enforced. Defendant did not have the authority under the GPTA to pay the condominium assessments. Therefore the trial court properly granted summary disposition in favor of defendant.

Affirmed.

CONDOMINIUMS — FORECLOSURE BY COUNTY TREASURER — CONDOMINIUM ASSOCIATION ASSESSMENTS — LIABILITY.

A county treasurer, who forecloses on a condominium unit for delinquent payment of taxes as required under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., may not be held liable for condominium assessments during the time it holds title to the unit.

John R. Turner for plaintiff.

Kathleen M. Abbott for defendant.

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

PER CURIAM. Plaintiff appeals as of right an order of the trial court granting defendant's motion for summary disposition. We affirm.

Plaintiff is the condominium association for Harbor Watch, a condominium project located in Petoskey, Michigan. Defendant is a "foreclosing governmental unit" as defined in MCL 211.78(8)(a)(*i*), authorized to foreclose upon properties for delinquent property taxes under Michigan's General Property Tax Act (GPTA), MCL 211.1 *et seq*. On February 17, 2011, the trial court entered a judgment of foreclosure due to delinquent

property taxes, vesting absolute title to Units 40 through 42 and Units 67 through 100 of Harbor Watch in defendant if the Units were not redeemed by March 31, 2011.[1] The redemption period lapsed, and on May 25, 2011, defendant signed a notice of foreclosure for each unit and had the notices recorded in the office of the Emmet County Register of Deeds. Following the procedures required by MCL 211.78m, defendant conducted two public sales of the units. On September 16, 2011, defendant conveyed Units 73 and 74 by quitclaim deed, and defendant conveyed the remaining units on November 30, 2011, also by quitclaim deed.

Plaintiff initiated a complaint against defendant, asserting that defendant was required to pay the common expenses described in the Harbor Watch bylaws for the period defendant was an owner of the units. Specifically, plaintiff asserted that defendant owes plaintiff $97,366.09 in common expenses, late fees, and interest.

The parties filed cross-motions for summary disposition. Defendant asserted that it was required by law to foreclose the tax liens on the units and was therefore an involuntary taker of the property. Defendant argued that a condominium unit owner's duty to pay association assessments is contractual in nature, and that defendant, as an involuntary taker, did not agree to be bound by the terms of the condominium documents. Defendant further argued that it is not authorized by law to pay condominium association assessments because the GPTA controls how a country treasurer must allocate the funds received from a tax lien foreclosure auction, and the act does not provide a mechanism for defendant to pay plaintiff's assessments. Further, defendant argued that paying plaintiff's assessments would violate the Michigan Constitution and would be

[1] This is the statutory redemption period provided by the GPTA.

against public policy because the stated purpose of the foreclosure proceedings in the GPTA is to allow municipalities to collect unpaid taxes and quickly return delinquent properties to productive use.

Plaintiff argued that its own bylaws and the Condominium Act, MCL 559.101 *et seq.*, do not draw a distinction between private owners of condominium property and governmental owners of condominium property. In response to defendant's argument that defendant was an "involuntary taker," plaintiff cited MCL 211.78(5), which at that time stated, "The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963."[2] Plaintiff argued that under this statutory subsection, defendant was a voluntary purchaser bound by the obligation to pay condominium assessments.

The trial court granted defendant's motion for summary disposition and dismissed plaintiff's complaint primarily on the basis of its determination that under the GPTA, defendant's ownership of the condominium units was involuntary. The trial court opined that the requirement that a unit owner pay assessments was enforceable against voluntary purchasers and that the language in former MCL 211.78(5), stating that foreclosure of forfeited property is "voluntary," was intended to protect the law from a challenge under the Headlee Amendment[3] as an unfunded mandate.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App

[2] This statute was amended effective May 27, 2014, by 2014 PA 132. The relevant language is now located in Subsection (6).

[3] Const 1963, art 9, § 29.

200, 206; 828 NW2d 459 (2012). A motion brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint, and dismissal is warranted under this rule if the opposing party has failed to state a claim on which relief can be granted. *Rorke v Savoy Energy, LP*, 260 Mich App 251, 253; 677 NW2d 45 (2003). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 30-31; 651 NW2d 188 (2002).

The validity of the condominium documents and the requirement that a unit owner pay assessments is not in dispute. This case presents the question whether a county treasurer is liable for condominium assessments during the time it holds title to a condominium unit that is subject to forfeiture and foreclosure under the GPTA.

The Condominium Act specifically states, "Each unit co-owner, tenant, or nonco-owner occupant shall comply with the master deed, bylaws, and rules and regulations of the condominium project and this act." MCL 559.165. Under the relevant condominium bylaws, all of the costs, fees, and expenses incurred or payable by the condominium association are to be paid to the association by the owners of the condominiums in proportion to their percentage of value. "Owner" is defined in the condominium master deed as "any Person owning one or more Units." "Person" is defined as "any natural person, corporation, [etc.], or other entity that exists under the laws of the State of Michigan." The master deed, which was recorded in the Office of the Emmet County Register of Deeds, states that all its terms are "covenants running with the land . . . ."

However, as pointed out by defendant, the GPTA *required* defendant to foreclose on the forfeited units. Defendant cannot be held liable for assessments when it was performing a statutory obligation. MCL 211.78h(1) states as follows:

> Not later than June 15 in each tax year, the foreclosing governmental unit *shall* file a single petition with the clerk of the circuit court of that county listing all property forfeited and not redeemed to the county treasurer under section 78g to be foreclosed under section 78k for the total of the forfeited unpaid delinquent taxes, interest, penalties, and fees . . . . [Emphasis added.]

And, MCL 211.78g(2), referred to in MCL 211.78h(1), provides as follows:

> Not more than 45 days after property is forfeited under subsection (1), the county treasurer *shall* record with the county register of deeds a certificate in a form determined by the department of treasury for each parcel of property forfeited to the county treasurer, specifying that the property has been forfeited to the county treasurer and not redeemed and that absolute title to the property shall vest in the county treasurer on the March 31 immediately succeeding the entry of a judgment foreclosing the property under [MCL 211.78k]. [Emphasis added.]

Use of the term "shall" designates the actions of the county treasurer as mandatory rather than discretionary.

Plaintiff nonetheless asserts that the version of MCL 211.78(5) in effect at the relevant time provided that defendant's acquisition was voluntary. Former MCL 211.78(5) stated, "The foreclosure of forfeited property by a county is voluntary and is not an activity or service required of units of local government for purposes of section 29 of article IX of the state constitution of 1963." "[I]t is important to ensure that words in a

statute not be ignored, treated as surplusage, or rendered nugatory." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). When used in a statute, the phrase "for purposes of" necessarily indicates that the words that follow that phrase limit the application of the statute. Accordingly, the phrase was used in former MCL 211.78(5) to indicate that the Legislature did not intend to violate the Headlee Amendment, Const 1963, art 9, § 29, by creating an unfunded mandate. Therefore, the trial court properly held that the Legislature intended that this subsection serve to insulate the GPTA from a challenge under the Headlee Amendment. To hold that the word "voluntary" as used in former MCL 211.78(5) is evidence that foreclosure proceedings under the GPTA are not mandatory would render the limitation "for purposes of [the Headlee Amendment]" nugatory.

Defendant also correctly asserts that the GPTA provides no mechanism by which it can pay plaintiff's assessments. The GPTA, in MCL 211.78m, prescribes the procedure a county treasurer must follow to dispose of foreclosed properties at public auction. The GPTA directs the county treasurer to "deposit the proceeds from the sale of property under this section into a restricted account designated as the 'delinquent tax property sales proceeds for the year _____'. " MCL 211.78m(8). The GPTA further directs that the county treasurer may only use the proceeds for the limited purposes listed, in order of priority, in MCL 211.78m(8)(a) through (f). Nowhere on the list of permitted uses is the payment of assessments to a condominium association.

Plaintiff contends that MCL 211.78m(8)(e) allows defendant to pay maintenance costs and asserts that the condominium assessments are a maintenance cost.

Even if plaintiff were correct that a condominium assessment could be considered a maintenance cost, it is clear from this record that there would have been no proceeds available to pay those costs. The first priority under MCL 211.78m(8)(a) is to pay "all taxes, interest, and fees on all of the property" into the "delinquent tax revolving fund."[4] The uncontested record evidence shows that the sales of the units did not generate enough proceeds to cover the taxes due on the properties, let alone the costs of conducting the sales and foreclosure proceedings under MCL 211.78m(8)(b) through (d).

Plaintiff also argues that defendant could have included the assessments in its calculation of a "minimum bid" under former MCL 211.78m(11).[5] This is inconsistent with the statutory scheme. As previously stated, a county treasurer must deposit all proceeds from the foreclosure sale into a restricted account and may only use the proceeds according to the priority set out in MCL 211.78m(8)(a) to (f). Defendant could not have disregarded the statutory priority order in order to pay plaintiff out of the proceeds of the sale even if the condominium assessments had been included in defendant's calculation of the minimum bid.

This Court's opinion in *Parker v West Bloomfield Twp*, 60 Mich App 583, 592; 231 NW2d 424 (1975), and the earlier opinion of the Michigan Supreme Court in *Webb v Wakefield Twp*, 239 Mich 521, 526; 215 NW 43 (1927), state the general rule that a municipality cannot be legally bound to perform an ultra vires act. In both cases, each Court held that the plaintiff was able to

[4] Delinquent tax revolving funds are described in MCL 211.87b. The funds are used to pay taxes owed to the county and to "any other political unit for which delinquent tax payments are due . . . ." MCL 211.87b(3).

[5] Now MCL 211.78m(16).

recover based on equitable principles (estoppel in *Parker* and quantum meruit in *Webb*). The controlling fact in both cases was that, although formalities had not been followed, performance was within the defendant's legal authority. *Webb*, 239 Mich at 526-528; *Parker*, 60 Mich App at 592-593, 599. In this case, defendant does not have the legal authority under the GPTA to pay the condominium assessments. "[A]n executory contract of a municipal corporation made without authority may not be enforced . . . ." *Webb*, 239 Mich at 526-528. The trial court therefore properly granted summary disposition in defendant's favor.

Affirmed. No costs, a public question being involved.

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

WYOMING CHIROPRACTIC HEALTH CLINIC, PC v AUTO-OWNERS INSURANCE COMPANY

Docket No. 317876. Submitted December 3, 2014, at Detroit. Decided December 9, 2014, at 9:00 a.m. Leave to appeal denied at 498 Mich 1029.

Wyoming Chiropractic Health Clinic, PC, brought an action in the Wayne Circuit Court against Auto-Owners Insurance Company, seeking payment under the no-fault act, MCL 500.3101 *et seq*., for services that plaintiff allegedly provided to Mary Catoni and her grandson, Kalem Rowe-Catoni, following a motor vehicle accident. Defendant moved for summary disposition, asserting that plaintiff did not have standing to bring the action and that plaintiff was not the real party in interest. The court, Jeanne Stempien, J., denied the motion. Defendant appealed.

The Court of Appeals *held*:

Under MCL 500.3112, personal protection insurance benefits are payable to or for the benefit of an injured person or, in the case of his or her death, to or for the benefit of his or her dependents. Payment by an insurer in good faith of personal protection insurance benefits to or for the benefit of a person who it believes is entitled to benefits discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person. The no-fault act permits an insurer to pay another person or entity for the benefit of the injured individual, and a healthcare provider has the right to be paid for an injured person's no-fault medical expenses. Therefore, under the statutory language, healthcare providers have an independent cause of action against insurers for personal protection insurance benefits for medical expenses associated with the treatment of the injured individual. In this case, accordingly, plaintiff had standing to bring a cause of action against defendant for personal protection insurance benefits. In *Aetna Cas & Surety Co v Starkey*, 116 Mich App 640 (1982), the Court of Appeals held that an insured individual could not assign to a hospital her right to benefits. But to the extent that *Starkey* prohibited a direct cause of action by a healthcare provider against an insurer, *Starkey* was abrogated by later cases. The trial court here properly denied defendant's motion for summary disposition.

Affirmed.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — STANDING — HEALTHCARE PROVIDERS.

A healthcare provider may bring an independent cause of action for personal protection insurance benefits against an insurer for medical expenses associated with the treatment of the injured individual (MCL 500.3112).

Haas & Goldstein, PC (by *Laurie Goldstein*), for plaintiff.

Secrest Wardle (by *Mark F. Masters* and *Drew Broaddus*) for defendant.

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

TALBOT, J. Auto-Owners Insurance Company (Auto-Owners) appeals as of right an order entering judgment in favor of Wyoming Chiropractic Health Clinic, PC (Wyoming Chiropractic). We affirm.

Auto-Owners argues that the trial court erred by denying its motion for summary disposition because Wyoming Chiropractic, a healthcare provider, did not have standing to bring an action against Auto-Owners, an insurer, for the purpose of obtaining personal injury protection (PIP) benefits under the personal protection benefits provision of the no-fault act.[1] We disagree.

Auto-Owners brought the motion for summary disposition under MCR 2.116(C)(8) and (10). This Court reviews de novo a trial court's ruling on a defendant's motion for summary disposition.[2] This Court also reviews de novo issues of statutory interpretation.[3]

A motion for summary disposition is properly considered under MCR 2.116(C)(8) or (10) when the movant

[1] MCL 500.3112.

[2] *Dalley v Dykema Gossett PLLC*, 287 Mich App 296, 304; 788 NW2d 679 (2010).

[3] *Grimes v Van Hook-Williams*, 302 Mich App 521, 526-527; 839 NW2d 237 (2013).

argues that the nonmovant is not the real party in interest in a suit.[4] In this case, Auto-Owners argued that Wyoming Chiropractic was not the real party in interest because Wyoming Chiropractic improperly asserted the rights of the insured individuals, Mary Catoni and her grandson, Kalem Rowe-Catoni, under the no-fault act.[5] Therefore, the motion was properly considered under MCR 2.116(C)(8) or (10).

A motion for summary disposition under MCR 2.116(C)(8) is granted if the party opposing the motion " 'has failed to state a claim on which relief can be granted.' "[6] A trial court's decision under MCR 2.116(C)(8) is based solely on the pleadings.[7] Accordingly, "[a] party may not support a motion under subrule (C)(8) with documentary evidence such as affidavits, depositions, or admissions."[8] "[T]his Court accepts all well-pleaded factual allegations as true and construes them in the light most favorable to the nonmoving party."[9] Summary disposition under MCR 2.116(C)(8) is only proper when "the claim 'is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery.' "[10] The parties did not support their arguments with

[4] *Leite v Dow Chem Co*, 439 Mich 920 (1992). Although *Leite* was an order of the Michigan Supreme Court, the order is binding because "it constitute[d] a final disposition of an application and contain[ed] 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).

[5] See *In re Beatrice Rottenberg Living Trust*, 300 Mich App 339, 355; 833 NW2d 384 (2013) (stating that "the real-party-in-interest rule is essentially a prudential limitation on a litigant's ability to raise the legal rights of another").

[6] *Dalley*, 287 Mich App at 304, quoting MCR 2.116(C)(8).

[7] *Dalley*, 287 Mich App at 304.

[8] *Id*. at 305.

[9] *Id*. at 304-305.

[10] *Id*. at 305 (citation omitted).

documentary evidence, and the trial court based its decision solely on the pleadings. Therefore, this Court's review of Auto-Owners's motion for summary disposition is proper under MCR 2.116(C)(8).

Auto-Owners also argued in its motion for summary disposition that there was an issue of statutory standing, which implicated the trial court's jurisdiction under MCR 2.116(C)(4). Specifically, Auto-Owners asserted that the no-fault act did not give Wyoming Chiropractic standing to bring a cause of action.[11] This Court reviews de novo a claim that a trial court lacks jurisdiction to hear a case.[12] Summary disposition under MCR 2.116(C)(4) is proper "when the trial court 'lacks jurisdiction of the subject matter' " in a case.[13] This Court examines whether the pleadings, affidavits, depositions, admissions, and documents in the case show that the trial court lacked subject matter jurisdiction.[14]

"Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of [MCL 500.3101 through MCL 500.3179]."[15]

> Personal protection insurance benefits are payable to *or for the benefit of* an injured person or, in case of his death,

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[11] See *Rottenberg Living Trust*, 300 Mich App at 355 ("The principle of statutory standing is jurisdictional; if a party lacks statutory standing, then the court generally lacks jurisdiction to entertain the proceeding or reach the merits."); *Packowski v United Food & Commercial Workers Local 951*, 289 Mich App 132, 138; 796 NW2d 94 (2010) (stating that summary disposition is proper under MCR 2.116(C)(4) when the trial court lacks subject matter jurisdiction over the case).

[12] *Packowski*, 289 Mich App at 138.

[13] *Id.*, quoting MCR 2.116(C)(4).

[14] *Packowski*, 289 Mich App at 138-139.

[15] MCL 500.3105(1).

> to or for the benefit of his dependents. Payment by an insurer in good faith of personal protection insurance benefits, to *or for the benefit of* a person who it believes is entitled to the benefits, discharges the insurer's liability to the extent of the payments unless the insurer has been notified in writing of the claim of some other person.[16]

This Court has discussed the issue whether a healthcare provider may sue an insurer for PIP benefits under the no-fault act. In *Munson Med Ctr v Auto Club Ins Ass'n*,[17] the plaintiff was a hospital, which sued an insurer for payment of unpaid bills under the no-fault act. This Court noted that the plaintiff had a "right to be paid for the injureds' no-fault medical expenses" under the no-fault statute.[18]

Additionally, in *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*,[19] the issue before this Court was whether the trial court erred by holding that the plaintiff, a healthcare services provider, was entitled to enforce the penalty interest and attorney fee provisions of the no-fault act against the defendant, a no-fault insurer. The plaintiff provided rehabilitation services to an insured individual injured in a motor vehicle accident.[20] The plaintiff filed a claim for payment for healthcare services provided to the injured individual.[21] In the trial court, the defendant was ordered to pay the plaintiff for the rehabilitation services.[22] On appeal to this Court, the defendant did not challenge the plain-

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[16] MCL 500.3112 (emphasis added).

[17] *Munson Med Ctr v Auto Club Ins Ass'n*, 218 Mich App 375, 378; 554 NW2d 49 (1996).

[18] *Id*. at 381.

[19] *Lakeland Neurocare Ctrs v State Farm Mut Auto Ins Co*, 250 Mich App 35, 36-37; 645 NW2d 59 (2002).

[20] *Id*. at 36.

[21] *Id*.

[22] *Id*. at 36-37.

tiff's ability to recover for the medical services that the plaintiff provided to the injured individual.[23] This Court analyzed the plain language of MCL 500.3112 and determined that the plaintiff was entitled to prompt payment because the plaintiff brought a claim for PIP benefits "for the benefit of" the injured individual when the plaintiff submitted a claim for PIP benefits to the defendant.[24] Therefore, the plaintiff could sue the defendant for enforcement of the penalty interest provision of the no-fault act, which requires an insurer to pay interest if a payment is overdue by more than 30 days.[25] This Court further clarified that the fact that the plaintiff was not the injured individual was "not dispositive" because the no-fault act permits an insurer to pay another person or entity " 'for the benefit of' " the injured individual.[26] This Court stated that it was common practice for insurers to reimburse healthcare providers directly, but this was because MCL 500.3112 allows a healthcare provider to receive payment from an insurer.[27] Therefore, industry practice was not the basis for this Court's decision.

Then, in *Univ of Mich Regents v State Farm Mut Ins Co*,[28] one issue that this Court discussed was whether the plaintiffs' claim for medical expenses under the no-fault act was barred by the applicable statute of limitations even though the plaintiffs were a political subdivision of the state of Michigan. The plaintiffs were the Regents of the University of Michigan and ran the

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[23] *Id*. at 37.

[24] *Id*. at 38-39.

[25] *Id*.

[26] *Id*. at 39, quoting MCL 500.3112.

[27] *Lakeland Neurocare*, 250 Mich App at 39.

[28] *Univ of Mich Regents v State Farm Mut Ins Co*, 250 Mich App 719, 731-734; 650 NW2d 129 (2002).

hospital that provided medical care to the individual involved in an automobile accident.[29] The defendant argued that the plaintiffs' claim was subject to the statute of limitations because the plaintiffs' claim derived from the insured individual's claim.[30] This Court disagreed and clarified that, "[a]lthough plaintiffs may have derivative claims, they also have direct claims for personal protection insurance benefits."[31] This was because the plaintiffs governed a hospital that provided medical care, rather than because the plaintiffs were a political subdivision of the state.[32] This Court cited *Munson* for the proposition that "a hospital that provides medical care is to be reimbursed by the injured person's no-fault insurance company."[33] Thus, this Court explained that the plaintiffs had a direct claim against the defendant for the medical expenses associated with treatment of the injured individual.[34]

Next, in *Borgess Med Ctr v Resto* (*Resto I*),[35] this Court cited *Lakeland Neurocare* for the premise "that a party providing benefits to an injured person entitled to no-fault benefits may make a direct claim against a no-fault insurer." This Court clarified that a healthcare provider does not "stand[] in the shoes" of the injured person, but instead has a direct claim against the insurer under the no-fault act.[36] This Court reiterated the fact that MCL 500.3112 "contemplates the payment

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[29] *Id*. at 722-723.

[30] *Id*. at 733.

[31] *Id*.

[32] See *id*.

[33] *Id*., citing *Munson*, 218 Mich App 375.

[34] See *Regents*, 250 Mich App at 733.

[35] *Borgess Med Ctr v Resto*, 273 Mich App 558, 569; 730 NW2d 738 (2007) (*Resto I*), vacated and judgment aff'd 482 Mich 946 (2008) (*Resto II*).

[36] *Resto I*, 273 Mich App at 569.

of PIP benefits to someone other than the injured person and that a provider of health care to a person injured in an automobile accident is a no-fault 'claimant' entitled to seek [penalty interest and attorney fees]."[37] Therefore, under *Resto I*, a healthcare provider that provides benefits to an injured individual has a cause of action against a no-fault insurer.[38] In *Borgess Med Ctr v Resto* (*Resto II*),[39] however, the Michigan Supreme Court vacated the majority opinion in *Resto I*, because of the Court's determination of an unrelated issue. The Michigan Supreme Court affirmed this Court's judgment based on the reasoning of the concurring opinion.[40] The concurring opinion did not discuss whether the plaintiff had standing to sue.[41] Therefore, this Court cannot rely on the majority opinion in *Resto I*.

Recently, this Court reiterated the fact that the no-fault act creates an independent cause of action for healthcare providers when it stated, "We note that the language 'or on behalf of' in the release is similar to the phrase 'or for the benefit of' in MCL 500.3112, which this Court has recognized creates an independent cause of action for healthcare providers."[42]

Based on the above, we conclude that Wyoming Chiropractic had standing to bring a cause of action against Auto-Owners for PIP benefits under the no-fault act. This Court established in *Munson* that a

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[37] *Id*.

[38] *Id*. at 569-570.

[39] *Resto II*, 482 Mich 946.

[40] *Id*.

[41] *Resto I*, 273 Mich App at 585 (WHITE, J., concurring).

[42] *Mich Head & Spine Institute, PC v State Farm Mut Auto Ins Co*, 299 Mich App 442, 448 n 1; 830 NW2d 781 (2013), citing *Lakeland Neurocare*, 250 Mich App at 39.

healthcare provider has the "right to be paid for the injureds' no-fault medical expenses . . . ."[43] This Court further explained in *Lakeland Neurocare* that when a healthcare provider submits a claim for payment under the no-fault act, the healthcare provider submits the claim "for the benefit of" the injured individual.[44] The fact that a healthcare provider submits a claim on behalf of an injured individual allows a healthcare provider to sue to enforce the penalty provisions of the no-fault act.[45] Thus, by implication, a healthcare provider may also bring an action for PIP benefits "for the benefit of" an injured individual.[46] Finally, this Court clarified that its decision in *Lakeland Neurocare* held that a healthcare provider has a direct cause of action to sue an insurer for PIP benefits under the no-fault act.[47] Therefore, Wyoming Chiropractic may bring a claim against Auto-Owners for PIP benefits under the no-fault act.

Auto-Owners argues that this Court did not discuss the issue whether a healthcare provider is entitled to sue an insurer for PIP benefits in *Lakeland Neurocare* because the issue was uncontested on appeal. Auto-Owners also asserts that this Court's statement in *Lakeland Neurocare* that "it is common practice for insurers to directly reimburse health care providers for services rendered to their insureds" was dicta.[48] However, this Court's reasoning in *Lakeland Neurocare* applies to a healthcare provider's claim for PIP benefits. This Court reasoned that a healthcare provider is

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[43] *Munson*, 218 Mich App at 381.

[44] *Lakeland Neurocare*, 250 Mich App at 38-39.

[45] *Id*. at 38-40.

[46] See *id*.

[47] *Mich Head & Spine*, 299 Mich App at 448 n 1; *Regents*, 250 Mich App at 733.

[48] *Lakeland Neurocare*, 250 Mich App at 39.

entitled to enforce the penalty provision of the no-fault act because a healthcare provider is entitled to payment of the PIP benefits.[49] Therefore, the fact that a healthcare provider is entitled to payment, as well as the fact that a healthcare provider can sue to enforce the penalty provision of the no-fault act, indicates that a healthcare provider may bring a cause of action to recover the PIP benefits under the no-fault act.[50] This interpretation is consistent with this Court's interpretation of *Lakeland Neurocare*.[51] In addition, this Court's holding that MCL 500.3112 entitles a healthcare provider to payment was based on this Court's interpretation of the statute, rather than this Court's statement regarding industry practice.[52] Therefore, Auto-Owners's argument fails.

Auto-Owners cites several cases to support its argument that Wyoming Chiropractic does not have standing to sue under the no-fault act for services provided to Catoni and Rowe-Catoni. Auto-Owners argues that this Court's decision in *Aetna Cas & Surety Co v Starkey*[53] controls the outcome in this case. In *Starkey*, the insured individual assigned her right to the benefits that would become due as a result of her son's medical treatment to a hospital.[54] This Court held that the assignment was void under the "nonassignability" section of the no-fault act.[55] This Court clarified that the insurer could have paid the hospital for the injured

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[49] *Id*.

[50] See *id*. at 38-40.

[51] *Mich Head & Spine*, 299 Mich App at 448 n 1.

[52] See *Lakeland Neurocare*, 250 Mich App at 39.

[53] *Aetna Cas & Surety Co v Starkey*, 116 Mich App 640; 323 NW2d 325 (1982), abrogated in part on other grounds by *Garcia v Butterworth Hosp*, 226 Mich App 254, 257 (1997).

[54] *Starkey*, 116 Mich App at 642.

[55] *Id*. at 646.

individual's medical bills as long as the individual did not file another claim for the same PIP benefits.[56] This Court further clarified that there were no exceptions to the statutory prohibition against assignment of benefits.[57]

This case can be distinguished from *Starkey* because Catoni did not assign her rights under her contract with Auto-Owners to Wyoming Chiropractic. Instead, Wyoming Chiropractic asserts a direct cause of action for the value of the chiropractic services it provided to Catoni and Rowe-Catoni. Furthermore, Wyoming Chiropractic only seeks payment for the services provided to Catoni and Rowe-Catoni, while the assignment in *Starkey* was not limited to services already performed or services provided by the hospital.[58] To the extent that *Starkey* prohibits a direct cause of action by a healthcare provider against an insurer under the no-fault act, *Starkey* has been abrogated by *Munson*, *Lakeland Neurocare*, and *Regents*.[59]

Auto-Owners cites *In re Hales Estate*,[60] for the proposition that Wyoming Chiropractic does not have standing to sue Auto-Owners for PIP benefits. This Court in *Hales* considered the issue whether a mother of an adult son who acted as the son's guardian-conservator and paid a portion of the son's medical expenses could recover duplicate PIP benefits under the son's no-fault

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[56] *Id*.

[57] *Id*. at 646-647.

[58] See *id*. at 642.

[59] See *Regents*, 250 Mich App at 733; *Lakeland Neurocare*, 250 Mich App at 39; *Munson*, 218 Mich App at 381; see also MCR 7.215(J)(1) (providing that this Court must follow the holding in a published decision issued on or after November 1, 1990, that has not been modified or reversed by the Michigan Supreme Court or a special panel of this Court).

[60] *In re Hales Estate*, 182 Mich App 55, 58; 451 NW2d 867 (1990).

policy.[61] This Court held that the mother was not entitled to subrogation with regard to the expenses that the defendant paid for the son's medical care.[62] This case can be distinguished from *Hales* because Wyoming Chiropractic alleges that it was entitled to reimbursement from Auto-Owners for chiropractic services performed on Catoni and Rowe-Catoni, while the plaintiff in *Hales* sought to recover duplicate benefits under her son's no-fault policy.[63]

Auto-Owners also cites to *Belcher v Aetna Cas & Surety Co*,[64] in which the Michigan Supreme Court stated that PIP benefits are "payable only to injured persons or surviving dependents of the injured person." However, the issue in *Belcher* was whether survivors of uninsured, deceased individuals could recover survivors' loss benefits.[65] The Michigan Supreme Court held that the survivors could not recover survivors' loss benefits.[66] The Michigan Supreme Court did not discuss whether a healthcare provider could recover PIP benefits under the no-fault act, nor did it interpret the meaning of the phrase "for the benefit of" in MCL 500.3112. Thus, this case can be distinguished from *Belcher* given that Wyoming Chiropractic argues that it is directly entitled to medical benefits, rather than survivors' loss benefits, under the no-fault act.

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[61] *Id*. at 56-60.

[62] *Id*. at 59-60.

[63] See *id*. at 56-59; see also *Hatcher v State Farm Mut Auto Ins Co*, 269 Mich App 596, 599-600; 712 NW2d 744 (2006) (holding that a mother could not bring a derivative action for PIP benefits on behalf of her daughter because the right to bring the action belonged to the daughter).

[64] *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 243-244; 293 NW2d 594 (1980).

[65] *Id*. at 236.

[66] *Id*.

In addition, the public policy goals of the no-fault act support allowing a healthcare provider to have standing to sue an insurer for PIP benefits. Auto-Owners argues that this rule will force insurers to defend multiple lawsuits at different times and in different courts. Auto-Owners also points out that insurers face an increased risk of having to pay penalty interest if healthcare providers have standing to sue because insurers will not be able to concentrate their efforts on paying insured individuals on time and at "fair and equitable rates." However, as discussed earlier in this opinion, this Court interpreted the plain language of MCL 500.3112 as allowing healthcare providers to maintain direct causes of action against insurers to recover PIP benefits under the no-fault act.[67] Therefore, the Michigan Legislature addressed the public policy issues related to healthcare provider standing when it drafted MCL 500.3112.[68]

Furthermore, public policy favors provider suits. The goal of the no-fault act is " 'to provide victims of motor vehicle accidents with assured, adequate, and prompt reparation for certain economic losses.' "[69] The no-fault act was designed to remedy " 'long delays, inequitable payment structure, and high legal costs' " in the tort system.[70] Allowing a healthcare provider to bring a cause of action expedites the payment process to the healthcare provider when payment is in dispute. Thus, provider standing meets the goal of prompt reparation

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[67] See *Mich Head & Spine*, 299 Mich App at 448 n 1; *Regents*, 250 Mich App at 733; *Lakeland Neurocare*, 250 Mich App at 39.

[68] See, e.g., *Woodman v Kera LLC*, 486 Mich 228, 245; 785 NW2d 1 (2010) (opinion by YOUNG, J.) (recognizing the Michigan Legislature's superiority in creating public policy).

[69] *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 595; 648 NW2d 591 (2002) (citation omitted).

[70] *Id*. (citation omitted).

for economic losses. Healthcare provider standing also offers a healthcare provider a remedy when an injured individual does not sue an insurer for unpaid PIP benefits, thus preventing inequitable payment structures and promoting prompt reparation. Therefore, public policy supports this Court's prior opinions. For the reasons stated in this opinion, the trial court properly denied Auto-Owners's motion for summary disposition. Wyoming Chiropractic had standing to sue Auto-Owners for PIP benefits under the no-fault act.

Affirmed.

JANSEN, P.J., and SERVITTO, J., concurred with TALBOT, J.

BULLARD v OAKWOOD ANNAPOLIS HOSPITAL

Docket No. 317334. Submitted November 5, 2014, at Detroit. Decided December 9, 2014, at 9:05 a.m.

Bruce Bullard, Jr., brought a premises liability action against Oakwood Annapolis Hospital in the Wayne Circuit Court. Plaintiff, an electrician, performed a monthly inspection of defendant's generators. Servicing one of the generators required plaintiff to climb an indoor ladder to reach the roof of the hospital, open a hatch, cross a stone walkway, scale another ladder, cross a metal catwalk to the generator, and walk across three 2 × 8 planks to reach the generator's control panel. The planks were not secured and were approximately 5 to 6 feet above the roof. On February 23, 2011, plaintiff attempted to cross the wooden planks. He slipped on ice that had formed on the planks and was injured when he fell onto the roof. Defendant moved for summary disposition, asserting that the ice was an open and obvious hazard that could not give rise to liability. The court, Jeanne Stempien, J., denied the motion. Defendant appealed on leave granted.

The Court of Appeals *held*:

The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of injury. A landowner must exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. A landowner, however, does not have to protect invitees from open and obvious hazards because those hazards, by their nature, apprise the invitee of the potential danger, which the invitee may then take reasonable measures to avoid. Whether a hazard is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection. If a hazard is open and obvious, liability does not arise unless special aspects of the hazard make even the open and obvious risk unreasonably dangerous as when (1) the hazard is, in and of itself, unreasonably dangerous or (2) the

hazard is rendered unreasonably dangerous because it is effectively unavoidable. In this case, there was no dispute that (1) plaintiff was an invitee, (2) the ice was the proximate cause of his injuries and caused him damages, and (3) the ice was an open and obvious hazard. The only question was whether the ice had special aspects that could give rise to liability. The ice on which plaintiff slipped was not unreasonably dangerous in and of itself because it did not present a substantial risk of death or severe injury. Unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome. The fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable. Plaintiff, in this case, had ample opportunity to avoid the ice. His fall was the result of choices he made that could have been made differently; he was not effectively trapped by the ice. Because the ice was neither unreasonably dangerous in and of itself nor effectively unavoidable, the trial court erred when it ruled that there was a question of fact as to whether the ice had special aspects that could give rise to liability.

Reversed and remanded for entry of summary disposition in favor of defendant.

NEGLIGENCE — PREMISES LIABILITY — OPEN AND OBVIOUS DANGERS — SPECIAL ASPECTS — EFFECTIVELY UNAVOIDABLE DANGERS — JOB DUTIES.

If a hazard is open and obvious, liability does not arise unless special aspects of the hazard make even the open and obvious risk unreasonably dangerous as when (1) the hazard is, in and of itself, unreasonably dangerous, or (2) the hazard is rendered unreasonably dangerous because it is effectively unavoidable; unavoidability is characterized by an inability to be avoided, an inescapable result, or the inevitability of a given outcome; the fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable.

Bernstein & Bernstein, PC (by *Mark M. Grayell*), for plaintiff.

Tanoury, Nauts, McKinney & Garbarino, PLLC (by *Linda M. Garbarino*, *Anita Comorski*, and *Carmine G. Paterra*), for defendant.

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

SAAD, J.

I. INTRODUCTION

This case stems from a slip and fall accident. Plaintiff, Bruce Bullard, Jr. (Bullard), slipped on ice that formed on a wood plank on the roof at defendant Oakwood Annapolis Hospital (Oakwood). Under Michigan caselaw, ice is an "open and obvious" hazard. Open and obvious hazards cannot give rise to liability unless they cause an accident that involves "special aspects." Specifically, a hazard might have special aspects that give rise to liability if the hazard is (1) "unreasonably dangerous" in and of itself, or (2) "effectively unavoidable" for the plaintiff.

The trial court wrongly denied Oakwood's motion for summary disposition. It correctly held that the ice was an open and obvious hazard, but erred by holding that the ice was "unreasonably dangerous" in and of itself, or was "effectively unavoidable" for Bullard. The only issue before our Court is whether the ice on which Bullard slipped was (1) unreasonably dangerous in and of itself or (2) effectively unavoidable for him.

Because the ice was neither unreasonably dangerous in and of itself, nor was it effectively unavoidable for Bullard, no special aspects were present, and the ice was an open and obvious hazard that could not give rise to liability. Accordingly, we reverse the holding of the trial court and remand for entry of an order granting summary disposition to Oakwood pursuant to MCR 2.116(C)(10).

II. FACTS AND PROCEDURAL HISTORY

At all relevant times, Bullard was employed as an electrician for Edgewood Electric, which held a contract

with Oakwood to perform maintenance. Bullard has worked at Oakwood since 1998, and was assigned to work full-time at the hospital in 2009. Part of his property maintenance duties included testing the hospital's five generators, which Bullard did on a monthly basis. One of the generators is located on the hospital roof and is not easy to access—servicing it required Bullard to climb an indoor ladder to reach the roof, open a hatch, cross a stone walkway, scale another ladder, cross a metal catwalk to the generator, and finally walk across three 2 × 8 planks to reach the generator's control panel. The planks, which are the only way to reach the control panel, are not secured and are approximately 5 to 6 feet above the roof.

In late February 2011, Bullard prepared to do his monthly inspection of the roof generator. On February 22, he asked hospital maintenance to clear snow from the stone walkway and 2 × 8 planks, because he planned to inspect the generator the next day. On February 23, at around 4:00 or 4:30 a.m., Bullard went up to the roof to inspect the generator. Though the roof was covered in snow, the stone pathway, metal catwalk, and planks had been cleared, as requested. As Bullard stepped on the first wooden plank to reach the control panel, he slipped on ice that had formed on the plank, and injured himself by falling to the roof below.

Bullard subsequently filed suit in the Wayne Circuit Court, and alleged that Oakwood was liable for negligence because it failed to remove a "dangerous condition"—ice—from its premises. He emphasized that the ice was "unavoidable" as part of his work duties. Oakwood responded by moving for summary disposition under MCR 2.116(C)(8) and (10). It argued that the ice was an open and obvious hazard under Michigan law, which precluded Bullard's negligence

suit. Oakwood further asserted that the two special aspects of an open and obvious hazard that can give rise to liability were not present in this case.

As previously stated, the trial court wrongly denied Oakwood's motion for summary disposition. In its holding from the bench, the court stated correctly that the ice on the 2 × 8 planks was an open and obvious condition, but it erred when it held that there was a question of fact as to whether the ice was unreasonably dangerous or effectively unavoidable as part of Bullard's job.

Oakwood sought leave to appeal the trial court's order. Our Court granted the application for leave, but explicitly limited the appeal to the issues raised in Oakwood's application—namely, whether the ice was unreasonably dangerous or effectively unavoidable for Bullard.[1] Specifically, Oakwood argues that ice is not a hazard that presents a substantial risk of severe harm or death, which means that it cannot be unreasonably dangerous. And Oakwood stresses that Bullard ultimately chose to access the generator and face whatever hazards existed on the way there, which means that the ice was not effectively unavoidable for him.

Bullard argues that the ice was an unreasonably dangerous hazard because of his injuries. He also claims that the ice was effectively unavoidable because it was located on the 2 × 8 planks, and the planks were the only way for him to access the generator control panel—which he had to access in the course of his employment.

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[1] In other words, our Court barred Bullard from contesting the trial court's holding that the ice was an open and obvious condition. See *Bullard v Oakwood Annapolis Hosp*, unpublished order of the Court of Appeals, entered January 10, 2014 (Docket No. 317334).

III. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A motion for summary disposition under MCR 2.116(C)(10)[2] challenges the factual sufficiency of a claim, and we consider the evidence—including "affidavits, depositions, admissions, or other documentary evidence"—in the light most favorable to the nonmoving party. *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 115; 839 NW2d 223 (2013). Summary disposition may be granted under MCR 2.116(C)(10) when "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. at 116 (quotation marks and citation omitted).

IV. ANALYSIS

A. THE OPEN AND OBVIOUS DOCTRINE

A plaintiff who brings a premises liability action must show " '(1) the defendant owed [him] a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of [his] injury, and (4) [he] suffered damages.' " *Sanders v Perfecting Church*, 303 Mich App 1, 4; 840 NW2d 401 (2013) (citation omitted). "The duty owed to a visitor by a landowner depends on whether the visitor was a trespasser, licensee, or invitee at the time of the injury." *Id*. A visitor is granted invitee status only if the purpose for which he was invited onto the owner's property was "directly tied to the owner's commercial business interests." *Stitt v Holland Abun-*

[2] Because the trial court considered evidence outside the pleadings when it denied defendant's motion for summary disposition, we analyze this case under MCR 2.116(C)(10). See *Steward v Panek*, 251 Mich App 546, 554-555; 652 NW2d 232 (2002).

dant Life Fellowship, 462 Mich 591, 604; 614 NW2d 88 (2000). A landowner must "exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001).

However, Michigan law is clear that a landowner does not have to protect invitees from open and obvious dangers, because "such dangers, by their nature, apprise an invitee of the potential hazard, which the invitee may then take reasonable measures to avoid." *Hoffner v Lanctoe*, 492 Mich 450, 460-461; 821 NW2d 88 (2012). "Whether a danger is open and obvious depends on whether it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection." *Id*. at 461. This standard is an objective, not subjective, one and requires "an examination of the objective nature of the condition of the premises at issue." *Id*. (quotation marks and citation omitted). "The objective standard recognizes that a premises owner is not required to anticipate every harm that may arise as a result of the idiosyncratic characteristics of each person who may venture onto his land." *Id*. at 461 n 15.

Here, there is no dispute as to whether (1) Bullard was an invitee, (2) the ice on which he slipped was the proximate cause of his injury and caused him damages, and (3) the ice was an open and obvious hazard. This is because the trial court held that the ice was an open and obvious hazard, and our Court explicitly limited this appeal to a single issue: whether there are special aspects of Bullard's case that preclude application of the open and obvious hazard doctrine.[3]

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[3] See note 1 of this opinion.

B. SPECIAL ASPECTS

Recently, the Michigan Supreme Court emphasized that "exceptions to the open and obvious doctrine are *narrow* and designed to permit liability for such dangers only in *limited*, extreme situations." *Hoffner*, 492 Mich at 472. "[L]iability does not arise for open and obvious dangers *unless special aspects* of a condition make even an open and obvious risk *unreasonably dangerous*. This may include situations in which it is 'effectively unavoidable' for an invitee to avoid the hazard posed by such an inherently dangerous condition." *Id*. at 455. In other words, an open and obvious hazard that ordinarily precludes liability can have special aspects that give rise to liability in one of two ways: (1) the hazard is, in and of itself, unreasonably dangerous or (2) the hazard was rendered unreasonably dangerous because it was effectively unavoidable for the injured party. *Id*. at 472-473; see also *Lugo*, 464 Mich at 517-519.

1. UNREASONABLY DANGEROUS IN AND OF ITSELF

An open and obvious hazard that is unreasonably dangerous can give rise to liability. *Hoffner*, 492 Mich at 472-473; *Lugo*, 464 Mich at 517-519. An " 'unreasonably dangerous' hazard must be just that—not just a dangerous hazard, but one that is *unreasonably* so. And it must be *more than* theoretically or retrospectively dangerous, because even the most unassuming situation can often be dangerous under the wrong set of circumstances." *Hoffner*, 492 Mich at 472.

Because the question of what constitutes an unreasonably dangerous condition is a question of law, we examine Michigan caselaw for guidance. An example of an open and obvious hazard that is unreasonably dan-

gerous is "an unguarded thirty foot deep pit in the middle of a parking lot." *Lugo*, 464 Mich at 518. On the other hand, an example of an open and obvious hazard that is *not* unreasonably dangerous is ice and frost located on "several 2 x 4 slats of wood" nailed at the lower edge of an approximately 20-foot-high roof. *Perkoviq v Delcor Homes–Lake Shore Pointe, Ltd*, 466 Mich 11, 12-13; 643 NW2d 212 (2002). "The mere presence of ice, snow, or frost on a sloped rooftop generally does not create an unreasonably dangerous condition." *Id*. at 19-20.

Here, the ice on which Bullard slipped is not unreasonably dangerous in and of itself because it does not "present . . . a substantial risk of death or severe injury . . . ." *Lugo*, 464 Mich at 518. Bullard slipped and fell off a 2 × 8 plank that was 5 to 6 feet above the roof. This danger is clearly much less of a danger than that encountered by the plaintiff in *Perkoviq*, who slipped and fell off a 2 × 4 slat of wood that was approximately *20 feet* above the ground. *Perkoviq*, 466 Mich at 12-13. Moreover, the fact that plaintiff's job duties entailed a monthly walk across these planks during all weather conditions militates against a finding that the circumstances here constituted an unreasonably dangerous condition.

Accordingly, the ice is not unreasonably dangerous in and of itself, and we reverse the trial court's holding that it could be shown to have been unreasonably dangerous.

2. EFFECTIVELY UNAVOIDABLE

An open and obvious hazard that is effectively unavoidable for the plaintiff is unreasonably dangerous and, thus, may give rise to liability. *Hoffner*, 464 Mich at 472; *Lugo*, 464 Mich at 517-518. "Unavoidability is

characterized by an *inability to be avoided*, an *inescapable* result, or the *inevitability* of a given outcome." *Hoffner*, 464 Mich at 468. An effectively unavoidable hazard, therefore, "must truly be, for all practical purposes, one that a person is required to confront under the circumstances." *Id*. at 472. Put simply, the plaintiff must be "effectively trapped" by the hazard. *Joyce v Rubin*, 249 Mich App 231, 242; 642 NW2d 360 (2002). The mere fact that a plaintiff's employment might involve facing an open and obvious hazard does not make the open and obvious hazard effectively unavoidable. See *Perkoviq*, 466 Mich at 18; *Hoffner*, 492 Mich at 471-472.

Here, the ice on which Bullard slipped was not effectively unavoidable. In fact, the opposite is true: Bullard had ample opportunity to avoid the ice. He confronted the ice after making multiple decisions, any one of which he could have decided differently and thus avoided the hazard. Bullard was clearly aware of the potential risks of inspecting the generator on February 23, because he asked the hospital staff to clear the stone pathway and wood planks on February 22.[4] He arrived at Oakwood between 4:00 a.m. and 4:30 a.m. on February 23—a time when it was still dark. Rather than wait until daylight, Bullard chose to inspect the generator at this early hour, when it was dark and cold. When he opened the hatch to the roof, he saw that the pathways to the generator had been cleared of snow, as he had asked. As noted, the path to the generator involved a walk across multiple surfaces: a stone walkway, another ladder, a metal catwalk, and the 2 × 8 planks. Bullard chose to

[4] The fact that Bullard made this request (which was complied with by the hospital maintenance staff) belies his claim that his job required him to confront the snow and ice on the roof. He clearly was able to ask the hospital staff to remove weather-related hazards on the route to the rooftop generator, and could have done so again on February 23.

traverse each of these, before eventually slipping on the ice, falling, and suffering injury.

Accordingly, Bullard's fall was the end result of choices he made that could have been made differently. In no way was he "effectively trapped" by the ice—he consciously decided to put himself in a position where he would face the ice. *Joyce*, 249 Mich App at 242. After informing the hospital staff of the roof's snowy condition on February 22, Bullard could have refused to inspect the generator the next day, and instead waited until the weather improved—the inspection was a monthly occurrence and not necessitated by an emergency. On February 23, he could have waited to inspect the generator until later in the morning, when daylight might have alerted him to the possible hazards of doing so. When he reached the roof, he could have turned back—but he did not. He could have returned inside at any point on his journey to the generator—at the stone walkway, at the second ladder, at the catwalk—and sought assistance. And, again, because his job duties entailed monthly inspections, he had the option of speaking with his employer or to the hospital staff—as he did on February 22—regarding the conditions on the roof.

In sum, there is nothing inescapable or inevitable about Bullard's accident. See *Hoffner*, 464 Mich at 468. His argument to the contrary, which is that he was required to face the ice by virtue of his employment, is unavailing, and similar arguments have been rejected by the Michigan Supreme Court. See *Perkoviq*, 466 Mich at 18; *Hoffner*, 492 Mich at 471-472. His job duties did not mandate that he encounter an obvious hazard.

Bullard could have made different choices that would have prevented him from encountering the ice, and the ice was accordingly not effectively unavoidable. The

trial court's ruling that the ice could be shown to be effectively unavoidable was wrong.

V. CONCLUSION

The trial court's holding that the ice might have been unreasonably dangerous in and of itself, or effectively unavoidable for Bullard, is incorrect as a matter of law. Its holding is thus reversed, and we remand for entry of an order granting Oakwood's request for summary disposition under MCR 2.116(C)(10).

Reversed and remanded. We do not retain jurisdiction.

RIORDAN, P.J., and TALBOT, J., concurred with SAAD, J.

MOUZON v ACHIEVABLE VISIONS

Docket No. 312219. Submitted May 13, 2014, at Detroit. Decided December 9, 2014, at 9:10 a.m.

Alwyn Mouzon brought a negligence action in the Wayne Circuit Court against the Blackwell Center; its lessee, Achievable Visions; and others, after he was shot by a fellow attendee at an event hosted by Achievable Visions and held at the Blackwell Center. After the other defendants were dismissed by stipulation, Achievable Visions moved for summary disposition, arguing that it was neither vicariously liable for the alleged negligence of the security guards it had hired for the event nor directly liable for breaching its duty to plaintiff as a business invitee. The court, John H. Gillis, Jr., J., granted summary disposition in defendant's favor, and plaintiff appealed.

The Court of Appeals *held*:

The trial court did not err by granting defendant's motion for summary disposition. Defendant had no duty to provide security guards at the event, to ensure that any hired security guards did not act negligently, or to do anything more than reasonably expedite the involvement of the police in response to the criminal acts that occurred on the premises.

Affirmed.

Arnold E. Reed and Associates (by *Arnold E. Reed*) for Alwyn Mouzon.

Ward Anderson Porritt & Bryant (by *Michael D. Bryant* and *Nicolette S. Zachary*) for Achievable Visions.

Before: MARKEY, P.J., and SAWYER and WILDER, JJ.

PER CURIAM. Plaintiff, Alwyn Mouzon, appeals the trial court's order granting summary disposition to defendant Achievable Visions (hereafter "defendant"). We affirm.

This case stems from a bar fight and subsequent shooting of Alwyn Mouzon by Antoine Kope at the Blackwell Center in the city of Highland Park. Defendant began renting the Blackwell Center from the city of Highland Park in fall 2009, with the intentions of creating an after-hours dance club on weekends. As part of the agreement to lease the building, defendant agreed to provide security at all events and contracted with PPO Security Company to provide bouncers at all events held at the club.

During the early morning hours of May 1, 2010, sometime between midnight and 1:00 a.m., plaintiff, along with his friend, Phillip Clark, while on their way to Detroit to visit one of the casinos, drove by the Blackwell Center, observed women entering, and decided to check out the party before going to the casino. After entering through the security checkpoint, plaintiff began to mingle with the crowd, drink, and dance. From time to time, plaintiff would look to the front door to see more people entering the building. At some point around 1:30 a.m., plaintiff saw Antoine Kope enter the building and noticed that he had a pistol in his belt. Not wanting to be where there was a weapon present, plaintiff informed Clark that he would like to leave. Neither Clark nor plaintiff alerted the security team that Kope was carrying a weapon. Clark agreed to leave and went ahead of plaintiff to get their vehicle. As plaintiff was walking toward the door, he noticed Kope being loud and boisterous. It was at this time that Kope bumped into plaintiff, and an altercation ensued. After a verbal exchange, as well as pushing and shoving, plaintiff tried to run outside; before he could make it out the door, Kope shot him.

All parties testified that security was trying to make it to the fight. However, testimony is split on how long

the altercation lasted; plaintiff testified it was just a few moments, while several other parties stated it lasted almost 7 to 8 minutes. Defendant became aware of the situation in the dance hall when the DJ noticed the fight and stated over the speaker system, "We don't allow that here." Police, who were in the vicinity of the building at the time, arrived immediately on the scene after hearing gun shots. Kope did not obey orders to stop firing and was shot and killed by the officers.

Plaintiff filed the initial lawsuit against defendant, the Blackwell Center, and others, alleging that defendant was liable for injuries he sustained as a result of the shooting at the hands of Kope. Plaintiff alleged that defendant owed him a duty of protection that was breached as a result of Kope's being able to enter the building with a weapon and discharge that weapon. Defendant moved for summary disposition, arguing that it was not vicariously liable for the alleged negligent actions of the security guards, who were independent contractors. In opposing the motion, plaintiff first argued that there were factual questions as to whether the security guards were independent contractors or employees of defendant. Plaintiff next argued that defendant had a nondelegable duty to provide safe premises regardless of the security guards' status as independent contractors. Finally, plaintiff argued that a jury could find that defendant's actions in responding to the assault were unreasonable and that the defendant therefore breached the duty of care it owed its business invitee.

On appeal, plaintiff first argues that the trial court erred by granting summary disposition on the basis of its determination that any duty defendant had to plaintiff was satisfied as a matter of law when security personnel promptly responded to the altercation and

the police arrived at the scene at exactly the same time as the altercation. We disagree.

We review a trial court's decision regarding a motion to dismiss de novo. *Cork v Applebee's of Mich, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000). To sustain a premises liability action,

> a plaintiff must prove the elements of negligence: (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the breach was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. [*Benton v Dart Props, Inc*, 270 Mich App 437, 440; 715 NW2d 335 (2006), citing *Taylor v Laban*, 241 Mich App 449, 452; 616 NW2d 229 (2000).]

Questions regarding whether a duty exists are for the court to decide as a matter of law. *Scott v Harper Recreation, Inc*, 444 Mich 441, 448; 506 NW2d 857 (1993).

To the extent plaintiff's argument is based on the premise that defendant had an obligation to provide security guards at the event and to ensure that those security guards did not act negligently, the Supreme Court has made it clear that "a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties." *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 501; 418 NW2d 381 (1988). Moreover, in *Scott v Harper Recreation*, the Court held that even when a merchant voluntarily provides security, the merchant does not become liable for the negligent actions of the security guards:

> The central holding of *Williams* is that merchants are ordinarily not responsible for the criminal acts of third persons. The present suit is an attempt to circumvent that holding by invoking the principle that a person can be held liable for improperly discharging a voluntarily undertaken

> function. However, the rule of *Williams* remains in force, even where a merchant voluntarily takes safety precautions. Suit may not be maintained on the theory that the safety measures are less effective than they could or should have been. [*Scott*, 444 Mich at 452.]

Plaintiff next argues that defendant breached its duty to call the police. For this we look to *MacDonald v PKT, Inc*, 464 Mich 322; 628 NW2d 33 (2001). Plaintiff is correct that *MacDonald* requires "a merchant [to] make reasonable efforts to contact the police" in situations in which "criminal acts [are] occurring on the premises." *MacDonald*, 464 Mich at 336. "[A] merchant is not obligated to do anything more than reasonably expedite the involvement of the police." *Id*. at 338. But *MacDonald* also held that the duty to contact the police has been met if the police are already present at the scene. *Id*. at 339.

Plaintiff raised several issues on appeal that were not addressed or decided by the trial court. "For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Therefore, we will not address these issues.

Affirmed. Defendant may tax costs.

MARKEY, P.J., and SAWYER and WILDER, JJ., concurred.

BAHRI v IDS PROPERTY CASUALTY INSURANCE CO

Docket No. 316869. Submitted September 10, 2014, at Detroit. Decided October 9, 2014. Approved for publication December 9, 2014, at 9:15 a.m. Leave to appeal sought.

Nazhat Bahri brought an action in the Wayne Circuit Court, seeking to recover personal protection insurance (PIP) benefits and uninsured motorist benefits from IDS Property Casualty Insurance Company after she was injured in a car accident. Doctors Labeed Nouri and Nazih Iskander intervened to recover the benefits payable to plaintiff for medical services they provided after the accident. Plaintiff submitted statements to defendant for various replacement services that she claimed to require as a result of her injuries; however, defendants submitted surveillance video indicating that plaintiff was able to and did perform the activities for which she had sought services during the period covered by her claim. Further, plaintiff submitted claims for services that she had received before the accident in question, and plaintiff's account of the accident varied from the description in the police report. Defendant moved for summary disposition, arguing that plaintiff's fraudulent representations barred both her and intervening plaintiffs from recovering benefits under her policy. The court, Kathleen Macdonald, J., granted the motion, and intervening plaintiffs appealed.

The Court of Appeals *held*:

1. The trial court properly concluded that the fraud exclusion in plaintiff's policy barred her from receiving PIP benefits in light of the evidence that she had performed activities inconsistent with her claimed limitations. Because intervening plaintiffs stood in plaintiff's shoes for purposes of recovering benefits, their claims were also barred. Accordingly, the trial court properly granted defendant summary disposition.

2. Intervening plaintiffs were not entitled to uninsured motorist benefits. Even assuming that intervening plaintiffs had standing to assert this claim, they did not seek these benefits in their complaint and, apart from the issue of fraud, the trial court properly ruled that plaintiff was not entitled to them under the applicable provision of her policy because she had no direct or indirect contact with an uninsured motor vehicle.

3. Intervening plaintiffs' request for sanctions was denied. Affirmed.

Nazek A. Gappy PC (by *Nazek A. Gappy*) for intervening plaintiffs.

Garan Lucow Miller, PC (by *Caryn A. Ford* and *Jami E. Leach*), for defendant.

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

PER CURIAM. Intervening plaintiffs, Dr. Labeed Nouri and Dr. Nazih Iskander, appeal as of right the trial court order granting summary disposition in favor of defendant, IDS Property Casualty Insurance Company, in this action to recover first-party personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101. We affirm.

I. FACTUAL BACKGROUND

Plaintiff was involved in two car accidents, one on March 4, 2011, and the other one on October 20, 2011.[1] The second accident is at issue in this appeal. Before the second accident, defendant issued a no-fault automobile policy to plaintiff on October 12, 2011.

According to the October 20, 2011 police report, as plaintiff exited an alley in Detroit, her brakes "failed" and she hit another car. The police report indicates only two cars were involved. However, plaintiff's deposition testimony varied from that report. She claimed a third car was involved, explaining: "We were stopped. I saw a car, it was coming -- it was coming like -- like an airplane was flying. He went and he did something and I don't know -- until now I don't know how. Did I press the gas? I wanted to just

[1] After the first accident, plaintiff filed for PIP benefits against her insurance company for bills incurred due to her alleged injuries.

get myself out of this problem and I hit another car as well."

Following the October 20 accident, plaintiff sought PIP and uninsured motorist benefits from defendant. With respect to replacement services, plaintiff submitted to defendant "Household Services Statements" which indicated that multiple replacement services were provided daily to plaintiff from October 2011 through February 29, 2012. The document indicates that plaintiff was receiving replacement services for the entire month of October. However, surveillance video during this time captured plaintiff bending, lifting, driving, and running errands.

Plaintiff filed the instant complaint on June 6, 2012, seeking to recover PIP benefits and uninsured motorist benefits from defendant. Doctors Nouri and Iskander, who treated plaintiff, intervened to recover PIP benefits payable to plaintiff for medical services they provided after the second accident.

Defendant moved for summary disposition, arguing that under the terms of the policy, PIP benefits and uninsured motorist benefits were precluded because of plaintiff's fraudulent representations. It also argued that because intervening plaintiffs stood in the shoes of plaintiff, they were not entitled to receive PIP benefits. In regard to uninsured motorist benefits, defendant argued that because no third vehicle had in fact struck plaintiff's vehicle, the plain language of the policy precluded the payment of uninsured motorist benefits.

The trial court ultimately agreed with defendant, and granted summary disposition in its favor. Intervening plaintiffs now appeal.[2]

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[2] This Court denied intervening plaintiffs' motion to amend the claim of appeal to add plaintiff as an appellant. Thus, Nazhat Bahri is not a party to this appeal.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Intervening plaintiffs first argue that the trial court erred by granting defendant's motion for summary disposition with respect to their claim for PIP benefits. A grant or denial of a motion for summary disposition under MCR 2.116(C)(10) is reviewed de novo. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011).[3] The motion for summary disposition "tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "A genuine issue of material fact exists when the record, 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). In reviewing a motion for summary disposition under MCR 2.116(C)(10), a court considers "affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Greene v A P Prods, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006) (quotations marks and citations omitted).

B. PIP BENEFITS

The no-fault policy at issue contained a general fraud exclusion, which provided: "We do not provide coverage for any insured who has made fraudulent statements or

[3] Although the trial court did not specify which subrule it was relying on, we will construe it as having been granted under MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

engaged in fraudulent conduct in connection with any accident or loss for which coverage is sought under this policy."

"The rules of contract interpretation apply to the interpretation of insurance contracts." *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010). The language in an insurance contract should be read as a whole, and we construe the language to give effect to every word, clause, and phrase. *Id*. "When the policy language is clear, a court must enforce the specific language of the contract. However, if an ambiguity exists, it should be construed against the insurer." *Id*. (citation omitted). Any undefined term should be given its plain and ordinary meaning, which may be gathered from dictionaries. *Id*. Although this Court will

> "construe the contract in favor of the insured if an ambiguity is found, this does not mean that the plain meaning of a word or phrase should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting an insured." [*Citizens Ins Co v Pro-Seal Serv Group, Inc*, 477 Mich 75, 82; 730 NW2d 682 (2007) (citation omitted).]

Because intervening plaintiffs stood in the shoes of the named insured, if plaintiff cannot recover benefits, neither can intervening plaintiffs. See, e.g., *TBCI, PC v State Farm Mut Auto Ins Co*, 289 Mich App 39, 44; 795 NW2d 229 (2010). Further, this Court has explained the requirements for establishing fraud or false swearing as follows:

> To void a policy because the insured has wilfully misrepresented a material fact, an insurer must show that (1) the misrepresentation was material, (2) that it was false, (3) that the insured knew that it was false at the time it was made or that it was made recklessly, without any knowledge of its truth, and (4) that the insured made the

> material misrepresentation with the intention that the insurer would act upon it. A statement is material if it is reasonably relevant to the insurer's investigation of a claim. [*Mina v Gen Star Indemnity Co*, 218 Mich App 678, 686; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997) (citation omitted).]

We agree with the trial court that the fraud exclusion applied in the instant case. In order to substantiate her claim for replacement services, plaintiff presented a statement indicating that services were provided by "Rita Radwan" from October 1, 2011 to February 29, 2012. Because the accident occurred on October 20, 2011, on its face, the document plaintiff presented to defendant in support of her PIP claim is false, as it sought recoupment for services that were performed over the 19 days preceding the accident.

Moreover, defendant produced surveillance evidence depicting plaintiff performing activities inconsistent with her claimed limitations. Plaintiff was observed bending, lifting, carrying objects, running errands, and driving—on the dates when she specifically claimed she needed help with such tasks. Of particular note, on November 11, 2011, plaintiff represented that she required assistance vacuuming, cooking, dishwashing, making beds, grocery shopping, taking out the garbage, driving, and running errands. Yet surveillance videos captured her performing various activities, such as lifting, carrying, and dumping a large bucket of liquid in her yard. On December 19, 2011, plaintiff sought replacement services for various household activities, including grocery shopping. But on that day, she was observed running several errands from 11:05 a.m. until 7:00 p.m. Plaintiff indicated that on December 29, 2011, she required Radwan's assistance to drive her and perform multiple household activities. However, surveillance video on that day captured plaintiff driving

her own vehicle on errands. Similar discrepancies were noted for December 30, 2011.

This evidence belies plaintiff's assertion that she required replacement services, and it directly and specifically contradicts representations made in the replacement services statements. Reasonable minds could not differ in light of this clear evidence that plaintiff made fraudulent representations for purposes of recovering PIP benefits. Stated differently, we find no genuine issue of material fact regarding plaintiff's fraud. See *Mina*, 218 Mich App at 686. Because plaintiff's claim for PIP benefits is precluded, intervening plaintiffs' claim for PIP benefits is similarly barred, as they stand in the shoes of plaintiff.

The trial court properly granted defendant summary disposition.

C. UNINSURED BENEFITS

Intervening plaintiffs also argue that the trial court erred when it dismissed plaintiff's claims for uninsured motorist benefits. Their argument is meritless for several reasons.

Even assuming, arguendo, that intervening plaintiffs have standing to assert this claim, they sought only PIP benefits in their complaint. Moreover, under the language in the policy, plaintiff would not be entitled to uninsured motorist benefits. The uninsured motorist provision of plaintiff's policy provides:

> We will pay compensatory damages which an insured person is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury caused by accident. We will pay these damages for bodily injury an insured person suffers in a car accident while occupying a private passenger car or utility car or as a pedestrian as a result of having been struck by an

> uninsured motor vehicle. We will pay under this coverage only after any applicable bodily injury liability bonds or policies have been exhausted by payment of judgements or settlements.

In the applicable definition section of the policy,[4] the following definition of an uninsured motor vehicle is provided:

> (c) A hit-and-run vehicle whose operator or owner cannot be identified and which hits or causes an object to hit:
>
> (i) you or a relative;
>
> (ii) a vehicle which you or a relative are occupying; or
>
> (iii) your insured car[.]

The definition requires some sort of physical contact with the insured. In other words, for the third vehicle to be an uninsured motor vehicle under the policy, it had to hit plaintiff or cause another object to hit plaintiff. Plaintiff, however, admitted that she made no direct or indirect contact with the third vehicle during her second accident. Thus, this section would not apply. Furthermore, in light of plaintiff's fraudulent representations, discussed earlier, coverage would not be applicable under the policy.

D. SANCTIONS

Finally, intervening plaintiffs request sanctions under MCR 2.114 and MCR 2.625 for defendant's alleged material misrepresentations and filing of a frivolous motion for summary disposition. Because intervening plaintiffs did not properly move for sanctions in the trial court, this issue is not properly before us. Nor do

[4] We note that plaintiff is quoting language from the original policy while ignoring the amendments of the policy.

we find that intervening plaintiffs have offered a sufficient argument to justify sanctions, especially in light of our finding that summary disposition was properly granted because of plaintiff's fraud.

III. CONCLUSION

Because there is no genuine issue of material fact regarding plaintiff's fraud, and therefore her inability to recover benefits under the policy, we affirm the trial court's grant of summary disposition. Further, intervening plaintiffs have not established that sanctions are warranted.

Affirmed.

RIORDAN, P.J., and CAVANAGH and TALBOT, JJ., concurred.

DILLARD v SCHLUSSEL

Docket No. 315485. Submitted July 8, 2014, at Detroit. Decided October 21, 2014. Approved for publication December 9, 2014, at 9:20 a.m.

Bentley T. Dillard, as trustee of the Bentley Terrace Dillard Family Trust, brought an action under the Michigan Uniform Fraudulent Transfer Act (MUFTA), MCL 566.31 *et seq*., in the Oakland Circuit Court against Mark E. Schlussel; his wife, Rose Lynn Schlussel; and others. Mark and Dillard formed a limited liability company in Arizona in 2002, funding it with a $500,000 line of credit that was backed by the personal guarantees of both Mark and Dillard. The company went out of business in 2004. Dillard paid off the line of credit and sued Mark for his share. An Arizona judgment was entered against Mark in 2008, and the judgment was affirmed on appeal in 2011. In 2009, the Oakland Circuit Court domesticated the Arizona judgment, which by then exceeded $500,000. In support of his application for the line of credit, Mark had valued a consulting company that he owned, M & A Enterprises, at $100,000. In 2004, Mark conveyed M & A to Rose. He received no consideration for the transfer. Although the couple's tax returns stated substantial adjusted gross income for tax years 2004 to 2008, particularly from Mark's law practice, the couple claimed that none of the money was available for collection because they had spent it all. Dillard's complaint alleged that Mark fraudulently transferred large amounts of money, including the law firm earnings and a loan against the cash value of a life insurance policy, to M & A accounts controlled by Rose. Defendants moved for summary disposition under MCR 2.116(C)(7), asserting that challenges made to any transfers occurring before June 23, 2005, were barred by the statute of limitations. Defendants also sought summary disposition under MCR 2.116(C)(10), contending that Mark received reasonably equivalent value for the transfers because Rose had paid the Schlussels' household and living expenses with the transferred funds. The court, Rae Lee Chabot, J., granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. Under MCL 600.5855, if a person who may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within two years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the statute of limitations. Mere silence does not demonstrate fraudulent concealment. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. In this case, no evidence supported fraudulent concealment. The evidence of the transfers was available and revealed during the six-year limitations period. Therefore, the circuit court properly granted summary disposition with regard to the fraudulent-transfer claims that arose more than six years before plaintiff filed her complaint.

2. Under MCL 566.34(1)(a), a transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor. Under this provision, the debtor's state of mind determines whether a transfer qualifies as made with an actually fraudulent intent. Badges of fraud are circumstances so frequently attending fraudulent transfers that an inference of fraud arises from them. The MUFTA, in MCL 566.34(2), enumerates a nonexclusive list of 11 factors, corresponding to the historical badges of fraud, that may be used in determining a debtor's actual intent. In this case, Mark gave the earnings he received from the law firm, in the form of endorsed checks, to Rose, who deposited the checks into M & A accounts. The evidence concerning these transfers supported the existence of at least 8 of the 11 factors that give rise to an inference of actual intent to defraud. This direct and circumstantial evidence gave rise to a prima facie case under MCL 566.34(1)(a). When Mark made most of the transfers, his financial situation was precarious at best. As of late 2004, his $250,000 share of the guaranty had been called and he apparently lacked the cash to pay it. In October 2005, Dillard filed suit, and by November 2008, a large judgment had entered against Mark. Beginning in March 2004, and continuing until some point in 2011, Mark purposefully endorsed all his law firm earnings checks to an insider, Rose, for no consideration. The insider deposited the checks in accounts controlled only by the insider and which did not bear Mark's name. The Schlussels admitted to using the money for other expenses (in other words, to preferentially pay other creditors), and deliber-

ately sheltering it from Dillard's collection. This evidence supports that Mark intended to hinder, delay, or defraud Dillard. The court erred when it concluded that because the funds were ultimately used to pay household expenses that Dillard's claim under MCL 566.34(1)(a) was nullified. Three fundamental legal errors undercut the circuit court's ruling. First, once a creditor establishes the presence of multiple badges of fraud, he or she has established a fact question regarding actual intent. Second, by ignoring the factors supporting Mark's actual intent to fraudulently transfer his earnings and instead crediting the Schlussels' claim that they merely intended to pay expenses rather than to hinder Dillard's collection efforts, the circuit court invaded the province of the fact-finder. Third, "reasonably equivalent value" received by a transferee is not a defense to a claim brought under MCL 566.34(1)(a). Receipt of reasonably equivalent value might present an obstacle to avoidance of transfers challenged under that section, but it does not cleanse the transfers of their fraud. The circuit court improperly granted summary disposition in defendants' favor on Dillard's claims under MCL 566.34(1)(a).

3. Under MCL 566.35(1), which concerns constructive fraud, a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer. The touchstone of reasonably equivalent value is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred. According to the Schlussels, because they ultimately spent all the transferred money on their own household expenses, Mark received reasonably equivalent value. A debtor's transfer of assets for the purpose of paying the debtor's household expenses does not immunize the transfers from challenge under the MUFTA. Any value Mark received came after the transfers, when Rose used the funds to pay other creditors, and value obtained later is inconsequential under the MUFTA. That is, the analysis under MCL 566.35(1) ends if it is determined that the transfer was not supported by consideration. On the other hand, if Mark received property or secured a preexisting debt through the transfers, and if the value of the property or the preexisting obligations was reasonably equivalent to the amount transferred, Dillard's constructive-fraud claim might ultimately fail. Therefore, the question whether Mark received reasonably equivalent value for the transfers is one for the fact-finder, and the circuit court erred by granting

summary disposition in favor of defendants with regard to Dillard's constructive-fraud claims.

4. The circuit court also erred by concluding that because the life insurance policy was owned by M & A at the time its cash value was transferred to Rose, that Mark's acts in that regard could not be considered fraudulent. On remand, the circuit court needed to determine whether the loan check issued by the insurance company constituted Mark's "property," as that term is defined in MCL 566.31(j). If so, the circuit court would have to address whether Mark transferred the property by applying MCL 566.31(*l*).

Circuit court ruling regarding the period of limitations affirmed; circuit court ruling that a debtor's transfer of assets for the purpose of paying the debtor's household expenses immunizes the transfers from challenge under the MUFTA reversed; Case remanded for further proceedings.

1. FRAUDULENT TRANSFERS — ACTUAL INTENT — DEFENSES — RECEIPT OF REASONABLY EQUIVALENT VALUE NOT A DEFENSE.

Under MCL 566.34(1)(a), part of the Michigan Uniform Fraudulent Transfer Act, a transfer made by a debtor is fraudulent as to a creditor if the debtor made the transfer with actual intent to hinder, delay, or defraud any creditor of the debtor; receipt of reasonably equivalent value is not a defense to a claim brought under MCL 566.34(1)(a).

2. FRAUDULENT TRANSFERS — CONSTRUCTIVE FRAUD — REASONABLY EQUIVALENT VALUE — TRANSFER FOR PAYMENT OF DEBTOR'S HOUSEHOLD EXPENSES.

Under MCL 566.35(1), which concerns constructive fraud, a transfer made by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made if the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer; the touchstone of reasonably equivalent value is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred; a debtor's transfer of assets for the purpose of paying the debtor's household expenses does not immunize the transfers from challenge under the statute.

Williams, Williams, Ratner & Plunkett, PC (by *David E. Plunkett*), and *Bendure & Thomas* (by *Mark R. Bendure*) for Bentley T. Dillard.

Law Office of Bryan L. Schefman PC (by *Bryan L. Schefman*) for Mark E. Schlussel and Schlussel & Schefman, PLLC.

Lippitt O'Keefe, PLLC (by *Daniel J. McCarthy*), for Rose L. Schlussel and M & A Consulting, LLC.

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

PER CURIAM. This action, brought under the Michigan Uniform Fraudulent Transfer Act (MUFTA), MCL 566.31 *et seq*., presents two legal questions. The first concerns the applicable statute of limitations. We affirm the circuit court's ruling that MUFTA's six-year limitations period bars plaintiff Bentley Terrance Dillard's fraudulent-transfer claims arising before June 23, 2005. The second issue is whether a debtor's transfer of assets for the purpose of paying the debtor's ordinary household expenses immunizes the transfers from challenge under the MUFTA. We hold that it does not, and reverse the circuit court's contrary ruling.

I. BACKGROUND FACTS AND PROCEEDINGS

Bentley Terrace Dillard holds a substantial judgment against defendant Mark E. Schlussel (Mark), a Michigan attorney. Mark's debt stems from his failed investment in A Little More Red, an Arizona limited liability company formed in 2002. Mark and Dillard funded the company with a $500,000 line of credit, for which both pledged personal guarantees. True to its name, however, A Little More Red consistently leaked cash. During 2003 and 2004, Mark personally contributed $206,936.83 to keep the enterprise afloat. A Little More Red closed its doors at the end of 2004. Dillard paid off the entire line of credit and sued Mark for his share. In

November 2008, a jury found in Dillard's favor and judgment entered against Mark. The Arizona Court of Appeals affirmed. *Dillard v Schlussel*, memorandum opinion of the Arizona Court of Appeals, issued May 10, 2011 (Docket No. 1 CA-CV 10-0219). In May 2009, the Oakland Circuit Court domesticated the Arizona judgment, which by then exceeded $500,000.

In March 2010, Mark sat for a creditor's examination. Relevant to the issues presented here, Mark testified that until March 2004, he owned a company called M & A Enterprises. Mark explained that "M & A Enterprises was a consulting company that I had[.] I was receiving salary. [T]hat company was the company that employed me . . . when I rendered services to Detroit Medical Center." Mark's counsel explained in a subsequent letter written to Dillard's attorney that "while M & A did receive deposits, it had no assets, nor contracts, nor receivables; it was essentially a receptacle for whatever Mr. Schlussel could gather together to invest." In support of his application for A Little More Red's line of credit, Mark valued M & A at $100,000.

In March 2004, Mark conveyed M & A to his wife, defendant Rose Lynn Schlussel (Rose Lynn).[1] Mark received no consideration from his wife for this transfer. Temporally, the transfer coincided with the period of A Little More Red's financial decline. By March 2004, A Little More Red had exhausted its line of credit and Schlussel had loaned the company more than $175,000.

During the continued creditor's exam in April 2010, Mark produced his tax returns for the years 2004 through 2008. The returns stated sizeable adjusted

[1] During the creditor's exam, Mark recalled that he transferred M & A to his wife in 2004, but could not recall the date. He later produced the assignment document setting forth the exact date of the transfer.

gross incomes for each year: $496,228 in 2004, $850,713 in 2005; $354,921 in 2006, $348,877 in 2007, and $427,959 in 2008. Mark claimed that none of the after-tax income earned during this five-year period remained available for collection because the Schlussels had spent it all.

Mark testified that his wife paid the couple's monthly expenses, which averaged approximately $18,000, with "[m]oney in her [personal] checking account." When asked where his wife got the money to pay the bills, Mark responded:

> *Q*. Do you pay any portion of the household bills?
>
> *A*. No.
>
> *Q*. What is the source of the money in her checking account?
>
> *A*. Various sources.
>
> *Q*. Does any of the money on a regular basis come from you?
>
> *A*. I don't understand the question.
>
> *Q*. Fair enough. You said that your wife pays your household expenses out of a checking account that's in her name, is that correct?
>
> *A*. Correct.
>
> *Q*. What I'm looking to find out is where does the money in her checking account come from, do you regularly deposit money in there, do you irregularly deposit money in there, does she have some different sources of money that she uses for her checking account, that's what I'm trying to find out[.]
>
> *A*. She has personal sources of money and of late . . . the money has come from my pension.
>
> *Q*. You take money out of your pension and put it in the checking account?
>
> *A*. Correct.

Dillard's counsel, David E. Plunkett, specifically inquired whether other "sources of funds" may have enhanced accounts owned by Rose Lynn, but was met with an objection by Mark's counsel, Norman L. Lippitt, and Mark's refusal to answer:

> *Q*. Besides your wife's checking account that I understand you are not going to give me any details about, are there any other accounts of any kind that are held in your wife's name into which you have deposited money since November of 2004? And by that I mean, is there an investment account? Is there some other kind of account, other than this checking account that we have been discussing?
>
> *A*. Not to the best of my recollection.
>
> *Q*. Understanding that I am going to get an objection from your counsel, what are the other sources of funds that are in your wife's checking account?
>
> *Mr*. *Lippitt*: Objection. Don't answer the question, unless they come from you.
>
> *Mr*. *Plunkett*: And when I said other, I meant other than you.
>
> *Mr*. *Lippitt*: Don't answer the question.
>
> *Mr*. *Plunkett*: And you are taking that instruction?
>
> *A*. Absolutely.
>
> *Q*. Do you have authority to sign checks on your wife's checking account?
>
> *A*. No.

Dillard filed this MUFTA action on June 23, 2011. Her first amended complaint avers that despite Mark's successful law practice and "substantial income," she has "been able to locate only approximately $2,000 in his accounts at various financial institutions and . . . collected an additional approximately $5,000 through other collection efforts." The first amended complaint alleges that beginning in 2004, and continuing through

2009, Mark transferred large amounts of money to M & A accounts held by Rose Lynn. These transfers, the complaint asserted, were fraudulent. The first amended complaint further states that Mark fraudulently transferred the cash value of a Pacific Life insurance policy to Rose Lynn. Defendants' affirmative defenses to the first amended complaint include an allegation that Dillard's claims "are barred as any and all funds alleged to have constituted fraudulent transfers were used for customary living expenses."

Rose Lynn was deposed in March 2011. By then, Dillard had obtained some discovery regarding Rose Lynn's personally held accounts. Between November 2010 and March 2011, one such account received $26,000 in deposits from Mark. Rose Lynn explained, "It is my account and it's an account that I did receive funds from Mark that I did pay some of our living expenses from."[2] Additionally, M & A was "receiving funds for a consulting fee that Mark was doing for a company in California. . . ."

According to Rose Lynn, Mark stopped depositing his law firm draw checks into his checking account in 2010, after Dillard garnished that account. Instead, he endorsed checks made out to him to Rose Lynn. She then deposited the checks into her personal account, or accounts held by M & A:

> *Q.* Did you ever ask why all of a sudden he started giving you his law firm checks for deposit into your account?
>
> *A.* No.
>
> *Q.* When Mark -- I'll take as an example the first check on here. It's a check dated March 1st, 2010 from Schlussel

[2] On instruction from counsel, Rose Lynn refused to identify the location of this account. Counsel indicated that he did not want the account garnished as the funds it held "were never Mark's funds and they are funds that are required to live on."

and Schefman, PLLC to Mark in the amount of 12 thousand 500 dollars that you deposited into your Comerica account on March 2nd, 2010, correct?

A. Correct.

Q. And when Mark gave you this check to deposit into your Comerica account, did you give him anything in return or did you just take the check and put it in your account?

A. I just take the check and put in my account.

Q. Did you segregate that money in any way or did you just put it into the account with the rest of the money?

A. To my recollection I just put it in my account.

Q. And I take it that it would, but would that answer be the same for the rest of these checks? Both the answers I guess, one, that you didn't give him anything in return, correct?

A. Correct.

Rose Lynn admitted that beginning in 2004, and continuing through 2010, she wrote $647,000 worth of checks to herself drawn on M & A accounts. The source of this money was Mark's law firm earnings. After depositing Mark's earnings in an M & A account, Rose Lynn wrote checks to herself or to Mark. According to a summary prepared by Dillard's counsel, between 2005 and 2007, Rose Lynn transferred $125,000 back to Mark using M & A as the conduit. Dillard contends that from 2004 through 2009, Rose Lynn deposited approximately $740,000 of Mark's law firm earnings into one account and an even greater amount (approximately $800,000) into another account, both held by M & A. Virtually all of that money was eventually distributed from the M & A accounts to Mark or Rose Lynn.[3]

[3] In August 2011, the circuit court entered an order garnishing 25% of Mark's law firm earnings.

Notably, defendants have not contested the amounts or the mechanism of these transfers.

The parties agree that during this time, M & A had no income other than Mark's consulting fees. The company performed no separate work, had no employees, and incurred no expenses. Rose Lynn gave no consideration for any of the checks endorsed to her. According to defendants, Rose Lynn used all the transferred money to pay the couple's substantial living expenses.

Dillard also unearthed evidence regarding the transfer of cash from a Pacific Life variable universal life insurance policy. The policy was owned by an entity called the M & A Enterprises LLC Defined Benefit Plan & Trust. Shortly before Mark's initial creditor's exam, the policy had a cash surrender value of approximately $50,000. Shortly after the creditor's exam, Mark obtained a $40,000 loan from the policy. Pacific Life made the check payable to the M & A Enterprises LLC Defined Benefit Plan & Trust. Mark requested reissuance of the check to Rose Lynn. Mark subsequently transferred the policy's ownership to his wife.[4]

Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that challenges to transfers made before June 23, 2005, were barred by the period of limitations set forth in MCL 566.39.[5] Dillard conceded that the statute prescribes a six-year limitations period,

[4] Evidence also revealed that Mark transferred $228,000 from an investment account he held at SEI into Rose Lynn's personal checking account. After noting the existence of this transfer in her appellate brief, Dillard provides no explanation of why the circuit court should not have treated these funds as beyond a judgment creditor's reach. Accordingly, we deem waived any appellate challenge in this regard. See *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 4 n 2; 516 NW2d 43 (1994).

[5] In relevant part, MCL 566.39 provides:

but argued that the Schlussels had fraudulently concealed the transfers, triggering the application of MCL 600.5855:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

Defendants additionally sought summary disposition under MCR 2.116(C)(10) regarding the transfers falling within the statute of limitations, contending that Mark received "reasonably equivalent value" for the transfers in the form of his wife's payment of living and household expenses. According to defendants, the Schlussels' use of the money to pay their ordinary household expenses eliminates any claim under the MUFTA. Further, defendants argued, the loan of $40,000 from the Pacific Life insurance policy was "proper as a matter of law" and did not constitute a fraudulent transfer.

In support of defendants' motion for summary disposition, Rose Lynn submitted an affidavit averring that

---

> A cause of action with respect to a fraudulent transfer or obligation under this act is extinguished unless action is brought under 1 or more of the following:
>
> (a) [MCL 566.34(1)(a) and (b) and MCL 566.35(1)], within the time period specified in . . . MCL 600.5813 and 600.5855.

MCL 600.5813 provides:

> All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statutes.

she always wrote the checks for the couple's household bills, and that "[f]or the last 25 years, our ordinary and customary living expenses, on an annual basis, have been in the range of $250,000-$275,000 per year." Rose Lynn admitted that she sometimes used her "own funds" to pay the expenses, and that when she did so, she "would repay [her]self from the monies Mark provided to [her] for this purpose when they became available."

The circuit court first addressed the applicable statute of limitations. The court found that the MUFTA "allows the discovery rule to extend the statute of limitations" if the "defendant . . . actively concealed the fraudulent transfer." The circuit court determined:

> There is nothing to suggest Rose was actively involved in the allegedly fraudulent transfer other than as the recipient. The substantively admissible evidence submitted in response to the instant motion does not demonstrate Rose was actively involved in concealing the transfer. Therefore, the period of limitations was not extended as to Rose and the claim is properly dismissed as barred by the statute of limitations as to Rose relating to the transfer of M&A.

Because Dillard's complaint was filed on June 23, 2011, claims based on transfers that occurred more than six years before that date were barred.

The court then granted summary disposition regarding the remaining transfers, premising its opinion on *United States v Goforth*, 465 F3d 730 (CA 6, 2006). According to the court, that case stands for the proposition that funds transferred from Mark to Rose Lynn "are exempt from the MUFTA claims" because they "were used to pay household expenses." The court ruled, "The undisputed substantively admissible evidence supplied in this case demonstrates Rose used the funds, including those funds initially transferred by

Mark to the corporate entity, to pay reasonable and ordinary household expenses."

The court also granted summary disposition in favor of defendants with regard to Dillard's claims relative to the Pacific Life policy, finding that because Mark did not own the policy when the loan was made, he bore no liability under the MUFTA arising from the transfer.

II. THE STATUTE OF LIMITATIONS

We first consider whether the statute of limitations bars Dillard's MUFTA claims involving transfers made more than six years before Dillard filed her complaint. Dillard argues that the discovery tolling provision embodied in MCL 600.5855 extends the period of limitations for an additional two years, because one or more defendants fraudulently concealed the existence of the transfers. We reject this argument for the simple reason that evidence of the transfers was available—and revealed—during the limitations period. In other words, no evidence supports fraudulent concealment.

Summary disposition may be granted under MCR 2.116(C)(7) when a claim is barred by the statute of limitations. We review de novo both a circuit court's decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(7) and questions of law. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

> When reviewing a motion under MCR 2.116(C)(7), this Court must accept all well-pleaded factual allegations as true and construe them in favor of the plaintiff, unless other evidence contradicts them. If any affidavits, depositions, admissions, or other documentary evidence are submitted, the court must consider them to determine whether there is a genuine issue of material fact. If no facts are in dispute, and if reasonable minds could not differ

> regarding the legal effect of those facts, the question whether the claim is barred is an issue of law for the court. However, if a question of fact exists to the extent that factual development could provide a basis for recovery, dismissal is inappropriate. [*Dextrom v Wexford Co*, 287 Mich App 406, 428-429; 789 NW2d 211 (2010) (citations omitted).]

Absent a fiduciary relationship, fraudulent concealment extends the applicable limitations period only when the defendant has made an affirmative act or representation. "The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery." *Meyer & Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005) (quotation marks and citation omitted). Mere silence does not demonstrate fraudulent concealment and, "[i]f liability were discoverable from the outset, then MCL 600.5855 will not toll the applicable period of limitations." *Id*.

Dillard filed this action on June 23, 2011. Her complaint encompasses the March 2004 transfer of M & A to Rose Lynn, and all subsequent transfers made to Rose Lynn and M & A. However, the record belies any concealment of the transfer of M & A, or of any of the other transfers. Dillard domesticated the Arizona judgment in May 2009, well within the six-year statute of limitations period, and began obtaining discovery shortly thereafter. Dillard knew of M & A's existence when she and Mark applied for the ill-fated line of credit. Mark was not deposed until March 2010. No evidence supports that Dillard lacked the ability to depose him earlier, or that defendants attempted to hide Mark's transfer of M & A during that interim. Mark admitted to the M & A transfer during his exam. And

while Mark resisted sharing information regarding his wife's bank accounts, Dillard has brought forward no evidence substantiating that during the years after she obtained a judgment against Mark, she was *prevented* from learning that Mark had transferred the company to his wife, or that checks written to him had been deposited in M & A accounts. To the contrary, the information emerged during the regular course of discovery. Accordingly, the circuit court properly granted summary disposition on the fraudulent-transfer claims that arose more than six years before Dillard filed her MUFTA complaint.

III. THE MUFTA CLAIMS

We now turn to the heart of Dillard's case on the merits: whether Mark and Rose Lynn fraudulently transferred assets in contravention of the MUFTA. Considerable record evidence supports that Mark transferred assets to Rose Lynn intending to hinder, delay, or defraud Dillard's collection of her judgment, establishing an actually fraudulent transfer under MCL 566.34. The evidence further substantiates constructive fraud under MCL 566.35(1). That the Schlussels used the transferred funds to pay their personal "living" expenses does not defeat Dillard's MUFTA claims.

We review de novo issues involving statutory interpretation or the propriety of summary disposition. *Prins v Mich State Police*, 291 Mich App 586, 589; 805 NW2d 619 (2011). When considering a motion for summary disposition under MCR 2.116(C)(10), a court must view the evidence submitted in the light most favorable to the party opposing the motion. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any

material fact and the moving party is entitled to judgment as a matter of law." *Id*. A genuine issue of material fact exists when the evidence submitted "might permit inferences contrary to the facts as asserted by the movant." *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 360; 320 NW2d 836 (1982). When entertaining a summary disposition motion under Subrule (C)(10), the court must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in favor of the nonmoving party, and refrain from making credibility determinations or weighing the evidence. *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

Well-established principles also guide our statutory construction efforts. We begin by examining the specific statutory language under consideration, bearing in mind that

> [w]hen faced with questions of statutory interpretation, our obligation is to discern and give effect to the Legislature's intent as expressed in the words of the statute. We give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. Where the language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written. [*Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (quotation marks and citations omitted).]

A brief overview of fraudulent-transfer law helps place the statutory provisions in context. "The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated 'covinous and fraudulent' transfers designed 'to delay, hinder or defraud creditors and others.' " *BFP v Resolution Trust*

Corp, 511 US 531, 540; 114 S Ct 1757; 128 L Ed 2d 556 (1994) (citation omitted). The Uniform Fraudulent Transfer Act (UFTA), promulgated by the National Conference of Commissioners on Uniform State Laws, codifies the common law.[6] The UFTA is "designed to prevent debtors from transferring their property in bad faith before creditors can reach it." *BMG Music v Martinez*, 74 F3d 87, 89 (CA 5, 1996). The Supreme Court of Wisconsin has explained, "The Uniform Fraudulent Transfer Act reflects a strong desire to protect creditors and to allow for the smooth functioning of our credit-based society. It is a creditor-protection statute. Without such protection for creditors, '[c]reditors would generally be unwilling to assume the risk of the debtor's fraudulent transfers.' " *Badger State Bank v Taylor*, 2004 WI 128, ¶ 41; 276 Wis 2d 312; 688 NW2d 439 (2004) (citations omitted) (alteration in original). Our Legislature enacted the MUFTA in 1998.

The MUFTA defines two species of fraudulent transfers. The first encompasses transfers made "[w]ith actual intent to hinder, delay, or defraud" a creditor and applies to transfers made either before or after the creditor's claim arose. MCL 566.34(1)(a). The second, commonly called "fraud in law" or constructive fraud, deems certain transactions fraudulent regardless of the creditor's ability to prove the debtor's actual intent. It applies only to transfers made after the creditor's claim arose. Three elements of proof are required: (1) the creditor's claim arose before the transfer, (2) the debtor was insolvent or became insolvent as a result of the transfer, and (3) the debtor did not receive "reasonably equivalent value in exchange for the transfer . . . ."

[6] Section 10 of the MUFTA states that "[u]nless in conflict" with the act's provisions, common-law principles "supplement the provisions of this act." MCL 566.40.

MCL 566.35(1). Dillard's first amended complaint invoked both MCL 566.34(1)(a) and MCL 566.35(1). We turn to a closer examination of the statutory language governing each claim.

A. ACTUAL INTENT

Dillard contends that when Mark transferred his law firm draw checks to his wife, Mark harbored an "actual intent to hinder, delay, or defraud" Dillard, evidenced by the couple's use of M & A as a receptacle for money that would otherwise have been available for Dillard's collection. The statutory language governing this claim provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in *either* of the following:
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> (*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.
>
> (*ii*) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due. [MCL 566.34(1) (emphasis added).]

Dillard relies on MCL 566.34(1)(a), asserting that Mark's transfers to Rose Lynn were made with "actual intent" to defraud Dillard as his judgment creditor.

Several important statutory definitions control our construction and application of this language. Under the MUFTA, Mark is the debtor, as he is "a person who is liable on a claim." MCL 566.31(f). The MUFTA defines a "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset," including "payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.31(*l*). An asset is

> property of a debtor, but the term does not include any of the following:
>
> (*i*) Property to the extent that it is encumbered by a valid lien.
>
> (*ii*) Property to the extent it is generally exempt under nonbankruptcy law.
>
> (*iii*) An interest in property held in tenancy by the entireties to the extent it is not subject to process by a creditor holding a claim against only 1 tenant. [MCL 566.31(b)].

Here, the "property" involved consists of Mark's earnings. This property was not encumbered by a valid lien or held by the entireties. Nor do Mark's law firm earnings qualify as wholly exempt under MCL 600.6023, which sets forth a lengthy list of property of the debtor and the debtor's dependents "exempt from levy and sale under an execution[.]" Rather, federal law exempts from garnishment 75% of a debtor's weekly disposable income. 15 USC 1673(a)(1). We proceed to apply the plain language of the MUFTA's "actual intent" provision.

Under the framework set forth in MCL 566.34(1)(a), the debtor's state of mind in making a transfer determines whether a transfer qualifies as made with an actually fraudulent intent. But debtors rarely admit to

having deliberately placed assets out of the reach of their creditors. In *BFP*, the United States Supreme Court explained that to facilitate proof of such intent,

> English courts . . . developed the doctrine of "badges of fraud": proof by a creditor of certain objective facts (for example, a transfer to a close relative, a secret transfer, a transfer of title without transfer of possession, or grossly inadequate consideration) would raise a rebuttable presumption of actual fraudulent intent. [*BFP*, 511 US at 540-541.]

"Badges of fraud are circumstances so frequently attending fraudulent transfers that an inference of fraud arises from them." *In re Triple S Restaurants, Inc*, 422 F3d 405, 414 (CA 6, 2005) (quotation marks and citation omitted). Our Supreme Court has approved the following description of the badges of fraud:

> Badges of fraud are not conclusive, but are more or less strong or weak according to their nature and the number concurring in the same case, and may be overcome by evidence establishing the *bona fides* of the transaction. However, a concurrence of several badges will always make out a strong case. [*Bentley v Caille*, 289 Mich 74, 78; 286 NW 163 (1939) (quotation marks and citations omitted).]

In MCL 566.34(2), the MUFTA sets forth a nonexclusive list of 11 factors that may be considered in determining a debtor's actual intent in making a transfer:

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.

(e) The transfer was of substantially all of the debtor's assets.

(f) The debtor absconded.

(g) The debtor removed or concealed assets.

(h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

(i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.

(j) The transfer occurred shortly before or shortly after a substantial debt was incurred.

(k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

These factors correspond to the historical badges of fraud. "In determining actual intent under subsection (1)(a)," the statute instructs, "consideration may be given, among other factors, to whether 1 or more" of the enumerated factors occurred. MCL 566.34(2). Here, the confluence of several factors supports a strong inference of fraud.

Factor (a) supports an inference of fraudulent intent when a transfer is made to an insider. The MUFTA defines a spouse as an "insider." MCL 566.31(g) and (k). "A classic example of such transfers is a debtor spouse subject to a money judgment who 'buries' the titles to the house, car, stocks, bank accounts, and other assets in the other spouse's name." Sullivan, *Future Creditors and Fraudulent Transfers: When A Claimant Doesn't Have A Claim, When A Transfer Isn't A Transfer, When Fraud Doesn't Stay Fraudulent, and Other Important Limits to Fraudulent Transfers Law for the Asset Protection Planner*, 22 Del J Corp L 955, 961 (1997). John E. Sullivan III continues, "The obvious and transparent intent behind this ploy is to leave the judgment debtor

with no assets in order to frustrate the creditor's collection efforts, while still allowing the debtor to retain the control, benefit, and use of the assets through the auspices of his or her spouse." *Id*.

Mark endorsed his law firm checks to an insider, who then deposited them in accounts owned by M & A, a company wholly owned by an insider. These transfers benefitted the Schlussels personally, while impairing Dillard's ability to collect her judgment. The evidence satisfies this badge of fraud.[7]

Factor (b) is satisfied by evidence that "[t]he debtor retained possession or control of the property transferred after the transfer." MCL 566.34(2)(b). Rose Lynn admitted to having written checks to Mark from the M & A account. Thus, Mark retained control of some of the money transferred to his wife, and then to M & A. "No effort to hinder or delay creditors is more severely condemned by the law than an attempt by a debtor to place his property where he can still enjoy it and at the same time require his creditors to remain unsatisfied." *Bentley*, 289 Mich at 78. Though expressed well before our Legislature's enactment of the MUFTA, this sentiment resonates here and gives rise to a second badge of fraud.

The third factor, MCL 566.34(2)(c), applies when "[t]he transfer was . . . concealed." By positioning Rose Lynn as the legal owner of M & A, Mark could conceal from Dillard the transfers of his law firm checks, which

[7] Our Supreme Court has long recognized that intrafamily transfers raise particular suspicions of fraud: "As a general rule transactions between members of a family must be closely scrutinized when the rights of creditors are involved and when such transactions are accompanied by other badges of fraud, a full explanation of the conveyance is required when it is challenged by an unsatisfied creditor." *Farrell v Paulus*, 309 Mich 441, 450; 15 NW2d 700 (1944) (quotation marks and citations omitted).

were deposited into M & A accounts. According to the Schlussels' testimony, this routing scheme was hatched precisely because Mark's bank accounts had been or were subject to garnishment.

Dillard filed the Arizona suit in 2005; consequently, evidence also supports the fourth factor, which is that "[b]efore the transfer was made . . . , the debtor had been sued or threatened with suit." MCL 566.34(2)(d). Viewing the evidence in the light most favorable to Dillard, Mark's debt arose even earlier than that.

Virtually every penny Mark earned was transferred to his wife, satisfying the fifth factor: "The transfer was of substantially all of the debtor's assets." MCL 566.34(2)(e).

Mark's conveyance of M & A Consulting to Rose Lynn for no value, followed by the couple's use of the corporation's bank account as the depository for Mark's earnings, substantiates that "[t]he debtor removed or concealed assets," satisfying MCL 566.34(2)(g), the sixth badge of fraud in this case. While we acknowledge that the conveyance occurred outside the statute of limitations look-back period, the Schlussels' employment of M & A as a conduit for cash both before and after the Arizona judgment evidences Mark's intent to hinder or delay Dillard's collection efforts.

MCL 566.34(2)(h) asks whether "[t]he value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred." Mark received no value for transferring his checks to Rose Lynn or for depositing them in the M & A accounts. For the reasons discussed later in this opinion, the "household expense" defense does not defeat this badge of fraud. But even assuming the transfers were intended as reasonably equivalent value in the form of payment for living

expenses, eliminating this single badge of fraud would not erase the other badges of fraud or the otherwise well-supported inference that Mark devised the M & A deposit scheme to hinder, delay, or defraud Dillard.

Mark has admitted being insolvent at the time Dillard demanded payment of the guaranty, satisfying MCL 566.34(2)(i) ("[t]he debtor was insolvent or became insolvent shortly after the transfer was made") and (j) ("[t]he transfer occurred shortly before or shortly after a substantial debt was incurred").

Accordingly, the evidence supports the existence of at least 8 of the 11 factors that give rise to an inference of actual intent to defraud. These strands of direct and circumstantial evidence give rise to a prima facie case under MCL 566.34(1)(a). When Mark made most of the transfers, his financial situation was precarious at best and dreadful at worst. As of late 2004, his $250,000 share of the guaranty had been called and he apparently lacked the cash to pay it. In October 2005, Dillard filed suit, and by November 2008, a large judgment had entered against Mark. Beginning in March 2004, and continuing until some point in 2011, Mark purposefully endorsed all his law firm earnings checks to an insider for no consideration. The insider deposited the checks in accounts controlled only by the insider and which did not bear Mark's name. The Schlussels admitted to using the money for other expenses (in other words, to preferentially pay *other* creditors), and deliberately sheltering it from Dillard's collection. This evidence supports that Mark intended to "hinder, delay, or defraud" Dillard.

Defendants raise a single defense to Dillard's case under MCL 566.34(1)(a): Mark transferred his earnings to Rose Lynn, who then transferred them to M & A, as a mechanism for paying their ordinary household

expenses. According to an affidavit signed by Rose Lynn, the sum ultimately expended on household expenses was "reasonable." The circuit court found that this defense nullified Dillard's claim under § 4(1)(a).[8]

Three fundamental legal errors undercut the circuit court's ruling. First, once a creditor establishes the presence of multiple badges of fraud, he or she has established a fact question regarding actual intent. Second, by ignoring the factors supporting Mark's actual intent to fraudulently transfer his earnings and instead crediting the Schlussels' claim that they merely intended to pay expenses rather than to hinder Dillard's collection efforts, the circuit court invaded the province of the fact-finder.[9] Third, "reasonably equiva-

[8] Mark also asserts that he transferred M & A to his wife for "estate planning purposes," thereby negating any fraud. Record evidence substantiates that the transfer was made for estate *preservation*, as are most fraudulent transfers to insiders. To the extent that one's intent to keep one's money corresponds with "estate planning," the fact-finder may decide to credit Mark's contention. Nevertheless, the transfer bears many indicia of actual fraud, and these indicia are not cleansed by Mark's claim that he was merely planning his "estate." Mark admitted as much during the creditor's exam when he offered that he transferred M & A to his wife for "[e]state planning purposes, I wanted to get things in her name, not my name." Whether placing a straw corporation regularly drained of assets in Rose Lynn's name was accomplished for purposes unrelated to hindering, delaying, or defrauding Dillard is for the fact-finder to determine.

[9] Even were it relevant, the "reasonableness" of the Schlussels' expenses also constitutes a question of fact. Simply put, whether the hundreds of thousands of dollars that flowed from Mark into the M & A Consulting account represented an amount *reasonably* necessary for the Schlussels' support represents a question of fact. That the Schlussels "ordinarily" spent $250,000 to $275,000 per year on themselves does not mean that this sum was "reasonable." Contrary to the circuit court's ruling, the Schlussels' ordinary living expenses are meaningless under the MUFTA. Rather, the issue is the reasonableness of the consideration received for the transfer from the perspective of the *creditor*. As stated in *Nat'l Loan Investors, LP v Robinson*, 98 SW3d 781, 784 n 2 (Tex App, 2003):

lent value" received by a transferee is not a defense to a claim brought under § 4(1)(a). Receipt of "reasonably equivalent value" might present an obstacle to *avoidance* of transfers challenged under § 4(1)(a), but it does not cleanse the transfers of their fraud. In other words, the consideration exchanged for an intentionally fraudulent transfer may limit the creditor's *remedy*, but it does not negate the fraudulent-transfer claim itself.[10] "[T]he determination that the transfer is fraudulent is conceptually distinct from the avoidance of the transfer, which is, in turn, separate and distinct from a recovery based upon the avoidance of a transfer." *In re Cohen*, 199 BR 709, 716 (Bankr CA 9, 1996). And here, Rose Lynn exchanged *no* value for the transfers, completely defeating defendants' argument.

The plain text of MCL 566.34(1) ascribes relevancy to "reasonably equivalent value in exchange for the transfer" only as to claims brought under § 4(1)(b), and not under § 4(1)(a). "Unlike constructively fraudulent transfers, the adequacy or equivalence of consideration provided for the actually fraudulent transfer is not material to the question whether the transfer is actually fraudulent." *Cohen*, 199 BR at 717. The South Dakota Supreme Court has clarified this point:

> The role of "reasonably equivalent value" in actual fraudulent intent as compared to constructive intent is not

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> Indeed, if the legitimacy of a conveyance was determined from the perspective of the debtor, it is questionable whether any transfer could ever be considered fraudulent *viz* his creditors. No doubt the debtor could always divine some explanation for transferring the property as he did, even though his creditors are left with nothing to satisfy the debt. He could always divine some subjective benefit which may be valueless to the creditor.

[10] Remedies other than avoidance are available to the judgment creditor, including the appointment of a receiver and the imposition of a constructive trust.

> the same although the meaning of the phrase is the same. In the context of actual fraud, the absence of reasonably equivalent value is only one of the badges of fraud that courts consider in determining whether a transfer was made with fraudulent intent. Its existence is not an absolute defense when other badges exist. Thus, several badges of fraud could overcome a finding that reasonably equivalent value was given when actual fraud is considered. [*Glimcher Supermall Venture, LLC v Coleman Co*, 2007 SD 98, ¶ 19; 739 NW2d 815 (2007).]

Rather, MCL 566.38(1) provides that "[a] transfer . . . is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value . . . ." In other words, transferees who have exchanged reasonably equivalent value for a transfer are protected from the avoidance remedy—they can keep that which they paid for. This makes good sense. If Mark exchanged his law firm check for a car, the dealer who sold him the vehicle would not be subject to avoidance of the transfer, because the dealer gave value in exchange. In other words, the MUFTA protects good faith purchasers for value. But neither Rose Lynn nor M & A gave anything in exchange for the transfers, rendering MCL 566.38 inapplicable. Because the transfers of Mark's money were entirely gratuitous as to Rose Lynn and M & A, the Schlussels cannot avoid liability by interposing a "reasonably equivalent value" defense, and the circuit court erred by applying this *remedy* provision as a legal bar to Dillard's actual-intent claim.

Genuine issues of material fact exist concerning Mark's intent in transferring his law firm earnings to Rose Lynn. Summary disposition is inappropriate for deciding cases premised on intent, good faith, or reasonableness. Accordingly, the circuit court improperly granted summary disposition in defendant's favor on Dillard's § 4(1)(a) claim under MCR 2.116(C)(10).

B. CONSTRUCTIVE FRAUD

Dillard's alternate fraudulent-conveyance claim arises under MCL 566.35(1), which provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

This provision is concerned with the economic realities of a transfer rather than the transferor's intent.

The sole issue placed in dispute concerning Dillard's claim under § 5(1) is whether Rose Lynn provided reasonably equivalent value in exchange for the money transferred to her by her husband. The Schlussels equate "reasonably equivalent value" with their "ordinary" household expenses. According to defendants, because the Schlussels spent all the transferred money on their own household expenses, they were entitled to summary disposition of Dillard's constructive-fraud claim. This argument finds no support in caselaw, or in the logic or language of the MUFTA.

Under the plain language of MCL 566.35, a transfer is constructively fraudulent if the debtor did not receive a "reasonably equivalent value in exchange for the transfer" and was insolvent at the time. Under the MUFTA,

> (1) Value is given for a transfer . . . if, in exchange for the transfer . . . , property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.

* * *

> (3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous. [MCL 566.33.]

The commentary to the uniform act provides:

> "Value" is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors. Consideration having no utility from a creditor's viewpoint does not satisfy the statutory definition. [7A Uniform Laws Annotated (Master ed), part II, Uniform Fraudulent Transfer Act, § 3, comment 2, p 48.]

"An unperformed promise to provide support is the only consideration that does not constitute value as a matter of law." *Schaefer v GRD Investments LLC*, 331 BR 401, 419 (Bankr ND Iowa, 2005). Indirect, noneconomic benefits that preserve a family relationship do not provide reasonably equivalent value. *In re Bargfrede*, 117 F3d 1078, 1080 (CA 8, 1997). Therefore, any promise made by Mark to support his wife, or to pay their joint household expenses, has no bearing here.

The first element under § 5(1) relates to timing. Dillard's claim potentially arose in 2004, when she demanded payment under the guaranty. This fact question must be resolved in the circuit court. Indisputably, Dillard's claim arose before many of the transfers were made, fulfilling the first element. Mark's insolvency, the third element, also constitutes a question of fact. But Mark has admitted insolvency as of the date of the 2008 judgment, rendering many transfers actionable. The second element, whether Mark "made the transfer . . . without receiving a reasonably equivalent value in exchange for the transfer," is where the battle lines are drawn on appeal.

"Reasonably equivalent value" is a commercial concept. "The touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred." *Mellon Bank, NA v Metro Communications, Inc*, 945 F2d 635, 647 (CA 3, 1991). This is not to say that the Schlussels' use of some of the transferred funds for reasonable and necessary household expenses is irrelevant. If Mark received property or secured a preexisting debt through the transfers, and if the value of the property or the preexisting obligations were reasonably equivalent to the amount transferred, Dillard's constructive-fraud claim might ultimately fail.

Record evidence substantiates that Mark received no contemporaneous value from Rose Lynn for the transfers made to her. Any "value" came later, indirectly, when Rose Lynn used the money to pay other creditors. However, "value" obtained from the checks down the road is simply inconsequential under the MUFTA. Judge Richard A. Posner has explained:

> [W]e think the inquiry should stop at the first stage of the analysis, that is, should stop after it is determined that the transfer was not supported by consideration. If it was gratuitous, the fact that some or for that matter all of it may later have seeped back to the debtor does not legitimize the transfer. . . . A compelling reason for stopping at the first stage is that the seeping back of the transferred money or property to the transferor is strong evidence of actual fraud by him. It is one thing to make a gift; it is another to transfer money to someone whom you expect to retransfer it to you; the inescapable implication is that you are parking your money in a place where you hope your creditors won't know to look. [*Nostalgia Network, Inc v Lockwood*, 315 F3d 717, 720 (CA 7, 2002).]

Defendants and the circuit court premise their contrary conclusion primarily on *Goforth*, 465 F3d 730, a

case brought under the Federal Debt Collection Procedures Act (FDCPA), 28 USC 3001 *et seq*. Aside from the fact that *Goforth* is not binding on this Court, defendants and the circuit court have misread the case. Properly understood, *Goforth* supports that, at most, the Schlussels' household-expense claim creates a question of fact precluding summary disposition in favor of Dillard for the full amount of the transfers.

Like the MUFTA, the FDCPA addresses fraudulent transfers. The latter statute involves debts to the United States rather than to general creditors. The FDCPA provides for the avoidance of constructively fraudulent transfers, 28 USC 3304(a), and transfers made with actual intent to defraud, 28 USC 3304(b)(1)(A). In *Goforth*, the government contended that monthly payments from debtor George Gilley to his wife, Sheila Gilley, ranging from $1,800 to $2,000 and made over the course of a 19-year period, constituted fraudulent transfers under the FDCPA. *Goforth*, 465 F3d at 732-733. The monthly payments ended four years before the government obtained judgment against George Gilley and his corporation. The district court entered summary disposition in favor of the government, finding the transfers constructively fraudulent. *Id*.

The United States Court of Appeals for the Sixth Circuit held that Sheila Gilley's affidavit attesting that she used the monthly payments for routine living expenses created a fact question regarding whether George had received "reasonably equivalent value" for the money, thereby precluding summary judgment. Contrary to the Oakland Circuit Court's interpretation of the case, the Sixth Circuit did not grant summary judgment in Sheila's favor. Nor did the Sixth Circuit hold that payment of household expenses with fraudulently

transferred funds constitutes a complete defense to a claim brought under the FDCPA. Rather, the Sixth Circuit simply held that the district court erred by granting summary judgment to the government without considering the merits of Sheila's "reasonably equivalent value" defense.

Aside from the fact that defendants have mischaracterized *Goforth* as creating a complete "living expenses" defense, common sense dictates that spending money on one's self or one's spouse does not automatically trump a fraudulent-transfer claim. If it did, the MUFTA would be a useless waste of ink and paper, as every debtor would simply transfer any cash in his or her possession to a covert account, spend it freely, and thereby avoid liability on a court-entered judgment. The Oakland Circuit Court's ruling would freely permit a debtor and his or her spouse to avoid liability for an otherwise fraudulent transfer simply by spending the money on themselves. Our Supreme Court long ago condemned this reasoning in a similar case, in which the creditor-plaintiffs claimed that the debtor-defendants had placed their property "under cover of the wife with intent to thereby keep the same away from the creditors of the husband." *Morse v Roach*, 229 Mich 538, 541; 201 NW 471 (1924). The Court affirmed a judgment in the plaintiffs' favor, concluding with this colorful language:

> Subsequent accumulations, being those of the husband, are not covered by the skirts of the wife. Defendants have treated such subsequent accumulations as belonging to the husband up to the point where creditors try to step in. The transparent screen of the ownership of the wife offers no insurmountable hurdle to the law. [*Id.*]

The MUFTA is similarly not so easily circumvented.

Federal law protects a judgment debtor from losing all ability to support himself and his family by allowing a creditor to garnish only up to 25% of the debtor's weekly disposable earnings. 15 USC 1673(a)(1). Looked at from the other direction, federal law permits a debtor to retain 75% of his or her weekly paycheck. Presumably, the law is intended to strike a balance by permitting a debtor to pay living expenses while also owning up to the financial consequences of a judgment. This exemption, blended into the MUFTA's definition of an "asset," inherently recognizes that "no man should be permitted to live at the same time in luxury and in debt." *In re Portnoy*, 201 BR 685, 693 (Bankr SD NY, 1996) (quotation marks and citation omitted). Like the United States Court of Appeals for the Third Circuit, we "see no reason that the law of fraudulent transfer should permit an insolvent debtor to transfer his own funds out of the reach of his creditors—frustrating or delaying attempts to recover a debt—while still directing the use of those funds towards amenities of his choice." *Cardiello v Arbogast*, 533 Fed Appx 150, 157 (CA 3, 2013).

That said, we do not decide the question whether Mark received reasonably equivalent value for the transfers, and reserve it for the finder of fact. Whether the Schlussels used the transferred funds to pay *reasonable* expenses, including their taxes and the claims of other creditors (such as the holder of their mortgage and their utilities), and whether those expenditures constitute reasonably equivalent value for the transfers, must be decided after a trial.

On the basis of the same reasoning, we reverse the circuit court's ruling regarding the Pacific Life insurance policy. Record evidence supports that in March 2010, the "M & A Enterprises LLC Defined Benefit

Plan & Trust" obtained a $40,000 loan against the policy. At that time, Mark was the only plan participant. He subsequently arranged to transfer this asset to Rose Lynn, and to transfer ownership of the life insurance policy to her as well. The circuit court erred by concluding that because the policy was "owned" by M & A at the time of the transfer, Mark's acts could not be considered fraudulent. On remand, the circuit court must determine whether the loan check issued by Pacific Life constituted Mark's "property," as that term is defined in MCL 566.31(j). If so, the circuit court must address whether Mark transferred the property by applying MCL 566.31(*l*).

In summary, material questions of fact preclude summary disposition in this case, including Mark's intent under § 4(1)(a), see *Szkrybalo v Szkrybalo*, 477 Mich 1086 (2007), and whether any of the transfers to Rose Lynn and then to M & A were made for reasonably equivalent value. The presence of multiple badges of fraud establishes a prima facie case of fraudulent transfer that is not negated by the Schlussels' expenditure of the money on their "ordinary" household expenses. Nor does the Schlussels' expenditure of hundreds of thousands of dollars each year on themselves defeat Dillard's claim for constructive fraud. Viewed in the light most favorable to Dillard, record evidence supports that the Schlussels not only put their needs and wants ahead of the creditor, but transferred assets intending to place those assets outside the creditor's reach.

We affirm the circuit court's ruling regarding the period of limitations, but reverse the circuit court's ruling that a debtor's transfer of assets for the purpose of paying the debtor's household expenses immunized the transfers from challenge under the MUFTA. We

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

BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ., concurred.

HAYNES v VILLAGE OF BEULAH

Docket No. 317391. Submitted October 9, 2014, at Petoskey. Decided October 21, 2014. Approved for publication December 9, 2014, at 9:25 a.m. Leave to appeal denied 498 Mich 860.

Jeffrey K. and Karen M. Haynes brought an action to quiet title in the Benzie Circuit Court against the village of Beulah, alleging that its plans to create angled parking, a new sidewalk, and a streetway in the platted right-of-way of its streets would encroach on property that plaintiffs claimed under a theory of acquiescence. Defendant counterclaimed, seeking an injunction to require plaintiffs to remove the improvements that they or their predecessors in title had placed on the disputed property. Defendant moved for summary disposition on the ground that MCL 247.190, which governs encroachments on public highways, barred plaintiffs' claim. The court, James M. Batzer, J., granted defendant's motion for summary disposition and dismissed its counterclaim without prejudice. Plaintiffs appealed.

The Court of Appeals *held*:

1. The court did not err by concluding that the scope of the term "public highways" in MCL 247.190 was broad enough to include village streets.

2. The trial court did not err by applying MCL 247.190 to bar plaintiffs' acquiescence claim and grant summary disposition in defendant's favor.

3. The holding in *Mason v City of Menominee*, 282 Mich App 525 (2009), did not apply because that case involved a defense based on MCL 600.5821(2), not MCL 247.190.

4. The unimproved portions of the platted rights-of-way at issue were covered by MCL 247.190 because defendant had spent public funds to develop and maintain public roads in the platted rights-of-way for the two streets involved in this case, which sufficed to bring the entire width of the platted right-of-way within the scope of the statute.

Affirmed.

1. PROPERTY — HIGHWAYS AND STREETS — ENCROACHMENTS — VILLAGE STREETS — STATUTES — WORDS AND PHRASES — HIGHWAYS.

The term "highways" in MCL 247.190, which governs encroachments on public highways, includes village streets.

2. PROPERTY — ACQUIESCENCE — HIGHWAYS AND STREETS — ENCROACHMENTS — STATUTES.

MCL 247.190, which governs encroachments on public highways, applies to claims that seek title to disputed property within the platted right-of-way of a village street on a theory of acquiescence.

3. HIGHWAYS AND STREETS — PLATTED RIGHTS-OF-WAY — UNIMPROVED PORTIONS.

Expenditure of public funds on a highway in a dedicated right-of-way is sufficient to constitute public acceptance of the entire width for purposes of MCL 247.190, even if some strips within the right-of-way were never improved.

Beier Howlett, PC (by *Jeffrey K. Haynes*), for plaintiffs.

Smith Haughey Rice & Roegge (by *Jon D. Vander Ploeg*, *Daniel M. Morley*, and *Karrie A. Zeits*) for defendant.

Amicus Curiae:

Johnson, Rosati, Schultz & Joppich, PC (by *Thomas R. Schultz* and *Carol A. Rosati*), for the Michigan Municipal League and Public Corporation Law Section of the State Bar of Michigan.

Before: MURPHY, C.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM. Plaintiffs appeal as of right following the trial court's grant of defendant's motion for summary disposition. We affirm.

Plaintiffs claim entitlement to two strips of land within the platted rights-of-way of Lake Street and Commercial Avenue in the village of Beulah under a theory of acquiescence. Plaintiffs are the owners of Lots 10, 11, and a portion of Lot 7 in Block 2, which are

bordered on the northwest by Lake Street and the southwest by Commercial Avenue. Before 1968, plaintiffs' predecessors in title installed railroad ties along Lake Street that separate the traveled portion of road from the grass, rocks, and trees composing the strip of land claimed by plaintiffs. On the southwest, a rock wall installed in the 1950s separates the traveled portion of Commercial Avenue from landscaping plants, a portion of plaintiffs' driveway, a maple tree, and a strip of grass now claimed by plaintiffs. In 2012, the village of Beulah introduced plans that would create angled parking, a new sidewalk, and a streetscape in the platted right-of-way of each street and would occupy portions of the land now claimed by plaintiffs. As a result, plaintiffs brought this action.

Plaintiffs argue that the trial court erred by granting defendant's motion for summary disposition because MCL 247.190 does not apply to platted village streets or property acquiescence claims. We review a trial court's grant of summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). It is unclear whether the trial court granted summary disposition to defendant under MCR 2.116(C)(8) or MCR 2.116(C)(10). If the trial court granted defendant's motion for summary disposition under MCR 2.116(C)(8) or (10) and it considered documents outside the pleadings, we review the trial court's decision as though it had been made under MCR 2.116(C)(10). *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997).

MCL 247.190 provides as follows:

> All public highways for which the right of way has at any time been dedicated, given or purchased, shall be and remain a highway of the width so dedicated, given or purchased, and no encroachments by fences, buildings or

> otherwise which may have been made since the purchase, dedication or gift nor any encroachments which were within the limits of such right of way at the time of such purchase, dedication or gift, and no encroachments which may hereafter be made, shall give the party or parties, firm or corporation so encroaching, any title or right to the land so encroached upon.

At issue is the scope of the term "highways," which is not defined in the statute.

When interpreting statutes, the primary goal of the judiciary is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). When the Legislature has unambiguously conveyed its intent within a statute, judicial interpretation is neither necessary nor permitted. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). However, if the intent of the Legislature is not clear, courts must interpret statutes in a way that gives effect to every word, phrase, and clause in a statute and "avoid an interpretation that would render any part of the statute surplusage or nugatory." *Id*. If a word is not defined in a statute, that word should be interpreted according to its plain and ordinary meaning, and in "those situations, [this Court] may consult dictionary definitions." *Id*. Judicial interpretation of statutes should "construe an act as a whole to harmonize its provisions and carry out the purpose of the Legislature." *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

At issue here is the scope of the term "highways" under MCL 247.190. *Black's Law Dictionary* (10th ed) defines "highway" as follows:

> **1.** Broadly, any main route on land, on water, or in the air. **2.** A free and public roadway or street that every person may use. . . . **3.** The main public road, esp. a wide one, connecting towns or cities. **4.** The entire width between

> boundaries of every publicly maintained way when part is open to public use for purposes of vehicular traffic.

Random House Webster's College Dictionary (2000) defines "highway" as follows: "**1.** A main road, esp. one between towns or cities. **2.** Any public road or waterway. **3.** Any main or ordinary route, track, or course."

Moreover, our Supreme Court has had multiple opportunities to define the term "highway" in the absence of a statutory definition both before and after the Legislature enacted MCL 247.190 in 1925. In 1911 and again in 1961, the Court used the definition of "highway" found in Elliott, A Treatise on the Law of Roads and Streets (1890), which defines highway as " ' "the generic name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers." ' " *In re Petition of Carson*, 362 Mich 409, 412; 107 NW2d 902 (1961), quoting *Burdick v Harbor Springs Lumber Co*, 167 Mich 673, 679; 133 NW 822 (1911), quoting Elliott. More recently, the Court relied on this definition to determine the scope of the word "highway" in other Michigan statutes that did not provide internal definitions of the term. See *Advisory Opinion on 1976 PA 295 & 1976 PA 297*, 401 Mich 686, 706-707; 259 NW2d 129 (1977). Because both dictionary definitions and the definition accepted by our Supreme Court before and after the Legislature enacted MCL 247.190 support a broad reading of the term "highway," the trial court did not err by broadly construing the term to include village streets.

Plaintiffs also contend that MCL 247.190 does not apply to property acquiescence claims. We disagree. MCL 247.190 provides that "no encroachments" on a public highway "shall give the party or parties, firm or

corporation so encroaching, any title or right to the land so encroached upon." Nothing in the plain language of the statute invites this Court to distinguish between different legal theories used to assert a private claim of title or right to a public highway. Further, as this Court has recently affirmed, "[b]oth adverse possession claims and acquiescence claims seek title to disputed property by virtue of possession, and both involve a limitations period." *Waisanen v Superior Twp*, 305 Mich App 719, 728-729; 854 NW2d 213 (2014).

Plaintiffs also argue that any private claim of title to municipal property brought under a theory of acquiescence falls within the scope of this Court's holding in *Mason v City of Menominee*, 282 Mich App 525; 766 NW2d 888 (2009). We disagree. In *Mason*, the plaintiffs claimed title under a theory of acquiescence to an undeveloped 60-foot strip of land located in a public park that was originally deeded as a proposed street. *Id*. at 527. We decided *Mason* under MCL 600.5821(2), which provides that a private landowner will only be precluded from acquiring municipal property by acquiescence if the action to recover property is brought by the municipality. *Id*. at 529. However, here, defendant does not assert a defense under MCL 600.5821(2), which applies to municipal land generally, but rather under MCL 247.190, which only applies to public highways. Because the platted rights-of-way for Lake Street and Commercial Avenue properly fall within the definition of "public highway" under MCL 247.190, *Mason* does not apply.

Finally, plaintiffs contend that the unimproved portions of platted rights-of-way are not "public highways" entitled to protection under MCL 247.190. Again, we disagree. "[I]t is not essential that every part of the highway, in length or width, should be worked and

traveled in order to show the intention of the public to accept the entire highway." *Crosby v City of Greenville*, 183 Mich 452, 460; 150 NW 246 (1914). Rather, expenditure of public funds on a road in a dedicated right-of-way is sufficient to constitute public acceptance of the entire width, even if a municipality never improved specific strips of land within the right-of-way. *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 401-402; 132 NW2d 92 (1965). Here, defendant developed and maintained public roads in the platted rights-of-way for Lake Street and Commercial Avenue. Therefore, the entire width of the platted right-of-way properly falls within the scope of "public highway" under MCL 247.190. Accordingly, the trial court did not err by granting defendant's motion for summary disposition.

Affirmed.

MURPHY, C.J., and SAWYER and M. J. KELLY, JJ., concurred.

JAHNKE v ALLEN

Docket No. 317625. Submitted December 2, 2014, at Grand Rapids. Decided December 16, 2014, at 9:00 a.m. Leave to appeal denied 498 Mich 866.

Bonnie Jahnke brought an action in the Kent Circuit Court against Darryl Allen, seeking damages for injuries sustained in a fall while walking arm-in-arm with defendant on defendant's property. Plaintiff alleged that her action sounded in negligence. Defendant alleged that the case sounded in premises liability and that summary disposition should be granted in his favor because the claim was barred under the open and obvious danger doctrine. The trial court, Donald A. Johnson, J., agreed with defendant and granted his motion for summary disposition. Plaintiff appealed.

The Court of Appeals *held*:

Plaintiff's injury occurred because of a condition on the land rather than defendant's conduct. Although defendant may have created the condition on the land, that does not transform the premises liability action into one alleging ordinary negligence. When, as in this case, the facts only support a premises liability claim, a plaintiff cannot avoid the open and obvious danger doctrine by claiming ordinary negligence. The action sounded in premises liability and not ordinary negligence.

Affirmed.

NEGLIGENCE — PREMISES LIABILITY.

Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land; the duty owed in a general negligence claim is that every person who engages in the performance of an undertaking has an obligation to use due care or to act so as not to unreasonably endanger the person or property of another; the duty owed in a premises liability case is that the landowner simply owes the licensee a duty to warn of unreasonably dangerous conditions when the licensee neither knows nor has reason to know of the condition and the risk involved; alleging that the defendant created the condition does not transform a premises liability claim into one for ordinary negligence.

Bleakley Law Offices, PC (by *Berton K. May*), for plaintiff.

Plunkett Cooney (by *Jeffrey C. Gerish* and *Matthew T. Thompkins*) for defendant.

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

PER CURIAM. Plaintiff appeals the May 24, 2013 order granting defendant's motion for summary disposition under MCR 2.116(C)(10) in this civil dispute involving plaintiff's fall and subsequent injury while walking arm-in-arm with defendant on defendant's property. We affirm.

Since April of 2009, plaintiff has resided with her fiancé, Randy Bates, in a mobile home adjacent to defendant's home, and defendant has been plaintiff's landlord. Defendant and plaintiff are good friends who socialize regularly. In June or early July of 2010, defendant began a landscaping project at his home with the help of plaintiff, Bates, and plaintiff's son. In early July 2010, plaintiff and defendant socialized on defendant's porch from where the construction was visible.

On July 17, 2010, plaintiff and defendant were socializing at plaintiff's home. At approximately 11:30 p.m., plaintiff was informed that defendant, who suffers from hydrocephalus, was having a dizzy spell. Plaintiff took defendant by the arm and walked arm-in-arm with him from plaintiff's garage toward defendant's garage. Bates walked behind plaintiff and defendant. As plaintiff and defendant rounded the corner of defendant's garage, plaintiff's right foot slipped off the edge of the concrete pavers, where some had been removed as part of the construction, and she fell. Plaintiff fell onto her right shoulder. Defendant fell on top of plaintiff because she pulled him down with her as she fell. The area

where plaintiff fell was not lit by the mercury light on defendant's garage, the motion-detector light above the garage door, or ambient light.

Plaintiff brought an action against defendant alleging negligence. Defendant filed a motion for summary disposition, asserting that plaintiff's claim was barred by the open and obvious danger doctrine because the case sounded in premises liability. The trial court granted defendant's motion. This appeal followed. The primary issue on appeal is whether plaintiff's claim sounds in premises liability or in ordinary negligence.

This Court "review[s] de novo a trial court's ruling on a motion for summary disposition." *Watts v Mich Multi-King, Inc*, 291 Mich App 98, 102; 804 NW2d 569 (2010). "In considering a motion pursuant to MCR 2.116(C)(10), a court considers affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in a light most favorable to the nonmoving party." *Id*. "Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law." *Id*. "The trial court cannot grant the defendant's motion unless it is impossible to support the plaintiff's claim at trial because of some deficiency that cannot be overcome." *Lichon v American Universal Ins Co*, 435 Mich 408, 414; 459 NW2d 288 (1990).

"Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land." *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). Plaintiff asserts that the trial court's review of her complaint was flawed because the complaint stated "COUNT I — NEGLIGENCE" and not "Premises Liability." However, plaintiff's argument provides little guidance on whether this is a premises liability claim or

an ordinary negligence claim because "[i]t 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." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Additionally, "[c]ourts are not bound by the labels that parties attach to their claims." *Buhalis*, 296 Mich App at 691.

In a premises liability action, "liability arises solely from the defendant's duty as an owner, possessor, or occupier of land." *Id*. at 692. "Terms such as 'premises possessor' and 'dangerous condition on the land' relate to the elements of a premises liability, rather than ordinary negligence, claim." *Wheeler v Central Mich Inns, Inc*, 292 Mich App 300, 304; 807 NW2d 909 (2011). The duty owed in a premises liability case is that "the landowner simply owes the licensee a duty to warn of unreasonably dangerous conditions, when the licensee neither knows nor has reason to know of the condition and the risk involved." *Burnett v Bruner*, 247 Mich App 365, 372; 636 NW2d 773 (2001). Whereas, the duty owed in a general negligence claim is that "every person who engages in the performance of an undertaking has an obligation to use due care or to act so as not to unreasonably endanger the person or property of another." *Schenk v Mercury Marine Div, Lowe Indus*, 155 Mich App 20, 25; 399 NW2d 428 (1986). Additionally, alleging that defendant created the condition "does not transform the claim into one for ordinary negligence." *Buhalis*, 296 Mich App at 692. An action in premises liability, however, "does not preclude a separate claim grounded on an independent theory of liability based on the defendant's conduct . . . ." *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005).

Plaintiff argued in the trial court and on appeal that this case sounds in ordinary negligence and should not have been dismissed because defendant was negligent in how he escorted plaintiff across the property. We disagree. Here, plaintiff's injury occurred because of a condition on the land, the removed concrete pavers, rather than defendant's conduct. While defendant may have created the condition on the land, that does not transform the premises liability action into one alleging ordinary negligence. See *Buhalis*, 296 Mich App at 692. A plaintiff cannot avoid the open and obvious danger doctrine by claiming ordinary negligence, when the facts only support a premises liability claim, as they do here. Therefore, the action sounded in premises liability and not ordinary negligence, and the trial court did not err by granting defendant's motion for summary disposition because the open and obvious danger doctrine bars plaintiff's claim. Moreover, the trial court did not err by denying plaintiff the opportunity to amend her complaint, because the proposed amendment was just another futile attempt to classify this case as one of general negligence rather than one of premises liability.

Affirmed. Defendant may tax costs.

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

SPRANGER v CITY OF WARREN

Docket No. 316180. Submitted September 10, 2014, at Detroit. Decided December 16, 2014, at 9:05 a.m.

Karen Spranger sought a poverty exemption from the 2012 property taxes assessed on her residential property by the city of Warren. Petitioner submitted a poverty exemption application to the city's March board of review, indicating that she had no income or savings and that she received government assistance to pay for food and utilities. However, the application did not specify the dollar amounts of assistance she received. Respondent scheduled a special hearing on petitioner's application for March 22, 2012, but did not give petitioner proper notice of the hearing, and she did not attend it. The board of review denied petitioner's request in her absence on the grounds that it was impossible to determine whether she qualified for a poverty exemption under MCL 211.7u because her application was incomplete. Petitioner appealed in the Tax Tribunal, which concluded that, despite petitioner's submission of additional evidence, she had not proved that she qualified for the exemption because her total income could not be determined. Petitioner appealed.

The Court of Appeals *held*:

The board of review violated its statutory duty and petitioner's constitutional right to due process by failing to send petitioner personal notice of her special hearing date to the address that she provided to respondent and by failing to afford her a meaningful opportunity to be heard. Although the error was committed by respondent and its board of review, the only available remedy was a remand for a hearing before the Tax Tribunal under MCL 205.735a(2) at which petitioner could supplement her original application and present new evidence for consideration de novo.

Reversed in part, vacated in part, and remanded to the Tax Tribunal for further proceedings.

Judge OWENS, dissenting, agreed that respondent had violated state statute and petitioner's due process rights by failing to adequately notify her of the special hearing date and afford her a meaningful opportunity to be heard; however, he would have concluded that the error was cured and remand was unnecessary

because petitioner was given a meaningful opportunity to be heard at the hearing de novo before the Tax Tribunal.

Karen Spranger, *in propria persona*.

David Griem and *Mary Michaels* for the city of Warren.

Before: OWENS, P.J., and JANSEN and O'CONNELL, JJ.

JANSEN, J. Petitioner Karen Spranger appeals by right the judgment of the Tax Tribunal denying her request for a poverty exemption from her 2012 property taxes on her residential property in the city of Warren. We reverse in part, vacate in part, and remand to the Tax Tribunal for further proceedings consistent with this opinion.

Petitioner submitted a City of Warren Poverty Exemption Application to respondent's March board of review. On her application, petitioner indicated that her source of income was a "Bridge Card" and that she received assistance from the Department of Human Services (DHS) for her utility bills. However, petitioner did not indicate the *specific amounts* of assistance that she received. Respondent scheduled a special hearing on petitioner's application for March 22, 2012, but petitioner did not appear for the special hearing because she had never received proper notice thereof. The board of review ultimately denied petitioner's request, in her absence, on the grounds that she had submitted an "incomplete application" and it was therefore impossible to determine whether she qualified for a poverty exemption under the standards set forth in MCL 211.7u.

Petitioner appealed in the Tax Tribunal. When petitioner appeared for her scheduled hearing before the

Tax Tribunal and attempted to present additional evidence, respondent objected on the ground that the proffered evidence had not been considered by the board of review. The Tax Tribunal found that petitioner had failed to provide specific documentation regarding the total amount of assistance she was receiving. Therefore, the Tax Tribunal concluded, petitioner's total income and qualification for a poverty exemption could not be determined. On appeal in this Court, petitioner argues that the board of review and the Tax Tribunal erred by basing their conclusions on the lack of specific documentation presented.

Tax exemptions are "strictly construed in favor of the taxing authority," *Sietsema Farms Feeds, LLC v Dep't of Treasury*, 296 Mich App 232, 236; 818 NW2d 489 (2012), and the petitioner has the burden to prove, by a preponderance of the evidence, that he or she is entitled to the requested exemption, *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002). The Tax Tribunal has exclusive jurisdiction to hear a taxpayer's claim for a poverty exemption under MCL 211.7u following an unsuccessful request before the local board of review. *Nicholson v Birmingham Bd of Review*, 191 Mich App 237, 239; 477 NW2d 492 (1991).

To be eligible for a poverty exemption under MCL 211.7u, a petitioner must prove, among other things, that he or she meets the poverty guidelines. MCL 211.7u(2)(e). Both the board of review and the Tax Tribunal determined that petitioner had failed to provide sufficient information concerning her income and therefore could not prove that she satisfied the poverty guidelines under MCL 211.7u(2)(e).

A petitioner's request for a poverty exemption must be submitted on a form provided by the local assessing

unit, MCL 211.7u(2)(b), and must comply with the policies and guidelines of the local assessing unit, MCL 211.7u(4). In deciding whether to grant the requested poverty exemption, the board of review must generally follow the policies and guidelines of the local taxing unit unless it finds that there are substantial and compelling reasons to deviate therefrom. MCL 211.7u(5).

As noted previously, petitioner submitted a City of Warren Poverty Exemption Application to the city's March board of review. The application was received in the city assessor's office on March 16, 2012.[1] Petitioner listed her address, telephone number, and the tax identification number for her parcel. She stated that she owned the residential property at issue, which she had inherited, and listed her monthly household water, gas, and electric expenses. Petitioner indicated that she had not filed a federal income tax return because she had no income.[2] She further indicated that she had no bank account balances or credit cards. Petitioner attached documentation of some of her utility expenses and a statement showing that DHS was assisting her with certain utility bills.

The city of Warren's policies and guidelines require that proof of all sources of income, including all family contributions and government assistance, must be submitted with the petitioner's poverty exemption application. We fully acknowledge that petitioner's written application was incomplete to the extent that it did not list the *specific amounts* of assistance that petitioner was receiving through her Bridge Card and from family members. At the same time, however, the board of review could have easily inquired into these particular

[1] Respondent's March board of review convened on March 19, 2012. Accordingly, petitioner's application was timely filed. MCL 211.7u(3).

[2] See MCL 211.7u(2)(b).

matters at the scheduled special hearing on March 22, 2012, if petitioner had been properly notified to attend. So, too, could petitioner have presented additional evidence at the hearing had she been given proper notice of the scheduled date and time.

Counsel for respondent represented at oral argument before this Court that the city of Warren's March board of review sat in regular session on March 19, 20, and 21, 2012. The board of review then reconvened for the purpose of holding special hearings on March 22, 2012. Counsel confirmed that petitioner's special hearing was scheduled for March 22, 2012, at 10:00 a.m. Although petitioner attended each regular session of the board of review on March 19, 20, and 21, 2012, she did not appear at the time set for her special hearing on March 22, 2012. Counsel for respondent confirmed that petitioner was never notified in writing of her special hearing on March 22, 2012, but was merely told of the hearing date orally, either by telephone or in person, by an unidentified employee of the city of Warren.[3] Indeed, respondent's attorney stated that the city of Warren has never provided written notice of the time and date set for hearing to taxpayers seeking poverty exemptions.

As explained, because petitioner did not list the *specific amounts* of assistance that she was receiving through her Bridge Card and from family members, the board of review denied her request on the ground that her application was incomplete. On appeal in the Tax Tribunal, the hearing referee found that petitioner

[3] Petitioner has consistently maintained that she was never orally informed of her special hearing date, by telephone or in person. Respondent has submitted no affidavit or other admissible documentary evidence to establish that the claimed oral notice to petitioner actually occurred.

owned the subject residential property, had no household assets, and had timely submitted a City of Warren Poverty Exemption Application for tax year 2012. Nevertheless, the hearing referee determined that petitioner had failed "to complete the City of Warren Poverty Exemption Application in full," primarily because she had listed "Bridge Card" rather than an "actual dollar amount" for her income. The Tax Tribunal issued its final judgment adopting the hearing referee's recommendations on April 23, 2013.

Petitioner has maintained at all relevant times that she never received oral notice, by telephone or in person, of her special hearing date. We can conceive of no reason to believe that petitioner would not have attended her scheduled special hearing on March 22, 2012, had she been properly notified thereof. After all, the record indicates that she diligently attended all three regular session days of the board of review on March 19, 20, and 21, 2012. Yet at no time did anyone from the board of review or city of Warren approach petitioner, ask her whether she was waiting to be heard, or inform her that her special hearing was actually scheduled for a later date.

At the time set for hearing, the board of review was empowered to take testimony under oath and consider other additional proofs. See Warren City Charter, § 9.9(b); see also *McMorran v Wright*, 74 Mich 356, 358-359; 41 NW 1082 (1889). Accordingly, if petitioner had been properly notified, and if she had appeared for her special hearing at the appointed time, she could have supplemented her written application with testimony and additional evidence concerning her income and assets.

The owner of real property is entitled to the protection of constitutional due process with respect to the

assessment and collection of property taxes. *Brandon Twp v Tomkow*, 211 Mich App 275, 282-283; 535 NW2d 268 (1995). At a minimum, due process requires notice and an opportunity to be heard in a meaningful time and manner. *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). A local board of review is required to provide constitutionally adequate notice in a manner that is consistent with due-process principles. *Fisher v Muller*, 53 Mich App 110, 121-122; 218 NW2d 821 (1974).

This Court has previously observed that taxpayers are charged with knowing the powers and duties of the board of review, as well as the dates that the board of review is scheduled to meet, because those dates are published in the local newspaper. *Fisher*, 53 Mich App at 121; see also MCL 211.29(6); Warren City Charter, §§ 9.8 and 9.9. In the present case, there is no dispute that petitioner knew the dates of the board of review's regular sessions. Indeed, she personally attended each regular session on March 19, 20, and 21, 2012. The problem is that petitioner's special hearing was scheduled for a later date, namely March 22, 2012, which was *not* published in the newspaper. Nor was petitioner otherwise properly notified of this special hearing day and time.

Persons or their agents who have a scheduled hearing before the board of review must be afforded an opportunity to be heard. MCL 211.30(3). For this statutory right to have any meaning at all, a local taxing authority must necessarily inform the taxpayer or his or her agent of the date and time of the scheduled hearing. Indeed, this Court has held that in order to comply with procedural due process, a board of review is required to give "personal notice by mail" when the petitioner's address is known to the taxing authority. *Fisher*, 53

Mich App at 122. It is beyond dispute that the city of Warren was fully aware of petitioner's address, which was provided on her poverty exemption application. The city of Warren's oral notice to petitioner regarding her special hearing date, assuming it ever took place, was constitutionally insufficient on the facts of this case. See *id*. Stated differently, although petitioner's poverty exemption application was technically incomplete insofar as it did not list the *specific amount* of her income, the board of review violated state statute, MCL 211.30(3), as well as petitioner's right to constitutional due process, *Cummings*, 210 Mich App at 253, by failing to ensure that she was adequately notified of her special hearing date and by failing to afford her a meaningful opportunity to be heard.

We wish to make clear that the Tax Tribunal did not commit any error of its own in this case. "[T]he Tax Tribunal does not have jurisdiction over constitutional questions . . . ." *WPW Acquisition Co v City of Troy (On Remand)*, 254 Mich App 6, 8; 656 NW2d 881 (2002). Accordingly, the Tax Tribunal lacked the authority to consider whether the procedures followed by the city of Warren and its board of review were sufficient to satisfy petitioner's constitutional right to procedural due process.

Nevertheless, although the error in this case was committed by respondent and its board of review, the only available remedy is a remand for a new hearing before the Tax Tribunal. *Nicholson*, 191 Mich App at 239-243. On consideration de novo, MCL 205.735a(2); *Nicholson*, 191 Mich App at 240-241, the Tax Tribunal will be in a position to cure the earlier constitutional error by providing petitioner with the procedural due process that she was denied by respondent, see *Johnston v Livonia*, 177 Mich App 200, 207-208; 441

NW2d 41 (1989); *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988). The Tax Tribunal will also be in a position to allow petitioner to supplement her original application and present new evidence. See *Heindlmeyer v Ottawa Co Concealed Weapons Licensing Bd*, 268 Mich App 202, 218; 707 NW2d 353 (2005).[4]

We reverse the decision of the board of review and vacate the judgment of the Tax Tribunal. We remand this matter to the Tax Tribunal for an independent consideration de novo of petitioner's request for a poverty exemption under MCL 211.7u for tax year 2012. MCL 205.735a(2); see also *Nicholson*, 191 Mich App at 240-241, 243. On remand, the Tax Tribunal shall provide petitioner with notice and a meaningful opportunity to be heard, allow petitioner to supplement her original application, and permit petitioner to present evidence and testimony regarding her income, assets, and qualifications for the exemption.

Reversed in part, vacated in part, and remanded to the Tax Tribunal for further proceedings consistent

[4] As explained previously, the Tax Tribunal has exclusive jurisdiction to hear a taxpayer's claim for a poverty exemption following an unsuccessful request before the board of review. *Nicholson*, 191 Mich App at 239. Such a proceeding before the Tax Tribunal "is original and independent and is *considered de novo*." MCL 205.735a(2) (emphasis added); see also *Nicholson*, 191 Mich App at 240. The term "de novo" contemplates the taking of new evidence and the presentation of new testimony. *Heindlmeyer*, 268 Mich App at 218. Under MCL 205.735a(2), the Tax Tribunal must not simply accept the findings of the board of review, but must make its own independent determination of whether the taxpayer is entitled to the requested exemption. See, generally, *Great Lakes Div of Nat'l Steel Corp v Ecorse*, 227 Mich App 379, 409; 576 NW2d 667 (1998). The Tax Tribunal's duty to undertake an independent consideration de novo is particularly great when the board of review has committed a procedural error or when its explanation for denying the requested exemption is inadequate. See *Nicholson*, 191 Mich App at 242.

with this opinion. We do not retain jurisdiction. Petitioner, having prevailed on appeal, may tax her costs pursuant to MCR 7.219.

O'CONNELL, J., concurred with JANSEN, J.

OWENS, P.J. (*dissenting*). I respectfully dissent from the majority opinion and would affirm the judgment of the Tax Tribunal denying petitioner a poverty exemption against her 2012 property taxes for the residential property that she owned in the city of Warren.

I agree with the majority that the board of review violated state statute, MCL 211.30(3), and petitioner's due process rights by failing to adequately notify her of the special hearing date and afford her a meaningful opportunity to be heard. However, because petitioner had a de novo hearing before the Tax Tribunal, see MCL 205.735a(2), where she was given a meaningful opportunity to be heard, I would conclude that the constitutional error committed by the board of review was cured. Thus, I find it unnecessary to remand to the Tax Tribunal for another hearing.

Following the denial of her request for a poverty exemption by the board of review, petitioner appealed to the Tax Tribunal. The hearing before the Tax Tribunal was "original and independent and [was] considered de novo." MCL 205.735a(2). Petitioner was provided the opportunity to be heard and allowed to supplement her application. In fact, petitioner presented additional documentation to the Tax Tribunal, which included a previous decision by the Tax Tribunal and four documents showing that the Department of Human Services had paid her utility bills in July 2010, October 2010, June 2011, and January 2011. Additionally, petitioner and her sister testified at the hearing. Further, a

proposed judgment was entered following the hearing, at which petitioner had the opportunity to file exceptions but did not do so. Unlike the plaintiff in *Nicholson v Birmingham Bd of Review*, 191 Mich App 237, 243; 477 NW2d 492 (1991),[1] which is cited by the majority, petitioner was not left without a forum to appeal the board of review's denial of her claim, because the Tax Tribunal considered her case de novo. See MCL 205.735a(2). Nevertheless, despite presenting testimony and additional documentation, petitioner still failed to supply the Tax Tribunal with the information necessary to calculate her income. As the Tax Tribunal found, petitioner did not provide an actual dollar amount of the governmental and family assistance she received. Further, petitioner included a vehicle in her list of assets, but her sister testified that she actually owned the vehicle and paid for the expenses. Petitioner carries the burden to prove, by a preponderance of the evidence, that she is entitled to the poverty exemption. *ProMed Healthcare v Kalamazoo*, 249 Mich App 490, 494-495; 644 NW2d 47 (2002). Accordingly, I would affirm the judgment of the Tax Tribunal.

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[1] In *Nicholson*, the board of review denied the plaintiff's request for an exemption from her 1986 and 1987 property tax assessments. *Nicholson*, 191 Mich App at 239. The plaintiff appealed in the Tax Tribunal, which dismissed her appeal on the ground that it lacked jurisdiction. *Id*. The board of review later denied the plaintiff's request for an exemption for her 1988 and 1989 property tax assessments. The plaintiff appealed in the circuit court, which dismissed plaintiff's claim on the ground that the Tax Tribunal had exclusive jurisdiction. *Id*. The plaintiff then appealed in this Court. Thus, unlike the present case, the Tax Tribunal never heard the merits of either case in *Nicholson*. Because the Tax Tribunal erred by dismissing the plaintiff's first appeal, which likely influenced the plaintiff's decision to file her complaint in circuit court the second time, this Court held that the only available remedy was to remand the matter to the Tax Tribunal, the appropriate forum, to determine whether the plaintiff was entitled to the tax exemption. *Id*. at 243.

BAGBY v DETROIT EDISON COMPANY

Docket No. 311597. Submitted October 14, 2014, at Detroit. Decided October 23, 2014. Approved for publication December 16, 2014, at 9:10 a.m. Leave to appeal sought.

Rosalie M. Bagby, personal representative of the estate of Dale L. Bagby II, deceased, brought an action in the Wayne Circuit Court against the Detroit Edison Company, seeking to recover damages resulting from the electrocution and death of the decedent during the course of his employment. Defendant's motion for summary disposition was denied by the court, Jeanne Stempien, J., on the basis that plaintiff presented a genuine issue of material fact with respect to her claim for recovery under the intentional tort exception to the exclusive remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1). The Court of Appeals denied defendant's application for leave to appeal in an unpublished order, entered September 13, 2013 (Docket No. 311597). The Supreme Court, in lieu of granting leave to appeal, remanded the case to the Court of Appeals for consideration as on leave granted. 495 Mich 983 (2014).

The Court of Appeals *held*:

1. To recover under the intentional tort exception, a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury. To show that an employer specifically intended an injury, a plaintiff can provide direct evidence that the employer had the particular purpose of inflicting an injury on the plaintiff or, in the alternative, an employer's intent can be proven by circumstantial evidence, i.e., that the employer had actual knowledge that an injury was certain to occur, yet disregarded that knowledge.

2. Constructive, implied, or imputed knowledge does not satisfy the actual knowledge requirement. An employer's knowledge of general risks is insufficient to establish an intentional tort.

3. A plaintiff, to establish a corporate employer's actual knowledge, need only show that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do.

4. An injury is certain to occur if there is no doubt that it will occur. The existence of a dangerous condition does not mean an injury is certain to occur. An employer's awareness of a dangerous condition, or knowledge that an accident is likely, does not constitute actual knowledge that an injury is certain to occur. Conclusory statements by experts are insufficient to allege the certainty of injury contemplated by the Legislature.

5. A continuously operative dangerous condition may form the basis of a claim under the intentional tort exception only if the employer knows the condition will cause an injury and refrains from informing the employee about it. The employer's act or failure to act must be more than mere negligence. The plaintiff must show that the employer willfully disregarded its actual knowledge that injury was certain to occur.

6. Plaintiff failed to provide evidence that defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

7. To be "known" and "certain" an injury must spring directly from the employee's duties and the employee cannot have had the chance to exercise individual volition. An employer cannot know that an injury is certain to occur when the employee makes a decision to act or not act in the presence of a known risk because the employer cannot know in advance what the employee's reaction will be and what steps the employee will take. No supervisor could have known what decisions the decedent was going to make, so no supervisor could have had actual knowledge that an injury was certain to occur.

Reversed and remanded.

Edwards & Jennings, PC (*Carl R. Edwards*), for plaintiff.

Warner Norcross & Judd LLP (by *Matthew T. Nelson*, *Michael G. Brady*, and *William R. Jansen*) for defendant.

Amicus Curiae:

Clark Hill PLC (by *Cynthia M. Filipovich* and *Matthew W. Heron*) for the Michigan Manufacturers Association.

Before: BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM. Defendant appeals by leave granted[1] the trial court's order denying its motion for summary disposition. The court determined that summary disposition was improper because plaintiff, Rosalie M. Bagby, personal representative of the estate of Dale Lee Bagby II, deceased, presented a genuine issue of material fact with respect to her claim for recovery under the intentional tort exception of the Worker's Disability Compensation Act (WDCA), MCL 418.131(1). We reverse and remand.

Defendant argues that the trial court erred because there was no evidence that it had actual knowledge that an injury was certain to occur and that it willfully disregarded that knowledge. We agree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *MEEMIC Ins Co v DTE Energy Co*, 292 Mich App 278, 280; 807 NW2d 407 (2011). A summary disposition motion under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. "When deciding a summary disposition motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party." *Id*., citing *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The interpretation and application of statutes are reviewed de novo. *Johnson v Detroit Edison Co*, 288 Mich App 688, 695; 795 NW2d 161 (2010).

[1] See *Bagby v Detroit Edison Co*, 495 Mich 983 (2014) ("[I]n lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.").

Generally, the benefits provided by the WDCA are the sole remedy for employees to recover from their employers when the employees sustain work-related injuries or occupational diseases. *Id*. at 695-696. The only exception to this rule is when the employee can show that the employer committed an intentional tort. MCL 418.131(1); *Johnson*, 288 Mich App at 696. For purposes of the WDCA, an "intentional tort" is not a true intentional tort. *Travis v Dreis & Krump Mfg Co*, 453 Mich 149, 168; 551 NW2d 132 (1996) (opinion by BOYLE, J.). Rather, it exists

> when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. [MCL 418.131(1).]

Thus, to recover under the intentional tort exception of the WDCA, a plaintiff must prove that his or her injury was the result of the employer's deliberate act or omission and that the employer specifically intended an injury. See MCL 418.131(1); *Travis*, 453 Mich at 169-180 (opinion by BOYLE, J.). In other words, a plaintiff must show that "an employer . . . made a conscious choice to injure an employee and . . . deliberately acted or failed to act in furtherance of that intent." *Travis*, 453 Mich at 180 (opinion by BOYLE, J.).

There are two ways for a plaintiff to show that an employer specifically intended an injury. The plaintiff can provide direct evidence that the employer "had the particular purpose of inflicting an injury upon his employee." *Id*. at 172. In the alternative, an employer's intent can be proven by circumstantial evidence, i.e., that the employer "has actual knowledge that an injury is certain to occur, yet disregards that knowledge." *Id*. at 173, 180.

Constructive, implied, or imputed knowledge does not satisfy this actual knowledge requirement. *Johnson*, 288 Mich App at 697. In addition, "[a]n employer's knowledge of general risks is insufficient to establish an intentional tort." *Herman v Detroit*, 261 Mich App 141, 149; 680 NW2d 71 (2004); see also *House v Johnson Controls, Inc*, 248 F Appx 645, 647-648 (CA 6, 2007). "In the case of a corporate employer, a plaintiff need only show that 'a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do.' " *Johnson*, 288 Mich App at 697, quoting *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 714; 777 NW2d 205 (2009) (citation and quotation marks omitted).

An injury is "certain to occur" if "there is no doubt that it will occur . . . ." *Johnson*, 288 Mich App at 697 (quotation marks and citation omitted); see also *Travis*, 453 Mich at 174 (opinion by BOYLE, J.). As the Supreme Court explained in *Travis*, 453 Mich at 174 (opinion by BOYLE, J.):

> [T]he laws of probability, which set forth the odds that something will occur, play no part in determining the certainty of injury. Consequently, scientific proof that, for example, one out of ten persons will be injured if exposed to a particular risk, is insufficient to prove certainty. Along similar lines, just because something has happened before on occasion does not mean that it is certain to occur again. Likewise, just because something has never happened before is not proof that it is not certain to occur.

In addition, "conclusory statements by experts are insufficient to allege the certainty of injury contemplated by the Legislature." *Id*. The existence of a dangerous condition does not mean an injury is certain to occur. *Id*. An employer's awareness of a dangerous condition, or knowledge that an accident is likely, does

not constitute actual knowledge that an injury is certain to occur. *Johnson*, 288 Mich App at 697-698. The Supreme Court has also reasoned that an employer's attempts to repair a machine and its repeated warnings to employees may be evidence that the employer did not have actual knowledge that an injury was certain to occur. *Travis*, 453 Mich at 177 (opinion by BOYLE, J.). On the other hand, "[a] continuously operative dangerous condition may form the basis of a claim under the intentional tort exception only if the employer *knows* the condition will cause an injury and refrains from informing the employee about it." *Alexander v Demmer Corp*, 468 Mich 896, 896-897 (2003).

Finally, the plaintiff must show that the defendant *willfully disregarded* its actual knowledge that injury was certain to occur. See MCL 418.131(1); *Travis*, 453 Mich at 179 (opinion by BOYLE, J.). This requirement is "intended to underscore that the employer's act or failure to act must be more than mere negligence . . . ." *Id*. at 179.

Even assuming arguendo that plaintiff established a deliberate act or a conscious failure to act, she has failed to provide evidence that defendant had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. See MCL 418.131(1); *Travis*, 453 Mich at 172-173 (opinion by BOYLE, J.). First, plaintiff has not presented evidence that defendant, or a supervisory or managerial employee of defendant, had actual knowledge that an injury was certain to occur. Because defendant is a corporate employer, plaintiff needed to show that "a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." *Johnson*, 288 Mich App at 697, quoting *Fries*, 285 Mich App at 714 (quotation marks and

citation omitted). Plaintiff points to several acts and omissions that allegedly resulted in Dale Bagby's death. As discussed hereinafter, there is no evidence that a supervisor knew that any of these acts or omissions was certain to result in injury.

For example, there was evidence that Edmund Bechard, the job supervisor, did not conduct, or inadequately conducted, a prejob briefing before Bagby and the rest of the crew began work on November 11, 2009. Such a briefing should have included discussion on the limits of protection and the hazards involved with the job. But it is speculation to conclude that the failure to conduct this briefing would result in Bagby's death. It is even more speculative to conclude that Bechard, or any other supervisor, knew that the failure to conduct the prejob briefing would result in certain injury. The same reasoning applies to plaintiff's argument that Bagby and other employees lacked proper training. Even assuming this is true, one cannot conclude that Bagby would not have been electrocuted if he had the proper training or that defendant knew that the inadequate training of electrical maintenance journeyman (EMJ) apprentices would result in certain injury.

There was also evidence that someone had failed to return the orange barrier rope to its proper position. If it had been in its proper place, the rope would have encompassed the place where Bagby placed his ladder to change the leads. Although Bechard and another supervisor had visited the job site the day before, there was no evidence that either noticed the barrier was in the wrong place. The accident investigation team concluded that these two supervisors should have noticed this issue; however, plaintiff must establish *actual knowledge*. Constructive, implied, or imputed knowledge is insufficient. See *Johnson*, 288 Mich App at 697. In addition, it is also conjecture to

conclude that Bagby would not have placed his ladder in the same area, and thus not been electrocuted, if the rope were in its proper place.

To the extent that plaintiff relies on witnesses' statements that someone was going to get killed or injured and defendant did not prioritize safety, we must again conclude that these statements are insufficient to establish actual knowledge. "[C]onclusory statements by experts are insufficient to allege the certainty of injury contemplated by the Legislature." *Travis*, 453 Mich at 174 (opinion by BOYLE, J.). In addition, defendant's knowledge that the bus was energized at 40,000 volts and that contact or proximity to it would be dangerous, does not constitute actual knowledge that an injury would be certain to occur. "An employer's knowledge of general risks is insufficient to establish an intentional tort." *Herman*, 261 Mich App at 149.

Finally, plaintiff cannot show that defendant had actual knowledge that an injury was certain to occur because Bagby had many opportunities to exercise his own discretion. "To be 'known' and 'certain,' an injury must spring directly from the employee's duties and the employee cannot have had the chance to exercise individual volition." *House*, 248 F Appx at 648. An employer cannot know that an injury is certain to occur when "the employee makes a decision to act or not act in the presence of a known risk" because the employer cannot know in advance what the employee's reaction will be and what steps he will take. *Id*. For example, in *Herman*, 261 Mich App at 150, this Court concluded that there was no evidence that the employer committed an intentional tort when the facts showed that the decedent's electrocution and death "was the result of decedent's momentary and tragic lapse in judgment . . . ." Similarly, in *Palazzola v Karmazin Prod Corp*, 223 Mich App 141, 153; 565 NW2d

868 (1997), this Court concluded that there was no evidence that the employer committed an intentional tort when the decision to clean the tank, which led to the inhalation of harmful vapors, was made "on the spot" by a nonsupervisory employee.

In the instant case, Bagby and others made numerous decisions that, along with other factors, ultimately led to his electrocution and death. No supervisor could have known what decisions Bagby was going to make, so no supervisor could have had actual knowledge that an injury was certain to occur. For example, Allan McKinney, an EMJ and Bagby's crew leader at the job site, told Bagby to work with Jeff Cooper, another EMJ apprentice, to change the leads. It appears Cooper was never told to change the leads; he was working on wiring. It also appears that Bagby did not speak with Cooper about helping him. He got the six-foot ladder, but thought it was too short. Bagby returned to McKinney and asked if a longer ladder was available. McKinney said that Richard Petersen, the other EMJ at the job site, had a longer ladder, but Bagby did not get this ladder. Bagby alone decided where to place the ladder. If he did indeed try to climb on the metal structure, that was also his own discretionary decision. The fact that no one knows exactly why Bagby happened to come close enough to the bus to be electrocuted also indicates that defendant did not have actual knowledge that an injury was certain to occur.

Second, there was no evidence that an injury was certain to occur. Plaintiff asserts that because Bagby was changing leads next to a bus at 40,000 volts, he was in a continuously operative dangerous condition. "A continuously operative dangerous condition may form the basis of a claim under the intentional tort exception only if the employer *knows* the condition will cause an injury and refrains from informing the employee about

it." *Alexander*, 468 Mich at 896-897. Defendant did not refrain from telling Bagby or other employees that the line was energized and dangerous. McKinney and Petersen both reminded Bagby at different points on November 9, 10, and 11, 2009, that the line was energized. According to the accident investigation report, "the metal structure" was red-tagged, advising that one should not operate or disturb that equipment. Bagby received training on what red flags mean. Bagby also received training on the importance of keeping a safe distance from energized lines. The evidence shows that Bagby was trained on minimum safe distances about one month before he died. Thus, there is no evidence that defendant hid from Bagby or other employees the fact that the line was energized or that energized lines are dangerous.

Because there was no evidence that defendant had actual knowledge that an injury was certain to occur, there was also no evidence that it willfully disregarded that knowledge. To prove willful disregard, one must prove more than mere negligence, "e.g., failing to protect someone from a foreseeable harm." *Palazzola*, 223 Mich App at 150. In this case, however, the evidence demonstrates at most that the harm Bagby sustained was foreseeable and that defendant could have protected Bagby from that harm. There is no evidence that defendant had actual knowledge the harm was certain to occur but willfully disregarded that knowledge. See MCL 418.131(1); *Travis*, 453 Mich at 173 (opinion by BOYLE, J.).

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

BOONSTRA, P.J., and MARKEY and K. F. KELLY, JJ., concurred.

RENTAL PROPERTIES OWNERS ASSOCIATION OF KENT COUNTY v KENT COUNTY TREASURER

KENT COUNTY LAND BANK AUTHORITY v 3830 G, LLC

Docket Nos. 314256, 314318, and 319733. Submitted September 3, 2014, at Grand Rapids. Decided December 18, 2014, at 9:00 a.m. Leave to appeal denied 498 Mich 868.

In 2012, the Kent County Treasurer foreclosed on numerous properties in Kent County. Kent County adopted resolutions authorizing the county to purchase county tax-foreclosed properties and sell them to the Kent County Land Bank Authority (the KCLBA). The treasurer conveyed the county properties to the KCLBA. The KCLBA filed a petition for expedited quiet-title proceedings and foreclosure of the properties. The Kent Circuit Court granted the petition. The Rental Properties Owners Association of Kent County, 3830 G, LLC, and others, filed a complaint in the Kent Circuit Court against the Kent County Treasurer, Kent County, and the KCLBA, seeking declaratory and injunctive relief. Plaintiffs alleged that defendants' actions violated MCL 124.755 and deprived plaintiffs of an opportunity to bid on and purchase the county properties. Plaintiffs filed a motion to set aside the quiet-title and foreclosure judgment. The court, George S. Buth, J., denied the motion to set aside the quiet-title and foreclosure judgment. The county and the treasurer filed a joint motion for summary disposition and the trial court granted the motion. Plaintiffs appealed the order granting the motion for summary disposition. (Docket No. 314256). 3830 G, LLC, and others appealed the order denying their motion to set aside the quiet-title and foreclosure judgment. (Docket No. 314813).

The Kent County Treasurer foreclosed on numerous properties in the city of Grand Rapids following the owners' failure to pay real property taxes and assessments. The properties were not redeemed from the foreclosure. Grand Rapids entered into a development agreement with the KCLBA to acquire the properties. The KCLBA placed money in escrow for the city to purchase

the properties from the treasurer. The city adopted a resolution that stated a public purpose supporting the acquisition and that authorized the purchase from the treasurer. The properties were conveyed by the treasurer to the city. The properties were thereafter sold to the KCLBA by the city for the amount paid by the city plus the cost of recording fees. The Rental Properties Owners Association of Kent County, 3830 G, LLC, and others, filed a complaint in the Kent Circuit Court against the Kent County Treasurer, the city of Grand Rapids, and the KCLBA, seeking injunctive relief and a writ of mandamus. Defendants moved for summary disposition. The court, George S. Buth, J., granted the motions for summary disposition. Plaintiffs appealed. (Docket No. 319733). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. A foreclosing governmental unit may not transfer property subject to foreclosure under MCL 211.78 to MCL 211.78p to a land bank fast track authority until after the property has been offered for sale or other transfer under MCL 211.78m and the foreclosing governmental unit has retained possession of the property under MCL 211.78m(7). The Kent County Treasurer is the foreclosing governmental unit in these cases.

2. Kent County had authority to purchase the Kent County tax-foreclosed properties from the Kent County Treasurer for the minimum bid. The Kent County tax-foreclosed properties were properly purchased by Kent County from the Kent County Treasurer.

3. MCL 211.78m(2) did not require Kent County to offer for sale by public auction the Kent County tax-foreclosed properties. Once Kent County purchased the tax-foreclosed properties from the Kent County Treasurer pursuant to MCL 211.78m(1), there was no requirement that its later sale of those properties be by public auction.

4. Plaintiffs misinterpret MCL 124.755(6) as requiring Kent County to hold an auction before it sold the tax-foreclosed properties to the KCLBA. The statute only applies to transfers of foreclosed properties by the foreclosing governmental unit, in these cases the Kent County Treasurer. Kent County did not violate MCL 124.755(6) when it sold the properties to the KCLBA. The trial court did not err by concluding that Kent County did not violate MCL 211.78m(1) and (2) and MCL 124.755(6) when it purchased the tax-foreclosed properties from the Kent County Treasurer and thereafter sold the properties to the KCLBA.

5. Although Grand Rapids entered into an agreement with the KCLBA before purchasing the properties from the Kent County Treasurer and the KCLBA placed the money in escrow for Grand Rapids to purchase the properties from the Kent County Treasurer, the transactions do not have to be invalidated under MCL 124.755(6) as a sham. The trial court did not err by concluding that Grand Rapids, like Kent County, did not violate MCL 124.755(6) or MCL 211.78m when it purchased the Kent County tax-foreclosed properties from the Kent County Treasurer and then immediately sold them to the KCLBA. Plaintiffs cannot rely on MCL 124.733, which does not apply to a local board authority such as the KCLBA, to argue that Kent County's sale of the tax-foreclosed properties to the KCLBA violated Michigan law.

6. Plaintiffs did not have a clear, legal right to performance of the specific duty sought, therefore, the trial court did not abuse its discretion by denying plaintiffs' request for a writ of mandamus. The trial court did not err by granting summary disposition in favor of defendants under MCR 2.116(C)(8). The trial court did not err by concluding that Grand Rapids did not violate MCL 124.755(6) or MCL 211.78m when it purchased the Kent County tax-foreclosed properties from the Kent County Treasurer and then immediately sold them to the KCLBA.

7. The process by which the KCLBA obtained the properties did not violate due process principles or otherwise run afoul of constitutional guarantees.

8. Plaintiffs were not entitled to the notice of the quiet-title and foreclosure proceedings required under MCL 124.759(3) because they are not owners of a property interest in the tax-foreclosed properties. Plaintiffs' due process rights were not violated by the notice provided.

9. Kent County did not violate its policies or resolutions when it purchased the tax-foreclosed properties from the Kent County Treasurer and then sold them to the KCLBA without a competitive-bid process.

10. The trial court erred when it determined that plaintiffs' claims in Docket No. 314256 were barred by the quiet-title and foreclosure judgment obtained by the KCLBA in Docket No. 314318. However, the error is harmless in light of the affirmance by the Court of Appeals of the trial court's order summarily dismissing plaintiffs' amended complaint under MCR 2.116(C)(8).

11. The trial court did not abuse its discretion by denying the motion to set aside the quiet-title and foreclosure judgment in Docket No. 314318 under MCR 2.612(C)(1)(a), (b), and (f) or

MCR 2.611(A)(1)(a) and (e), although in the latter case it did so for the wrong reason. Plaintiffs were not entitled to relief under MCR 2.611(A)(1) because the judgment in the lower court was not the result of a trial. The trial court's failure to set aside the quiet-title and foreclosure judgment under MCR 2.611(A)(1)(g) did not constitute plain error affecting plaintiffs' substantial rights.

12. The trial court's order granting summary disposition in Docket Nos. 314256 and 319733 was affirmed. The order denying the motion to set aside the quiet-title and foreclosure judgment in Docket No. 314318 was affirmed.

Affirmed.

1. REAL PROPERTY — LAND BANK FAST TRACK AUTHORITIES.

The Land Bank Fast Track Act, MCL 124.751 *et seq*., grants land bank fast track authorities broad authority to acquire real property by purchase or otherwise on terms and conditions and in a manner the authority considers proper; the act does not limit a land bank fast track authority's ability to provide interim funding for a local government to purchase tax-foreclosed properties (MCL 124.755(1) and (6)).

2. REAL PROPERTY — LAND BANK FAST TRACK AUTHORITIES.

The Land Bank Fast Track Act, MCL 124.751 *et seq*., provides a procedure by which a land bank fast track authority may initiate an expedited quiet-title and foreclosure action; the authority must record a notice of the pending expedited action with the register of deeds in the county in which the property is located; the notice must include a statement that any legal interests in the property may be extinguished by a circuit court order vesting title to the property in the authority; after recording the notice, the authority must initiate a search of the records to identify the owners of a property interest in the property who are entitled to notice of the hearing; the owner of a property interest is entitled to notice if the owner's interest was identifiable before the authority recorded its notice (MCL 124.759).

Cunningham Dalman, PC (by *Ronald J. Vander Veen*), for Rental Properties Owners Association of Kent County, 3830 G, LLC, Rusty Richter, Affordable Housing Coalition, Charlie Curtis, Jeff Fortuna, James Kane, Daniel Hibma, Keystone Realty Group, LLC, Greg McKee, Josh Beckett, Michael Beckett, Cieria Chavez, Rosie Baker, and Sharon Hall.

Warner Norcross & Judd LLP (by *Matthew T. Nelson* and *Nicole L. Mazzocco*) for the Kent County Treasurer.

Daniel A. Ophoff, Corporation Counsel, for Kent County.

Miller Johnson (by *David J. Gass*, *Robert W. O'Brien*, and *Joseph J. Gavin*) for the Kent County Land Bank Authority.

Dickinson Wright (by *Scott G. Smith*) for the city of Grand Rapids.

Amicus Curiae:

Steinport Law PLC (by *Jeff Steinport*) for the Kent County Taxpayers Alliance.

Before: SHAPIRO, P.J., and WHITBECK* and STEPHENS, JJ.

PER CURIAM. In these consolidated appeals, various individuals, companies, and associations involved in property ownership, rehabilitation, and development in Kent County (the 3830 G parties)[1] seek to invalidate tax deeds executed by the Kent County Treasurer (the Treasurer) to Kent County (the County) and the city of Grand Rapids (the City) and from the County and the City to the Kent County Land Bank Authority (the KCLBA), claiming that their actions deprived the 3830 G parties

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

[1] For clarity purposes, the various individuals, companies, and associations that are plaintiffs in Docket Nos. 314256 and 319733 and appellants in Docket No. 314318 are collectively referred to as "the 3830 G parties" even though there is a slight variance in the named plaintiffs and appellants in the three cases, respectively. When necessary, the parties are identified individually.

of the opportunity to purchase the properties. The appealed orders were all decided by the same circuit court judge on different dates.

In Docket No. 314256, the 3830 G parties appeal as of right the December 20, 2012 trial court order granting summary disposition in favor of appellees. We affirm.

In Docket No. 314318, the 3830 G parties appeal as of right the trial court's December 26, 2012 order denying their motion to set aside the quiet-title and foreclosure judgment entered in favor of petitioner, the KCLBA. We affirm.

In Docket No. 319733, the 3830 G parties appeal as of right the trial court's December 6, 2013 order granting summary disposition in favor of all appellees. We affirm.

This Court ordered the appeals consolidated.[2]

I. BACKGROUND

A. DOCKET NOS. 314256 AND 314318

In 2012, the Treasurer foreclosed on numerous properties in Kent County (the County properties). On June 28, 2012, and July 12, 2012, the County adopted resolutions authorizing the County to purchase county tax-foreclosed properties and sell those properties to the KCLBA, allegedly as the result of an agreement between the County, the Treasurer, and the KCLBA. The Treasurer conveyed the County properties to the KCLBA on July 18, 2012. The KCLBA filed a petition for expedited quiet-title proceedings and foreclosure of the County properties on August 29, 2012. The trial court granted the KCLBA's petition on October 19,

[2] *Rental Props Owners Ass'n of Kent Co v Kent Co Treasurer*, unpublished order of the Court of Appeals, entered February 25, 2014 (Docket Nos. 314256, 314318, and 319733).

2012, noting that the KCLBA had complied with all notice, service, and publication requirements.

The 3830 G parties filed a complaint against the Kent County Treasurer, Kent County, and the KCLBA in the Kent Circuit Court on October 17, 2012, and filed a first amended complaint on December 6, 2012, seeking declaratory and injunctive relief. They claimed that the Treasurer, the County, and the KCLBA's actions violated MCL 124.755 and deprived the 3830 G parties of an opportunity to bid on and purchase any of the County properties. The 3830 G parties also alleged that Kent County violated its own policies and breached its fiduciary and constitutional duties with respect to the purchase and resale of the County properties.

The 3830 G parties filed a motion to set aside the October 19, 2012 quiet-title and foreclosure judgment pursuant to MCR 2.603(D), MCR 2.611(A)(1)(a) and (e), or MCR 2.612(C)(1)(a), (b), and (f), to intervene in the KCLBA's quiet-title and foreclosure action, and to consolidate that action with the 3830 G parties' December 6, 2012 case. The trial court denied the 3830 G parties' motion to set aside the quiet-title and foreclosure judgment, concluding that

> [the motion is] not timely because [it was] not filed prior to the October 19 Order quieting title; procedurally defective in that plaintiffs failed to submit a pleading as required by MCR 2.209(C)(2), no legitimate basis here. The Legislature created a specific statutory scheme which excludes more general remedies. And there's no violation here of due process.
>
> The 3830 G plaintiffs were aware of the expedited quiet title and foreclosure action, at least as early as October 9. And even if the argument could be made that they lacked actual notice, the public notice provided by posting and publication satisfies due process requirements.

The County and the Treasurer filed a joint motion for summary disposition in Kent Circuit Court Docket No. 12-009669 on November 30, 2012, and the KCLBA filed a motion for summary disposition on December 10, 2012.

The trial court granted the motions for summary disposition, reasoning:

> First, the Court's of the opinion that this motion should be granted. [The 3830 G parties] lack standing, due to both their failure to identify an actual controversy as required by [MCR] 2.605, and the Court's determination that [the 3830 G parties] do not have a special injury right or substantial interest that would be detrimentally affected in a manner different from the citizenry at large.
>
> Next, the Court finds no actions by the County Treasurer or Kent County itself that exceeded the powers conferred by the Constitution and laws of this State.
>
> Finally, the Court's October 19 Order quieting title in the properties bars [the 3830 G parties'] attempts to challenge that title. Summary disposition is granted . . . pursuant to MCR 2.116(C)(5), (7) and (8).

B. DOCKET NO. 319733

In 2013, the Treasurer foreclosed on numerous properties (the Grand Rapids properties) in the city of Grand Rapids as a result of the owners' failure to pay real property taxes and assessments. The properties were not redeemed from the foreclosures. On June 18, 2013, Grand Rapids entered into a development agreement with the KCLBA to acquire the Grand Rapids properties. The KCLBA placed money in escrow for the City to purchase the Grand Rapids properties from the Kent County Treasurer. The City adopted a resolution that stated that acquisition of the Grand Rapids properties constituted a public purpose under the City's policy in connection with its obligation to provide for

the health, safety, and welfare of the community and that authorized their purchase from the Kent County Treasurer. The properties were thereafter conveyed by the Treasurer to the City to "fulfill the public purpose of restoring blighted properties and neighborhoods and providing housing on tax-reverted abandoned properties." The Grand Rapids properties were thereafter sold to the KCLBA by the City for the amount paid by the City to the Kent County Treasurer for the properties, plus the cost of recording fees.

The 3830 G parties filed a complaint in the Kent Circuit Court on July 19, 2013, against the Kent County Treasurer, Grand Rapids, and the KCLBA, and a first amended complaint on September 27, 2013. The 3830 G parties sought injunctive relief and a writ of mandamus, claiming that Kent County, the Kent County Treasurer, and the KCLBA's actions in acquiring the Grand Rapids properties violated MCL 124.755 because the City never intended to own the properties, many of the properties were not blighted, and the KCLBA paid a fraction of the value of the Grand Rapids properties. The 3830 G parties also claimed that they were denied due process because the City was merely a conduit and not a genuine purchaser of the Grand Rapids properties, depriving them of the opportunity guaranteed by the statute and the Michigan Constitution to participate in an open, reasonable, and fair bidding process on the subject properties. Finally, the 3830 G parties asserted that by disposing of the Grand Rapids properties at less than fair market value, the City breached its fiduciary duty to its residents and violated Const 1963, art 7, § 26, which prohibits a city or village from lending its credit to another entity.

Following a motion by the Kent County Treasurer, the City, and the KCLBA, this case was reassigned to

the judge to whom the cases in Docket Nos. 314256 and 314318 were assigned. On August 23, 2013, the Treasurer, the City, and the KCLBA filed a joint motion for summary disposition on Counts I and II of the 3830 G parties' complaint and the City filed a separate motion for summary disposition on Count III of the 3830 G parties' complaint. A second joint motion for summary disposition was filed on November 15, 2013. Following a hearing on all of the motions, the trial court granted the motions for summary disposition, reasoning:

> All right. The Court has viewed the briefs and heard the arguments here today, and the Court sees essentially no difference between this year's case and last year's case. The Court sees no violation of the statutes here with what the County Treasurer and the City of Grand Rapids and [the KCLBA] have done, so motion for summary disposition is granted.

This Court consolidated this appeal with the appeals in Docket Nos. 314256 and 314318 in an unpublished order of the Court of Appeals, entered February 25, 2014 (Docket Nos. 314256, 314318, and 319733).

II. STATUTORY COMPLIANCE

The trial court granted summary disposition to the Kent County Treasurer, Kent County, the city of Grand Rapids, and the Kent County Land Bank Authority[3] and dismissed the 3830 G parties' amended complaint under MCR 2.116(C)(5), (7), and (8). The essence of the appellants' argument is that the process through which the KCLBA obtained title to the City and the County foreclosed properties was in violation of the law. Their first claim is that the properties were obtained in direct

[3] These parties will collectively be referred to as "the defendants." When necessary the parties are identified individually.

contravention of the authority granted to the units of government and the governmental officer under MCL 211.78m and MCL 124.755(6). They also argue that the Treasurer, the County, and the City violated ordinances, policies, or resolutions. In both cases we disagree. This is an issue of first impression.

In Docket No. 319733, the 3830 G parties first argue that, under MCL 124.755(6), the Treasurer could not transfer the tax-foreclosed properties to the KCLBA until after the properties were sold at public auction. We conclude otherwise.

With respect to statutory interpretation, our Supreme Court has stated:

> 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. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent[.] [*Krohn v Home-Owners Ins Co*, 490 Mich 145, 156-157; 802 NW2d 281 (2011) (citations and quotation marks omitted).]

Thus, if the statute's language is clear and unambiguous, judicial construction is not required or permitted. *In re Certified Question*, 468 Mich 109, 113; 659 NW2d 597 (2003). In addition, "nothing may be read into a statute that is not within the manifest intent of the Legislature as derived from the act itself." *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 218; 801 NW2d 35 (2011) (quotation marks and citations omitted).

A foreclosing governmental unit may not transfer property subject to foreclosure under MCL 211.78 to MCL 211.78p to a land bank fast track authority "until after the property has been offered for sale or other transfer under [MCL 211.78m] and the foreclosing governmental unit has retained possession of the property under [MCL 211.78m(7)]." MCL 124.755(6). Under the General Property Tax Act (GPTA), MCL 211.1 *et seq*., the phrase "foreclosing governmental unit" means (1) the treasurer of a county, or (2) this state (under circumstances not present in this case). MCL 211.78(8). In this case, the Treasurer is the foreclosing governmental unit. The 3830 G parties assert that the Treasurer, in its role as the foreclosing governmental unit, effectively violated the prohibition of MCL 124.755(6) because transfer of the tax-foreclosed properties to the County without an auction was a "sham," with the "real" transferee being the KCLBA.

MCL 124.755(6), which is part of the Land Bank Fast Track Act, MCL 124.751 *et seq*., read in conjunction with the GPTA provides that a foreclosing governmental unit may not transfer property subject to foreclosure under MCL 211.78 to MCL 211.78p "until after the property has been offered for sale or other transfer under [MCL 211.78m] and the foreclosing governmental unit has retained possession of the property under [MCL 211.78m(7)]."

Under the GPTA, when property taxes are delinquent for two years, the property is forfeited to the county treasurer. MCL 211.78a; MCL 211.78g. The governmental unit in which the tax-delinquent property is located may foreclose after the property taxes are delinquent for at least two years. MCL 211.78a; MCL 211.78g; MCL 211.78h. Once title is vested in the

foreclosing governmental unit, the state is granted the right of first refusal to purchase the tax-foreclosed property at the greater of the minimum bid or its fair market value. MCL 211.78m(1). However, if the state elects not to purchase the property

> a city, village, or township may purchase for a public purpose any property located within that city, village, or township set forth in the judgment and subject to sale under this section by payment to the foreclosing governmental unit of the minimum bid. *If a city, village, or township does not purchase that property, the county in which that property is located may purchase that property under this section by payment to the foreclosing governmental unit of the minimum bid. If property is purchased by a city, village, township, or county under this subsection, the foreclosing governmental unit shall convey the property to the purchasing city, village, township, or county within 30 days*. If property purchased by a city, village, township, or county under this subsection is subsequently sold for an amount in excess of the minimum bid and all costs incurred relating to demolition, renovation, improvements, or infrastructure development, the excess amount shall be returned to the delinquent tax property sales proceeds account for the year in which the property was purchased by the city, village, township, or county or, if this state is the foreclosing governmental unit within a county, to the land reutilization fund created under [MCL 211.78n]. Upon the request of the foreclosing governmental unit, a city, village, township, or county that purchased property under this subsection shall provide to the foreclosing governmental unit without cost information regarding any subsequent sale or transfer of the property. *This subsection applies to the purchase of property by this state, a city, village, or township, or a county prior to a sale held under subsection (2)*. [MCL 211.78m(1) (emphasis added).]

In this case, in accordance with MCL 211.78m(1), Kent County purchased the Kent County tax-foreclosed properties for the minimum bid; it thereafter transferred

the properties to the KCLBA. The Kent County tax-foreclosed properties were never available for public auction, nor were the 3830 G parties ever specifically excluded from the bidding process. Thus, Kent County had authority to purchase the Kent County tax-foreclosed properties from the Kent County Treasurer for the minimum bid.

MCL 211.78m(2) next provides:

> *Subject to subsection (1), . . . the foreclosing governmental unit . . . shall hold at least 2 property sales at 1 or more convenient locations at which property foreclosed by the judgment entered under* [MCL 211.78k] *shall be sold by auction sale, which may include an auction sale conducted via an internet website*. Notice of the time and location of the sales shall be published not less than 30 days before each sale in a newspaper published and circulated in the county in which the property is located, if there is one. If no newspaper is published in that county, publication shall be made in a newspaper published and circulated in an adjoining county. Each sale shall be completed before the first Tuesday in November immediately succeeding the entry of judgment under [MCL 211.78k] vesting absolute title to the tax delinquent property in the foreclosing governmental unit. Except as provided in subsection (5), property shall be sold to the person bidding the highest amount above the minimum bid. The foreclosing governmental unit may sell parcels individually or may offer 2 or more parcels for sale as a group. The minimum bid for a group of parcels shall equal the sum of the minimum bid for each parcel included in the group. The foreclosing governmental unit may adopt procedures governing the conduct of the sale and may cancel the sale prior to the issuance of a deed under this subsection if authorized under the procedures. The foreclosing governmental unit may require full payment by cash, certified check, or money order at the close of each day's bidding. Not more than 30 days after the date of a sale under this subsection, the foreclosing governmental unit shall convey the property by deed to the person bidding the highest amount

> above the minimum bid. The deed shall vest fee simple title to the property in the person bidding the highest amount above the minimum bid, unless the foreclosing governmental unit discovers a defect in the foreclosure of the property under [MCL 211.78 to 211.78*l*]. If this state is the foreclosing governmental unit within a county, the department of natural resources shall conduct the sale of property under this subsection and subsections (4) and (5) on behalf of this state. [Emphasis added.]

In brief, if the city, village, township, or county does not purchase the tax-foreclosed property, a public auction is held, with the tax-foreclosed property sold to the person bidding the highest amount above the minimum bid. MCL 211.78m(2). Reading MCL 211.78m(1) and (2) together, the language clearly provides that Subsection (1) applies specifically to those situations where the tax-foreclosed property has been purchased from the foreclosing governmental unit by either the state, a city, village, or township, or the county in which the tax-foreclosed property was located. The final sentence in MCL 211.78m(1) supports this conclusion: "This subsection applies to the purchase of property by this state, a city, village, or township, or a county *prior to a sale held under subsection (2)*." [Emphasis added.] Thus, the Kent County tax-foreclosed properties were properly purchased by Kent County from the Kent County Treasurer.

Contrary to the 3830 G parties' argument, MCL 211.78m(2) did not require Kent County to offer for sale by public auction the Kent County tax-foreclosed properties. Rather, MCL 211.78m(2), by its own language, requires the foreclosing governmental unit to hold public auctions to sell the foreclosed properties. See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009) (stating that the first criterion in determining the Legislature's intent is the specific language of the statute). Because the term "foreclosing governmental

unit" is defined in MCL 211.78(8), that definition controls. *Haynes v Neshewat*, 477 Mich 29, 35; 729 NW2d 488 (2007). In this case, the Kent County Treasurer, and not Kent County, was the foreclosing governmental unit. MCL 211.78(8). Thus, once Kent County purchased the tax-foreclosed properties from the Kent County Treasurer pursuant to MCL 211.78m(1), there was no requirement that its later sale of those properties be by public auction. Notwithstanding the 3830 G parties' argument that Kent County acted as a "strawman" in the transaction, requiring the state, a city, village, or township, or a county to subsequently sell by public auction foreclosed properties it had purchased under MCL 211.78m(1) would inappropriately read language into MCL 211.78m(2); by its express words, Subsection 2 specifically applies to sales by the foreclosing governmental unit after the state, a city, village, or township, or a county have not exercised their respective right to purchase the property under MCL 211.78m(1). See *Mich Ed Ass'n*, 489 Mich at 217.

The 3830 G parties also misinterpret MCL 124.755(6) as requiring Kent County to hold an auction before it sold the tax-foreclosed properties to the KCLBA. The Land Bank Fast Track Act authorizes a land bank fast track authority to purchase real property. MCL 124.755(1). It also authorizes a land bank fast track authority to purchase property from a foreclosing governmental unit under the GPTA. The Land Bank Fast Track Act also provides:

> A *foreclosing governmental unit* may not transfer property subject to forfeiture, foreclosure, and sale under . . . MCL 211.78 to 211.78p, until after the property has been offered for sale or other transfer under . . . MCL 211.78m, and the *foreclosing governmental unit* has retained possession of the property under . . . MCL 211.78m. [MCL 124.755(6) (emphasis added).]

The language is clear and unambiguous and must be interpreted as written. *In re Certified Question*, 468 Mich at 113. MCL 124.755(6), which states that the procedures under MCL 211.78m must be followed, by its very terms only applies to transfers of foreclosed properties by the foreclosing governmental unit. As stated earlier in this discussion section, the Kent County Treasurer is the foreclosing governmental unit in this case, not Kent County. The Kent County Treasurer did not retain possession of the tax-foreclosed properties; rather, it sold them to Kent County under MCL 211.78m(1). Accordingly, Kent County did not violate MCL 124.755(6) when it sold the tax-foreclosed properties to the KCLBA. We find no support for a requirement that a public auction be held after the purchase of a foreclosed property by either the City or the County.

The 3830 G parties essentially assert that Kent County was not a true owner of the properties before they were then sold to the KCLBA and that the Kent County Treasurer is the party who actually sold the properties to the KCLBA, contrary to MCL 124.755(6). While their concerns are understandable, it does not negate the fact that Kent County did in fact purchase the properties from the Kent County Treasurer and that MCL 124.755(6) and MCL 211.78m do not place restrictions on, or even address, a local governmental unit's use or subsequent sale of such properties. This Court may not read language into the statutes to prevent the transactions in this case. *Mich Ed Ass'n*, 489 Mich at 217-218. See also *Robinson v Detroit*, 462 Mich 439, 474; 613 NW2d 307 (2000) (CORRIGAN, J., concurring) ("If the Legislature acted unwisely in enacting the statute or failing to adequately debate its merits, the judiciary may not act to save the Legislature from its folly.") (citation and quotation marks omitted).

Thus, the trial court did not err by concluding that Kent County did not violate MCL 211.78m(1) and (2) and MCL 124.755(6) when it purchased the tax-foreclosed properties from the Kent County Treasurer and thereafter sold those same properties to the KCLBA.

The 3830 G parties again argue here that Grand Rapids' purchase of the properties was a "ruse" to disguise the violation, that the KCLBA inappropriately funded Grand Rapids' purchase of the properties from the Kent County Treasurer, and that the Legislature did not intend for local governmental units to act as a "straw man" to avoid a public sale of the properties. The 3830 G parties rely on *Rutland Twp v City of Hastings*, 413 Mich 560; 321 NW2d 647 (1982), to argue that this Court should reject the "straw-man" transaction and look at the real transaction.

In *Rutland Twp*, the plaintiff township filed an action, seeking a declaration that a purported annexation of a parcel of land by the defendant city was void. The property was originally owned by the private defendants, who conveyed the property to the defendant city. On the same date, the defendant city gave the private defendants an option to repurchase the property and adopted a resolution annexing the parcel. The private defendants exercised the option and repurchased the property. *Id*. at 562. The transaction was repeated one month later to exclude a portion of the property that had included buildings in violation of MCL 117.9(8). *Id*. at 562-563. The defendant city admitted "that the sole purpose of its purchase of the parcel was to permit annexation of the parcel without seeking the approval of the township or the State Boundary Commission." *Id*. at 563. The Court invalidated the annexation, concluding that

the "city's purported 'ownership' was a mere subterfuge to avoid the safeguards found in the annexation statutes by taking advantage of what is meant to be a narrow exception for vacant city-owned property." *Id*. at 565.

The 3830 G parties' reliance on *Rutland Twp* is misplaced because *Rutland Twp* is factually dissimilar to these appeals. Unlike *Rutland Twp*, which involved an analysis of MCL 117.9(8) (annexation of property by a city under the Home Rule City Act, MCL 117.1 *et seq*.), these appeals involved the interplay between MCL 124.755 (the Land Bank Fast Track Act) and MCL 211.78m (the General Property Tax Act). Also, unlike *Rutland Twp*, in which the city defendant admitted that the sole purpose of the transaction was to avoid seeking approval from the township or the boundary commission, Grand Rapids has not admitted that it purchased the properties to avoid a public auction. In fact, Grand Rapids purchased the properties as part of its obligation to provide for the health, safety, and welfare of its community and then conveyed them to the KCLBA to fulfill the public purpose of restoring blighted properties and neighborhoods and to provide housing on tax-foreclosed properties. Language cannot be read into MCL 211.78m to proscribe how Grand Rapids chooses to effectuate the public purpose. Although Grand Rapids entered into an agreement with the KCLBA before purchasing the properties from the Kent County Treasurer, and the KCLBA placed the money in escrow for Grand Rapids to purchase the properties from the Kent County Treasurer, it does not follow from the *Rutland Twp* analysis that the transactions should be invalidated under MCL 124.755(6) as a "sham."

Reading MCL 124.755 and MCL 211.78m together, the GPTA creates a scheme where the foreclosing governmental unit must offer the tax-foreclosed prop-

erties for sale to the state first, then the city, village, or township, then the county in which the property is located. MCL 211.78m(1). Any purchase by the city, village, township, or county must be for a public purpose. *Id*. The purchase in these appeals was for a public purpose, which was to restore blighted properties and to provide housing on tax-foreclosed properties. Other than the restriction that the purchase be for a public purpose, the Legislature did not restrict in any way how Grand Rapids may convey the property thereafter. *Id*. The existing contract to sell the properties to the KCLBA immediately after it purchased the properties, as well as the terms related to financing the sale, do not invalidate Grand Rapids' purchase of the tax-foreclosed properties. The Land Bank Fast Track Act, MCL 124.751 *et seq*., grants land bank fast track authorities broad authority to acquire by purchase, "or otherwise on terms and conditions and in a manner the authority considers proper," real property. MCL 124.755(1). The act contains no language limiting a land bank fast track authority's ability to provide interim funding for a local government to purchase tax-foreclosed properties. MCL 124.755(6). The act also broadly grants the land bank fast track authority authority to "implement the purposes, objectives, and provisions of this act," and to "[e]nter into contracts and other instruments necessary, incidental, or convenient to the performance of its duties and the exercise of its powers . . . ." MCL 124.754(1)(d). Thus, the trial court did not err by concluding that Grand Rapids, like Kent County, did not violate MCL 124.755(6) or MCL 211.78m when it purchased the Kent County tax-foreclosed properties from the Kent County Treasurer and then immediately sold them to the KCLBA.

The 3830 G parties also erroneously rely on MCL 124.773 to argue that, by using Kent County to allow the Kent County Treasurer to transfer property to the KCLBA, the KCLBA exceeded the authority granted to county land bank fast track authorities. However, as noted by Kent County and the Kent County Treasurer in their appeal brief, MCL 124.773 does not even apply to the KCLBA as a local board authority; rather, the statute explicitly states that it applies to the state authority (as defined in MCL 124.753(p) and MCL 124.765). Thus, the 3830 G parties cannot rely on MCL 124.773 to argue that Kent County's sale of the tax-foreclosed properties to the KCLBA violated Michigan law.

III. MANDAMUS

The 3830 G parties' challenge to the validity of the tax-foreclosed property deeds by way of mandamus also fails. This Court reviews for an abuse of discretion a trial court's decision on a writ of mandamus. *Coalition for a Safer Detroit v Detroit City Clerk*, 295 Mich App 362, 367; 820 NW2d 208 (2012). However, the first two elements required for issuance of a writ of mandamus—that the defendants have a clear legal duty to perform and the plaintiffs have a clear legal right to performance of the requested act—are reviewed de novo as questions of law. *Id*.

To obtain the extraordinary remedy of a writ of mandamus, the plaintiff must show that (1) the plaintiff has a clear, legal right to performance of the specific duty sought, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial, and (4) no other adequate legal or equitable remedy exists that might achieve the same result. *Hanlin v Saugatuck Twp*, 299 Mich App 233, 248; 829 NW2d 335 (2013). In relation to

a request for mandamus, "a clear, legal right" is "one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts regardless of the difficulty of the legal question to be decided." *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 143; 369 NW2d 277 (1985) (quotation marks and citation omitted). "Even where such a right can be shown, it has long been the policy of the courts to deny the writ of mandamus to compel the performance of public duties by public officials unless the specific right involved is not possessed by citizens generally." *Id*.

Again, as in Docket No. 314256, the Kent County Treasurer was not required by MCL 211.78m to offer the tax-foreclosed properties for sale at public auction because Grand Rapids purchased the properties first. Thus, the 3830 G parties did not have a clear, legal right to performance of the specific duty sought, *Hanlin*, 299 Mich App at 248, and the trial court did not abuse its discretion by denying the request for mandamus, *Coalition for a Safer Detroit*, 295 Mich App at 367.

The trial court did not err by granting summary disposition in favor of defendants under MCR 2.116(C)(8). The trial court did not err by concluding that Grand Rapids, like Kent County, did not violate MCL 124.755(6) or MCL 211.78m when it purchased the Kent County tax-foreclosed properties from the Kent County Treasurer and then immediately sold them to the KCLBA.

IV. DUE PROCESS AND CONSTITUTIONAL VIOLATIONS

Next, the 3830 G parties argue that the process by which the KCLBA obtained the properties violated due process and otherwise ran afoul of constitutional guarantees. Again, we disagree.

The trial court granted summary disposition under MCR 2.116(C)(8) in both Docket No. 314256, regarding Kent County, and Docket No. 319733, regarding the city of Grand Rapids. This Court reviews de novo motions for summary disposition under MCR 2.116(C)(8). *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted." *Id*. "The motion must be granted if no factual development could justify the plaintiff's claim for relief." *Id*. This Court also reviews de novo issues of law involving statutory construction. *Klooster v Charlevoix*, 488 Mich 289, 295-296; 795 NW2d 578 (2011).

MCL 124.759 provides the procedure by which a land bank fast track authority may initiate an expedited quiet-title and foreclosure action. The land bank fast track authority must record a notice of the pending expedited quiet-title and foreclosure action with the register of deeds in the county in which the property is located. MCL 124.759(1). Among other things not at issue here, the notice must include a statement that any legal interests in the property may be extinguished by a circuit court order vesting title to the property in the authority. *Id*. After notice is recorded, the authority must initiate a search of records to identify the owners of a property interest in the property who are entitled to notice of the quiet-title and foreclosure hearing. MCL 124.759(2). The owner of a property interest is entitled to notice under this section if that owner's interest was identifiable before the authority recorded its notice. *Id*. The authority must search county register of deeds land title records, county treasurer tax records, local assessor tax records, and local treasurer tax records to identify the owner of a property interest who is entitled

to notice of the expedited quiet-title and foreclosure action. *Id*. The authority may file a petition in the circuit court, listing all the property for which the authority seeks to quiet title; the petition must "include a date, within 90 days, on which the authority requests a hearing on the petition." MCL 124.759(3). The clerk is required to immediately set the date, time, and place for a hearing on the petition and the hearing shall not be more than 10 days after the date requested by the authority in the petition. MCL 124.759(4).

The 3830 G parties argue under MCR 2.612(C)(1)(a) and (f) that the quiet-title and foreclosure judgment should be set aside because they were not given notice of the petition hearing date in the manner required by MCL 124.759(3). This argument has no merit. The 3830 G parties were not entitled to notice of the proceedings because only the owner of a property interest in the tax-foreclosed properties was entitled to notice of the filing of the petition. MCL 124.759(2). To hold otherwise would inappropriately read language into the statute. *Mich Ed Ass'n*, 489 Mich at 217-218. Because they were not entitled to notice, the quiet-title and foreclosure judgment cannot be set aside under either MCR 2.612(C)(1)(a) or (f) on the basis that the notification requirement was violated.

Moreover, even if the 3830 G parties were entitled to notice, the trial court did not abuse its discretion by concluding that the judgment should not be set aside on the basis that the KCLBA allegedly violated their due process rights when it did not immediately request a hearing date as required by MCL 124.759(3). No person may be deprived of life, liberty, or property without due process of law. US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. Due process generally requires notice and an opportunity to be heard. *Dusenbery v*

United States, 534 US 161, 167; 122 S Ct 694; 151 L Ed 2d 597 (2002); *Republic Bank v Genesee Co Treasurer*, 471 Mich 732, 742; 690 NW2d 917 (2005). MCL 124.759(19) specifically states that the failure of the authority to follow a requirement in MCL 124.759 relating to the quiet-title and foreclosure proceeding under that section does not create a cause of action against an authority "unless the minimum requirements of due process . . . are violated."

The 3830 G parties' due process rights were not violated by the notice provided in the petition and the quiet-title and foreclosure proceedings. The KCLBA's petition was filed on August 29, 2012, requesting that a hearing be held within 90 days, contrary to MCL 124.759(3), which requires the petition to include a specific date on which the authority requests the hearing be held. While the date was not specified within the petition, notices of the proceedings were posted at each of the Kent County tax-foreclosed properties, notice of the October 19, 2012 hearing was published for each parcel of property on September 19, September 26, and October 3, 2012, and notices of expedited quiet-title and foreclosure proceedings were also mailed by certified mail and first-class mail to the "occupants" of each parcel of property. Each of the notices indicated that the hearing on the KCLBA's petition was scheduled for October 19, 2012. In addition, the circuit court register of actions indicates that on October 11, 2012, the motion to quiet title was scheduled for a hearing on October 19, 2012.

These notices provided the 3830 G parties notice of an opportunity to be heard in relation to the petition sufficient to satisfy due process. *Dusenbery*, 534 US at 167; *Republic Bank*, 471 Mich at 742. In addition, the 3830 G parties had actual notice of the October 19, 2012

hearing on the motion to quiet title before the judgment was entered, which also satisfies the fundamental requirements of due process. See *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich App 502, 506; 448 NW2d 43 (1989) (concluding that where the trustee received actual notice of the claim, the service of process that was effected "satisfied fundamental requirements of due process and was not a substantial defect" in the process).

V. KENT COUNTY'S FIDUCIARY DUTY

The 3830 G parties also argue that Kent County exceeded its authority and violated its fiduciary duties to its taxpayers when it sold the tax-foreclosed properties to the KCLBA at prices allegedly below their market values. The 3830 G parties did not raise these arguments in their statement of questions presented and thus they are not properly presented for appellate review. *Bouverette v Westinghouse Electric Corp*, 245 Mich App 391, 404; 628 NW2d 86 (2001). Regardless, these arguments are without merit.

First, the resolutions passed by the Kent County Board of Commissioners did not violate county resolutions regarding the sale of county-owned property. It is the policy of Kent County to seek to maximize the benefits to the taxpayers in the sale, disposal, or transfer of any property owned by Kent County. Kent County Resolution 12-12-02-191, ¶ I.1.a. While, in general, the minimum price accepted for real property to be sold by Kent County must be based on an appraisal, property that is requested by other public entities may be sold by Kent County without requiring competitive proposals and upon the approval of the Kent County Board of Commissioners. *Id*. at II.3.c. and II.5. Because the KCLBA is a public entity, MCL 124.773(6)(a), contrary

to the 3830 G parties' argument, Kent County did not violate its policies when it sold the tax-foreclosed properties to the KCLBA without first obtaining competitive proposals.

Second, Kent County stated a public purpose behind its purchase of the Kent County tax-foreclosed properties. It is a valid public purpose for a land bank fast track authority, like the KCLBA, to acquire tax-reverted property as a way to strengthen and revitalize the economy of where it is located. MCL 124.752. The minutes from the July 12, 2012 meeting in which the board voted to purchase the properties from the Kent County Treasurer provide in full in this regard:

> WHEREAS, 64 properties . . . are part of 325 parcels that have all been foreclosed by the Kent County Treasurer for nonpayment of real property taxes in 2012; and
>
> WHEREAS, pursuant to MCL 211.78m, Kent County has the right to acquire tax-foreclosed properties prior to them being offered for sale at auction by paying the minimum bid price. Kent County has the right to sell these properties to the Kent County Land Bank Authority (KCLBA); and
>
> WHEREAS, *KCLBA has reviewed the entire list of 325 parcels and has now identified 43 properties that either meet the criteria for following its strategic plan or have been requested to be acquired on behalf of the local unit where it is located*; and
>
> WHEREAS, *four local non-profit developers are interested in acquiring and redeveloping 21 additional properties*. Treasurer Parrish requests that the County acquire and transfer ownership of these parcels to KCLBA; and
>
> WHEREAS, no recording fees are required for a transfer to the KCLBA. Corporate Counsel will review and approve the transfer documents before execution.
>
> NOW THEREFORE, BE IT RESOLVED that the Board of Commissioners hereby exercise its right to purchase 64

> parcels for the minimum bid price and sell them to the KCLBA at the same minimum bid price for future redevelopment and sale and that the Treasurer be authorized to sign the necessary documents. [Emphasis added.]

Thus, because Kent County resolved that the tax-foreclosed properties meet the KCLBA's strategic plan, were requested by the local government, or were requested for redevelopment, and the KCLBA's acquisition of property is a valid public purpose involving the revitalization of the economy, MCL 124.752, Kent County's sale of the properties to the KCLBA did fulfill a valid county public purpose of revitalization.

Further, the 3830 G parties cannot rely on MCL 46.11 and MCL 46.358 to argue that Kent County exceeded its authority when it sold the tax-foreclosed properties to the KCLBA. MCL 46.11(c) provides that the Kent County Board of Commissioners has the authority to sell real estate belonging to the county. MCL 46.358 grants a county commission authority to acquire real property for public parks, preserves, etc., on behalf of the county. Neither of these provisions limits a county's authority to purchase tax-foreclosed properties from the Kent County Treasurer and then resell them to the KCLBA at the same price. Moreover, the Michigan Constitution provides that constitutional provisions relating to counties "shall be liberally construed in their favor." Const 1963, art 7, § 34. In addition, "[p]owers granted to counties . . . by [the] constitution and by law shall include those fairly implied and not prohibited by [the] constitution." *Id*. Because MCL 211.78m(1) authorizes a foreclosing governmental unit to sell tax-foreclosed property to a county, Kent County, by implication, had authority to purchase the tax-foreclosed properties. Const 1963, art 7, § 34. Furthermore, the statute does not prohibit a county from reselling tax-foreclosed properties it pur-

chased; to hold otherwise would inappropriately read language into the statute. *Mich Ed Ass'n*, 489 Mich at 217-218.

Kent County did not violate its policies or resolutions when it purchased the tax-foreclosed properties from the Kent County Treasurer and then sold them to the KCLBA without a competitive-bid process.

VI. COLLATERAL ESTOPPEL

The 3830 G parties argue that the trial court erred when it determined that their claims in Docket No. 314256 were barred by the quiet-title and foreclosure judgment obtained by the KCLBA in Docket No. 314318. We agree, but find the error harmless in light of our affirmance earlier in this opinion of the trial court's order summarily dismissing the 3830 G parties' amended complaint under MCR 2.116(C)(8).

The KCLBA argued that the 3830 G parties' complaint in Docket No. 314256 was barred by the prior quiet-title and foreclosure judgment and the trial court addressed this issue when it granted summary disposition in favor of all defendants in part under MCR 2.116(C)(7).

"This Court reviews de novo a trial court's decision on a motion for summary disposition pursuant to MCR 2.116(C)(7) to determine whether the moving party was entitled to judgment as a matter of law." *Duncan v Michigan*, 300 Mich App 176, 194; 832 NW2d 761 (2013). The application of legal doctrines, like collateral estoppel, is a question of law that this Court reviews de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008). Even if the trial court erred by granting summary disposition under a particular subrule, this Court will not reverse if the error was harmless; this Court must determine "whether declining to grant a

new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice." *Chastain v Gen Motors Corp (On Remand)*, 254 Mich App 576, 586; 657 NW2d 804 (2002) (quotation marks and citation omitted).

A land bank fast track authority like the KCLBA may initiate an expedited quiet-title and foreclosure action to quiet title to real property by recording notice of the pending action with the register of deeds in the relevant county. MCL 124.759(1). The land bank fast track authority must initiate a search of records to identify the owners of a property interest in the property who are entitled to notice of hearing on such an action and any identified property-interest owner is entitled to notice of the action. MCL 124.759(2). The land bank fast track authority may file a petition in the circuit court listing all the properties subject to the expedited quiet-title and foreclosure action and seeking a judgment in favor of the land bank fast track authority; the petition must include a date within 90 days on which the authority requests a hearing. MCL 124.759(3).

If a petition for an expedited quiet-title and foreclosure hearing is filed under MCL 124.759(3), a person claiming an interest in a parcel of property set forth in the petition who desires to contest that petition must "file written objections with the clerk of the circuit court and serve those objections on the [land bank fast track] authority before the date of the hearing." MCL 124.759(11). The judgment must specify, in part, that all existing recorded and unrecorded interests in that property are extinguished (except in certain limited circumstances not at issue in this case) and that fee simple title to the foreclosed property is vested absolutely in the land bank fast

track authority. MCL 124.759(11)(b) and (e); MCL 124.759(12). Under MCL 124.759(12), the judgment may not be modified, stayed, or held invalid except as provided in MCL 124.759(13), which allows a land bank fast track authority or person claiming to have a property interest under MCL 124.759(2) to appeal the trial court's foreclosure order within 21 days to the Court of Appeals. Moreover, if the judgment of foreclosure is entered under MCL 124.759(12), "the owner of any extinguished recorded or unrecorded interest in that property who claims that he or she did not receive notice of the expedited quiet title and foreclosure action shall not bring an action for possession of the property against any subsequent owner, but may only bring an action to recover monetary damages as provided in this subsection." MCL 124.759(15).

The 3830 G parties claim that their complaint in Docket No. 12-009669-CH is not barred by the foreclosure judgment obtained by the KCLBA in Kent Circuit Court Docket No. 12-008120-CH because the foreclosure procedures outlined in MCL 124.759 apply only to parties asserting an existing property interest, unlike the 3830 G parties who assert a right in bidding at the public auction proceeding required by statute (MCL 124.755(6) and MCL 211.78m). It is unnecessary to address this aspect of their argument because the 3830 G parties were not a party in the Docket No. 12-008120-CH foreclosure proceeding and the judgment in that action cannot be used to collaterally estop the 3830 G parties complaint in Docket No. 12-009669-CH.

Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in that prior proceeding. *Leahy*

v Orion Twp, 269 Mich App 527, 530; 711 NW2d 438 (2006). Collateral estoppel is a flexible rule intended to relieve parties of multiple litigation, conserve judicial resources, and encourage reliance on adjudication. *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990).

Generally, application of collateral estoppel requires (1) that a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) that the same parties had a full and fair opportunity to litigate the issue, and (3) mutuality of estoppel. *Monat v State Farm Ins Co*, 469 Mich 679, 682-684; 677 NW2d 843 (2004).

In the subsequent action, the ultimate issue to be concluded must be the same as that involved in the first action. *Qualls*, 434 Mich at 357. The issues must be identical, and not merely similar. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 340; 657 NW2d 759 (2002). In addition, the common ultimate issues must have been both actually and necessarily litigated. *Qualls*, 434 Mich at 357.

To be actually litigated, a question must be put into issue by the pleadings, submitted to the trier of fact, and determined by the trier. *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). The parties must have had a full and fair opportunity to litigate the issues in the first action. *Keywell & Rosenfeld*, 254 Mich App at 340.

For collateral estoppel to apply, the parties in the second action must be the same as or privy to the parties in the first action. *VanVorous v Burmeister*, 262 Mich App 467, 480; 687 NW2d 132 (2004). A party is one who was directly interested in the subject matter and had a right to defend or to control the proceedings and to appeal from the judgment, while a privy is one

who, after the judgment, has an interest in the matter affected by the judgment through one of the parties, as by inheritance, succession, or purchase. *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999).

In this case, the October 19, 2012 judgment quieting title of the Kent County tax-foreclosed properties in the KCLBA in Docket No. 12-008120-CH does not bar the 3830 G parties' amended complaint in Docket No. 12-009669-CH. Collateral estoppel does not apply because the parties in this action are not the same as those involved in the first action. While the KCLBA was involved in both the quiet-title and foreclosure action and this action, the 3830 G parties were not involved in the quiet-title and foreclosure action. While the 3830 G parties were interested in the subject matter in the quiet-title and foreclosure action, they did not have a right to defend or control the proceedings. *Id*. In fact, the trial court denied their motion to intervene in the quiet-title and foreclosure action and, as a result, the 3830 G parties also did not have a full and fair opportunity to litigate the issues raised in their complaint relative to the facts surrounding the sale of the Kent County tax-foreclosed properties in the first action; thus, the issue of the KCLBA's ownership of those properties was not actually litigated. *Keywell & Rosenfeld*, 254 Mich App at 340. Accordingly, the trial court erred by concluding that the 3830 G parties' complaint was barred by the prior quiet-title and foreclosure judgment under MCR 2.116(7).

While the trial court erred by granting summary disposition to defendants on the basis of collateral estoppel, the error was harmless because summary disposition was appropriate under MCR 2.116(C)(8). *Chastain*, 254 Mich App at 586.

VII. THE QUIET-TITLE ACTION

In Docket No. 314318, the trial court denied the 3830 G parties' motion to set aside the quiet-title and foreclosure judgment on the bases that (1) it was not timely filed, (2) the 3830 G parties failed to submit a pleading as required by MCR 2.209(C)(2), and (3) there was no due process violation because actual notice was achieved. Upon review, we find that the trial court did not abuse its discretion by denying the 3830 G parties' motion to set aside the judgment brought under MCR 2.612(C)(1)(a), (b), and (f). Further, we find that the trial court did not abuse its discretion by denying the 3830 G parties' motion to set aside under MCR 2.611(A)(1)(a) and (e), albeit it did so for the wrong reasons. Finally, we find that the trial court's failure to set aside the quiet-title and foreclosure judgment under MCR 2.611(A)(1)(g) did not constitute plain error affecting the 3830 G parties' substantial rights.

This Court reviews for an abuse of discretion a trial court's decision on a motion to set aside a judgment under MCR 2.612. *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). This Court also reviews for an abuse of discretion the trial court's decision to grant or deny motions for a new trial under MCR 2.116. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *Bay City v Bay Co Treasurer*, 292 Mich App 156, 164; 807 NW2d 892 (2011). The determination whether a party has been afforded due process is a question of law subject to review de novo on appeal. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277; 831 NW2d 204 (2013); *In re*

Moroun, 295 Mich App 312, 331; 814 NW2d 319 (2012) (opinion by K. F. KELLY, J.).

In addition, this Court also reviews de novo issues of law involving statutory construction, *Klooster*, 488 Mich at 295-296, as well as the proper interpretation and application of a court rule, *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Finally, unpreserved error may be considered if (1) failure to do so would result in manifest injustice, (2) consideration is necessary for a proper determination of the case, or (3) the issue involves a question of law, and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353(2008). An unpreserved nonconstitutional claim of error is reviewed for plain error affecting substantial rights. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994); *Veltman v Detroit Edison Co*, 261 Mich App 685, 690; 683 NW2d 707 (2004) (applying the unpreserved plain error standard to civil cases).

A. MCR 2.611

In Docket No. 314318, the 3830 G parties argue that the trial court abused its discretion by denying their "motion to set aside" brought under MCR 2.611(A)(1)(a) and (e). We conclude that the trial court reached the correct result by denying the 3830 G parties' motion to set aside the quiet-title and foreclosure judgment under MCR 2.611(A)(1)(a) and (e), but did so for the wrong reasons.

Our Supreme Court has stated:

> This Court uses the principles of statutory construction when interpreting a Michigan court rule. We begin by considering the plain language of the court rule in order to ascertain its meaning. The intent of the rule must be

> determined from an examination of the court rule itself and its place within the structure of the Michigan Court Rules as a whole. [*Henry*, 484 Mich at 495 (quotation marks and citations omitted).]

In relevant part, MCR 2.611(A)(1) provides:

> *A new trial may be granted* to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:
>
> (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
>
> * * *
>
> (e) A verdict or decision against the great weight of the evidence or contrary to law. [Emphasis added.]

By its plain language, MCR 2.611(A)(1) applies only to judgments reached following a trial. *Henry*, 484 Mich at 495. In Docket No. 12-008120-CH, the trial court entered judgment on the KCLBA's petition for quiet title and foreclosure of the tax-foreclosed properties; there was no trial and there was thus no judgment following a trial to be set aside. Thus, by its very terms, a motion under this rule must be preceded by a trial on the merits, which did not occur in this action and the 3830 G parties were not entitled to relief under this court rule. MCR 2.611(A)(1)(a) and (e); *Henry*, 484 Mich at 495. Although the trial court erred by addressing the 3830 G parties' motion to set aside the quiet-title and foreclosure judgment on the merits under MCR 2.611, the right result (denial of the motion to set aside the judgment under MCR 2.611(A)(1)(a) and (e)) should be affirmed. See *Gleason v Dep't of Transp*, 256 Mich App 1, 3; 662 NW2d 822 (2003) ("A trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.").

B. MCR 2.612

MCR 2.612 governs how a party may obtain relief from a judgment or order. MCR 2.612(C)(1)(a) and (f) provide:

> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
>
> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.

As noted earlier in the due process section of this opinion, the 3830 G parties premised their argument that the trial court erred by denying them relief from the judgment on the mistaken assertion that they were not given the proper notice regarding the petitions to expedite the proceedings pursuant to MCL 124.759. Again, since they were not entitled to notice, the 3830 G parties cannot demonstrate any error in the underlying judgment that entitles them to relief under this court rule.

VIII. OTHER CLAIMS OF ERROR

The 3830 G parties also argue, for the first time on appeal, that the quiet-title and foreclosure judgment entered in Docket No. 12-008120-CH should also be set aside under MCR 2.611(A)(1)(g), which provides that a new trial may be granted when a party's substantial rights are affected because of an "[e]rror of law occurring in the proceedings, or mistake of fact by the court." As stated earlier, the 3830 G parties are not entitled to

relief under MCR 2.611(A)(1), *Henry*, 484 Mich at 495, because the judgment in Docket No. 12-008120-CH is not the result of a trial. Thus, they cannot demonstrate plain error affecting their substantial rights and the trial court's denial of the 3830 G parties' motion to set aside the judgment will not be reversed on this basis. *Grant*, 445 Mich at 552-553; *Veltman*, 261 Mich App at 690.

The 3830 G parties also offered numerous arguments regarding the trial court's determination that they lacked standing. The question of standing is only significant in relation to the ability to bring the rejected assertions of statutory, policy, and constitutional error. Therefore, we need not address standing to resolve this case.

IX. CONCLUSION

In Docket Nos. 314256 and 319733, we affirm the trial court's order granting summary disposition. In Docket No. 314318, we affirm the trial court's order denying the motion to set aside the quiet-title and foreclosure judgment.

SHAPIRO, P.J., and STEPHENS, J., concurred.

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

ALLARD v ALLARD

Docket No. 308194. Submitted October 2, 2013, at Detroit. Decided December 18, 2014, at 9:05 a.m. Leave to appeal granted 497 Mich 1040.

Earl H. Allard, Jr., and Christine A. Allard were granted a divorce in the Wayne Circuit Court, Megan M. Brennan, J. Christine appealed, contending that the trial court erred by enforcing the parties' antenuptial agreement.

The Court of Appeals *held*:

1. Antenuptial agreements may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of a material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable. To determine if an antenuptial agreement is unenforceable because of a change in circumstances, the focus is on whether the changed circumstances were reasonably foreseeable either before or during the signing of the agreement. The types of changes of circumstances that may void an antenuptial agreement must relate to the issues addressed in the agreement. In this case, Christine asserted that the antenuptial agreement should be voided because of unforeseen abuse by Earl that she allegedly suffered during the marriage. But the parties' implicitly agreed in their antenuptial agreement that fault would not be a factor in awarding spousal support or dividing the marital estate, and to invalidate the agreement on the basis of one party's fault would contravene its clear and unambiguous language. Moreover, the focus of the antenuptial agreement was spousal support and the division of assets. Earl's alleged abuse was unrelated to those issues and, therefore, was not a change of circumstances that could be used to support voiding the agreement.

2. A contract may be deemed unenforceable if it was executed under duress. To succeed with respect to a claim of duress, the party must establish that he or she was illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes. The fear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully. In this case, Chris-

tine explained that she felt under duress because the agreement was executed on the day of the rehearsal dinner, two days before the wedding, and she did not want to cancel the wedding and lose her deposits if she refused to sign the agreement. But Christine failed to offer any evidence of illegal behavior. Therefore, her claim of duress was without merit, and the trial court correctly determined as a matter of law that she could not prevail on the issue.

3. An unconscionable contract is not enforceable. In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present. Procedural unconscionability exists when the weaker party has no realistic alternative to acceptance of the term. Substantive unconscionability exists when the challenged term is not substantively reasonable, in other words, when the inequity of the term is so extreme as to shock the conscience. In this case, there was no evidence that there was any procedural unconscionability. Christine admitted that she received a draft of the agreement 10 days before the wedding and had time to consult with her father regarding the antenuptial agreement. And Christine admitted that during her meeting with Earl and his attorney, a term of the agreement was modified because of a concern she had regarding what would happen in the event Earl died during the marriage. Nor was there evidence of substantive unconscionability. The terms of the agreement were neutral regarding the parties even if they ultimately resulted in an uneven outcome. The trial court did not err by determining, as a matter of law, that the antenuptial agreement was enforceable.

4. Generally, each party in a divorce is entitled to retain their separate estate, but a spouse's separate estate may be opened for redistribution when one of two statutory exceptions is met. MCL 552.23(1) permits invasion of the separate estates when one party demonstrates additional need. And under MCL 552.401, when one significantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation. Although the Court of Appeals, in *Reed v Reed*, 265 Mich App 131 (2005), indicated that these statutory exceptions might be used to invade a marital estate contrary to an antenuptial agreement, that statement in *Reed* was obiter dictum. MCL 557.28 states that a contract relating to property made between persons in contemplation of marriage shall remain in full force after the marriage takes place. Reading MCL 557.28 together with MCL 552.23(1) and MCL 552.401, it is clear that the later statutes did not permit the trial court to disregard the antenuptial agreement.

5. Antenuptial agreements, like other written contracts, are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. The antenuptial agreement at issue provided that any property acquired in either party's individual capacity or name during the marriage would remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name. Much of the real estate acquired during the course the marriage was acquired in the name of various limited liability companies (LLCs) formed by Earl and of which he was the sole member. As a matter of law, the LLCs were separate legal entities and should not have been construed as being the same as Earl for purposes of applying the antenuptial agreement. To the extent any real property or other assets were acquired during the course of the marriage by the LLCs created during the marriage, their disposition was not governed by the antenuptial agreement. Further, the antenuptial agreement did not treat the terms "income" and "property" as synonymous. Therefore, all income earned by the parties during the course of the marriage should have been treated by the trial court as part of the marital estate.

Trial court's determination that the antenuptial agreement was valid and enforceable affirmed; trial court's determination that all property and income acquired during the marriage by Earl and his LLCs was part of Earl's separate estate reversed; remanded for further proceedings.

1. DIVORCE — ANTENUPTIAL AGREEMENTS — CHANGES OF CIRCUMSTANCES.

Antenuptial agreements may be voided when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable; when determining whether an antenuptial agreement is unenforceable because of a change in circumstances, the focus is on whether the changed circumstances were reasonably foreseeable either before or during the signing of the agreement; the types of changes of circumstances that may void an antenuptial agreement must relate to the issues addressed in the agreement.

2. DIVORCE — STATUTORY EXCEPTIONS PERMITTING THE INVASION OF SEPARATE ESTATES — ANTENUPTIAL AGREEMENTS.

A valid and enforceable antenuptial agreement may not be disregarded under either MCL 552.23(1), which generally permits invasion of the separate estates when one party demonstrates additional need, or MCL 552.401, under which, when one significantly assists in the acquisition or growth of a spouse's separate

asset, the court may generally consider the contribution as having a distinct value deserving of compensation (MCL 557.28).

James N. McNally and *Breitmeyer Cushman PLLC* (by *Carol F. Breitmeyer*) for Earl H. Allard, Jr.

Gentry Nalley, PLLC (by *Kevin S. Gentry*), for Christine A. Allard.

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

WILDER, J. Defendant appeals as of right a judgment of divorce entered by the trial court. We affirm in part, reverse in part, and remand for further proceedings.

I

The parties signed an antenuptial agreement on September 9, 1993, two days before their wedding on September 11, 1993. This case primarily deals with the validity and enforcement of that antenuptial agreement.

In August 1992, plaintiff's father, who was ill and hospitalized for treatment of lung cancer, summoned his family attorney, John Carlisle, to the hospital and instructed him to draft antenuptial agreements for his two sons. Plaintiff's father had advised plaintiff that, while it was his intention to leave him a substantial inheritance in the event of his death, he would not do so if plaintiff had not secured an antenuptial agreement before he married. Carlisle did not actually draft any antenuptial agreements until he was approached by plaintiff in mid to late summer 1993.

Approximately 10 days before their wedding, plaintiff gave defendant a draft of an antenuptial agreement dated August 25, 1993. Plaintiff and defendant dis-

cussed his father's expression that he did not approve plaintiff getting married unless he and defendant first signed an antenuptial agreement, and his intention to honor his father's wishes. Evidently, defendant did not consult with an attorney about the agreement; instead, she consulted with her father, who had signed an antenuptial agreement before his second marriage. On September 9, the day of the rehearsal dinner, plaintiff reminded defendant that his father was adamant that, if she did not sign the agreement, there should be no wedding, and that plaintiff intended to honor his father's wishes. Both plaintiff and defendant then drove together to Carlisle's office.

There is no dispute that, at some point in time, whether 10 days before the wedding or on some other occasion, defendant asked Carlisle what would happen if plaintiff died during their marriage. According to Carlisle, in direct response to defendant's question, he added a life insurance provision to the agreement. According to defendant, the draft agreement already contained a life insurance provision, and her question to Carlisle prompted an increase in the coverage from $200,000 to $250,000.[1]

At the September 9 meeting, Carlisle reiterated to defendant that there would be no wedding if she did not sign the agreement, which she then did, but claimed she wanted to write "signed under duress" on the document

[1] Both the August 25, 1993 and the September 9, 1993 versions of the agreement were submitted in evidence. Both have the same ¶ 16, which requires plaintiff to carry a life insurance policy of $200,000. The only difference of any substance between the two documents is located in ¶ 11(c); the August 25 draft states that each party "has entered into this agreement freely and voluntarily after taking into account the advice of his or her own legal counsel," while the signed September 9 agreement omitted the phrase "after taking into account the advice of his or her own legal counsel."

and was not permitted to do so by Carlisle. Carlisle disputed defendant's recollection, stating in his deposition that defendant was pleasant at the September 9 meeting and had never mentioned feeling forced to sign the agreement.

The pertinent sections of the signed antenuptial agreement provide as follows:

> 4. Each party shall during his or her lifetime keep and retain sole ownership, control, and enjoyment of all real, personal, intangible, or mixed property now owned, free and clear of any claim by the other party. However, provided that nothing herein contained shall be construed to prohibit the parties from at any time creating interests in real estate as tenants by the entireties or in personal property as joint tenants with rights of survivorship and to the extent that said interest is created, it shall, in the event of divorce, be divided equally between the parties. At the death of the first of the parties hereto, any property held by the parties as such tenants by the entireties or joint tenants with rights of survivorship shall pass to the surviving party.
>
> 5. In the event that the marriage . . . terminate[s] as a result of divorce, then, in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce (including any right to payment of legal fees incident to a divorce), under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released), the parties agree that all property acquired after the marriage between the parties shall be divided between the parties with each party receiving 50 percent of the said property. However, notwithstanding the above, the following property acquired after the marriage will remain the sole and separate property of the party acquiring the property and/or named on the property:

a. As provided in paragraphs Two and Three of this antenuptial agreement, any increase in the value of any property, rents, profits, or dividends arising from property previously owned by either party shall remain the sole and separate property of that party.

b. Any property acquired in either party's individual capacity or name during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name.

* * *

8. Each party shall, without compensation, join as grantor in any and all conveyances of property made by the other party or by his or her heirs, devises, or personal representatives, thereby relinquishing all claim to the property so conveyed, including without limitation any dower or homestead rights, and each party shall further, upon the other's request, take any and all steps and execute, acknowledge, and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose and intent of this agreement.

* * *

10. Each party acknowledges that the other party has advised him or her of the other party's means, resources, income, and the nature and extent of the other party's properties and holdings (including, but not limited to, the financial information set forth in exhibit A attached hereto and incorporated herein by reference) and that there is a likelihood for substantial appreciation of those assets subsequent to the marriage of the parties.

Included with the agreement was plaintiff's disclosure statement, which indicated that he already had approximately $400,000 in net worth.

The parties were married on September 11, 1993. During the course of the marriage, the parties held a joint checking account with Private Bank, which was closed in November 2010. There were no other jointly held accounts. Defendant worked at two different advertising agencies during the first several years of the marriage. At the end of her employment, she earned approximately $30,000 per year. In 1999, after she became pregnant with the couple's second child, defendant stopped working and did not seek further employment.

Plaintiff received numerous cash gifts from his parents during the marriage, often totaling $20,000 per year. Plaintiff also testified that he received loans from his father during the course of the marriage, and claims that he used those funds to acquire some of the real estate he purchased during the marriage. Plaintiff also formed six limited liability companies (LLCs) during the marriage and served as the sole member of these companies.[2] James R. Graves, who prepared federal and state tax returns for the parties, testified that because these were single-member LLCs, the LLCs were treated as disregarded entities for tax purposes.[3] Graves also testified that the parties filed joint tax returns as a married couple until 2008, but that in 2009 and 2010, the parties' tax status was changed to married, filing separately.

Testimony during trial established that plaintiff used at least some of the LLCs as a vehicle to purchase and

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[2] From our review of the record, it appears most if not all of the LLCs were formed before 2009.

[3] "As a 'disregarded entity,' a single-member LLC is not taxed separately, but has its income attributed to its owner and the owner is then responsible for paying all taxes due." *Kmart Mich Prop Services, LLC v Dep't of Treasury*, 283 Mich App 647, 651; 770 NW2d 915 (2009).

convey numerous real estate holdings. In addition, the marital home, which plaintiff owned before the marriage, was conveyed to one of the LLCs. Plaintiff asserted in the trial court that defendant never incurred any liability as the result of the obligations arising from these multiple transactions, and that, as required by the antenuptial agreement, defendant signed warranty deeds when properties were sold to release any dower rights she might have acquired.[4] However, despite contending that defendant willfully released her dower rights in accordance with the terms of the antenuptial agreement, plaintiff also asserted that defendant never gained any ownership interest in any of the properties.

After more than 16 years of marriage, plaintiff filed for divorce on July 28, 2010. On July 13, 2011, plaintiff filed a second[5] motion for partial summary disposition regarding the antenuptial agreement. Plaintiff argued that the antenuptial agreement governed and was dispositive of all issues except for custody, parenting time, and child support. Plaintiff attached as evidentiary support for his motion the September 9 antenuptial agreement, the deposition of John Carlisle, the deposition of Brian Carrier,[6] and the affidavit of Sherrie

[4] Defendant argued at trial that she never signed any deeds, and that her signature was forged. Plaintiff disputed this testimony, and offered contrary testimony in addition to identifying the signatures on the deeds as defendant's signature.

[5] Plaintiff first moved for partial summary disposition under MCR 2.116(C)(4), (7), and (10). While the trial court denied the motion with prejudice with respect to MCR 2.116(C)(4) and (7), it denied the motion with respect to MCR 2.116(C)(10) without prejudice. The trial court explained that plaintiff failed to submit "any supporting affidavits, deposition transcripts, admissions, or other documentary evidence . . . ."

[6] Carrier worked in Carlisle's office and was the person who notarized the antenuptial agreement on September 9, 1993.

Doucette.[7] At the August 8, 2011 motion hearing, plaintiff also introduced the deposition testimony of defendant. Defendant responded to the motion by arguing that the agreement was void because the terms of the agreement were unconscionable, defendant did not have the benefit of independent counsel, and also because the agreement was signed under duress on the day of the wedding rehearsal. Defendant also contended that a change of circumstances supported the setting aside of the agreement, asserting that the facts would show she was abused by plaintiff during the marriage and that plaintiff never intended to create a marital partnership. In support of her response opposing the motion, defendant submitted her own affidavit and plaintiff's deposition.

The trial court granted plaintiff's motion. First, the trial court determined that defendant could not establish that the contract was signed under duress because there was no evidence of any illegal action. Next, the trial court determined that the agreement was not unconscionable because its terms did not shock the conscience of the court. Last, the trial court found that there was no change of circumstances that would make enforcement of the contract unfair and unreasonable. In particular, the trial court noted that the length of a marriage and the growth of assets are not unforeseeable and therefore cannot qualify as a change of circumstances. Further, the trial court questioned the validity of defendant's claim of abuse because, as far as the trial court was concerned, it was raised at the "eleventh hour," but regardless, noted that the allegation on its face would not "rise to the level of rendering th[e] contract unenforceable . . . ." Finally, the trial court found defendant's argument—that plaintiff's

[7] Doucette worked in Carlisle's office and was one of the witnesses who signed the antenuptial agreement on September 9, 1993.

lack of intent to create a marital partnership was unforeseeable—unpersuasive, noting that the clear language of the agreement allowed for each spouse to maintain separate assets.

Subsequently at trial, defendant argued that aside from the plain language of the antenuptial agreement as interpreted by the trial court, she should be able to "invade" plaintiff's personal assets based on a partnership theory. The trial court ultimately rejected this argument. The trial court also concluded "that the equitable distribution factors contemplated by MCL 552.19 and set forth in *Sparks v. Sparks*, 440 Mich 141, 159-162 [485 NW2d 893] (1992) were not applicable" because of the presence of the unambiguous antenuptial agreement. Further, the trial court declined defendant's invitation to invade plaintiff's personal assets under MCL 552.23(1) or MCL 552.401. The court explained that if it allowed such an invasion to take place, then the right to freely contract would be jeopardized. As a result, the focus of the bench trial was to determine who owned what assets.

The record is clear that all the assets of worth were titled in either plaintiff's name, one of plaintiff's LLCs' names, or defendant's name. Given that evidence, the trial court concluded that there was little marital property to distribute. Consequently, pursuant to the antenuptial agreement, the trial court awarded plaintiff the six LLC entities, the stock he owned, and "all bank accounts presently titled in his name alone or titled in the name of his single-member LLCs." The trial court awarded defendant the stock she owned, an IRA account that was in her name, and all bank accounts that were in her name. The value of the assets awarded to plaintiff was in excess of $900,000, while the assets awarded to defendant were valued at approximately $95,000.

Because the antenuptial agreement prohibited the award of any spousal support, the trial court did not award any. And, although not pertinent to any issue on appeal, the parties reached agreement on the issues of custody and parenting time, and this agreement was incorporated in the judgment of divorce entered by the trial court.[8]

With regard to child support, the trial court used the Michigan Child Support Formula to calculate the base child support to be $3,041 a month for both children. However, the trial court also determined that application of the formula would be both unjust and inappropriate and, therefore, not in the children's best interests. Consequently, the trial court increased the base monthly child support award by $1,000.

II

A

We first address defendant's arguments that the antenuptial agreement was void and, therefore, unenforceable. We disagree.

A trial court's decision on a motion for summary disposition brought under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When deciding a motion for summary disposition under this rule, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713

[8] The parties were awarded joint legal custody, defendant was awarded primary physical custody, and plaintiff was awarded reasonable parenting time.

NW2d 717 (2006). The motion is properly granted if the evidence fails to establish a genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Michalski v Bar-Levav*, 463 Mich 723, 730; 625 NW2d 754 (2001).

In Michigan, antenuptial agreements "may be voided (1) when obtained through fraud, duress, mistake, or misrepresentation or nondisclosure of a material fact, (2) if it was unconscionable when executed, or (3) when the facts and circumstances are so changed since the agreement was executed that its enforcement would be unfair and unreasonable." *Reed v Reed*, 265 Mich App 131, 142-143; 693 NW2d 825 (2005). The party challenging the validity of an antenuptial agreement carries the burden of proof and persuasion. *Id*. at 143.

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"To determine if a prenuptial agreement is unenforceable because of a change in circumstances, the focus is on whether the changed circumstances were reasonably foreseeable either before or during the signing of the prenuptial agreement." *Woodington v Shokoohi*, 288 Mich App 352, 373; 792 NW2d 63 (2010). Like she argued at the trial court, defendant on appeal claims that she was abused during the marriage, which she claims constituted an unforeseen change of circumstances that would make enforcement of the antenuptial agreement unreasonable. We disagree.

In response to plaintiff's second motion for partial summary disposition, defendant submitted an affidavit, in which she claimed that she was the victim of verbal and physical abuse during the course of the marriage. But defendant has provided no caselaw that supports her position that someone's "fault" in a divorce can constitute an unforeseen change in circumstances.

While "fault" is a factor that courts generally consider in awarding spousal support, *Berger v Berger*, 277 Mich App 700, 726-727; 747 NW2d 336 (2008), and dividing the marital property, *Sparks*, 440 Mich at 158-160, the parties implicitly agreed in their antenuptial agreement that fault would not be a factor in these determinations. Therefore, to invalidate the agreement on the basis of one party's fault would contravene the clear and unambiguous language of the agreement.

Moreover, even assuming that the abuse occurred and was unforeseeable, this change in circumstances is not sufficient to void the parties' antenuptial agreement in this instance. The types of changes of circumstances that may void an otherwise valid antenuptial agreement must relate *to the issues addressed in the antenuptial agreement*. Because the primary focus of the antenuptial agreement was spousal support and the division of the parties' assets, any change of circumstances has to relate to those issues, and here, the domestic abuse does not. See *Justus v Justus*, 581 NE2d 1265, 1273 (Ind App, 1991) (while reviewing how other jurisdictions have addressed a change of circumstances after the execution of an antenuptial agreement, the court concluded that courts "may decline to enforce an antenuptial agreement, but only where enforcement would leave a spouse in the position where he would be unable to support himself. At that point, the state's interest in not having the spouse become a public charge outweighs the parties' freedom to contract.").

Defendant's reliance on *Hutchison v Hutchison*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2009 (Docket No. 284259), for the proposition that abuse may play a role in constituting a change of circumstances is misplaced. Although unpublished opinions are not binding precedent, we may

consider them for their persuasive value. MCR 7.215(C)(1); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010). In *Hutchison*, this Court affirmed the trial court's determination that the parties' antenuptial agreement was unenforceable because of a change of circumstances. While the Court noted that the defendant suffered years of mental and physical abuse, it also noted that, when the plaintiff retired, he insisted that the defendant quit her employment and threatened that he would make her life miserable if she did not comply. *Hutchison*, unpub op at 2. *Hutchison*, therefore, does not stand for the proposition that abuse, alone, can constitute a sufficient change of circumstances to void an otherwise valid antenuptial agreement. Instead, it was important that the plaintiff's unforeseen actions prohibiting the defendant from working directly affected the defendant's financial situation. In the present case, there was no evidence that plaintiff's alleged abuse affected defendant's ability to earn income or affected any of her property rights. She testified at her deposition that plaintiff never told her she could not work. She also stated that she chose to not seek employment after leaving the work force because plaintiff earned enough to take care of the family. Accordingly, we hold that, as a matter of law, defendant failed to show that any change of circumstances was sufficient to void the antenuptial agreement.

Defendant also argues that the trial court erroneously made credibility findings at the summary disposition phase. Defendant is correct that a trial court is precluded from making any findings of fact or credibility determinations during summary disposition. *Moon v Mich Reproductive & IVF Center, PC*, 294 Mich App 582, 595; 810 NW2d 919 (2011). Although the trial court appeared to impermissibly weigh defendant's

credibility related to her allegations of abuse,[9] it also noted that it, even assuming the allegations were true, failed to see how the existence of any abuse was *relevant*. Because the trial court correctly determined that evidence of abuse was not a relevant consideration as it pertained to defendant's claimed change of circumstances, any error introduced by the trial court also potentially discounting the evidence as being less than credible was harmless. See MCR 2.613(A); *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004).

2

A contract may be deemed unenforceable if it was executed under duress. *Liparoto Constr, Inc v General Shale Brick, Inc*., 284 Mich App 25, 30; 772 NW2d 801 (2009). "[T]o succeed with respect to a claim of duress, [defendants] must establish that they were illegally compelled or coerced to act by fear of serious injury to their persons, reputations, or fortunes." *Farm Credit Servs of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 681; 591 NW2d 438 (1998) (quotation marks and citation omitted; second alteration in original); see also *Norton v State Hwy Dep't*, 315 Mich 313, 320; 24 NW2d 132 (1946). Further, the "[f]ear of financial ruin alone is insufficient to establish economic duress; it must also be established that the person applying the coercion acted unlawfully." *Weldon*, 232 Mich App at 681-682 (quotation marks and citation omitted). Defendant claims on appeal that Michigan's definition of duress is unclear and that the "unlawful"

[9] The trial court expressed its skepticism of the veracity of defendant's claim of abuse because she was raising it for the first time in response to plaintiff's second motion for partial summary disposition: "And the fact that this [the allegation of abuse] was raised at the eleventh hour does cause some concern to this court. This is the second motion for summary disposition on this issue, and this was never raised beforehand."

aspect should be removed. We disagree. First, the definition is quite clear and needs no clarification. Second, defendant's argument tacitly acknowledges that the definition is indeed clear because she then argues that this Court should remove the definition's key component. Moreover, even if we were inclined to agree with defendant, we are bound by the doctrine of stare decisis and have no power to modify this Court's and our Supreme Court's prior definition of duress by removing the component addressing illegal acts by the person applying the coercion. MCR 7.215(C)(2); *W A Foote Mem Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004).

At the trial court, defendant never suggested that any unlawful or illegal coercion took place when she signed the antenuptial agreement. As she stated in her deposition, she explained that she felt under "duress" because the agreement was executed on the day of the rehearsal dinner for the wedding. She was concerned that, if she did not sign the agreement, then the wedding would be called off and 150 wedding guests would have to be notified. She also explained her fear of losing deposits and payments associated with the wedding and that "[i]t was money I couldn't afford to lose at the time." These facts do not support the conclusion that anyone engaged in any illegal or unlawful acts to coerce defendant to sign the antenuptial agreement, and defendant's "[f]ear of financial ruin alone is insufficient to establish economic duress[.]" *Weldon*, 232 Mich App at 681 (quotation marks and citation omitted). Therefore, because defendant never offered any evidence of any illegal behavior, her claim of duress is without merit, and the trial court correctly determined that she could not prevail on this issue as a matter of law.

3

An unconscionable contract is not enforceable. "In order for a contract or contract provision to be considered unconscionable, both procedural and substantive unconscionability must be present." *Clark v Daimler-Chrysler Corp*, 268 Mich App 138, 143; 706 NW2d 471 (2005).

> Procedural unconscionability exists where the weaker party had no realistic alternative to acceptance of the term. If, under a fair appraisal of the circumstances, the weaker party was free to accept or reject the term, there was no procedural unconscionability. Substantive unconscionability exists where the challenged term is not substantively reasonable. However, a contract or contract provision is not invariably substantively unconscionable simply because it is foolish for one party and very advantageous to the other. Instead, a term is substantively unreasonable where the inequity of the term is so extreme as to shock the conscience. [*Id*. at 144 (citations omitted).]

In this case, there was no evidence that there was any procedural unconscionability. On appeal, defendant relies on her characterization that plaintiff timed the signing of the agreement "perfectly" on the day of the rehearsal dinner. But in her affidavit, she admitted that she received a draft of the agreement 10 days before the wedding. Plus, she testified in her deposition that she had time to consult with her father regarding the antenuptial agreement. Moreover, defendant admitted that during her meeting with plaintiff and his attorney, a term of the agreement was modified because of a concern she had regarding what would happen in the event plaintiff died during the marriage. In sum, the evidence is not sufficient to establish that there was any procedural unconscionability.

Likewise, there was no evidence that there was any substantive unconscionability. Defendant relies on the disparate outcome after enforcing the agreement. But that is not the proper focus. Instead, courts must look to the *terms* of the contract itself. See *id*. On appeal, defendant fails to identify any specific terms of the agreement that she deems to be unconscionable. Our review of the agreement's terms shows that they are neutral. For instance, the agreement provided that "[e]ach party shall during his or her lifetime keep and retain sole ownership, control, and enjoyment of all real, personal, intangible, or mixed property now owned, free and clear of any claim by the other party." It also provided that in the event of divorce, the marital assets would be divided equally between the parties and that "[a]ny property acquired in either party's individual capacity or name during the marriage . . . shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name." Therefore, it is clear that the terms of the agreement were neutral with respect to the parties, and they do not shock the conscience.

Accordingly, the trial court did not err by concluding, as a matter of law, that the antenuptial agreement was enforceable. There was no change of circumstances that made its enforcement unfair and unreasonable; the agreement was not signed under duress; and the agreement itself was not unconscionable.

B

Because we conclude that the parties' antenuptial agreement was enforceable, we turn our attention to defendant's other arguments. Defendant also argues that the trial court erred by failing to give any consid-

eration to dividing the parties' property under MCL 552.23 and MCL 552.401. We disagree. This Court reviews de novo the proper interpretation and application of statutes. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

A determination of the parties' property rights must be included in a judgment of divorce. MCR 3.211(B)(3); *Olson v Olson*, 256 Mich App 619, 627; 671 NW2d 64 (2003). The goal in distributing marital assets is to make the distribution fair and equitable in light of all the circumstances of the case. *McNamara v Horner*, 249 Mich App 177, 188; 642 NW2d 385 (2002). Only the marital estate—not the spouses' separate estates—is the subject of the property division. *Woodington*, 288 Mich App at 358; *Korth v Korth*, 256 Mich App 286, 291; 662 NW2d 111 (2003); *Reeves v Reeves*, 226 Mich App 490, 494; 575 NW2d 1 (1997). However, generally, assets earned by one spouse during the marriage are nonetheless considered part of the marital estate. *Korth*, 256 Mich App at 291. When dividing the marital estate, trial courts may consider the following factors:

> (1) the duration of the marriage, (2) the contributions of the parties to the marital estate, (3) the age of the parties, (4) the health of the parties, (5) the life situation of the parties, (6) the necessities and circumstances of the parties, (7) the parties' earning abilities, (8) the parties' past relations and conduct, and (9) general principles of equity. [*Berger*, 277 Mich App at 717.]

In Michigan, parties may enter into antenuptial agreements to govern the distribution of property in the event of divorce. *Rinvelt v Rinvelt*, 190 Mich App 372, 382; 475 NW2d 478 (1991). In *Reed*, this Court reiterated the following:

> Antenuptial agreements are subject to the rules of construction applicable to contracts in general. Antenup-

> tial agreements, like other written contracts, are matters of agreement by the parties, and the function of the court is to determine what the agreement is and enforce it. Clear and unambiguous language may be [sic] not rewritten under the guise of interpretation; rather, contract terms must be strictly enforced as written, and unambiguous terms must be construed according to their plain and ordinary meaning. . . .
>
> * * *
>
> Prenuptial agreements . . . provide . . . people with the opportunity to ensure predictability, plan their future with more security, and, most importantly, decide their own destiny. . . .
>
> * * *
>
> In sum, both the realities of our society and policy reasons favor judicial recognition of prenuptial agreements. . . . [W]e see no logic or compelling reason why public policy should not allow two mature adults to handle their own financial affairs. Therefore, we join those courts that have recognized that prenuptial agreements legally procured and ostensibly fair in result are valid and can be enforced. [*Reed*, 265 Mich App at 144-145 (quotation marks and citations omitted; alternations in original).]

The overriding principle is that "parties who negotiate and ratify antenuptial agreements should do so with the confidence that their expressed intent will be upheld and enforced by the courts." *Id*. at 145 (quotation marks and citations omitted).

In this case, there is an antenuptial agreement that unambiguously provides that "[a]ny property acquired in either party's individual capacity or name during the marriage . . . shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity

or name." Nevertheless, defendant claims that the trial court incorrectly refused to consider dividing the property under MCL 552.23(1) and MCL 552.401.

As explained earlier, each party in a divorce is generally entitled to retain their own separate estate without invasion by the other party. *Reeves*, 226 Mich App at 494. "However, a spouse's separate estate can be opened for redistribution when one of two statutorily created exceptions is met." *Id*.

"The first exception to the doctrine of noninvasion of separate estates is found at MCL 552.23. Subsection 1 of this statute permits invasion of the separate estates if after division of the marital assets 'the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party . . . .' "[10] *Id*., quoting MCL 552.23(1) (citation omitted). This simply means that invasion is allowed when one party demonstrates additional need. *Reeves*, 226 Mich App at 494.

"The other statutorily granted method for invading a separate estate is available only when the other spouse 'contributed to the acquisition, improvement, or accumulation of the property.' " *Id*. at 494-495, quoting MCL 552.401.[11] In other words, "[w]hen one signifi-

[10] MCL 552.23(1) provides:

> Upon entry of a judgment of divorce or separate maintenance, if the estate and effects awarded to either party are insufficient for the suitable support and maintenance of either party and any children of the marriage who are committed to the care and custody of either party, the court may also award to either party the part of the real and personal estate of either party and spousal support out of the real and personal estate, to be paid to either party in gross or otherwise as the court considers just and reasonable, after considering the ability of either party to pay and the character and situation of the parties, and all the other circumstances of the case.

[11] MCL 552.401 provides:

cantly assists in the acquisition or growth of a spouse's separate asset, the court may consider the contribution as having a distinct value deserving of compensation." *Reeves*, 226 Mich App at 495.

We disagree with defendant's assertions that these statutes allow a party to invade the other spouse's separate estate contrary to the terms of a valid antenuptial agreement. The only prior Michigan case that refers to this type of interaction between the statutes at issue and a valid antenuptial agreement is *Reed*. In *Reed*, the parties' antenuptial agreement provided that " 'each party shall have complete control of his or her separate property, and may enjoy and dispose of such property in the same manner as if the marriage had not taken place. The foregoing shall apply to all property now owned by either of the parties and to all property which may hereafter be acquired by either of them in an individual capacity.' " *Reed*, 265 Mich App at 146. On appeal, the defendant in *Reed* argued, *inter alia*, that property he had purchased in Oakland County as well as some Malcolm X papers that he had purchased were erroneously considered part of the marital estate, in contravention of the antenuptial agreement. This Court agreed and stated the following:

> All of the Oakland County property, as well as the Malcolm X papers, is excluded from the marital estate by

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> The circuit court of this state may include in any decree of divorce or of separate maintenance entered in the circuit court appropriate provisions awarding to a party all or a portion of the property, either real or personal, owned by his or her spouse, as appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property. The decree, upon becoming final, shall have the same force and effect as a quitclaim deed of the real estate, if any, or a bill of sale of the personal property, if any, given by the party's spouse to the party.

> the prenuptial agreement. Although the testimony and documents defendant presented regarding this property were less than credible, it is undisputed that defendant acquired this property either in his individual capacity or through one of the entities he controlled. Accordingly, the trial court clearly erred by including this property in the marital estate *without factual findings that one of the two statutory exceptions permitting invasion of separate property was applicable*. [*Id*. at 156 (emphasis added).]

We first note that the emphasized portion of the quoted material is dictum. "Obiter dictum" has been defined as "a judicial opinion in a matter related but not *essential* to a case." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 437; 751 NW2d 8 (2008) (quotation marks and citation omitted; emphasis added). The *Reed* Court earlier in its opinion concluded that the trial court had erred by failing to enforce the antenuptial agreement. *Reed*, 265 Mich App at 141, 149. As a result, it is clear from the opinion that the trial court was reversed, not because it failed to apply one of the statutory exceptions, but because it failed to enforce the plain language of the antenuptial agreement. In short, the Court's reference to "the two statutory exceptions" was not essential to the resolution of the issue before it because it already had decided that the trial court had erroneously failed to enforce the antenuptial agreement. Therefore, we find mere dictum and not binding that portion of the Court's opinion that implied, despite contrary language contained in a valid antenuptial agreement, that both MCL 552.23(1) and MCL 552.401 permit a spouse to invade the other spouse's separate estate. *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011).

Second, and perhaps more importantly, MCL 557.28 unambiguously provides that "[a] contract relating to property made between persons in contemplation of

marriage shall remain in full force after marriage takes place." To the extent that it could be argued that MCL 557.28 is ambiguous, "[s]tatutes that relate to the same subject or that share a common purpose are *in pari materia* and must be read together as one law, even if they contain no reference to one another and were enacted on different dates." *Mich Deferred Presentment Servs Ass'n, Inc v Comm'r of the Office of Fin & Ins Regulation*, 287 Mich App 326, 334; 788 NW2d 842 (2010) (citation and quotation marks omitted). Clearly, MCL 557.28, MCL 552.23(1), and MCL 552.401 all relate to the division of property in a divorce action and, therefore, must be read together and as consistent with each other. We therefore reject defendant's contention that MCL 552.23(1) and MCL 552.401 required the trial court to disregard the antenuptial agreement in determining an equitable division of property.

C

Defendant next argues that the trial court erred by finding that all the property that plaintiff acquired during the marriage was acquired as his separate estate rather than as part of the marital estate. We agree.

A trial court's findings of fact made following a bench trial in a divorce action are reviewed for clear error. *McNamara v Horner (After Remand)*, 255 Mich App 667, 669; 662 NW2d 436 (2003). "A finding is clearly erroneous if, after a review of the entire record, the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id*. This issue also necessarily involves the interpretation of the antenuptial agreement, which is a question of law that this Court reviews de novo. *Reed*, 265 Mich App at 141.

As we previously explained, assets acquired and income earned during the course of a marriage are

generally to be considered part of the marital estate. MCL 552.19; *Cunningham v Cunningham*, 289 Mich App 195, 201; 795 NW2d 826 (2010); see also *Reed*, 265 Mich App at 151-152. An exception to this general principle, again as we have already discussed, is that the unambiguous terms of a valid antenuptial agreement are to be enforced. MCL 557.28; *Reed*, 265 Mich App at 141; see also *Woodington*, 288 Mich App at 372 ("A court should never disregard a valid prenuptial agreement, but should instead enforce its clear and unambiguous terms as written."). The tension evoked by the collision between these two conflicting and apparently controlling principles of law is resolved by the law's ultimate recognition that "[t]he mere fact that property may be held jointly or individually is not necessarily dispositive of whether the property is classified as separate or marital." *Cunningham*, 289 Mich App at 201-202. In other words, the facts developed in the record determine whether the named classification of property and other assets should be honored by the court when the assets of the parties are divided.

Again, the salient portions of the parties' antenuptial agreement as it concerns the division of assets provide:

> 5. In the event that the marriage . . . terminate[s] as a result of divorce, then, in full satisfaction, settlement, and discharge of any and all rights or claims of alimony, support, property division, or other rights or claims of any kind, nature, or description incident to marriage and divorce (including any right to payment of legal fees incident to a divorce), under the present or future statutes and laws of common law of the state of Michigan or any other jurisdiction (all of which are hereby waived and released), the parties agree that all property acquired after the marriage between the parties shall be divided between the parties with each party receiving 50 percent of the said property. However, notwithstanding the above, the following property acquired after the marriage will remain the

sole and separate property of the party acquiring the property and/or named on the property:

a. As provided in paragraphs Two and Three of this antenuptial agreement, any increase in the value of any property, rents, profits, or dividends arising from property previously owned by either party shall remain the sole and separate property of that party.

b. Any property *acquired in either party's individual capacity or name* during the marriage, including any contributions to retirement plans (including but not limited to IRAs, 401(k) plans, SEP IRAs, IRA rollovers, and pension plans), shall remain the sole and separate property of the party named on the account or the party who acquired the property in his or her individual capacity or name.

* * *

8. Each party shall, without compensation, join as grantor in any and all conveyances of property made by the other party or by his or her heirs, devises, or personal representatives, thereby relinquishing all claim to the property so conveyed, including without limitation any dower or homestead rights, and each party shall further, upon the other's request, take any and all steps and execute, acknowledge, and deliver to the other party any and all further instruments necessary or expedient to effectuate the purpose and intent of this agreement.

* * *

10. Each party acknowledges that the other party has advised him or her of the other party's means, resources, *income*, and the nature and extent of the other party's properties and holdings (including, but not limited to, the financial information set forth in exhibit A attached hereto and incorporated herein by reference) and that there is a likelihood for substantial appreciation of those assets subsequent to the marriage of the parties. [Emphasis added.]

The trial court concluded that, given the plain and unambiguous language of the antenuptial agreement, in which the parties agreed to waive "all rights or claims" to property division under statute or common law, to evenly divide whatever existed of the marital estate, and to keep his or her own separate estate, all it was required to do was determine what property was in the name of each party in order to distribute the assets according to the agreement. This was error.

First, defendant agreed to forgo her claim to an equitable division of the *property*[12] plaintiff acquired in his individual capacity or name. The testimony presented during the trial, however, was that much of the real estate acquired during the course of the marriage was acquired in the name of the various LLCs formed by plaintiff during the course of the marriage. A limited liability company exists as an independent legal entity, and as such, can own assets and enter into contracts, is liable for its own debts, and cannot be held automatically liable for the debts of another separate legal entity. MCL 450.4210. Moreover, a member of a limited liability company "is not liable for the acts, debts, or obligations of the limited liability company." MCL 450.4501(4). Michigan courts generally recognize the principle that separate entities will be respected. *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). We conclude, therefore, that as a matter of law, the LLCs created during the course of the marriage are separate legal entities and *not* to be construed, for purposes of interpreting and applying the plain and unambiguous terms of this antenuptial agreement, as being the same as plaintiff "in his . . . individual capacity or name." Accordingly, to the extent any

[12] As we will discuss hereafter, the antenuptial agreement does not define property to also mean income.

real property or other assets were acquired during the course of the marriage by the various LLCs created during the marriage, we find that their disposition in this divorce action is *not* governed by the antenuptial agreement.

Second, the antenuptial agreement does not treat the income earned by the parties during the marriage as separate property. Whereas ¶ 5(b) of the antenuptial agreement specifically refers to "property," inclusive of retirement plans, ¶ 10 discusses the parties' "means, resources, income, and . . . properties . . . ." The specific mention of income in ¶ 10 of the antenuptial agreement and the absence of its mention in ¶ 5 is deemed to be intentional. See *Hackel v Macomb Co Comm*, 298 Mich App 311, 324; 826 NW2d 753 (2012) (under the doctrine of *expressio unius est exclusio alterius*, inclusion by specific mention excludes what is not mentioned); 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 term is used in another section of the statute."). If the parties had intended that "income" and "property" were to be treated as synonymous terms, they would have so specified in the body of the antenuptial agreement. Therefore, we conclude as a matter of law that all income earned by the parties during the course of the marriage should have been treated by the trial court as marital income that was part of the marital estate, subject to an appropriate dispositional ruling. See *Cunningham*, 289 Mich App at 201. The trial court made no findings concerning the extent of marital income earned by the parties, and thus remand is required for further development of the record on this question.

While the record is insufficient for us to make definitive rulings regarding the extent of plaintiff's earnings

to be treated as marital income, we can and do note, by way of example, that the joint tax returns filed by the parties in 2005 and 2006 claimed, respectively, $89,000 and $113,000 in earned business income, with no wages earned by the parties, and that plaintiff's 2010 tax returns show business income in excess of $200,000 attributable to the LLCs and $21,000 in wages. " 'Business income' means all income arising from transactions, activities, and sources in the regular course of the taxpayer's trade or business . . . ." MCL 206.4. The record reveals that, as of March 2011, during the pendency of the divorce proceedings, plaintiff incurred in excess of $5,600 a month in expenses for such items as the mortgage, taxes, insurance, and outside maintenance on the marital home (which was classified as an asset of one of the LLCs), defendant's personal credit card bill, cable, utilities, water, telephone, defendant's car note and insurance, and health and life insurance. The fact that plaintiff incurred nearly $68,000 (on an annualized basis) in what can be characterized as personal expenses between 2010 and 2011, despite filing tax returns showing only $21,000 in wages for 2010, and no wages in 2005 and 2006, calls into question whether income treated by plaintiff, and accepted by the trial court, as business income generated by the LLCs should be treated instead as marital income subject to division. We recognize that plaintiff testified he received up to $20,000 in annual cash gifts from his father and further that his father loaned him funds, which plaintiff may have used for various personal expenses. However, the record is unclear on these points, and given its erroneous interpretation of the antenuptial agreement, the trial court made no findings on these questions.

Moreover, if marital income was used in whole or in part by the LLCs to purchase the various real estate

holdings and other assets acquired by the LLCs during the course of the marriage, commingling of marital and separate income might have caused the assets to become part of the marital estate and subject to equitable division by the trial court. *Cunningham*, 289 Mich App at 201, quoting *Pickering v Pickering*, 268 Mich App 1, 11; 706 NW2d 835 (2005) (stating that separate assets may "transform into marital property if they are commingled with marital assets and 'treated by the parties as marital property' "). Because the trial court erred by interpreting the antenuptial agreement such that, as long as a property was titled in the name of an LLC, an in-depth inquiry into the source of the funds used to purchase the various real estate holdings of the LLCs was precluded, remand is required in order for the trial court to receive additional evidence and make findings on these questions.

In connection with our remand of this matter, we take care to note that "[t]he rules regarding piercing a corporate veil are applicable in determining whether to pierce the corporate veil of a limited-liability company." *Florence Cement Co v Vettraino*, 292 Mich App 461, 468-469; 807 NW2d 917 (2011). Piercing the corporate veil of a limited liability company is permissible when there is evidence that the corporate entity (1) is a mere instrumentality of another individual or entity, (2) was used to commit a wrong or a fraud, and (3) caused an unjust injury or loss. *Id*.

III

In conclusion, we find that the antenuptial agreement between the parties is valid and enforceable; that under the plain and unambiguous language of the antenuptial agreement, the LLCs created by plaintiff during the course of the marriage were not acquired in

plaintiff's individual capacity or name; that under the plain and unambiguous language of the antenuptial agreement, the income of the parties is to be treated as marital income and not property; and that remand is required for further action by the trial court consistent with this opinion, particularly a determination regarding the extent to which income earned by plaintiff and derived from the LLCs should be treated as marital income, and whether that marital income was used to purchase assets titled to the LLCs.

Affirmed in part, reversed in part, and remanded for further proceedings. Neither party having prevailed in full, no costs are taxed. MCR 7.219. We do not retain jurisdiction.

M. J. KELLY, P.J., and FORT HOOD, J., concurred with WILDER, J.

SULAICA v ROMETTY

Docket Nos. 321275 and 322760. Submitted December 3, 2014, at Detroit. Decided December 18, 2014, at 9:10 a.m.

Paul Sulaica, Jr., brought an action in the Oakland Circuit Court, Family Division, against Leslie Rometty, seeking custody of the parties' minor child. The parties, who never married, agreed to the entry of a consent judgment specifying custody, parenting time, and support. The consent judgment granted defendant sole legal custody and granted both parties joint physical custody. Defendant's residence was named the primary residence for school purposes. The consent judgment specified weekly parenting time for plaintiff and further provided that neither party could permanently move the child from Michigan without the prior written consent and approval of the other party or without first obtaining the approval of the court. Defendant thereafter filed a motion to change the child's domicile to Florida. Defendant argued that because she was the sole legal custodian, it was unnecessary to analyze the factors set forth in MCL 722.31(4). Plaintiff argued that there was an established custodial environment with both parties and that defendant had not shown proper cause or a change in circumstances warranting a change to the established custodial environment. Plaintiff also filed a motion for joint legal custody. Following a hearing on defendant's motion to change domicile, the court, Mary Ellen Brennan, J., stated its inclination to rule that defendant's sole legal custody would allow defendant to change the child's domicile without a best interests determination. Plaintiff then filed a motion for extended parenting time and joint legal custody. Defendant responded, arguing that plaintiff's motion was frivolous and seeking attorney fees incurred in responding to the motion. During a second hearing on defendant's motion to change domicile, the trial court ruled that it was appropriate, in light of the fact that defendant has sole legal custody, to grant defendant's motion. The court denied plaintiff's motions regarding parenting time and joint legal custody and referred the issue of parenting time to the Friend of the Court for analysis and a recommendation. The court ordered plaintiff to pay defendant $1,000 in attorney fees and denied plaintiff's subsequent motion for reconsideration. The Friend of the Court there-

after issued a parenting time recommendation. Defendant responded and argued that the parenting time provided to plaintiff was excessive. Plaintiff filed a response to defendant's objections and requested attorney fees and costs for responding to defendant's objections. The trial court thereafter entered a parenting time order without holding a hearing. The court adopted the Friend of the Court's recommendation with certain modifications. The trial court then denied plaintiff's motion for reconsideration and request for attorney fees related to the parenting time order. Plaintiff appealed as of right the order granting the motion to change the domicile of the child and the order requiring plaintiff to pay defendant $1,000 in attorney fees with regard to his motion to extend parenting time and for joint custody (Docket No. 321275). Plaintiff also appealed as of right the order denying plaintiff's motion to enter a parenting time order and denying plaintiff's request for attorney fees (Docket No. 322760). The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. The Court of Appeals has jurisdiction over the appeals with regard to the orders addressing custody and change of domicile. Both of the orders are orders affecting the custody of a minor and are appealable as of right.

2. The trial court properly relied on MCL 722.31(2) in reasoning that, because defendant had sole legal custody of the child, it did not have to analyze the factors set forth in MCL 722.31(4) in determining whether to change the child's domicile. However, the trial court should have then determined whether changing the child's domicile to Florida constituted a change in an established custodial environment. The failure to make this determination was not harmless error. The case must be remanded for a determination by the trial court whether an established custodial environment existed. In the event that the move is found to constitute a change to an established custodial environment, MCL 722.27(1)(c) would compel defendant to demonstrate clear and convincing evidence that the move was in the child's best interests with careful analysis of the factors set forth in MCL 722.23.

3. The trial court erred by ordering plaintiff to pay $1,000 in attorney fees because of his filing of a motion for extended parenting time and joint custody. The trial court's fee order was the result of its erroneous interpretation of the law controlling the domicile issue and is reversed.

4. Plaintiff did not waive any potential objection to the trial court's award of attorney fees by approving "as to content and form" the order granting the award of fees. Such approval by

plaintiff's counsel does not show an intent to enter into a consent order that cannot be challenged on appeal. Plaintiff's counsel merely acknowledged that the prepared order contained the substance of the trial court's oral ruling.

5. Because the determination of proper parenting time depends on the outcome of the trial court's resolution of the custodial environment and best interests issues on remand, the June 6, 2014 parenting time order is reversed.

6. The trial court did not abuse its discretion by denying plaintiff's request for attorney fees incurred in responding to defendant's objections to the recommendations of the Friend of the Court.

Affirmed in part, reversed in part, and remanded.

1. COURT OF APPEALS — JURISDICTION — DOMESTIC RELATIONS ACTIONS.

The Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a final judgment or final order of the circuit court; a "final judgment" or "final order" in a domestic relations action means a postjudgment order affecting the custody of a minor; an order need not change custody to be a final order (MCR 7.202(6)(a)(iii); MCR 7.203(A)(1)).

2. DOMESTIC RELATIONS — CHANGE OF DOMICILE — CHANGE OF ESTABLISHED CUSTODIAL ENVIRONMENT.

A trial court, after granting a change of domicile, must determine whether there will be a change in the established custodial environment and, if so, whether the relocating parent can prove, by clear and convincing evidence, that the change is in the child's best interests (MCL 722.23; MCL 722.27; MCL 722.31).

Anne Argiroff, PC (by *Anne Argiroff*), for plaintiff.

Melinda N. Deel, PLLC (by *Melinda N. Deel*), for defendant.

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

PER CURIAM. In Docket No. 321275, plaintiff, Paul Sulaica, Jr., appeals as of right the trial court's order granting a motion filed by defendant, Leslie Rometty, to change the domicile of the parties' minor child from

Michigan to Florida. Plaintiff also argues that the trial court erred by ordering him to pay $1,000 in attorney fees in connection with his filing of a motion to extend parenting time and for joint legal custody. In Docket No. 322760, plaintiff appeals as of right the trial court's order denying plaintiff's motion to enter a parenting time order and denying plaintiff's request for attorney fees. We consolidated the appeals. We affirm in part, reverse in part, and remand for further proceedings.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

These appeals arise from orders concerning the domicile, custody, and parenting time of the parties' minor child. The parties were never married. They resided together for the first 1½ years of their child's life.

In October 2002, plaintiff filed a complaint for custody, which ultimately led to a December 9, 2003 consent judgment specifying custody, parenting time, and support. That consent judgment granted defendant sole legal custody and both parties joint physical custody of the child. Defendant's residence was named the "primary residence . . . for school purposes." The parties were both Michigan residents at the time. The consent judgment specified weekly parenting time for plaintiff, including alternate weekends, midweek overnights, and some holidays. The consent judgment further provided that "neither party may permanently move the minor child of the parties from the State of Michigan without the prior written consent and approval of the other party or without first obtaining the approval of the Court . . . ."

On February 5, 2014, defendant filed a motion to change the child's domicile to Florida. Defendant emphasized that she had sole legal custody and provided the child's primary residence. Defendant also argued

that plaintiff had "an extensive criminal history including felony convictions, as well as assaultive behavior toward [defendant], some of his children and previous girlfriends." Defendant claimed that she was the child's primary caregiver and had been offered more secure employment in Florida as a sonographer, which would pay her $75,000, annually ($31,000 more than she made in her present position in Michigan). Defendant stated that she had located suitable schooling for the child and that she would continue to encourage a relationship between plaintiff and the child. Defendant argued that because she was the sole legal custodian, it was unnecessary to analyze the best interests factors set forth in MCL 722.31(4).

On February 11, 2014, plaintiff filed a response to defendant's motion, arguing that there was an established custodial environment with both parties and that defendant had not shown proper cause or a change in circumstances warranting a change to the established custodial environment. On that same day, plaintiff filed a motion for joint legal custody.

On February 12, 2014, the trial court held a hearing on defendant's motion to change domicile. The trial court noted that there was an open investigation by Child Protective Services (CPS) concerning conduct by defendant's husband and stated its intent to withhold ruling on defendant's motion until the investigation was completed.[1] The trial court asked for argument, however, on the state of the law as it related to a party with sole legal custody seeking to change domicile. Plaintiff argued that defendant sought to change an established custodial environment and, therefore, that a best interests hearing was required. Plaintiff cited as

[1] The CPS report appears to have been initiated by plaintiff on February 6, 2014.

support *Brown v Loveman*, 260 Mich App 576; 680 NW2d 432 (2004). The trial court stated its inclination to rule that defendant's sole legal custody would allow defendant to change the child's domicile without such detailed inquiry.

On February 19, 2014, plaintiff filed a motion for extended parenting time and joint legal custody. He again argued that there was an established custodial environment with both parties. Plaintiff contended that it was in the child's best interests to grant him joint legal custody or, at least, extended parenting time. Defendant filed a response to plaintiff's motion, arguing, in part, that it was frivolous and seeking attorney fees incurred in responding.

On February 26, 2014, the trial court held a second hearing on defendant's motion to change domicile. The CPS investigation into defendant's husband had been completed with the allegations being unsubstantiated. The trial court stated that it had reviewed defendant's motion to change domicile as well as plaintiff's motion to change custody and parenting time and had closely reviewed the case file. The trial court took testimony from defendant regarding the new job that she intended to take in Florida and her increased salary and job stability. The trial court stated that it found defendant's testimony credible and ruled "[I]t's appropriate in light of the fact that [defendant] has sole legal custody for the Court to allow this move, to give her permission to do that." The trial court also denied plaintiff's motions regarding parenting time and joint legal custody and referred the issue of parenting time to the Friend of the Court for analysis and a recommendation. The trial court stated its belief that plaintiff was "playing games" in connection with his filing of his motions

and ordered plaintiff to pay defendant $1,000 in attorney fees. The trial court denied plaintiff's subsequent motion for reconsideration.

On April 9, 2014, the Friend of the Court issued its parenting time recommendation. It recommended, in light of defendant's planned move to Florida, that plaintiff be granted the following parenting time:

> 1. Six weeks during the summer vacation from school, starting two weeks after school is out for the summer.
>
> 2. Every spring break, for a period of seven days.
>
> 3. Every mid-winter break, if applicable.
>
> 4. Every other Thanksgiving break, from the day school is out until the day before school begins. The father would have odd years and the mother would have even years.
>
> 5. Christmas break every year, as follows: in even years, he would have the child the day after school is out until the day before school begins. In odd years, he would have the child from December 26 until the day before school begins. This allows for the Christmas Eve/Christmas Day holiday to be alternated.
>
> 6. The mother would provide or pay for transportation for the summer, Christmas and spring break visits. The father would pay for the mid winter and Thanksgiving breaks.
>
> 7. If the father travels to Florida, he is entitled to parenting time with a one-week notice.

On April 30, 2014, defendant filed objections to the Friend of the Court recommendation, arguing that the parenting time provided to plaintiff was excessive. Plaintiff filed a response to defendant's objections and included a request for attorney fees and costs, claiming that he was unable to afford the costs and attorney fees incurred in responding to defendant's objections.

On May 15, 2014, plaintiff filed a motion for entry of the Friend of the Court recommendation, with the

modification that he be granted parenting time for full summers. Plaintiff included argument that defendant was not complying with prior parenting time requirements.

On June 6, 2014, the trial court entered a parenting time order without holding a hearing. The trial court adopted the Friend of the Court recommendation, with modification. It ordered that the recommendation in ¶ 5 be revised to state: "In odd years, [plaintiff] would have the child from December 27 until the day before school begins." The trial court struck the recommendation in ¶ 7 regarding parenting time if plaintiff traveled to Florida. Plaintiff filed a motion for reconsideration, which the trial court denied. The trial court also stated that it was denying plaintiff's request for attorney fees related to entry of the parenting time order.

Plaintiff filed the present appeals and, on August 19, 2014, a panel of this Court entered an order of consolidation. *Sulaica v Rometty*, unpublished order of the Court of Appeals, entered August 19, 2014 (Docket Nos. 321275 and 322760).

II. JURISDICTION

As an initial matter, we address and reject defendant's contention that this Court lacks jurisdiction over these appeals with regard to the orders addressing custody and change of domicile.[2] Defendant argues in both appeals that the orders appealed from are not final orders that are appealable as of right.

[2] Defendant does not separately challenge this Court's jurisdiction with respect to plaintiff's issues on appeal concerning attorney fees. The orders regarding attorney fees are final orders appealable as of right. See MCR 7.202(6)(a)(iv) (including in the definition of "final order" "a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule").

"Whether this Court has jurisdiction to hear an appeal is an issue that we review de novo." *Rains v Rains*, 301 Mich App 313, 320; 836 NW2d 709 (2013) (citation and quotation marks omitted). This Court "has jurisdiction of an appeal of right filed by an aggrieved party from . . . [a] final judgment or final order of the circuit court . . . ." MCR 7.203(A)(1). In a domestic relations action, "final judgment" or "final order" means "a postjudgment order affecting the custody of a minor[.]" MCR 7.202(6)(a)(iii). An order need not change custody to be a final order. Indeed, this Court has held that the term "affects" as it is used in regard to child custody orders includes a broad class of orders. *Wardell v Hincka*, 297 Mich App 127, 132-133; 822 NW2d 278 (2012) (explaining that "a decision regarding the custody of a minor is of the utmost importance regardless of whether the decision changes the custody situation or keeps it as is"). In *Wardell*, we held that an order denying a motion for a change of custody is appealable as of right. *Id*. at 133. We have also held that where "a change in domicile will substantially reduce the time a parent spends with a child, it would potentially cause a change in the established custodial environment," so that the denial of a motion for a change in domicile is a final order appealable as of right. *Rains*, 301 Mich App at 324. See also *Thurston v Escamilla*, 469 Mich 1009 (2004). In this case, the trial court's orders affected the child's domicile and substantially reduced the amount of time plaintiff can spend with the child as a result of the child's move from Michigan to Florida. Accordingly, we find that both of the orders from which plaintiff appeals were orders "affecting the custody of a minor" and that they are appealable as of right. See *Rains*, 301 Mich App at 324; *Wardell*, 297 Mich App at 131-132.

III. DOCKET NO. 321275

A. CHANGE OF DOMICILE

On appeal, plaintiff first argues that the child had an established custodial environment with both parents and defendant was obligated to show proper cause or a change of circumstances that established that the modification of the environment via the move to Florida was in the child's best interests. This Court agrees that the trial court focused too narrowly on whether the 100-mile rule, MCL 722.31, applied and failed to analyze the requested move in the context of whether it constituted a change to an established custodial environment, which would warrant closer scrutiny.

This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a motion for change of domicile. *Rains*, 301 Mich App at 324. In this context, an abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Id*., citing *Brown*, 260 Mich App at 600-601. In the child custody context, questions of law are reviewed for clear legal error. A trial court commits legal error when it incorrectly chooses, interprets, or applies the law. *Fletcher v Fletcher*, 447 Mich 871, 881; 526 NW2d 889 (1994); *Sturgis v Sturgis*, 302 Mich App 706, 710; 840 NW2d 408 (2013).

The trial court decided the issue of domicile only on the basis of defendant's status as the party with sole legal custody of the child. The trial court looked to the 100-mile rule in MCL 722.31, concerning the change in a child's legal residence. That statute provides, in pertinent part:

(1) 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.

(2) A parent's change of a child's legal residence is not restricted by subsection (1) if the other parent consents to, or if the court, after complying with subsection (4), permits, the residence change. This section does not apply if the order governing the child's custody grants sole legal custody to 1 of the child's parents.

* * *

(4) Before permitting a legal residence change otherwise restricted by subsection (1), the court shall consider each of the following factors, with the child as the primary focus in the court's deliberations:

(a) Whether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent.

(b) The degree to which each parent has complied with, and utilized his or her time under, a court order governing parenting time with the child, and whether the parent's plan to change the child's legal residence is inspired by that parent's desire to defeat or frustrate the parenting time schedule.

(c) The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

> (d) The extent to which the parent opposing the legal residence change is motivated by a desire to secure a financial advantage with respect to a support obligation.
>
> (e) Domestic violence, regardless of whether the violence was directed against or witnessed by the child.

The trial court properly relied on Subsection (2) in reasoning that—because defendant had sole legal custody of the child—it need not analyze the factors set forth in Subsection (4). *Brecht v Hendry*, 297 Mich App 732, 743; 825 NW2d 110 (2012); *Brausch v Brausch*, 283 Mich App 339, 349-350; 770 NW2d 77 (2009); *Spires v Bergman*, 276 Mich App 432, 439-440; 741 NW2d 523 (2007). But that should not have ended the inquiry.

MCL 722.27 prohibits any change to an established custodial environment unless the change is shown by clear and convincing evidence to be in the child's best interests:

> (1) 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:
>
> * * *
>
> (c) Modify or amend its previous judgments or orders for proper cause shown or because of change of circumstances until the child reaches 18 years of age and, subject to section 5b of the support and parenting time enforcement act, 1982 PA 295, MCL 552.605b, until the child reaches 19 years and 6 months of age. *The court shall not modify or amend its previous judgments or orders 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.[3] The custodial environment of a child 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

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[3] The best interests factors are set forth in MCL 722.23, which states:

As used in this act, "best interests of the child" means the sum total of the following factors to be considered, evaluated, and determined by the court:

(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.

> physical environment, and the inclination of the custodian and the child as to permanency of the relationship shall also be considered. If a motion for change of custody is filed during the time a parent is in active military duty, the court shall not enter an order modifying or amending a previous judgment or order, or issue a new order, that changes the child's placement that existed on the date the parent was called to active military duty, except the court may enter a temporary custody order if there is clear and convincing evidence that it is in the best interest of the child. Upon a parent's return from active military duty, the court shall reinstate the custody order in effect immediately preceding that period of active military duty. If a motion for change of custody is filed after a parent returns from active military duty, the court shall not consider a parent's absence due to that military duty in a best interest of the child determination. [MCL 722.27(1)(c) (emphasis added).]

Therefore, the question is whether changing the child's domicile to Florida constituted a change in an established custodial environment warranting the scrutiny required under MCL 722.27(1)(c). The trial court should have analyzed this question. It is true that *Brecht*, *Brausch*, and *Spires* held that, when the party seeking to change domicile has sole legal custody, the trial court has discretion to decide the change in domicile without considering the factors set forth in MCL 722.31(4). *Brecht*, 297 Mich App at 743; *Brausch*, 283 Mich App at 352-353; *Spires*, 276 Mich App at 438-439. A plain reading of MCL 722.31(2) requires that conclusion. But none of those cases involved parties with joint physical custody. See *Brecht*, 297 Mich App at 734, *Brausch*, 283 Mich App at 342-343, and *Spires*, 276 Mich App at 434 (in each, the party who sought to change domicile had sole legal and physical custody). The absence of joint physical custody is an important distinction, which the panel in *Spires* recognized when it cited *Brown*:

> Only when the parents share joint physical custody and the proposed change of domicile would also constitute a change in the child's established custodial environment is it also necessary to evaluate whether the change of domicile would be in the child's best interest. [*Brown*, 260 Mich App at 598 n 7.] This concern is not present in the case at bar because plaintiff had sole legal and physical custody. [*Spires*, 276 Mich App at 437 n 1.]

In *Brown*, 260 Mich App at 578-579, the parties shared physical custody of their minor daughter. The defendant sought court approval to remove the child from Michigan. Neither party had sole legal custody of the child and, therefore, the trial court applied the MCL 722.31(4) factors and granted the defendant permission to move the child out of state. *Id*. at 590-591. On appeal, the *Brown* panel considered whether the trial court should have more closely scrutinized the move in the context of its effect on the child's established custodial environment. The panel reasoned that MCL 722.31 and MCL 722.27 have common purposes and should be applied in tandem. *Id*. at 593. The *Brown* panel held that a trial court must make the inquiry required under MCL 722.27 when a change in domicile effectively changes an established custodial environment of a minor, explaining:

> It would be illogical and against the intent of the Legislature to apply MCL 722.31 without considering the best interests of the minor child, if the change in legal residence would effectively change the established custodial environment of the minor. *Ansell* [*v Dep't of Commerce (On Remand)*, 222 Mich App 347, 355; 564 NW2d 519 (1997)]. Otherwise, where parents have joint physical custody and one party seeks to change the legal residence of the child (which would effectively change the established custodial environment), the party would only be subject to the lesser preponderance of the evidence burden required by MCL 722.31. The Legislature could not have intended MCL 722.27 and MCL 722.31 to be

> applied completely independently of each other where the result would allow a party seeking to change domicile (and in effect change the established custodial environment) to circumvent its burden of proof by clear and convincing evidence that the change is in the child's best interest.[4] [*Id*. at 594-595.]

The panel in *Brown* ultimately remanded the case to the trial court to conduct an evidentiary hearing in order to determine whether the defendant could prove by clear and convincing evidence that the proposed change of domicile was in the child's best interests. *Id*. at 598.

Because the parties to the present case had joint physical custody, the trial court should have engaged in the additional analysis of whether the proposed change in domicile had the effect of changing an established custodial environment. See *id*. See also *Gagnon v Glowacki*, 295 Mich App 557, 570; 815 NW2d 141 (2012) (emphasis added) ("After granting a change of domicile, *the trial court must determine whether there will be a change in the established custodial environment* and, if so, determine whether the relocating parent can prove, by clear and convincing evidence, that the change is in the child's best interest."); *Rittershaus v Rittershaus*, 273 Mich App 462, 470; 730 NW2d 262 (2007) (holding that the trial court erred by failing to determine whether granting the plaintiff's motion for a change of domicile would have changed the child's established

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[4] The *Brown* Court deemed "illogical" the idea that a parent could circumvent the requirements of MCL 722.27(1)(c) and effectively change a child's established custodial environment by simply satisfying the lesser preponderance of the evidence burden necessary to change domicile under MCL 722.31(4). It would be equally illogical, if not more so, to let a party with sole legal custody skip that step too under MCL 722.31(2) and change custody with no proofs whatsoever; it would turn a person's sole legal custody status into a trump card.

custodial environment).[5] The trial court's failure to properly apply the law constituted clear legal error. *Fletcher*, 447 Mich at 881.

For several years leading up to defendant's motion to change domicile, plaintiff had significant parenting time, including weekly overnights and overnights on alternating weekends, along with some holidays. Plaintiff argued in the trial court that there was an established custodial environment with both parties and that *Brown* required the trial court to engage in a factual analysis to determine the effect of the change of domicile on that environment. The trial court, however, allowed little factual development. It briefly questioned defendant before granting the motion to change domicile, but it did not examine whether an established custodial environment existed and, if so, with whom.

Whether an established custodial environment exists is a question of fact. *Brausch*, 283 Mich App at 356 n 7. 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).]

An established custodial environment is one of significant duration, both physical and psychological, in which

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[5] We note that neither *Gagnon* nor *Rittershaus* addressed the precise issue in this case, i.e., whether the trial court must consider the child's established custodial environment in a situation where a parent has sole legal custody and therefore is not required to satisfy the factors set forth in MCL 722.31(4); however, given the analysis of MCL 722.31 and MCL 722.27 set forth already in this opinion, and that the "touchstone" of the trial court's analysis in custody decisions is to be the child's best interests, see *Kubicki v Sharpe*, 306 Mich App 525, 542; 858 NW2d 57 (2014), we find that the cases support our analysis.

the relationship between the custodian and child is marked by security, stability, and permanence. *Berger v Berger*, 277 Mich App 700, 706; 747 NW2d 336 (2008).

"[A] trial court's clear legal error would generally require remand for further consideration under the proper legal framework" unless the error is harmless. *Rains*, 301 Mich App at 331. See also *Kubicki v Sharpe*, 306 Mich App 525, 540-541; 858 NW2d 57 (2014); *Brausch*, 283 Mich App at 356 n 7 ("When a trial court fails to make a finding regarding the existence of a custodial environment, this Court will generally remand for such a finding unless sufficient information exists in the record for this Court to make a de novo determination of this issue."). On the basis of the record before us, we are unable to conclude that the error was harmless and we remand with instruction that the trial court examine the question of whether an established custodial environment existed. We find that the four-step process outlined in *Rains*, 301 Mich App at 325, is applicable and instructive in this instance, save for the first step which deals with the factors set forth in MCL 722.31(4), because defendant in this case was not required to satisfy those factors. That process provides:

> 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*[6] 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

[6] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27 (1976).

> 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. [*Id.*]

Here, insofar as the trial court finds an established custodial environment with plaintiff, the trial court should further consider whether defendant's move to Florida represented a change to that environment. In the event that the move is found to constitute a change to an established custodial environment, MCL 722.27(1)(c) would compel defendant to demonstrate clear and convincing evidence that the move was in the child's best interests with careful analysis of the factors set forth in MCL 722.23.

B. TRIAL COURT'S AWARD OF ATTORNEY FEES

Plaintiff next argues that the trial court erred by ordering him to pay $1,000 in attorney fees based on his filing of his motion for extended parenting time and joint custody. We agree.[7]

The findings of fact underlying an award of attorney fees are reviewed for clear error, *Brown v Home-Owners*

[7] The trial court did not expressly state the authority pursuant to which it granted attorney fees. Nevertheless, the trial court indicated that it found plaintiff's motions to extend parenting time and for joint custody were meant as a "roadblock" to defendant's motion to change domicile, that plaintiff's motions were "baseless," and that plaintiff was "playing games." Defendant requested fees, contending that plaintiff's motions were "frivolous." Given this context, it is apparent that the trial court granted attorney fees because it found that plaintiff's motions were frivolous or intended to delay the proceedings. See MCL 600.2591, MCR 2.114(E), and MCR 2.625(A)(2) (authorizing an award of attorney fees for frivolous actions or pleadings or for actions or pleadings filed for the purpose of unnecessary delay). As discussed later in this opinion, this determination was premised on the trial court's erroneous interpretation of the law.

Ins Co, 298 Mich App 678, 690; 828 NW2d 400 (2012), while underlying questions of law are reviewed de novo, *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012), and the decision whether to award attorney fees and the determination of the reasonableness of the fees are within the trial court's discretion and will be reviewed on appeal for an abuse of discretion, *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008); *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

The trial court appeared to conclude that plaintiff's motions to change parenting time and for joint legal custody were frivolous and, therefore, awarded fees. As discussed, the trial court erred by failing to analyze the existence of an established custodial environment and, insofar as the change in domicile affected such an environment, whether the move was in the child's best interests. *Brown*, 260 Mich App at 598. That is part of the relief that plaintiff was seeking through his motion for extended parenting time and joint legal custody. The trial court's fee order was the result of its erroneous interpretation of the law controlling the domicile issue and is, therefore, reversed. See *Loutts*, 298 Mich App at 24.

In reaching this conclusion, we reject defendant's contention that plaintiff waived any potential objection to the trial court's award of attorney fees by approving "as to content and form" the trial court's order granting fees. Defendant contends that plaintiff's approval as to "content and form" was the equivalent of the parties entering into a consent decree that cannot be challenged on appeal. Our Supreme Court has recognized that, although previous caselaw held that approving an order as to "form and content" could be viewed as waiver of the ability

to challenge the order, the "better rule," which the Court adopted, cautioned against finding waiver simply where an order was approved as to form and content. *Ahrenberg Mech Contracting, Inc v Howlett*, 451 Mich 74, 77; 545 NW2d 4 (1996). Rather than amounting to waiver, the Court explained that an attorney's approval of an order as to "form and substance" or "form and content" should be, under certain circumstances, viewed "but only as recognition that the proposed decree was legally formulated, and contained in substance the decision as orally announced by the court." *Id*. at 77 (citation and quotation marks omitted). In *Ahrenberg*, there was no evidence of negotiations indicating that the parties were looking to compromise or otherwise surrender rights. *Id*. at 78. In addition, the fact that the defendant vigorously challenged the trial court's ruling—both before and after entry of the order—demonstrated that the approval of the order as to "form and content" was not a waiver, but rather an acknowledgement that the prepared order contained the substance of the trial court's decision. *Id*.

Similarly, in this case, there is no indication that the parties stipulated with regard to an outcome regarding the attorney fees. Plaintiff's counsel's comments at oral argument show that she challenged the trial court's decision to award fees; plaintiff subsequently moved for rehearing and continued to challenge those fees on appeal. There is nothing to suggest that plaintiff's counsel's approval of the order at issue as to "content and form" illustrated counsel's intent to enter into a consent order; rather, as in *Ahrenberg*, it merely appears that plaintiff's counsel acknowledged that the prepared order contained the substance of the trial court's oral ruling. See *id*.

IV. DOCKET NO. 322760

A. PARENTING TIME

Plaintiff next argues that the trial court erred by denying his request to extend parenting time without allowing factual development concerning changes to the established custodial environment. As discussed, the trial court erred by failing to engage in a more detailed analysis of whether an established custodial environment existed and whether defendant's planned move to Florida constituted a change to that environment that was in the child's best interests. *Brown*, 260 Mich App at 598. The trial court's decision to grant defendant's motion to change domicile necessarily affected its ruling on plaintiff's later motion to extend parenting time because the trial court analyzed parenting time in the context of what was appropriate given defendant's move to Florida. Because the determination of proper parenting time depends on the outcome of the trial court's resolution of the custodial environment and best interests issues on remand, the June 6, 2014 parenting time order is also reversed.

B. PLAINTIFF'S REQUEST FOR ATTORNEY FEES

Finally, plaintiff argues that the trial court erred by denying his request for attorney fees. He contends that, pursuant to MCR 3.206(C), he was entitled to his attorney fees incurred in responding to defendant's objections to the Friend of the Court's recommendations because he was unable to afford such fees. We review for an abuse of discretion the trial court's denial of plaintiff's request for fees. *Ewald v Ewald*, 292 Mich App 706, 724; 810 NW2d 396 (2011). "The trial court abuses its discretion when its decision results in an

outcome that falls outside the range of reasonable and principled outcomes." *Id*. at 725.

Pursuant to MCR 3.206(C):

> (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.

"Attorney fees are not awarded as a matter of right but only when necessary to enable a party to carry on or defend the litigation." *Spooner v Spooner*, 175 Mich App 169, 174; 437 NW2d 346 (1989). "The party requesting the attorney fees has the burden of showing facts sufficient to justify the award." *Woodington v Shokoohi*, 288 Mich App 352, 370; 792 NW2d 63 (2010). This burden includes the burden to provide evidence of the attorney fees that were incurred. *McIntosh v McIntosh*, 282 Mich App 471, 483; 768 NW2d 325 (2009) ("The party requesting attorney fees must show that the attorney fees were incurred and that they were reasonable."). A party cannot rely on unsubstantiated assertions when requesting attorney fees under MCR 3.206(C). *Smith v Smith*, 278 Mich App 198, 208; 748 NW2d 258 (2008).

On the record presented, we find that the trial court's decision was not outside the range of reasonable and principled outcomes. See *Ewald*, 292 Mich App at 725. Despite requesting attorney fees, plaintiff alleged, only generally, that he was unable to afford attorney

fees. As such, plaintiff "has not alleged sufficient facts to demonstrate that plaintiff would be unable to bear the expense of this action without aid." *Spooner*, 175 Mich App at 174. Concerning plaintiff's contention that the trial court was required to hold a hearing, we find his claim to be meritless. See MCR 2.119(E)(3); *American Transmission, Inc v Channel 7 of Detroit, Inc*, 239 Mich App 695, 709; 609 NW2d 607 (2000).

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

RIORDAN, P.J., and BECKERING and BOONSTRA, JJ., concurred.

DOE v HENRY FORD HEALTH SYSTEM

Docket Nos. 317973 and 317975. Submitted December 9, 2014, at Detroit. Decided December 18, 2014, at 9:15 a.m. Leave to appeal sought.

Jane Doe brought a class action in the Wayne Circuit Court against Henry Ford Health System and two of its medical transcription providers, Perry Johnson and Associates, Inc., and C Tech LLC, after her medical records and those of others were inadvertently made available on the Internet. The complaint alleged negligence, invasion of privacy by public disclosure of private facts, and breach of contract in connection with separate breaches by Perry Johnson and C Tech. Although the complaint sought all damages suffered by Doe and those similarly situated, during discovery, Doe acknowledged that she was seeking only the damages that could be presumed from the invasion of her privacy and the cost of a credit-monitoring service to protect her from identity theft. The court, David J. Allen, J., certified a class of 320 plaintiffs under MCR 3.501 and granted C Tech's motion for summary disposition. The remaining two defendants moved for reconsideration of the class certification and for summary disposition. The court denied the motions for summary disposition and also declined to decertify the class, although it reduced the class size to 159 to eliminate those whose medical records had been disclosed by C Tech. In Docket No. 317973, defendants appealed the order denying their motions for summary disposition and to decertify the class. In Docket No. 317975, plaintiffs cross-appealed the trial court's reduction of the certified class. The cases were consolidated.

The Court of Appeals *held*:

1. The trial court erred by denying defendants' motion for summary disposition of plaintiffs' claim for invasion of privacy. Invasion of privacy is an intentional tort, and the undisputed facts indicated that plaintiffs' medical information was disclosed unintentionally.

2. The trial court erred by denying defendants' motion for summary disposition of plaintiffs' remaining claims because Doe did not identify any cognizable damages from the disclosure of her medical information. Doe had no evidence that her information

was viewed by anyone or used for an improper purpose. Accordingly, the costs of having her credit monitored were incurred in anticipation of a possible future injury and did not constitute the actual present injury required to recover in a negligence action. Similarly, the costs of the credit-monitoring services related to damages that were speculative and derived from a possible future harm that might not occur, and therefore they could not form the basis of a breach-of-contract action. Contrary to Doe's argument, a court will not presume the existence of damages for an invasion of privacy to establish damages for purposes of establishing a claim for negligence or breach of contract.

3. The trial court abused its discretion by certifying the class because Doe had no individual claims to pursue against the defendants and was therefore not a member of the class she sought to certify. For this reason, plaintiff's assertion on cross-appeal that the class size should have been larger was without merit.

Reversed and remanded for summary disposition in favor of defendants.

1. TORTS — INVASION OF PRIVACY — PUBLIC DISCLOSURE OF PRIVATE FACTS — NEGLIGENT DISCLOSURE.

A plaintiff who seeks to maintain a cause of action for invasion of privacy through the public disclosure of private facts must establish that the disclosure was intentional.

2. DAMAGES — NEGLIGENCE — BREACH OF CONTRACT — PUBLIC DISCLOSURE OF PRIVATE FACTS — CREDIT-MONITORING SERVICES.

The costs of engaging a credit-monitoring service after one's private information has been publicly disclosed are not themselves damages on which an action for negligence or breach of contract can be based.

3. DAMAGES — NEGLIGENCE — BREACH OF CONTRACT — PUBLIC DISCLOSURE OF PRIVATE FACTS.

A court will not presume the existence of damages in a claim for negligence or breach of contract based on an invasion of privacy through the public disclosure of private facts.

Hertz Schram PC (by *Elizabeth C. Thomson*, *Patricia A. Stamler*, and *Matthew J. Turchyn*) for plaintiffs.

Straub, Seaman & Allen, PC (by *Joseph R. Enslen* and *Nicholas V. Dondzila*), and *Pilchak Cohen & Tice PC* (by *Daniel G. Cohen*) for Perry Johnson and Associates.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Christina A. Ginter* and *John M. Sier*) for Henry Ford Health System.

Before: MURRAY, P.J., and SAAD and HOEKSTRA, JJ.

PER CURIAM. The present consolidated cases involve a class action concerning allegations of negligence, breach of contract, and invasion of privacy. Defendants Perry Johnson and Associates, Inc. (Perry Johnson), and Henry Ford Health Systems (Henry Ford) appeal by leave granted the order denying their respective motions for summary disposition and the majority of their challenges to class certification. Plaintiffs[1] have filed a cross-appeal in which they contest the trial court's decision to decertify a subgroup in the class, thereby reducing its number from 320 to 159. For the reasons explained in this opinion, we reverse the grant of class certification and we remand for entry of summary disposition in favor of Henry Ford and Perry Johnson.

Plaintiff and the other members of the certified class are a group of 159 patients who had doctor's visits at Henry Ford between June 3 and July 18, 2008. Perry Johnson provides transcription services involving patient records for Henry Ford, and the present case arises from an error by Perry Johnson's subcontractor, Vingspan, that led to the availability of patient records on the Internet. Specifically, Vingspan made a configuration change to their server that left certain patient records "unprotected." As a result, "Googlebot," Google's automated web crawler, indexed the information, thereby making it possible to find patient information through Google's search engine. The information made

[1] As used in this opinion, "plaintiff" refers to Jane Doe and "plaintiffs" denotes all the class members collectively.

accessible included the patient's name, medical record number, the date of the patient's visit, the location of the visit, the physician's name, and a summary of the visit. In plaintiff's particular case, this information included diagnoses of "Cervical dysplasia secondary to HPV (Human Papillomavirus)"—a sexually transmitted disease—and alopecia, i.e., baldness.

After Henry Ford learned of the problem, all information was made inaccessible on the Internet, the affected patients were notified, and steps were taken to more adequately protect patient information. Notably, there is no indication in the lower court record that the information in question was viewed by a third party on the Internet[2] or that it was used inappropriately. Henry Ford established a "hotline" following the incident and received no report, through the hotline or otherwise, that patient information had been viewed online or used for identity-theft purposes. Plaintiff likewise conceded at her deposition that she had no indication that anyone saw, or used, any of her information that had been made visible on the Internet.

Following Henry Ford's notification to the patients, plaintiff filed the current lawsuit and sought class certification. Her suit includes three claims: (1) negligence, (2) invasion of privacy in the form of public disclosure of private facts, and (3) breach of contract under the theory that she was a third-party beneficiary of Henry Ford's agreement with Perry Johnson. Plaintiff's complaint sought "all damages" suffered by her and those similarly situated. When asked during discovery particularly what harm she had suffered and damages she intended to pursue, plaintiff advanced a theory

[2] There is evidence that an unknown patient discovered his or her own personal medical records online, but there is absolutely no indication that records were otherwise accessed via the Internet.

of "presumed damages" and generally indicated that she and the others were "entitled to compensation as a result of the Defendant's invasion of their common interest in privacy." However, the only actual losses she identified were those incurred for the procurement of monitoring to guard against identity theft. In total, plaintiff's attorney paid $275 to a company called "LifeLock" for identity-theft protection on plaintiff's behalf. Plaintiff and her counsel both expressly acknowledged during the discovery process that they were not seeking damages for emotional distress, wage loss, or personal injury.

Over objections from Perry Johnson and Henry Ford, the trial court granted class certification. Initially the class consisted of 320 individuals, but the trial court later reduced that number to the 159 members mentioned earlier.[3] Both Perry Johnson and Henry Ford moved for summary disposition, and the trial court denied those motions. Henry Ford and Perry Johnson now both appeal by leave granted the denial of their respective motions for summary disposition. Also, plaintiff filed a cross-appeal, contesting the trial court's reduction of the class from 320 individuals to 159.

Appellate review of a motion for summary disposition is de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim and should be granted, as a matter of law, if no genuine issue of any material fact

[3] The additional members decertified from the class were Henry Ford patients who had information made available online relating to doctor's visits between February 23 and April 23, 2009. This availability of information was factually distinct, however, in that Perry Johnson and Vingspan were uninvolved. A different contractor, C Tech LLC, and its subcontractor, Odyssey, had responsibility for the medical records and their subsequent availability on Google.

exists to warrant a trial. *Id*. This Court considers the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); MCR 2.116(G)(5). A material question of fact exists when, after viewing the evidence in a light most favorable to the nonmoving party, reasonable minds could differ on the issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

When reviewing a trial court's certification of a class, we review the trial court's findings of fact for clear error and its discretionary decisions for an abuse of discretion. *Duncan v Michigan*, 300 Mich App 176, 185; 832 NW2d 761 (2013). The interpretation and application of a court rule involves questions of law that this Court reviews de novo. *Id*.

On appeal, we first consider whether a material question of fact remains in regard to plaintiff's claim for invasion of privacy in the form of public disclosure of private facts. Among other arguments regarding this claim, we are asked to address whether it must be dismissed because invasion of privacy is an intentional tort and it is undisputed that the information in question became accessible on the Internet through negligence. Plaintiff, in contrast, maintains that invasion of privacy may be established without regard for whether the disclosure of information was intentional.

In basic terms, to prove invasion of privacy through the public disclosure of private facts, a plaintiff must show "(1) the disclosure of information (2) that is highly offensive to a reasonable person and (3) that is of no legitimate concern to the public." *Doe v Mills*, 212 Mich App 73, 80; 536 NW2d 824 (1995). The information revealed must relate to the individual's private as

opposed to public life. *Lansing Ass'n of Sch Adm'rs v Lansing Sch Dist Bd of Ed*, 216 Mich App 79, 89; 549 NW2d 15 (1996). "Liability will not be imposed for giving publicity to matters that are already of public record or otherwise open to the public." *Doe*, 212 Mich App at 82. Further, the "publicity" must consist of communicating that information "to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge." Restatement, Torts 2d, § 652D, comment *a*, p 384. See also *Lansing Ass'n of Sch Adm'rs*, 216 Mich App at 89.

We are not aware of a Michigan case that overtly considered whether the disclosure of private information to the public must have been done intentionally, but our review of Michigan caselaw leads us to conclude that it is in fact an intentional tort. Specifically, we find it notable that the public disclosure of private facts has been discussed by the Michigan Supreme Court as an intentional tort. See, e.g., *Smith v Calvary Christian Church*, 462 Mich 679, 680, 688-689; 614 NW2d 590 (2000). Further, we are not aware of—nor has plaintiff presented us with—any Michigan case in which an action alleging invasion of privacy proceeded on the basis of negligent disclosure. The conduct involved has instead been the intentional disclosure of private facts. See, e.g., *id*. (considering a pastor's announcement of a parishioner's sins during church services); *Doe*, 212 Mich App at 77 (involving protestors' display of signs informing public about specific women's intentions to undergo abortions); *Winstead v Sweeney*, 205 Mich App 664, 673; 517 NW2d 874 (1994) (discussing publication of a newspaper article detailing facts about the plaintiff's sex life). Given that no Michigan authority discusses a cause of action for invasion of privacy premised on negligent conduct, the logical conclusion is that such

a cause of action does not exist in Michigan. Cf. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 250; 828 NW2d 660 (2013) (concluding that noneconomic damages for negligent destruction of property not available in Michigan when such damages had never before been contemplated in Michigan's caselaw). Consequently, we conclude that to establish an invasion of privacy through the disclosure of private facts, a plaintiff must show that the disclosure of those facts was intentional.[4] Because the undisputed facts in this case indicate nothing more than a negligent disclosure of private information, no material question of fact remains and summary disposition should have been granted regarding plaintiff's invasion-of-privacy claim.

Regarding plaintiff's claims for negligence and breach of contract, on appeal, the parties dispute the availability of damages to compensate for the procurement of identity-theft protection. Henry Ford and Perry Johnson both contend that, in the absence of evidence of present injury to plaintiff's person or property, such damages are not recoverable in negligence, breach of contract, or invasion of privacy.[5] Plaintiff, in contrast, maintains that the present injury in this case consists of the invasion of her privacy, for which she maintains she

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[4] This view comports not only with Michigan's caselaw, but with that of other jurisdictions, see, e.g., *Randolph v ING Life Ins & Annuity Co*, 973 A2d 702, 711 (DC, 2009); *Granger v Klein*, 197 F Supp 2d 851, 869 (ED Mich, 2002); *Snakenberg v Hartford Cas Ins Co, Inc*, 299 SC 164, 170-171; 383 SE2d 2 (1989), and with learned treatises, see, e.g., 77 CJS, Right of Privacy and Publicity, § 32, p 568 (stating that the tort of public disclosure of private facts "involves the *intentional* public disclosure of private facts") (emphasis added); 3 Dobbs, Hayden & Bublick, Torts (2d ed), § 581, p 368 (recognizing that disclosure must be intentional to give rise to liability).

[5] Having determined that no material question of fact remains regarding plaintiff's invasion-of-privacy claim, we need not address what damages would be available in relation to such a claim.

may recover costs associated with LifeLock's services. For the reasons described below, we agree with Henry Ford and Perry Johnson, and we hold that plaintiff's identity-theft-protection services are not cognizable damages in the absence of a present injury.

Specifically, in the negligence context, in order to establish a claim for negligence, plaintiffs must prove: "(1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." *Henry v Dow Chem Co*, 473 Mich 63, 71-72; 701 NW2d 684 (2005). Stated differently, in a negligence action, plaintiffs must show "duty, breach of that duty, causation, and damages." *Id*. at 72 (quotation marks omitted). Underlying these four elements is the issue of injury, and it is well settled that, in Michigan, the injury complained of in a negligence action must be an actual, present injury. *Id*. at 74-76. "It is a *present* injury, not fear of an injury in the future, that gives rise to a cause of action under negligence theory." *Id*. at 73. Consequently, damages "incurred in anticipation of possible future injury rather than in response to present injuries" are not cognizable under Michigan law. *Id*. Thus, for example, in *Henry*, the Court determined that the plaintiffs, individuals living and working in the Tittabawassee floodplain, could not pursue damages for medical monitoring services when there was no indication, as of yet, that anyone had been harmed by the release of dioxin into the floodplain. *Id*. at 68-70.

Analogously, in this case, plaintiff has not shown that the costs for the credit-monitoring services relate to a present, actual injury. She has in fact conceded that she has no evidence that her information was viewed by anyone on the Internet or used for an improper purpose

such as identity theft. Absent some such indication of present injury to her credit or identity, it is clear that these damages for credit monitoring were incurred in anticipation of possible future injury. See *id*. at 73. Because "these economic losses are wholly derivative of a *possible, future* injury rather than an *actual, present* injury," *id*. at 78, the costs of these credit-monitoring services are not cognizable under Michigan's negligence law.[6]

Similarly, in regard to breach of contract, a party claiming a breach must establish (1) that there was a contract, (2) that the other party breached the contract, and (3) that the party asserting breach of contract suffered damages as a result of the breach. *Dunn v Bennett*, 303 Mich App 767, 774; 846 NW2d 75 (2013). The measure of damages in relation to a breach of contract is " 'the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached.' " *Ferguson v Pioneer State Mut Ins Co*, 273 Mich App 47, 54; 731 NW2d 94 (2006) (citation omitted). "The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512;

[6] This conclusion comports not only with *Henry*'s reasoning, but with the persuasive authority of the numerous courts that have determined that credit-monitoring services may not be recovered as damages to combat an increased risk of future identity theft following a data breach when there has been no evidence of identity theft. See, e.g., *Reilly v Ceridian Corp*, 664 F3d 38, 45 (CA 3, 2011); *Randolph v ING Life Ins & Annuity Co*, 486 F Supp 2d 1, 7 (D DC, 2007); *Pisciotta v Old Nat Bancorp*, 499 F3d 629, 639 (CA 7, 2007); *Amburgy v Express Scripts, Inc*, 671 F Supp 2d 1046, 1055 (ED Mo, 2009); *Shafran v Harley-Davidson, Inc*, unpublished opinion of the United States District Court for the Southern District of New York, issued March 20, 2008 (Docket No. 07 CIV 01365 (GBD)).

667 NW2d 379 (2003). Thus, in contrast, the damages "must not be conjectural or speculative in their nature, or dependent upon the chances of business or other contingencies . . . ." *McEwen v McKinnon*, 48 Mich 106, 108; 11 NW 828 (1882). See also *Body Rustproofing, Inc v Mich Bell Tel Co*, 149 Mich App 385, 390; 385 NW2d 797 (1986).

In this case, assuming arguendo that plaintiff could seek damages for breach of the contract in question, plaintiff's claim for credit-monitoring services are speculative insofar as they do not arise from the purported breach of contract but depend entirely on the occurrence of multiple contingencies which might or might not occur at some point in the future. That is, the alleged breach has not caused plaintiff to suffer an injury to her identity or credit. Rather, any injury is entirely contingent on the hypothetical possibility that some unknown person viewed the information and at some unknown time in the future might make use of it for nefarious purposes. Because her speculative damages derive from a possible future harm that might or might not occur, rather than directly from the breach of contract, plaintiff may not recover under contract law for the cost of credit-monitoring services. See *McEwen*, 48 Mich at 108. See also *Hendricks v DSW Shoe Warehouse, Inc*, 444 F Supp 2d 775, 780 (WD Mich, 2006).

In regard to both negligence and breach of contract, plaintiff offers the assertion on appeal that, because she has suffered an invasion of privacy, injury is presumed and she may therefore recover "presumed" damages. Plaintiff's assertion is entirely unsupported given that plaintiff is required to prove "all" damages in a negligence action, *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 72; 602 NW2d 215 (1999), and to demon-

strate the existence of an actual, present injury, *Henry*, 473 Mich at 74-76. In short, setting aside that plaintiff does not have a viable invasion of privacy claim, damages will not be presumed in a negligence action for an alleged invasion of privacy. Cf. *Amburgy v Express Scripts, Inc*, 671 F Supp 2d 1046, 1055 (ED Mo, 2009). Likewise, damages are not presumed in relation to contracts, in which cases a plaintiff is instead required to prove the measure of damages with "reasonable certainty." *Alan Custom Homes*, 256 Mich App at 512.

In sum, we will not presume damages from plaintiff's purported invasion of privacy, and plaintiff's claim for credit monitoring is not cognizable. Because plaintiff has failed to identify any other damages she wishes to pursue in relation to negligence or breach of contract,[7] she has not shown that a material question of fact remains and summary disposition therefore should have been granted in regard to both of these claims. MCR 2.116(C)(10). See *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000); *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 69-70; 761 NW2d 832 (2008). As discussed, plaintiff's claim for invasion of privacy should likewise have been dismissed because no material question of fact remains regarding whether the disclosure in this case was intentional. MCR 2.116(C)(10).

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[7] Plaintiff maintains that Perry Johnson and Henry Ford misstate the lower court record by suggesting that the only damages she intends to pursue relate to economic damages incurred for identity-theft-protection monitoring. Despite these protests, apart from the assertion of presumed damages (which is without merit), plaintiff does not identify what additional damages she intends to pursue. In fact, in the lower court, she specifically indicated that she would not be pursuing claims of personal injury, emotional distress, or wage loss, and we view these concessions as an abandonment or waiver of those damages. See *Braverman v Granger*, 303 Mich App 587, 609; 844 NW2d 485 (2014). See also *Greenwood v Davis*, 106 Mich 230, 235; 64 NW 26 (1895). In short, she has failed to identify the damages necessary to survive a motion for summary disposition.

Having determined that plaintiff has no individual claims to pursue against either Henry Ford or Perry Johnson, we also conclude that the trial court's grant of class certification must be reversed. See MCR 3.501(A)(1). That is, "[t]he threshold question in any proposed class action is whether the proposed class representative is a member of the class." *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 598; 654 NW2d 572 (2002). See also MCR 3.501(A)(1)(c) (stating that, to merit class certification, a representative for the class must have claims typical of the class). "A plaintiff who cannot maintain the cause of action as an individual is not qualified to represent the proposed class." *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999). See also *Tucich v Dearborn Indoor Racquet Club*, 107 Mich App 398, 407; 309 NW2d 615 (1981) ("[O]ne may not sue in a class action a defendant whom one could not sue individually."). It follows that, because plaintiff is not a qualified representative, the trial court abused its discretion by certifying the class and the order granting class certification must be reversed.[8] See *Camden v Kaufman*, 240 Mich App 389, 402; 613 NW2d 335 (2000). We therefore reverse the grant of class certification and remand for entry of summary disposition in favor of Henry Ford and Perry Johnson.

Reversed and remanded for entry of summary disposition for Henry Ford and Perry Johnson.

MURRAY, P.J., and SAAD and HOEKSTRA, JJ., concurred.

[8] Having determined that class certification was an abuse of discretion, we find no merit to plaintiff's assertion on cross-appeal that the class size should have been larger. Plaintiff was no more qualified to represent the larger class than she was to represent the 159 individuals in question.

ROBERTS v SALMI

Docket No. 316068. Submitted October 9, 2014, at Petoskey. Decided December 18, 2014, at 9:20 a.m. Leave to appeal sought.

Lale and Jean Roberts brought an action in the Houghton Circuit Court against Kathryn Salmi, a licensed professional counselor doing business as Salmi Christian Counseling, alleging ordinary negligence and malpractice in the treatment of their daughter, K. Plaintiffs alleged that defendant had used recovered memory therapy and implanted in K's mind false memories of physical and sexual abuse by her father, after which K severed all ties with her parents, they were subjected to civil and criminal investigations, and the community became aware of the allegations. Defendant asserted that she did not use recovered memory therapy in her practice and moved for summary disposition. The court, Thomas L. Solka, J., granted defendant's motion, concluding that defendant had no duty of care to avoid harming third parties by her treatment of K. Plaintiffs appealed.

The Court of Appeals *held*:

1. In determining whether defendant owed plaintiffs a legal duty, the ultimate inquiry is whether the social benefits of imposing a duty outweigh the social costs of imposing it. Factors relevant to the determination include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. In a medical malpractice action, the duty owed by the health professional arises from his or her relationship with the patient. A health professional's duty to perform within the standard of care normally extends only to the patient, and a plaintiff generally cannot sue in malpractice for derivative damages caused by a health professional's negligent treatment of a loved one. The absence of a direct health professional-patient relationship between the health professional and a third party harmed by the patient's treatment, however, does not by itself preclude the imposition of a duty. In some instances, a health professional may be liable in malpractice to a third party for harm caused by his or her breach of the applicable standard of care notwithstanding the lack of a health professional-client relationship with the third party. And even in the absence of

that relationship, Michigan's common law imposes on every person a general obligation to refrain from taking actions that unreasonably endanger others. The question is whether the parents of a patient being treated by a mental health professional are sufficiently connected to the patient's treatment to warrant the imposition of a limited duty of care on the mental health professional to avoid treating the patient in a way that might harm the parents.

2. Given the protracted and contentious debate over the science underlying repressed and recovered memories and the evidence that therapy techniques designed to help a patient recover memories might in fact implant false memories, a reasonable mental health professional should understand the potential for harm occasioned by the use of those techniques to treat a patient and should proceed with the utmost caution, especially when the therapist's only evidence of abuse is that the patient has sought help. The patient is harmed when a mental health professional uses techniques that give rise to false memories of sexual abuse, and a therapist who uses those techniques knows that the persons most likely to be implicated in the abuse are the patient's parents. Therefore, it is entirely foreseeable that the use of suggestive techniques to recover memories might result in the creation of false memories of abuse by the patient's parent and that the patient will act on the belief that the memories are accurate. The relationship between a mental health professional and his or her patient's parents is sufficiently close and the foreseeability of the harm sufficiently strong to weigh in favor of a limited duty of care, one that does not unduly burden a mental health professional's ability to diagnose and treat patients for trauma originating from childhood sexual abuse.

3. The trial court erred when it determined that defendant did not owe K's parents a duty of care and dismissed plaintiffs' claim on that basis. A mental health professional has a limited duty to exercise reasonable professional judgment to limit the possibility that his or her treatment of the patient will give rise to false memories of childhood sexual abuse. If the mental health professional uses inappropriate treatment techniques or inappropriately applies otherwise proper techniques, causing the patient to have false memories of sexual abuse by a parent, the mental health professional may be liable to the patient's parents for the harm occasioned by the false memories. To establish a claim for a breach of this duty, the plaintiff must show that the mental health professional breached the applicable standard of care in the selection or use of a therapeutic technique or combination of

techniques, that the improper use of the therapy or therapies caused the patient to have false memories of childhood sexual abuse by the parent or parents, and that the existence of the false memories caused the parents' injuries.

4. The fact that plaintiffs' claim involved the alienation of K's affections to some extent did not transform the essential character of the claim. As pleaded, the claim was for malpractice. Because plaintiffs brought their claim to recover for their own injuries caused by defendant's purported malpractice, it was not barred by MCL 600.2901, which abolished claims for alienation of affection.

Reversed and remanded.

SAWYER, J., dissenting, stated that creating a duty between a therapist and a patient's parents under the circumstances of this case was a policy decision best left to the Legislature. It is outside the expertise of courts and juries to determine what is an appropriate therapy method or under what circumstances a therapy method may be used, if at all. While health professionals must assess the benefits and risks of recommending a particular treatment or test to the patient, the majority's limited duty will impose another level of risk-benefit analysis, requiring them to also assess the risks and benefits to the patient's parents, which may not always be aligned between patient and parent. Moreover, the Legislature has addressed policy issues relevant to this case, including requirements for the mandatory reporting of child abuse and statutes concerning privilege in these contexts. A duty to the parents of a child being treated for abuse might be at odds with those legislative policy determinations. Judge SAWYER would have affirmed.

TORTS — NEGLIGENCE — MALPRACTICE — MENTAL HEALTH PROFESSIONALS — RECOVERED MEMORY THERAPY — DUTY TO PATIENT'S PARENTS — IMPLANTATION OF FALSE MEMORIES.

A mental health professional has a limited duty to exercise reasonable professional judgment to limit the possibility that his or her treatment of the patient will give rise to false memories of childhood sexual abuse; if the mental health professional uses inappropriate treatment techniques or inappropriately applies otherwise proper techniques, causing the patient to have false memories of sexual abuse by a parent, the mental health professional may be liable to the patient's parents for the harm occasioned by the false memories; to establish a claim for a breach of this duty, the plaintiff must show that the mental health professional breached the applicable standard of care in the selection or use of a therapeutic technique or combination of techniques, that

> the improper use of the therapy or therapies caused the patient to have false memories of childhood sexual abuse by the parent or parents, and that the existence of the false memories caused the parents' injuries.

The Kemp Law Firm, PLLC (by *Zachary C. Kemp*), for plaintiffs.

Kitch Drutchas Wagner Valitutti & Sherbrook (by *Beth A. Wittmann* and *Susan D. MacGregor*) for defendant.

Before: MURPHY, C.J., and SAWYER and M. J. KELLY, JJ.

M. J. KELLY, J. In this suit for malpractice, plaintiffs, Lale Roberts and Joan Roberts, appeal by right the trial court's order dismissing their claims against defendant, Kathryn Salmi, LPC, who does business as Salmi Christian Counseling. On appeal, we must determine whether a mental health professional, such as a licensed professional counselor, see MCL 330.1100b(16)(e); 333.18101(b),[1] owes a duty of care to third persons who might be harmed by the professional's treatment of his or her patients. Specifically, we must determine whether a mental health professional has a duty to third parties (specifically, a patient's parents) who might foreseeably be implicated in abuse when the mental health professional treats a patient using techniques that cause his or her patient to have false memories of sexual abuse. For the reasons more fully explained below, we conclude that Michigan's common law recognizes a duty of care to third parties who might foreseeably be harmed by the mental health profession-

[1] The Legislature has extended the definition of medical malpractice to include licensed professional counselors. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 420 n 8; 684 NW2d 864 (2004); see also MCL 600.5838a(1)(b); MCL 333.18101(b).

al's use of techniques that cause his or her patient to have false memories of sexual abuse. Because the trial court erred when it dismissed Lale and Joan Roberts's claim on the grounds that Michigan does not recognize such a duty, we reverse and remand for further proceedings.

I. BASIC FACTS

In 2009, Lale and Joan Roberts had two daughters living with them at home: L, who is a person with Down Syndrome, and her older sister, K. After it was discovered that a friend of the family had engaged in inappropriate sexual contact with K, Lale and Joan Roberts sought help for K from a mental health professional. Eventually they hired Salmi to provide counseling to K. K began to see Salmi in July 2009. K was 17 years of age when she first started counseling with Salmi. K began to live with family friends around the same time.

Shortly after Salmi began to counsel K, K purportedly remembered that her father had physically and sexually abused her since she was five years old. Salmi invited Lale and Joan Roberts to attend a group counseling session, which was held in July 2009. At the group counseling session, K allegedly confronted her father with what Lale and Joan Roberts maintain were false allegations of sexual abuse.

In September 2009, Salmi reported the allegations to the Department of Human Services. Salmi provided the investigators with a handwritten note wherein she described the abuse that K had "just remembered." In the note Salmi stated that K told her that L had also been abused at home. Thereafter, the Department of Human Services and the Michigan State Police investigated the allegations.

The investigators found no physical evidence that L had been or was being physically or sexually abused. An investigator with the department interviewed K, and K's allegations, as recorded by the investigator, were strikingly similar to those provided by Salmi in her note. An investigator also interviewed K's older sister, who had not lived in the home for several years. She described her parents as fundamentalist Christians who hold strong beliefs and practice discipline that she felt was emotionally and physically abusive, but she nevertheless stated that she did not believe that her father would hurt L or K. She also stated that she had never observed anything that could be characterized as sexual abuse in the home. The investigator ultimately determined that it was unnecessary to take any action. Police officers also investigated and reviewed K's allegations, but no charges were brought against Lale or Joan Roberts.

In January 2012, Lale and Joan Roberts sued Salmi for ordinary negligence or malpractice. They alleged that they sent K to Salmi for counseling and Salmi treated K with "Recovered Memory Therapy." In July 2009, they further alleged, Salmi invited them to a "joint counseling session." At the session, K confronted her father with "false accusations of severe physical and sexual abuses." They maintained that Salmi owed them a duty to "not improperly implant, or reinforce false memories of physical and sexual abuse in K's mind by use of hypnosis, age regression and other psychotherapy techniques." Lale and Joan Roberts stated that K only began to "remember" the abuse after she began treatment with Salmi and was now "adamant" that those things had actually happened. After Salmi "improperly implanted, or reinforced false memories of physical and sexual abuse," Lale and Joan maintained, K severed all ties with her parents, investigators sub-

jected them to civil and criminal investigations, and the community became aware of the allegations.

In her affidavit of meritorious defense, Salmi averred that she does not offer or practice " 'Repressed or Recovered Memory Therapy' " and has "at no time . . . intentionally used any suggestive techniques with clients." She also stated that she has not been trained in hypnosis and does not use it in her practice. She addresses "claims or reports of sexual abuse when reported, but [does] not believe in exploring for such events or other traumas when not presented to me as an issue by the client."

In October 2012, Salmi moved for summary disposition under MCR 2.116(C)(8). She argued that the trial court should dismiss the claim because K's records were protected by privilege and Lale and Joan Roberts would thus be unable to show that Salmi had negligently treated K. She also argued that under Michigan's common law, she only owed a duty of care to K. Because third parties cannot sue a therapist for damages resulting from the therapist's malpractice or treatment provided to others, she maintained, the court should dismiss the claim against her. Finally, she argued that Lale and Joan Roberts's claim was essentially a claim for the alienation of affections, which was abolished in Michigan.

The trial court held a hearing on the motion in January 2013. After hearing the parties' arguments, the trial court determined that it would be premature to dismiss the claim on the ground that Lale and Joan Roberts would, as a result of the client-therapist privilege, be unable to discover the evidence necessary to establish their claim. It also did not believe that their complaint was for alienation of affections or barred by the line of cases involving claims of malpractice made

by members of the patient's family. The trial court, however, agreed that—under Michigan law—Salmi had no duty of care to avoid harming third parties by her treatment of K. For that reason, the trial court entered an order dismissing Lale and Joan Roberts's claim later that same month.

After the trial court eventually denied their motion for reconsideration in April 2013, Lale and Joan Roberts appealed in this Court.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

On appeal, Lale and Joan Roberts argue that the trial court erred when it determined that under Michigan law, Salmi did not owe any duty of care to ensure that her treatment of K did not harm them. This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper scope and application of Michigan's common law. *Grandberry-Lovette v Garascia*, 303 Mich App 566, 572-573; 844 NW2d 178 (2014).

B. MCR 2.116(C)(8)

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). In reviewing such a challenge, this Court must accept the factual allegations stated in the complaint as true and construe them in a light most favorable to the nonmoving party. *Kuznar v Raksha Corp*, 481 Mich 169, 176; 750 NW2d

121 (2008). If the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery, the court should dismiss the claim. *Id*. Salmi argued in support of her motion for summary disposition, in relevant part, that Lale and Joan Roberts's claim was unenforceable as a matter of law because they did not plead that Salmi had breached a duty recognized under Michigan law.

C. LEGAL DUTY

In order to establish a prima facie claim of negligence against Salmi, Lale and Joan Roberts had to establish that Salmi owed them a legal duty. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012) (stating that it is axiomatic that there can be no tort liability unless the plaintiff first establishes that the defendant owed a duty to the plaintiff). Whether Salmi owed Lale and Joan Roberts a duty under the circumstances involved in this case is a question of first impression in Michigan.

" 'Duty' comprehends whether the defendant is under *any* obligation to the plaintiff to avoid negligent conduct; it does not include—where there is *an* obligation—the nature of the obligation: the general standard of care and the specific standard of care." *Moning v Alfono*, 400 Mich 425, 437; 254 NW2d 759 (1977). Whether a defendant owes an actionable legal duty to the plaintiff is a question of law that must be decided by the court after " 'assessing the competing policy considerations for and against recognizing the asserted duty.' " *In re Certified Question from the Fourteenth Dist Court of Appeals of Texas*, 479 Mich 498, 504-505; 740 NW2d 206 (2007), quoting *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). "Thus, the ultimate inquiry in determining whether a legal

duty should be imposed is whether the social benefits of imposing a duty outweigh the social costs of imposing a duty." *Certified Question*, 479 Mich at 505.

When assessing the competing policy considerations for and against recognizing a duty, the nature of the relationship between the parties and the foreseeability of the harm are paramount:

> Factors relevant to the determination whether a legal duty exists include . . . "the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented." We have recognized, however, that "[t]he most important factor to be considered [in this analysis] is the relationship of the parties" and also that there can be no duty imposed when the harm is not foreseeable. In other words, "[b]efore a duty can be imposed, there must be a relationship between the parties and the harm must have been foreseeable." If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors. [*Hill*, 492 Mich at 661 (citations omitted) (alterations in original).]

1. RELATIONSHIP AND FORESEEABILITY

For purposes of our analysis, we shall assume that Salmi had a health professional-patient relationship with K and not her parents.[2] In a medical malpractice action, the duty owed by the health professional arises from the health professional's relationship with the patient. *Oja v Kin*, 229 Mich App 184, 187; 581 NW2d 739 (1998). A health professional's duty to perform

[2] Because we conclude that mental health professionals owe a duty to the parents of a patient because the parents are within the class of persons most likely to be harmed when the professional negligently causes his or her patient to have false memories of sexual abuse, we need not determine whether Lale and Joan Roberts's payment for the services to K or participation in a group session established a professional-patient relationship with Salmi.

within the standard of care normally extends only to the health professional's patient; a plaintiff cannot sue in malpractice for derivative damages caused by a health professional's negligent treatment of a loved one. See, e.g., *Malik v William Beaumont Hosp*, 168 Mich App 159, 168-170; 423 NW2d 920 (1988). But the absence of a direct health professional-patient relationship between the professional and a third party harmed by the professional's treatment does not by itself preclude the imposition of a duty. Courts have recognized that a professional may be liable in malpractice to a third party for harms caused by his or her breach of the applicable standard of care notwithstanding the lack of a professional-client relationship with the third-party. See *Dyer v Trachtman*, 470 Mich 45, 51-54; 679 NW2d 311 (2004) (recognizing that a physician who performs an independent medical examination for a third party does not have a traditional physician-patient relationship with the person examined, but nevertheless stating that the physician owes a limited duty of care to the person examined and a breach of that duty sounds in medical malpractice); *Mieras v DeBona*, 452 Mich 278; 550 NW2d 202 (1996) (holding that a lawyer who drafts a will has a limited duty to the beneficiaries named in the will). Moreover, even in the absence of a professional-patient relationship, Michigan's common law imposes on every person a general obligation to refrain from taking actions that unreasonably endanger others: "every person engaged in the prosecution of any undertaking [has] an obligation to use due care, or to so govern his [or her] actions as not to unreasonably endanger the person or property of others." *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). Consequently, within the context of the facts of this case, the question becomes whether the parents of a patient being treated by a mental health professional

are sufficiently connected to the patient's treatment to warrant the imposition of a limited duty of care on the mental health professional to avoid treating the patient in a way that might harm the parents. Because this question is interconnected with the nature of the treatment at issue and the foreseeability that the treatment will harm a patient's parents, it will be useful to discuss recovered memory theory.[3] See *Moning*, 400 Mich at 439 (noting that whether there is a requisite relationship giving rise to a duty will often depend on issues of foreseeability—namely, "whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable").

As there developed a heightened awareness of the prevalence of child sexual abuse, some mental health professionals began to subscribe to the position that a wide variety of problems, such as sleep and eating disorders, had their origin with repressed memories of sexual abuse during childhood. See Note, *A Claim for Third Party Standing in Malpractice Cases Involving Repressed Memory Syndrome*, 37 Wm & Mary L Rev 337, 339 (1995). These mental health professionals adopted the theory—referred to as "recovered memory theory"—that persons suffering from these disorders can best be helped by awakening the dormant memories through recovered memory therapy and then confronting their abusers. *Id*. at 339-340. Therapists who subscribe to this theory might employ a wide range of tools—including drugs, hypnosis, guided fantasy, automatic writing, support groups, suggestion, interper-

[3] Lale and Joan Roberts alleged that Salmi treated K with "Recovered Memory Therapy," which in turn caused K to have false memories of sexual abuse. We must accept these allegations as true for purposes of this motion. *Kuznar*, 481 Mich at 176.

sonal pressure, and appeals to authority—in order to cause the patient to recover the memories of sexual abuse, if the patient has no memory of abuse. See Note, *Has Time Rewritten Every Line?: Recovered-Memory Therapy and the Potential Expansion of Psychotherapist Liability*, 53 Wash & Lee L Rev 763, 770 (1996). Recovered memory theory has, however, come under increasing scrutiny by members of the mental health community who are skeptical of its validity:

> The idea that childhood sexual abuse may result in suppression of memory such that the victim may not remember it until many years later under the guidance of a psychotherapist is, to say the least, a controversial one *within* the psychotherapeutic community. Much of the force of the idea originated with one book, The Courage to Heal (1992), by Ellen Bass and Laura Davis, which traces a variety of psychological disorders to unremembered early childhood sexual abuse. The high-water mark of acceptance of the theory appears to have been the adoption by many state legislatures, including California's, of special, relaxed statutes of limitations which implicitly accept the idea that a victim of sexual abuse may not have reason to know of the abuse until many years after its occurrence. . . .
>
> As the end of the 20th century approaches, however, recovered memory theory finds itself on the intellectual defensive. In 1992 a group of families torn asunder by false accusations of child abuse formed the False Memory Syndrome Foundation to combat the idea. Commentators have noted that the pendulum is now swinging the other way. Many psychotherapists now see recovered memory theory as a " 'widespread and . . . damaging' fad." And, indeed, the case against the idea that someone may so repress a memory of sexual abuse that he or she will have no awareness of it until adulthood is formidable—so formidable in fact that we doubt (though we stress we do not decide the point now) that recovered memory will pass muster under the [California] test . . . for admissibility.

[*Trear v Sills*, 69 Cal App 4th 1341, 1344-1345; 82 Cal Rptr 2d 281 (1999) (citations omitted).]

Many mental health professionals now question the evidence that victims of abuse can completely repress memories of the abuse only to recover them decades later with complete accuracy. See Finer, *Therapists' Liability to the Falsely Accused for Inducing Illusory Memories of Childhood Sexual Abuse -- Current Remedies and a Proposed Statute*, 11 J L & Health 45, 68-82 (1996) (discussing the debate among mental health professionals concerning the repression and retrieval of traumatic memories). Opponents of recovered memory therapy also note studies that suggest that the techniques used in the therapy do not enable patients to recall real events, but instead "result[] in therapists negligently suggesting, implanting, and reinforcing false beliefs of childhood sexual abuse in their patients." Comment, *False Memories and the Public Policy Debate: Toward A Heightened Standard of Care for Psychotherapy*, 2002 Wis L Rev 169, 171. See also Piper, Lillevik & Kritzer, *What's Wrong With Believing in Repression?: A Review for Legal Professionals*, 14 Psych Pub Pol'y & L 223 (2008) (discussing the flaws in the studies that support repressed memory theory and the concept of recovered memories). "The danger in all of these techniques," one commentator explained, "is that the therapist validates the 'memories' by encouraging their creation and rewarding the patient with positive feedback when she 'remembers' anything." *A Claim for Third Party Standing*, 37 Wm & Mary L Rev at 351, citing Loftus & Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (New York: St. Martin's Press, 1994), p 24.

Child sexual abuse is one of the most heinous offenses that a person can commit. And for that reason,

there is nothing more stigmatizing than being branded a child molester. See *Trear*, 69 Cal App 4th at 1346 ("It takes very little imagination to recognize the damning horror that must ensue to a parent *falsely* accused of child molestation."). Given the protracted and contentious debate over the science underlying repressed and recovered memories and the evidence that therapy techniques designed to help a patient recover memories might in fact implant false memories, a reasonable mental health professional should understand the potential for harm occasioned by the use of those techniques to treat a patient and should proceed with the utmost caution. This is especially true when the therapist's only evidence of abuse is the fact that the patient has sought help. The patient himself or herself is obviously harmed when a mental health professional uses techniques that give rise to false memories of sexual abuse. But in addition, a therapist who uses such techniques in order to help a patient recover memories of sexual abuse from childhood, on the assumption that such abuse occurred, must also know that the persons most likely to be implicated in the abuse (perhaps falsely) are the patient's parents. See *Hungerford v Jones*, 143 NH 208, 213; 722 A2d 478 (1998) (recognizing that family members are more likely to be victims of false accusations than nonfamily members). It is, therefore, entirely foreseeable that the use of suggestive techniques to recover memories might result in the creation of false memories of abuse by the patient's parent or parents and that the patient will act—with or without encouragement—on the belief that the memories are accurate. See *Trear*, 69 Cal App 4th at 1347 ("[T]here is the judicial temptation to allow parents damaged by recovered memory claims a tort recovery in professional malpractice based on the obvious foreseeability of the harm to the parent from the 'false' memory.").

The same cannot be said of a mental health professional's diagnosis of childhood sexual abuse standing alone. A diagnosis does not by itself implicate any particular person as the perpetrator of the abuse. Moreover, a patient confronted with that diagnosis and no memory of the abuse is less likely to act on the diagnosis to his or her parent's detriment. In the absence of evidence that the professional contributed to or caused the formation of a false memory or otherwise encouraged the patient to falsely implicate his or her parents, the mere diagnosis of childhood sexual abuse as the underlying cause of a mental disorder does not result in a direct foreseeable harm to the patient's parents.[4]

Because a patient's parents are within the class of persons most likely to be implicated by the creation of a false memory, when a mental health professional elects to treat a patient using techniques that might give rise to false memories in the patient, the mental health professional must consider not only the patient's welfare, but also the possibility that his or her decision to treat the patient in that way might result in a false memory that directly harms the patient's parents. The parent-child relationship is so fundamental to human relations that a parent cannot be equated with a third party in the ordinary sense. *Webb v Neuroeducation Inc, PC*, 121 Wash App 336, 350; 88 P3d 417 (2004). And when a therapist's inept use of therapeutic techniques causes his or her patient to have false memories and make false allegations of sexual abuse, the harm is foreseeable and strikes "at the core of a parent's basic

[4] We do not mean to suggest that a misdiagnosis of childhood sexual abuse can never be relevant; evidence that the mental health professional misdiagnosed his or her patient as having been sexually abused as a child may be relevant to show that a reasonable mental health professional confronted with the same situation would not have proceeded to use questionable techniques to help the patient recover memories.

emotional security . . . ." *Id*. (quotation marks and citation omitted). Stated another way, although the mental health professional does not have a direct professional-patient relationship with his or her patient's parents, it cannot be said that the mental health professional's connection to the parents is so tenuous that it cannot give rise to any duty of care. See *Certified Question*, 479 Mich at 515 (characterizing the connection between the decedent and the defendant manufacturer as "highly tenuous" because she was separated from the manufacturer by several intermediate relationships). Rather, the mental health professional who employs therapies that might give rise to a false memory has a substantial connection to the persons most likely to be harmed by the implantation of the false memory: the patient's parents.[5] See *Hungerford*, 143 NH at 213.

We note that this case does not involve a situation in which this Court is asked to analyze whether the mental health professional has a duty to protect his or her patient's parents from false accusations of sexual abuse. The allegations here are not that a mental health professional has a duty to ensure that a patient's allegations are true before reporting them or to otherwise protect a patient's parents from potentially false allegations of sexual abuse. Rather, this case involves allegations of professional misfeasance—namely, the negligent use of therapeutic techniques on a patient that actually *cause* the patient to have a false memory of childhood sexual abuse. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 498; 418 NW2d 381 (1988) ("In determining standards of conduct in the area of negligence, the courts

[5] The present case involves only whether a mental health professional owes a duty of care to his or her patient's parents. We leave it to future courts to determine whether the duty should be extended to other persons who might foreseeably be harmed by a patient's false memory of sexual abuse, such as a pastor or teacher.

have made a distinction between misfeasance, or active misconduct causing personal injury, and nonfeasance, which is passive inaction or the failure to actively protect others from harm."). Furthermore, the fact that the patient might be the active agent in the perpetration of the harm does not transform the case from one of misfeasance to one of nonfeasance.[6] See *Ross v Glaser*, 220 Mich App 183, 187-191; 559 NW2d 331 (1996) (opinion by MARILYN KELLY, J.) (characterizing the defendant's act of handing a loaded gun to his mentally unstable son as misfeasance, not nonfeasance, and holding that the defendant had a duty to refrain from handing his son the gun, given the likelihood that his son would injure someone with it). Because the nature of the duty limits our consideration to whether a mental health professional may be held liable for implanting a false memory of sexual abuse, we conclude that the relationship between a mental health professional and his or her patient's parents is sufficiently close and the foreseeability of the harm sufficiently strong to weigh in favor of a limited duty of care.[7]

2. POLICY CONSIDERATIONS

Having determined that the relationship between a mental health professional and his or her patient's

[6] The cases involving the duty to act for another's benefit as a result of a special relationship are, therefore, inapposite. See *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 25-26; 780 NW2d 272 (2010) (stating that generally there is no duty that obligates one person to aid or protect another, but that certain special relationships may give rise to such a duty).

[7] Lale and Joan Roberts also alleged that Salmi improperly diagnosed K and that the improper diagnosis caused their damages. However, for the reasons already stated, we do not recognize that a mental health professional may be liable to third parties solely for misdiagnosing his or her patient as having been sexually abused. Rather, there must be a more significant connection between the harm and the mental health professional's acts or omissions.

parents weighs in favor of imposing a limited duty, we must next consider the "competing policy considerations for and against recognizing the asserted duty." *Certified Question*, 479 Mich at 504-505 (quotation marks and citation omitted). We must consider the burden on the defendant and the nature of the risk presented. *Id*. at 505. If the social benefits of imposing the duty are outweighed by the social costs, courts will not recognize a duty. *Hill*, 492 Mich at 669-670. Thus, if the burden to be imposed on mental health professionals would be "onerous and unworkable" or would shift the burden to protect from the party best equipped to prevent the hazard, we will not recognize the duty. *Id*. at 670.

Courts in several states have examined the competing policy considerations and concluded that the social cost of imposing such a duty outweighs the potential benefits.[8] Those courts have been concerned that the imposition of a duty would unduly interfere with the mental health professional's ability to diagnose and treat his or her patients:

> The issue presented by a claim of a duty to the potential "third party" abuser is to what degree therapists necessarily become *insurers* of the truth of any diagnosis of childhood sexual abuse by a parent. We say "insurers" because a moment's reflection will demonstrate the perilous position in which any such duty would put the therapist. The therapist risks utter professional failure in his or her duty to the *patient* if possible childhood sexual abuse is ignored.

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[8] See *Ramsey v Yavapi Family Advocacy Ctr*, 225 Ariz 132; 235 P3d 285 (Ariz App, 2010); *PT v Richard Hall Community Mental Health Care Ctr*, 364 NJ Super 561; 837 A2d 436 (2002); *Althaus v Cohen*, 562 Pa 547; 756 A2d 1166 (2000); *Paulson v Sternlof*, 2000 Okla Civ App 128; 15 P3d 981 (2000); *Doe v McKay*, 183 Ill 2d 272; 233 Ill Dec 310; 700 NE2d 1018 (1998); *Flanders v Cooper*, 1998 Me 28; 706 A2d 589 (1998); *Zamstein v Marvasti*, 240 Conn 549; 692 A2d 781 (1997); *Bird v WCW*, 868 SW2d 767 (Tex, 1994).

> On the other hand, if the heinous crime of (recently discovered) childhood sexual abuse really is the cause of the patient's disorders, then it is virtually inevitable that the alleged abuser will suffer "harm."
>
> Of course, it can be argued that no patient is well served by an *incorrect* "diagnosis" of childhood sexual abuse hitherto supposedly repressed in the memory: One might surmise that the legal solution is to use the law of negligence to impose discipline on the therapist to *get the diagnosis right*. But in the context of what must necessarily be an inquiry involving at least a potentially adversarial relationship, that so-called "solution" would be unrealistic in the extreme. [*Trear*, 69 Cal App 4th at 1351.]

The imposition of such a duty, the court in *Trear* stated, would expose the mental health professional to inherently conflicting incentives: a duty to a potential abuser that might interfere with and deprive the patient of the benefit of the professional's treatment. *Id*. at 1351-1352. The mental health professional would be left with no leeway to decide whether the patient really had been abused. *Id*. at 1352. This would in turn lead to the practice of defensive therapy:

> [G]iven the problem of unverifiability and the role that the possibility of early childhood sexual abuse has played in the history of psychotherapy (e.g., the early Freud), it would be an *undue* burden on therapists to force them into a position where they must be 100 percent accurate in every case. "Defensive" therapy practiced under the sword of liability if a therapist is wrong about a recovered memory can hardly serve the person to whom the therapist's duty unquestionably does run: the patient. And by the same token the consequences to the community of imposing a duty running to third parties means a disincentive to diagnose and remedy the serious social ill of child molestation by the very profession best suited to remedy it. [*Id*. at 1355-1356.]

We wholeheartedly agree that the detection and eradication of child sexual abuse is an important societal goal. See *Hungerford*, 143 NH at 212. However, we do not agree that recognizing a limited duty of care to third parties would unduly burden a mental health professional's ability to diagnose and treat his or her patients for trauma originating from childhood sexual abuse. The question here is not whether a mental health professional can in good faith diagnose his or her patient as having psychological issues that were caused by childhood sexual abuse. At issue is whether a mental health professional has the unfettered right to treat his or her patient using techniques that might cause the patient to develop a *false memory* of sexual abuse.

A carefully crafted duty would not implicate a mental health professional confronted with a patient who relates that he or she has been abused without having been subjected to therapies that may induce false memories. The duty would only apply when the mental health professional elects to treat his or her patient using techniques that may cause false memories—in which case, the mental health professional must take steps to limit that possibility. Moreover, the plaintiff would bear the burden of proving by a preponderance of the evidence that the patient's memories of childhood sexual abuse are actually false. Even when a mental health professional uses a therapeutic technique that actually causes a patient to have a false memory of sexual abuse, the duty could be further limited so that the mental health professional would not be liable if a reasonable mental health professional would have employed the technique under the circumstances, notwithstanding the apparent risk. Accordingly, with a properly limited duty, the mental health professional would have the full array of therapeutic techniques at his or her disposal, subject only to the duty to treat his or her

patient in a way that minimizes the risk that the patient will develop false memories of childhood sexual abuse. This standard is the same standard that already applies to mental health professionals: they must treat their patients with "competent and carefully considered professional judgment." *Hungerford*, 143 NH at 214 (quotation marks and citation omitted).

While the burden on a mental health professional can be minimized with a carefully crafted duty, the failure to recognize that duty might encourage the continued use of questionable therapeutic techniques on uninformed patients. This might continue despite the fact that there is plainly no social benefit to the creation of a false memory in a patient. A false memory of sexual abuse will not benefit the patient and may indeed cause him or her severe emotional harm. In addition, an accusation of child molestation arising from a false memory will likely sunder families, ruin marriages, and destroy lives:

> It is indisputable that "being labeled a child abuser [is] one of the most loathsome labels in society" and most often results in grave physical, emotional, professional, and personal ramifications. This is particularly so where a parent has been identified as the perpetrator. Even when such an accusation is proven to be false, it is unlikely that social stigma, damage to personal relationships, and emotional turmoil can be avoided. In fact, the harm caused by misdiagnosis often extends beyond the accused parent and devastates the entire family. Society also suffers because false accusations cast doubt on true claims of abuse, and thus undermine valuable efforts to identify and eradicate sexual abuse. [*Hungerford*, 143 NH at 212 (alteration in original).]

Finally, the mental health professional is in the best position to avoid the harm caused by the introduction of false memories. The mental health professional alone is

responsible for the methods used in treatment; the patient must trust that the mental health professional will pursue a course of treatment guided by competent professional judgment. Similarly, the persons most intimately connected with the patient—his or her parents—have a right to expect that a mental health professional will not cause the patient to have false memories of childhood sexual abuse. *Id*. at 214 ("Because the therapist is in the best position to avoid harm to the accused parent and is solely responsible for the treatment procedure, an accused parent should have the right to reasonably expect that a determination of sexual abuse, touching him or her as profoundly as it will, will be carefully made in those cases where the diagnosis is publicized.") (quotation marks and citation omitted). Accordingly, balancing the policy considerations also weighs in favor of recognizing that a mental health professional has a limited duty to his or her patient's parents; namely, a duty to ensure that the professional's treatment does not give rise to false memories of childhood sexual abuse.

D. THE LIMITED DUTY

Society has a strong interest in protecting children from sexual abuse by identifying and punishing the perpetrators of sexual abuse and treating the victims. But it also has long recognized the importance of protecting the fundamental bond between parent and child from unwarranted interference by third parties. See *In re Sanders*, 495 Mich 394, 409-410; 852 NW2d 524 (2014). The nature of the relationship between parent and child is such that a reasonable mental health professional who undertakes to treat a patient understands that the treatment of the patient might cause harm to members of the patient's family. This is

especially true in cases in which the mental health professional suspects that his or her patient has been subjected to sexual abuse as a child. Because the patient's parents are not third parties in the ordinary sense, the mental health professional has a significant—if limited—relationship with the patient's parents. Given the foreseeability and severity of the harm accompanying false memories of sexual abuse, this relationship warrants the imposition of a limited duty of care on mental health professionals to the patient's parents.

On appeal, Salmi maintains that, given the policy considerations at issue, whether to impose a duty should properly be left to the Legislature. We must respectfully disagree; this Court has an obligation to decide what the common-law rule is when the Legislature has not already spoken: "The law of negligence was created by common-law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law *absent* legislative directive." *Moning*, 400 Mich at 436. And the fact that the Legislature might exercise its constitutional authority to reach a different choice at a later date should not dissuade the Court from deciding the issue when properly before it. *Id*. at 435.

After having carefully considered the issue, we join those jurisdictions that recognize that a mental health professional owes a duty of care to his or her patient's parents arising from the treatment of the patient.[9] However, because the mental health professional has a limited relationship with his or her patient's parents, we conclude that the duty that the professional owes to

[9] See *Webb*, 121 Wash App 336; *Sawyer v Midelfort*, 227 Wis 2d 124; 595 NW2d 423 (1999); *Hungerford*, 143 NH 208; *Montoya v Bebensee*, 761 P2d 285 (Colo App, 1988).

the parents should likewise be limited. See, e.g., *Dyer*, 470 Mich at 53. The mental health professional must exercise reasonable professional judgment to limit the possibility that his or her treatment of the patient will give rise to false memories of childhood sexual abuse. If the mental health professional uses inappropriate treatment techniques or inappropriately applies otherwise proper techniques, causing the patient to have a false memory of sexual abuse by a parent, the mental health professional may be liable to the patient's parents for the harms occasioned by the false memories. In order to establish a claim for a breach of this duty, a plaintiff must show that the mental health professional breached the applicable standard of care in the selection or use of a therapeutic technique or combination of techniques, that the improper use of the therapy or therapies caused the patient to have false memories of childhood sexual abuse by the parent or parents, and that the existence of the false memories caused the parents' injuries.

E. RESPONSE TO THE CONCERNS OF THE DISSENT

We respectfully disagree with the concerns voiced by our colleague in the dissenting opinion. The dissent concludes that the issue of whether a duty should be recognized under the circumstances of this case is best left for the Legislature. The dissent relies heavily on *Henry v Dow Chem Co*, 473 Mich 63; 701 NW2d 684 (2005), in support of its proposition. However, *Henry* did not concern the issue of "duty." Rather, *Henry* addressed whether the Court should recognize an entirely new cause of action for medical monitoring premised, not on a present injury, but on the mere risk of disease that "*may* at some indefinite time in the future develop" as a result of the negligent release of dioxin.

Id. at 67. Furthermore, in refusing to recognize that claim, the Court in *Henry* emphasized that the Legislature had already acted to provide a remedy:

> The propriety of judicial deference to the legislative branch in expanding common-law causes of action is further underscored where, as here, the Legislature has already created a body of law that provides plaintiffs with a remedy. Were we to create an alternate remedy in such cases—one that may be pursued in lieu of the remedy selected by our Legislature—we would essentially be acting as a competing legislative body. And we would be doing so without the benefit of the many resources that inform legislative judgment. [*Id*. at 92.]

The Legislature has not created a body of law providing plaintiffs here with a remedy. Therefore, we are not acting as a competing legislative body by recognizing a limited duty. We also note that the complexities in *Henry* far surpass those involved in this case.

In *Moning*, our Supreme Court held that a "manufacturer, wholesaler and retailer of a manufactured product owe a legal obligation [i.e., a duty] of due care to a bystander affected by use of" a slingshot. *Moning*, 400 Mich at 432. The Court rejected the argument that by recognizing such a duty, it was performing a legislative task. *Id*. at 434-435. The Court observed:

> The law of negligence was created by common-law judges and, therefore, it is unavoidably the Court's responsibility to continue to develop or limit the development of that body of law *absent* legislative directive. The Legislature has not approved or disapproved the manufacture of slingshots and their marketing directly to children; the Court perforce must decide what the common-law rule shall be. [*Id*. at 436.]

The Legislature has not spoken on the issue confronting us today; there is an absence of legislative directive. Therefore, we must decide the issue of duty.

Our Supreme Court recently reiterated that it has not hesitated to examine and alter when necessary the common law in view of changes in societal institutions, mores, and problems, so as to determine which common-law rules best serve the citizens. *People v Woolfolk*, 497 Mich 23, 26; 857 NW2d 524 (2014). We also note that the factors set forth by the Supreme Court to be employed when determining whether a duty should be recognized do not include questioning whether we should defer to the Legislature, but instead require the Court to engage in assessing the competing policy considerations and the balancing of interests. See *Certified Question*, 479 Mich at 504-509. Moreover, a common-law duty of a psychiatrist to protect third persons from his or her patients under certain circumstances was recognized by this Court *before* the Legislature stepped in and enacted a comparable statutory duty under MCL 330.1946. *Davis v Lhim*, 124 Mich App 291, 298-301; 335 NW2d 481 (1983), rev'd on other grounds sub nom *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988). Accordingly, and by analogy, we see no reason to await, perhaps indefinitely, action by the Legislature when this Court has the competence and authority to determine the existence of a common-law duty.

We disagree with the dissent's assessment that "[i]t is far outside the expertise of this Court, or any future jury for that matter, to determine what is, or is not, an appropriate therapy method." We surmise and believe it indisputable that determinations of appropriate professional methods and standards are made regularly in the course of litigation throughout this state and the country, mainly through the aid of expert witnesses. Finally, the dissent's concerns regarding possible interference with the Legislature's enactment of mandatory reporting with respect to child abuse, MCL 722.623, are

misplaced, given the *limited* nature of the duty that we recognize today; therapists are not placed in an untenable position.

III. CONCLUSION

The trial court erred when it determined that Salmi did not owe K's parents a duty of care; Salmi had a limited duty to take reasonable steps to ensure that her treatment of K would not cause K to have false memories of childhood sexual abuse. Therefore, the trial court should not have dismissed Lale and Joan Roberts's claim on that basis.

Salmi argues on appeal that this Court should affirm for two alternative reasons. She states that this Court should affirm because Lale and Joan Roberts will be unable to secure the evidence necessary to prove their claim as a result of the privilege that protects the relationship between Salmi and K. This appeal involves the trial court's decision to dismiss under MCR 2.116(C)(8), which must be determined by examining the pleadings alone, see *Bailey*, 494 Mich at 603, and the parties have not yet had an adequate opportunity to conduct discovery and develop a factual record. Whether dismissal would be appropriate on that ground should be decided in the first instance by the trial court after a properly supported motion for summary disposition under MCR 2.116(C)(10). Accordingly, we decline to consider this alternative basis for affirming.

Salmi also argues that Lale and Joan Roberts's claim is essentially a claim for alienation of affection, which has been abolished under MCL 600.2901. As this Court has recognized, MCL 600.2901 broadly applies to all claims premised on the alienation of affections, not just the traditional situation involving the seduction of another person's spouse. *Nicholson v Han*, 12 Mich App

35, 39-40; 162 NW2d 313 (1968). However, Lale and Joan Roberts did not allege that Salmi acted with the intent to estrange K from them; they alleged that Salmi negligently treated K, causing her to have false memories of sexual abuse, which in turn caused them damage. Lale and Joan Roberts's claim does indirectly involve the loss of K's society and companionship, but it is not premised solely on that harm. If able to prove their claim, Lale and Joan Roberts would be entitled to damages for all the harms they suffered as a result of the false allegations. The fact that their claim involves the alienation of K's affections to some extent does not transform the essential character of the claim; as pleaded, the claim is for malpractice. Because they brought their claim to recover for their own injuries caused by Salmi's purported malpractice, Lale and Joan Roberts's claim is not barred by the statute abolishing claims for alienation of affection. See *Cotton v Kambly*, 101 Mich App 537, 539; 300 NW2d 627 (1980).

For the reasons stated, we reverse the trial court's decision to dismiss Lale and Joan Roberts's claim against Salmi on the ground that Salmi did not owe them any duty of care and remand for further proceedings consistent with this opinion.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. There being an important question of public policy, we order that the parties may not tax their costs. MCR 7.219(A).

MURPHY, C.J., concurred with M. J. KELLY, J.

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

While the majority lays out a strong policy argument in favor of the conclusion that we should create a duty

between a therapist and a patient's parents under the circumstances of this case, I nonetheless believe that represents a policy decision best left to the Legislature. In reaching this conclusion, I am guided by the wisdom expressed by the Supreme Court in *Henry v Dow Chem Co*.[1] While the majority correctly points out that the facts, as well as the specific question presented, are significantly different from those presented in our case, the more fundamental jurisprudential question is the same: when should a court exercise its authority to modify the common law and recognize a duty in tort law and when is that determination best left to the Legislature?

In *Henry*,[2] the Court noted the extensive fact-finding and resolution of conflicting policy concerns that would be required:

> Although we recognize that the common law is an instrument that may change as times and circumstances require, we decline plaintiffs' invitation to alter the common law of negligence liability to encompass a cause of action for medical monitoring. Recognition of a medical monitoring claim would involve extensive fact-finding and the weighing of numerous and conflicting policy concerns. We lack sufficient information to assess intelligently and fully the potential consequences of recognizing a medical monitoring claim.
>
> Equally important is that plaintiffs have asked this Court to effect a change in Michigan law that, in our view, ought to be made, if at all, by the Legislature. Indeed, the Legislature has already established policy in this arena by delegating the responsibility for dealing with health risks stemming from industrial pollution to the Michigan Department of Environmental Quality (MDEQ). As a matter of prudence, we defer in this case to the people's represen-

[1] 473 Mich 63; 701 NW2d 684 (2005).

[2] *Id*. at 68-69.

> tatives in the Legislature, who are better suited to undertake the complex task of balancing the competing societal interests at stake.

The same concerns, and the same need for prudence, exist in the instant case. Plaintiffs' claim is, in essence, that defendant relied on "junk science" as a therapy method, which resulted in the creation of a false memory. It is far outside the expertise of this Court, or any future jury for that matter, to determine what is, or is not, an appropriate therapy method. It would seem to me that this is a question better left to the Legislature to address, or for the Legislature to delegate to an appropriate regulatory body with the expertise to determine under what circumstances a therapy method may be used, if at all. Under these circumstances, a court could entertain a claim that a therapist used a prohibited method or used a method outside the circumstances approved for its use.

Moreover, this case presents a plethora of competing policy considerations. For example, as is often the case in the health professions, a particular approach to treatment or diagnosis presents potential benefits to the patients, but is often accompanied by some risk as well. And while we impose on the healthcare professional the obligation to assess those benefits and risks in recommending a particular treatment or test to the patient, what the majority would do here imposes another level of risk-benefit analysis to the professional: what are the risks and benefits to the patient's parents? While these risks and benefits may often be aligned between patient and parent, that can hardly be taken for granted by this Court. It is possible that adding this additional duty may well create a conflict in the exercising of professional judgment when meeting the duty owed to one may constitute a breach of a duty to the

other. I suggest that the determination whether such a conflict exists and, if so, how it should be resolved is best left to the Legislature's investigative and policy resolution functions.

This is particularly true given that this case represents an area that has not been ignored by the Legislature. The Legislature has addressed policy issues not irrelevant to this case. For example, the Legislature has created a policy of mandatory reporting of child abuse.[3] The Legislature has also addressed the question of privilege in these contexts.[4] The creation of a duty to the parents of a child being treated for abuse, or when abuse is discovered during the course of treatment for something else, may well be at odds with these legislative policy determinations. Prudence would dictate that the Legislature should determine how such a duty may, or may not, fit into the legislative policy determinations in this area.

The California Court of Appeal made a similar observation in *Trear v Sills*.[5] Under the heading "A Therapist Should Not Be Required to Serve Two Masters," the court[6] said as follows:

> Indeed, the law would hardly impose upon a *lawyer* the duty to refrain from negligently doing harm to his or her client's adversary. (E.g., *Norton v. Hines* (1975) 49 Cal. App. 3d 917, 921 [123 Cal. Rptr. 237].) An attorney is not even required to believe that his or her client would prevail in a court of law in order to avoid liability for malicious prosecution--a sin rather more grievous than mere negligence. If an attorney who cannot know the absolute truth of a client's position has no duty in negligence toward the

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[3] MCL 722.623.

[4] See MCL 330.1750.

[5] 69 Cal App 4th 1341; 82 Cal Rptr 2d 281 (1999).

[6] *Id*.

> client's adversary, how much less of a reason is there to impose a duty on a therapist, who must, by necessity, choose between possible harm to a patient if a recovered memory story is not believed and harm to a possible abuser if the patient's recovered memory story is believed. If therapists are to be put in what is so obviously an untenable position, it should be by the Legislature, not the legal fiat of appellate judges.

In the same vein, our Supreme Court in *Henry*[7] summed it up best:

> It may be desirable that our tort law should expand to allow a cause of action for medical monitoring. But what we as *individuals* prefer is not necessarily what we as *justices* ought to impose upon the people. Our decision in this case is driven not by a preference for one policy or another, but by our recognition that we must not impose our will upon the people in matters, such as this one, that require a delicate balancing of competing societal interests. In our representative democracy, it is the legislative branch that ought to chart the state's course through such murky waters.

I find the waters in this case to be equally murky, and I too think it best to leave it to the Legislature to chart a course on this issue.

For these reasons, I would affirm.

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[7] 473 Mich at 98.

NEW PRODUCTS CORPORATION v HARBOR SHORES BHBT LAND DEVELOPMENT, LLC

Docket No. 317309. Submitted November 5, 2014, at Grand Rapids. Decided December 23, 2014, at 9:00 a.m. Leave to appeal sought.

New Products Corporation brought an action in the Berrien Circuit Court against Harbor Shores BHBT Land Development, LLC (Harbor Shores Development), Harbor Shores Golf Course, LLC (Harbor Shores Golf), the city of Benton Harbor, Benton Charter Township, and others that might claim an interest in a disputed parcel of real property. New Products alleged that it was the rightful owner of the property and that Harbor Shores Development and Harbor Shores Golf wrongfully constructed and maintained a golf course on it. New Products asked the trial court, John M. Donahue, J., to permanently enjoin Harbor Shores Development, Harbor Shores Golf, and Benton Harbor from trespassing on the disputed parcel and to quiet title to the parcel in New Products. New Products also asked the court to declare that none of the defendants have any interest in the parcel and that the parcel falls within the jurisdiction of Benton Harbor. New Products demanded the right to have a jury decide all the issues. Defendants Harbor Shores Development and Horizon Bank filed a motion to limit the issues to be tried by a jury. They argued that the claims for quiet title, injunctive relief, and declaratory relief were equitable claims that should be decided by the court and that only the claim for damages from trespass should be submitted to a jury. The remaining defendants concurred with the motion. The court, relying on MCL 600.2932 and MCR 3.411, determined that, with the exception of the claim for trespass, all the claims were equitable and should be tried by the court. The Court of Appeals granted New Products' application for leave to appeal and for a stay pending resolution of the appeal in an unpublished order, entered August 9, 2013 (Docket No. 317309).

The Court of Appeals *held*:

1. Although equity and law claims have been merged in modern practice, courts must continue to recognize the distinction between law and equity to preserve the constitutional right to trial

by a jury in legal matters and trial by the court in equity matters. The constitutional guarantee that the right of trial by a jury shall remain, Const 1963, art 1, § 14, preserves the right to have a jury try all issues where the right existed before the adoption of the Constitution. The right is not limited to causes of action that existed before the adoption of the Constitution. The constitutional guarantee also applies to cases arising under statutes enacted after the adoption of the Constitution that are similar in character to cases in which the right to a jury trial existed before the Constitution was adopted.

2. There is no dispute that New Products' claim for trespass is an action at law that must be submitted to a jury. New Products' request for an injunction is a request for equitable relief that can only be granted by the trial court sitting in equity. Whether the factual disputes involved in the request for declaratory relief must be submitted to a jury or decided by the trial court depends on the nature of the claim underlying the request for declaratory relief. In this case, the request for declaratory relief involves determining the interests held by the parties to the land at issue.

3. The Legislature's decision to provide that actions brought to determine interests in land under MCL 600.2932 are equitable expresses the Legislature's intent to preclude a trial by jury for claims brought under the statute. The cause of action stated under the statute is broader than that provided by the common-law claim for ejectment and the equitable action to quiet title. The Legislature crafted the cause of action to broadly apply to every dispute involving a claimed interest in real property, whether arising under law or under equity.

4. A trial court sitting in equity must decide any claim to determine interests in land brought under MCL 600.2932 unless the plaintiff's claim, as pleaded, clearly fits within the narrow confines of a traditional common-law action for ejectment, or other action at law. If the plaintiff pleads a claim that on its face could only have been brought in a court of law under prior practice, the claim must be submitted to a jury. If the claim could plausibly have been decided by a court sitting in equity under prior practice, the claim must be decided by the court sitting in equity as required by MCL 600.2932(5).

5. New Products, in Count III of its complaint, specifically asked the trial court to grant it equitable relief and quiet title under MCL 600.2932. New Products specifically invoked equity and asked the trial court to resolve any and all claims under MCL 600.2932. Because New Products could not obtain equitable relief in an action for ejectment and could not obtain equitable relief

with regard to any claimed interests other than claims to legal title, its claim would have sounded in equity under prior practice. Consequently, New Products was not entitled to have a jury decide this claim. The trial court did not err when it determined that, as pleaded, New Products' claims, other than its trespass claim, sounded in equity and had to be decided by a court sitting in equity.

Affirmed and remanded.

LAW — EQUITY — SUITS TO DETERMINE INTERESTS IN LAND.

A trial court sitting in equity must decide any claim to determine interests in land brought under MCL 600.2932 unless the claim, as pleaded, clearly fits within the narrow confines of a traditional common-law action for ejectment or other action at law; if the plaintiff pleads a claim that on its face could only have been brought in a court of law under prior practice, the claim must be submitted to a jury; if the claim could plausibly have been decided by a court sitting in equity under prior practice, the claim must be decided by the court sitting in equity.

Demorest Law Firm, PLLC (by *Mark S. Demorest*, *Michael K. Hayes*, and *Melissa L. Demorest*), for New Products Corporation.

Dickinson Wright PLLC (by *K. Scott Hamilton*, *John G. Cameron, Jr.*, and *Christina K. McDonald*) for Harbor Shores Golf Course, LLC, Michigan Magnet Fund E, LLC, and Whirlpool Corporation.

Kreis, Enderle, Hudgins & Borsos, PC (by *Mark E. Kreter* and *James D. Lance*), for Harbor Shores BHBT Land Development, LLC, and Horizon Bank.

Plunkett Cooney (by *Michael S. Bogren*) for the city of Benton Harbor.

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

M. J. KELLY, P.J. In this real property dispute, plaintiff, New Products Corporation, appeals by leave

granted the trial court's order granting the motion by defendants Harbor Shores BHBT Land Development, LLC (Harbor Shores Development) and Horizon Bank asking the trial court to limit the issues to be tried by a jury. On appeal, the sole question is whether the trial court erred when it determined that Michigan's Constitution does not guarantee the right to a jury trial on each of New Products' claims. We conclude that the trial court did not err when it determined that New Products' claims, other than its trespass claim, were equitable and had to be decided by the trial court. Accordingly, we affirm the trial court's order and remand for further proceedings.

I. BASIC FACTS

In 1950, Elwood and Evelyn McDorman owned a 250-foot-wide parcel of land running south from Higman Park Road to the then existing channel of the Paw Paw River, which served as the boundary between the city of Benton Harbor (Benton Harbor) and Benton Charter Township (the Township). At around that time, engineers relocated the river approximately 500 feet north. To facilitate the relocation, Benton Harbor purchased a right of way over the McDormans' land for the new channel and transferred to them a 250-foot-wide parcel located to the south of their existing parcel. After that transfer, the McDormans owned a 250-foot-wide strip of land extending from Higman Park Road in the north to Klock Road in the south. The parcel in dispute is that part of the McDormans' land that was located in the Township before the relocation of the river, but which is now south of the relocated river.

New Products owns and operates a manufacturing facility in Benton Harbor along Klock Road. In 1955, New Products acquired the parcel that Benton Harbor

transferred to the McDormans as part of the project to relocate the river along with the disputed parcel. Benton Harbor taxed both parcels and New Products paid the taxes. However, the Township continued to tax the disputed parcel and listed the taxpayer of record as Frank Hoffman.

In 1970, the Township foreclosed against Hoffman's property for unpaid taxes. The state acquired the property, but transferred it back to Hoffman in 1973. Larry and Heidi Heald acquired the property from Hoffman and his co-owners in 1991. Harbor Shores Development then purchased the disputed parcel from the Healds in 2007.[1] As part of a large development project, Harbor Shores Development conveyed a portion of the disputed parcel to Benton Harbor and a portion to defendant Harbor Shores Golf Course, LLC (Harbor Shores Golf). Harbor Shores Golf then constructed a golf course, which included the disputed parcel.

In September 2011, New Products sued Harbor Shores Development, Harbor Shores Golf, Benton Harbor, the Township, and other parties that might claim an interest in the disputed parcel. New Products alleged that it was the rightful owner of the parcel and that Harbor Shores Development and Harbor Shores Golf wrongfully constructed and maintained a golf course on it. It asked the trial court to permanently enjoin Harbor Shores Development, Harbor Shores Golf, and Benton Harbor from trespassing on the disputed parcel and to quiet title to the parcel in New Products. Finally, New Products asked the trial court to declare that none of the defendants have any interest in the parcel and declare that it falls within Benton Harbor's jurisdiction.

[1] Harbor Shores Development and Harbor Shores Golf Course, LLC, later filed a third-party complaint against the Healds, but those claims are not at issue in this appeal.

New Products demanded the right to have a jury decide all the issues. New Products later amended its complaint, but the claims were substantially the same.

In April 2013, Harbor Shores Development and Horizon Bank filed a motion to limit the issues to be tried by a jury. They argued that New Products' claims for quiet title, injunctive relief, and declaratory relief were all equitable and should be decided by the court. They maintained that only New Products' claim for damages from trespass should be submitted to a jury, if necessary. The remaining defendants concurred with the motion.

The trial court held a hearing on the motion in June 2013. At the hearing, New Products maintained that its claims involving "ownership of the land and whether New Products was entitled to possession" were claims that a jury traditionally decided. It stated that its quiet title and declaratory relief claims were—in effect—common-law actions for ejectment, which under Michigan's Constitution must be decided by a jury. The trial court did not agree. The trial court noted that New Products never used the term "ejectment" in its complaint, but instead repeatedly referred to equity and equitable relief. Relying on the language in MCL 600.2932 and the related court rule, MCR 3.411, the court determined that, with the exception of New Products' claim for trespass, the claims were equitable and should be tried by the court.

The trial court entered an order granting the relief requested in the motion on July 12, 2012. This Court granted New Products' request for leave to appeal the order and for a stay pending resolution of the appeal in August 2013.[2]

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[2] *New Prod Corp v Harbor Shores BHBT Land Dev, LLC*, unpublished order of the Court of Appeals, entered August 9, 2013 (Docket No. 317309).

II. RIGHT TO JURY TRIAL IN TITLE DISPUTES

A. STANDARDS OF REVIEW

On appeal, New Products argues that Michigan's Constitution protects its right to have a jury decide any claim that would have been submitted to a jury before the merger of law and equity. Because its claims for quiet title and declaratory relief are in the nature of a claim for ejectment and because ejectment was a law claim that would have been decided by a jury before the merger, New Products maintains that the trial court erred when it determined that New Products was not entitled to have a jury decide the title dispute. This Court reviews de novo whether the trial court properly interpreted and applied this state's Constitution, statutes, and court rules. *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010); *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). This Court also reviews de novo whether the trial court properly applied this state's common law. *Bailey v Schaaf (On Remand)*, 304 Mich App 324, 343; 852 NW2d 180 (2014).

B. THE RIGHT TO A JURY TRIAL AFTER THE MERGER OF LAW AND EQUITY

Our Supreme Court has the power to "establish, modify, amend and simplify the practice and procedure in all courts" through general rules of practice and procedure. Const 1963, art 6, § 5. The Constitution also provides that the "distinctions between law and equity proceedings shall, as far as practicable, be abolished." *Id*. With the adoption of the General Court Rules of 1963, our Supreme Court eliminated the separate character of actions at law and actions in equity and established one form of action, which practice continues to this day. See *Livingston v Krown Chem Mfg, Inc*, 394

Mich 144, 149-150; 229 NW2d 793 (1975); MCR 2.101(A); MCR 2.111(A)(2)(b).

Although equity and law claims have been merged in modern practice, courts must continue to recognize the distinction between law and equity to preserve the "constitutional rights to trial by jury in legal matters and trial by court in equity matters." *Madugula v Taub*, 496 Mich 685, 705; 853 NW2d 75 (2014) (quotation marks, citations, and emphasis omitted). Courts must recognize these distinctions because our Constitution provides that the "right of trial by jury shall remain . . . ." Const 1963, art 1, § 14; see also MCR 2.508(A). This guarantee preserves the right to have a jury try all issues where the right existed before the adoption of the Constitution. *Madugula*, 496 Mich at 704; *Anzaldua v Band*, 216 Mich App 561, 564; 550 NW2d 544 (1996) ("The 'shall remain' language indicates that this provision retains the right to a jury trial as it existed at the time the constitution was adopted and neither restricts nor enlarges it."). But the right is not limited to causes of action that existed before the adoption of the Constitution: "[T]he constitutional guarantee also applies 'to cases arising under statutes enacted subsequent to adoption of the Constitution which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted.' " *Madugula*, 496 Mich at 704-705, quoting *Conservation Dep't v Brown*, 335 Mich 343, 346; 55 NW2d 859 (1952). And, although the Legislature can confer a right to trial by jury, *Madugula*, 496 Mich at 696, it cannot abrogate an existing right by reclassifying what was traditionally a law claim as an equitable claim:

> The constitutional guaranty applied to cases arising under statutes enacted subsequent to adoption of the Constitu-

> tion, which are similar in character to cases in which the right to jury trial existed before the Constitution was adopted. The right to trial by jury, in cases where it existed prior to adoption of the Constitution, may not be defeated by enactment of a statute providing for trial on the chancery side of issues formerly triable in proceedings at law. Where there are questions of fact to be determined and the issues are such that at common law a right to jury trial existed, that right cannot be destroyed by statutory change of the form of action or creation of summary proceedings to dispose of such issues without jury, in the absence of conduct amounting to waiver. [*Brown*, 335 Mich at 346-347 (citations omitted).]

In the present case, there is no dispute that New Products' claim for trespass is an action at law that must be submitted to a jury. See *Hendershott v Moore*, 188 Mich 364, 366; 154 NW 17 (1915) (stating that a simple trespass involves a claim at law rather than equity). Moreover, New Products' request for an injunction is not itself a cause of action, but rather is a request for equitable relief that can only be granted by the trial court sitting in equity. See *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008) ("It is well settled that an injunction is an equitable remedy, not an independent cause of action."). And whether the factual disputes involved in New Products' request for declaratory relief must be submitted to a jury or decided by the trial court depends on the nature of the claim underlying the request for declaratory relief. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 481 n 7; 776 NW2d 398 (2009). In this case, the claim underlying New Products' request for declaratory relief involves determining the interests held by the parties to the land at issue. As such, the primary issue on appeal is whether the trial court erred when it determined that New Products' claim under MCL 600.2932 must be decided by the trial court sitting in equity.

With MCL 600.2932, the Legislature created a new statutory cause of action described as an action to determine interests in land. The Legislature provided that it should take effect in January 1963 as part of the Revised Judicature Act, 1961 PA 236. Because this statutory cause of action came into effect after the adoption of the Constitution, this Court must determine whether claims brought under it are to be tried by a jury or by the trial court. *Madugula*, 496 Mich at 704-705. In making this determination, we first examine the statutory scheme to see if the Legislature intended to provide a statutory right to have a jury decide claims brought under MCL 600.2932. *Id*. at 696.

The Legislature did not explicitly provide a right to have a jury decide a claim brought under MCL 600.2932. Instead, it provided that actions brought "under this section are equitable in nature." MCL 600.2932(5). Equitable actions were historically tried by the court sitting in equity rather than by a jury. *Madugula*, 496 Mich at 701. Accordingly, the Legislature's decision to provide that actions brought under MCL 600.2932 are equitable must be understood to express the Legislature's intent to preclude trial by jury for claims brought under that statute. See *Wolfenden v Burke*, 69 Mich App 394, 399; 245 NW2d 61 (1976) ("The only apparent purpose, therefore, of the statutory provision that actions under [MCL 600.2932] are equitable in nature is to establish that there is no right to trial by jury in this type of action.").

Having determined that the Legislature intended causes of action brought under MCL 600.2932 to be decided by the trial court sitting in equity, this Court

must next examine whether the Legislature's decision contravenes Const 1963, art 1, § 14. *Madugula*, 496 Mich at 704. In order to make that determination, we examine the statutory cause of action to see if it is similar "in character to cases in which the right to jury trial existed before the Constitution was adopted." *Id*. at 705 (quotation marks and citation omitted). The statutory cause of action must be examined as a whole and compared to causes of action that preexisted the adoption of the Constitution to determine whether it would have been treated as a claim at law or in equity:

> We focus on "the nature of the controversy between the parties . . . ." If the nature of the controversy would have been considered legal at the time the 1963 Constitution was adopted, the right to a jury trial is preserved. However, if the nature of the controversy would have been considered equitable, then it must be heard before a court of equity.
>
> In making this determination, we consider not only the nature of the underlying claim, but also the relief that the claimant seeks. Indeed, equity will not take "jurisdiction of cases where a suitor has a full, complete, and adequate remedy at law, unless it is shown that there is some feature of the case peculiarly within the province of a court of equity." Accordingly, we must consider the relief sought as part of the nature of the claim to determine whether the claim would have been denominated equitable or legal at the time the 1963 Constitution was adopted. [*Id*. at 705-706 (citations omitted).]

Accordingly, in order to determine how the cause of action provided under MCL 600.2932 would have been treated before the adoption of the Constitution of 1963, it is necessary to examine the legal and equitable actions that were available to settle disputes over interests in real property.

C. CLAIMS INVOLVING INTERESTS IN REAL PROPERTY

Traditionally, Michigan courts recognized two distinct methods for determining interests in or title to real property: an action at law for ejectment and an action in equity to quiet title. See *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 711; 742 NW2d 399 (2007).

An action for ejectment vindicated a plaintiff's right to possess real property. *Brown v Eckel*, 259 Mich 551, 553; 244 NW 160 (1932). Because an action for ejectment was premised on wrongful dispossession, a plaintiff could not bring the action if he or she was in actual possession of the property at issue. *Beaver v Zwonack*, 250 Mich 96, 97-99; 229 NW 598 (1930) (stating that the plaintiff could not have brought an action at law for ejectment because he was in possession at the time; instead, he properly brought an action in equity to settle the boundary dispute and enjoin his neighbor from removing the fence). For these reasons, the only remedies available to a plaintiff who prevailed in an action for ejectment were "damages for the trespass and a writ of possession." *Hawkins v Dillman*, 268 Mich 483, 489; 256 NW 492 (1934). Nevertheless, actions for ejectment frequently involved competing claims of ownership, which the finder of fact would have to resolve in order to determine which party had the right to possess the property. See *White v Ziegenhardt*, 339 Mich 195, 197; 63 NW2d 625 (1954) (stating that the remedies available in an action for ejectment are broader than those involved in a summary proceeding to recover possession; an ejectment suit involves both title to the lands and the right of possession); *Brown*, 259 Mich at 552-554. Accordingly, an action for ejectment was a proper action for resolving disputes concerning who held paramount legal title to property and the right to immediate possession.

An action for ejectment was an action at law and, absent a waiver of the right, had to be submitted to a jury. See *Featherston v Pontiac Twp*, 310 Mich 129, 133; 16 NW2d 689 (1944). The right to have a jury determine actions in ejectment ensured that a person in peaceable possession of property would not be disseized "except by a judgment of his peers . . . ." *Kamman v Detroit*, 252 Mich 498, 500; 233 NW 393 (1930). Because an action for ejectment was an action at law, a defendant could not assert equitable defenses to defeat the suit. *Lundberg v Wolbrink*, 331 Mich 596, 598-599; 50 NW2d 168 (1951). Rather, the action for ejectment concerned parties who each claimed legal title to the property—as opposed to an equitable interest in the property. See *Gilford v Watkins*, 342 Mich 632, 637-638; 70 NW2d 695 (1955) (refusing to recognize the equities involved between the parties because the plaintiff sued in an action for ejectment and a vendee's title on a land contract is equitable and courts will not take cognizance of equitable title in an action at law); *Carpenter v Dennison*, 208 Mich 441, 445-446; 175 NW 419 (1919). Similarly, a plaintiff could not use an action for ejectment to challenge the validity of the defendant's legal title on equitable grounds; in such a case, the plaintiff had to sue in equity to invalidate the defendant's title. See *Moran v Moran*, 106 Mich 8, 12-13; 63 NW 989 (1895).

An action to quiet title, by contrast, did not normally involve competing claims to legal title or the right to possession, but instead addressed interests that might impair a party's ability to convey legal title. See *Tray v Whitney*, 35 Mich App 529, 533; 192 NW2d 628 (1971) (stating that an action to quiet title is an action whereby "one in possession of property seeks to clear title against the world"). It was intended to reach persons who were not in possession and, therefore, who could not be compelled to defend their rights at law.

Featherston, 310 Mich at 133. A plaintiff claiming legal title could not assert a claim to quiet title against a party in actual possession of the property; instead, the plaintiff normally had to proceed at law in an action for ejectment. *White*, 339 Mich at 197; *Featherston*, 310 Mich at 132-133. Further, the parties to a claim involving equity did not have a right to a jury trial; instead, such claims had to be decided by the trial court sitting in equity: "Long ago, we recognized that '[t]he right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury.' " *Madugula*, 496 Mich at 705, quoting *Brown v Buck*, 75 Mich 274, 284; 42 NW 827 (1889).

A court sitting in equity could, however, decide a claim that properly invoked equity jurisdiction even though the request for relief included a request for possession. *Whipple v Farrar*, 3 Mich 436, 446 (1855) (rejecting the notion that a plaintiff must sue in equity to invalidate another's title and then sue at law in order to eject the defendant from the property and stating that a court sitting in equity has the authority to grant full relief, which includes the power to decree the surrender of possession). Similarly, a court sitting in equity could under some circumstances order the payment of money damages. *Madugula*, 496 Mich at 713-714. Finally, although potentially involving independent causes of action, a court sitting in equity also had jurisdiction to take actions that might indirectly affect interests in title; for example, a court sitting in equity could void, rescind, or reform deeds and create or modify interests in land under various equitable theories and could consider the full panoply of equitable defenses to a claim asserting an interest in land. See *Lundberg*, 331 Mich at 598-599; *Moran*, 106 Mich at 12-13; *Eastbrook Homes, Inc v Dep't of Treasury*, 296 Mich App 336, 352; 820 NW2d 242 (2012) ("A court of

equity may impose and foreclose an equitable mortgage on a parcel of real property when no valid mortgage exists but some sort of lien is required by the facts and circumstances of the parties' relationship.") (quotation marks and citation omitted); *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371-372; 761 NW2d 353 (2008) ("Michigan courts sitting in equity have long had the power to reform an instrument that does not express the true intent of the parties as a result of fraud, mistake, accident, or surprise.").

With this background in mind, we shall now examine the nature of the cause of action provided under MCL 600.2932.

D. THE STATUTORY ACTION TO DETERMINE INTERESTS IN LAND

MCL 600.2932 represents the Legislature's effort to provide a simplified cause of action to address every possible competing interest in real property. To that end, the Legislature provided that a plaintiff who claims any interest—without regard to the nature of the interest—in a particular piece of real property may sue any other person with a competing claim to the property: "Any person . . . who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff . . . ." MCL 600.2932(1). Notably, the statute does not limit the interests that may be resolved to those arising at law; indeed, a plaintiff may sue even when relying on an interest that arises in equity and may sue another person on the mere possibility that the other person "might" make a claim that is inconsistent with the plaintiff's claimed interest. *Id*. Similarly, the Legis-

lature provided that the plaintiff may sue "whether he [or she] is in possession of the land in question or not" and may do so without regard to "whether the defendant is in possession of the land or not." *Id*. Thus, a plaintiff in possession is not precluded from suing to confirm his or her title and right of possession, as would be the case in an action for ejectment. *Beaver*, 250 Mich at 98-99.

The Legislature provided some limits on the right to sue under MCL 600.2932. If the person claiming an interest seeks to recover land under a mortgage, that person may not sue under MCL 600.2932(1) until the mortgagee's title has become absolute. MCL 600.2932(2). Likewise, a person seeking to recover possession of land sold under a land contract cannot use MCL 600.2932(1) to recover possession if that person would be able to obtain relief using the summary proceedings available under MCL 600.5714. See MCL 600.2932(2).

The Legislature did not address the full extent of the relief available in a claim under MCL 600.2932. However, because the cause of action involves competing interests in real property, MCL 600.2932(1), it is evident that the circuit court has the authority to resolve every dispute involving competing interests in land. See also MCR 3.411 (stating the rules governing actions to determine interests in land under the statute and providing for specific types of relief).[3] Moreover, the

[3] On appeal, defendants argue that the court rules support an inference that there is no right to a jury trial on claims brought under MCL 600.2932. Specifically, they note that MCR 3.411(D)(1) provides that the court shall make the necessary findings to resolve the disputed rights. This argument is inapposite; the determination at issue depends on the nature of the controversy encompassed within the cause of action and whether such controversies were a matter for the jury or a court sitting in equity under prior practice. *Madugula*, 496 Mich at 705-706.

Legislature provided that, should the plaintiff establish title to the disputed land, the court shall order the defendant or defendants to release all claims. MCL 600.2932(3). The Legislature also provided the court with authority to issue writs to permit the recovery of possession: "In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated." *Id*.

The cause of action stated under MCL 600.2932 is broader than that provided by the common-law claim for ejectment and the equitable action to quiet title—even when those causes of action are considered together; a careful reading shows that it includes *any claim*, whether actual or potential and without regard to the legal or equitable theory underlying the claim, as long as the claim concerns competing interests in land. See *Adams*, 276 Mich App at 714-721 (recognizing that a claim under MCL 600.2932 includes all actions to decide interests in land, even when the claim involves fraud or rescission, and holding that the 15-year period of limitations applies to such an action rather than the shorter periods applicable to typical claims for fraud and rescission). The only limits are those applicable to interests arising under a mortgage or to recover on a land contract. See MCL 600.2932(2). It is, therefore, not accurate to state that the Legislature merely combined the common-law claim for ejectment and the equitable action to quiet title with the enactment of MCL 600.2932(1). See *Tray*, 35 Mich App at 534 (stating that MCL 600.2932 combined "the two actions of ejectment and quiet title, and created a single action to determine interests in land"). Instead, the Legislature crafted the cause of action to broadly apply to every dispute involving a claimed interest in real property, whether arising under law or under equity.

E. APPLYING THE LAW

It is true that a court sitting in equity would not assert jurisdiction over a disputed interest in real property if the plaintiff could obtain full, complete, and adequate relief through an action for ejectment. See *Hawkins*, 268 Mich at 488; see also *Marshall v Ullmann*, 335 Mich 66, 73; 55 NW2d 731 (1952) (stating that equity will not take jurisdiction where a suitor has full, complete, and adequate remedy at law unless it is shown that some feature of the case is peculiarly within the province of a court of equity). But the common-law action for ejectment applied to a narrow set of circumstances. A plaintiff could not bring an action for ejectment if he or she was in actual possession of the land, *Beaver*, 250 Mich at 98-99, if the claim involved equitable interests, *Gilford*, 342 Mich at 637-638, or depended on the modification of legal title through equitable doctrines, *Lundberg*, 331 Mich at 598-599; *Moran*, 106 Mich at 12-13, or, in some instances, where the interest at issue involved less than full legal title, *McMorran Milling Co v Pere Marquette R Co*, 210 Mich 381, 393; 178 NW 274 (1920) (noting that an action for ejectment will not normally lie to recover possession of an easement). By contrast, once equity properly acquired jurisdiction to hear a claim involving an interest in real property, equity had jurisdiction to consider the totality of the circumstances and grant appropriate relief, which might include a determination of legal title, damages, and possession. See *Hawkins*, 268 Mich at 488 ("Of course, where a court of chancery has jurisdiction of the subject matter on an independent ground, it may determine the question of title although an action of ejectment would likewise be open."). That is, while an action for

ejectment was limited to a narrow set of circumstances and never permitted the grant of equitable relief, an equitable action—such as one to quiet title—could apply to a broad array of factual patterns and included both equitable relief and relief traditionally thought of as legal. *Whipple*, 3 Mich at 446; see also *Madugula*, 496 Mich at 713-714; *Anzaldua*, 216 Mich App at 576 n 4 ("[T]he mere fact that damages are sought is not determinative of the legal or equitable nature of the action, because damages may be recovered in purely equitable proceedings."). Hence, under prior practice, a plaintiff's claim involving title might be brought in either a court of law or a court sitting in equity, depending on the manner in which the plaintiff pleaded his or her claim. If the plaintiff was out of possession and his or her claim involved only questions of legal title and the right of possession, the claim was one for ejectment to be decided by a jury. See *Dolph v Norton*, 158 Mich 417, 425; 123 NW 13 (1909) ("It is the settled law of this State that a bill to quiet title brought by one not in possession against one who is, cannot take the place of an action of ejectment, where the only questions at stake are the legal title and legal right of possession."). If, however, the plaintiff properly invoked equity, that claim would be decided by a court sitting in equity even though it might also involve a determination of title and the right to possession. See *Hawkins*, 268 Mich at 488. Because a court sitting in equity could resolve competing claims to title and possession, the fact that a plaintiff's claim involves title or possession does not by itself implicate Const 1963, art 1, § 14.

To the extent that the Legislature included the common-law action for ejectment within the cause of action described under MCL 600.2932, our Constitution

protects the right to have a jury decide that claim.[4] See Const 1963, art 1, § 14; see also *Wolfenden*, 69 Mich App at 399 (stating in dicta that, if a cause of action brought under MCL 600.2932 would have been an action in ejectment under prior practice, "the right to trial by jury is preserved because ejectment was a civil action at law triable by jury at the time the constitutional guarantee of the right to jury trial was adopted"). But our Constitution also protects the right to have a court decide claims that would have fallen under equity's jurisdiction under prior practice.[5] *Madugula*, 496 Mich at 705. And, because this Court must uphold the constitutionality of a statute to the greatest extent possible, we must uphold the Legislature's directive to have claims brought under MCL 600.2932 decided by a court sitting in equity, if at all possible. See *Avis Rent-A-Car Sys, Inc v Romulus*, 400 Mich 337, 348-349; 254 NW2d 555 (1977); *Tabor v Cook*, 15 Mich 322, 325 (1867) ("The courts will always construe a legislative act so as to give it effect as law, if it be practicable to do

[4] With the enactment of MCL 600.2932, the Legislature did not expressly abrogate the common-law action for ejectment. Although one might conclude that the Legislature implicitly abrogated the common-law action for ejectment, courts will not lightly presume the abrogation or modification of the common law. See *Dawe v Dr. Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010). Because the issue is not now before us, we need not determine whether the common-law cause of action for ejectment remains even after the enactment of MCL 600.2932.

[5] Under prior practice a defendant who had an equitable defense to a claim for ejectment had the right to stay the action for ejectment while he or she asked a court sitting in equity to convert his or her equitable claim into legal title that could be asserted as a defense to the action for ejectment. See, e.g., *Johnston v Loose*, 201 Mich 259, 263-264; 167 NW 1021 (1918) (opinion by FELLOWS, J.); *id*. at 261 (opinion by BIRD, J.). Accordingly, in modern practice, when a defendant asserts an equitable defense that could give rise to legal title, the trial court would have to hear and decide that issue before the action for ejectment could be submitted to a jury.

so."). In order to give effect to MCL 600.2932(5) while still preserving the right to a jury guaranteed by Const 1963, art 1, § 14, we hold that a trial court sitting in equity must decide any claim to determine interests in land brought under MCL 600.2932 unless the plaintiff's claim—as pleaded—clearly fits within the narrow confines of a traditional common-law action for ejectment, or other action at law. That is, if the plaintiff pleads a claim that on its face could only have been brought in a court of law under prior practice, the claim must be submitted to a jury; if, however, the claim could plausibly have been decided by a court sitting in equity under prior practice, the claim must be decided by the court sitting in equity as required by MCL 600.2932(5).

Under Count III of its amended complaint, New Products specifically asked the trial court to grant it equitable relief and "quiet title" under MCL 600.2932 against every defendant "regarding the Property." It also alleged that it never conveyed any "right, title, or interest" in the property to any of the defendants and none of the defendants had any right to enter or use the property "by lease, license, or otherwise." It then asked the trial court to enter judgment in its favor determining that New Products "holds full legal and equitable title to the entire Property in fee simple absolute, free and clear of any and all claims, liens or encumbrances . . . and quieting title to the Property for ever in New Products . . . ." New Products also asked the trial court to "grant such other relief as is equitable . . . ."

As is evident from the pleadings, New Products specifically invoked equity and asked the trial court to resolve any and all claims that any of the defendants might have in the real property at issue under MCL 600.2932. Because New Products could not obtain equitable relief in an action for ejectment and could not

obtain relief with regard to any claimed interests other than claims to legal title, its claim would have sounded in equity under prior practice. Consequently, New Products was not entitled to have a jury decide this claim.

III. CONCLUSION

The trial court did not err when it determined that—as pleaded—New Products' claims, other than its trespass claim, sounded in equity and had to be decided by the court sitting in equity. Accordingly, we affirm the trial court's order.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Because this appeal involved an issue of importance to the bench and bar, we order that none of the parties may tax their costs. MCR 7.219(A).

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

In re KANJIA

Docket No. 320055. Submitted October 8, 2014, at Grand Rapids. Decided December 30, 2014, at 9:00 a.m.

The Kent County Prosecuting Attorney, on behalf of the Department of Human Services (DHS), filed a petition in the Kent Circuit Court, Family Division, seeking the removal of S Kanjia, a minor, from the home of his mother, who was not living with the putative father at the time. The petition alleged, as statutory grounds for the taking of jurisdiction, that a parent of the child had neglected or refused to provide proper care and support and that the home environment had become unfit for the child because of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent. At a preliminary hearing at which the putative father (hereafter "respondent") was not present, the court, G. Patrick Hillary, J., found probable cause to determine that one or more of the allegations in the petition was true and authorized the filing of the petition. The court then placed the child with the DHS, which placed the child in a licensed foster home. An adjudication hearing was held. Respondent was present at the hearing. The mother pleaded no contest to the allegations in the petition. The trial court found that grounds for jurisdiction over the child existed on the basis of the mother's plea and independent evidence substantiating the allegations in the petition. The DHS did not pursue any allegations against respondent at the adjudication trial and respondent did not enter a plea. Consequently, respondent was never adjudicated as unfit by the trial court. Although the trial court's order of adjudication did not name respondent as a respondent, he was subjected to the court's dispositional authority and ordered to comply with a parent-agency treatment plan. Ultimately, his parental rights were terminated after the court authorized the filing of a supplemental petition to terminate his parental rights. Respondent filed an appeal as of right. His appointed counsel filed a motion in the Court of Appeals seeking to withdraw his representation, asserting that he could not identify any appellate issues of legal merit, thereby rendering the appeal wholly frivolous. The Court of Appeals entered an unpublished order that denied the motion to withdraw as

counsel and ordered counsel to address two issues on appeal: whether the termination order must be vacated in light of the opinion of the Supreme Court in *In re Sanders*, 495 Mich 394 (2014), and whether respondent's appointed trial counsel was ineffective because she had no contact with respondent for 10 months after her appointment and only met with respondent after the trial court had authorized the filing of the supplemental petition to terminate respondent's parental rights.

The Court of Appeals *held*:

1. *Sanders*, which was decided while this case was pending on appeal, held that use of the one-parent doctrine, under which a trial court was not required to adjudicate more than one parent and could establish jurisdiction over a child by virtue of the adjudication of only one parent, after which it had the authority to subject the other, unadjudicated parent to its dispositional authority, violated procedural due process. Under *Sanders*, respondent's due process rights were violated.

2. A respondent may raise a *Sanders* challenge to a trial court's adjudication in a child protective proceeding on direct appeal from the trial court's order terminating the respondent's parental rights. Such an appeal does not constitute an impermissible collateral attack on the trial court's adjudication, but, rather, a direct attack on the court's exercise of its dispositional authority.

3. *Sanders* is to be given full retroactive effect to apply to all cases pending on direct appeal at the time it was decided. The trial court's order terminating respondent's parental rights is vacated and the case is remanded to the trial court for further proceedings consistent with this opinion and *Sanders*.

Vacated and remanded.

1. PARENT AND CHILD — DUE PROCESS — PARENTAL RIGHTS — ADJUDICATION OF PARENT'S UNFITNESS.

Due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship; a parent must be individually adjudicated as unfit before the state can interfere with the parent's parental rights; due process principles prevent a trial court from entering dispositional orders, including orders terminating parental rights, against an unadjudicated parent; an unadjudicated parent's appeal of an order terminating the parent's parental rights does not constitute an impermissible collateral attack on the trial court's adjudication, but rather, a direct attack on the court's exercise of its dispositional authority.

2. PARENT AND CHILD — APPELLATE COURT DECISIONS — RETROACTIVE APPLICATION.

The opinion of the Supreme Court in *In re Sanders*, 495 Mich 394 (2014), in which the Court held unconstitutional the one-parent doctrine, under which a trial court was not required to adjudicate more than one parent and could establish jurisdiction over a child by virtue of the adjudication of only one parent and then subject the other, unadjudicated parent to its dispositional authority, is to be afforded full retroactive effect to apply to all cases pending on direct appeal when *Sanders* was decided.

John P. Pyrski for respondent father.

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

SHAPIRO, J. Respondent father appeals as of right the trial court order terminating his parental rights to the minor child under MCL 712A.19b(3)(c)(*ii*) (failure to rectify other conditions causing the child to come within the court's jurisdiction) and (3)(g) (failure to provide proper care and custody). For the reasons set forth in this opinion, we vacate the order of termination and remand for further proceedings.

Following the entry of the termination order, respondent filed an appeal as of right. On April 23, 2014, respondent's appointed appellate counsel filed a motion in this Court to allow him to withdraw his representation pursuant to MCR 7.211(C)(5), asserting that he could not identify any appellate issues of legal merit, thereby rendering the appeal wholly frivolous.[1] This Court denied the motion and ordered counsel to address two issues on appeal: (1) whether the termination order must be vacated in light of our Supreme Court's opinion in *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014), and (2) whether respondent's appointed trial counsel

[1] See *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967).

was ineffective because counsel had no contact with respondent for 10 months after her appointment and only met with respondent after the trial court had authorized the filing of a supplemental petition to terminate respondent's parental rights.[2]

I. APPLICATION OF *SANDERS*

Respondent argues that, in light of *Sanders*, his adjudication in these child protective proceedings violated his procedural due process rights.[3]

A. ADJUDICATION IN CHILD PROTECTIVE PROCEEDINGS AND THE ONE-PARENT DOCTRINE

"In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase." *Sanders*, 495 Mich at 404. "Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase." *Id*. Jurisdiction is established pursuant to MCL 712A.2(b). *Id*. "When the petition contains allegations of abuse or neglect against a parent, MCL 712A.2(b)(1), and those allegations are proved by a plea or [by a preponderance of the evidence] at the [adjudication] trial, the adjudicated parent is unfit." *Id*. at 405. "While the adjudicative phase is only the first step in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id*. at 405-406 (quotation marks and citation omitted).

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[2] *In re Kanjia Minor*, unpublished order of the Court of Appeals, entered June 18, 2014 (Docket No. 320055).

[3] "Whether child protective proceedings complied with a parent's right to procedural due process presents a question of constitutional law, which we review de novo." *Sanders*, 495 Mich at 403-404.

Child protective proceedings are initiated by the state's filing a petition in the family division of the circuit court requesting the court to take jurisdiction over a child. *Id*. at 405. A respondent-parent may admit the allegations in the petition, plead no contest to the allegations, or demand a trial. *Id*. In any event, to take jurisdiction over a child, the trial court must find that the petitioner has proved by a preponderance of the evidence one or more statutory grounds for the taking of jurisdiction alleged in the petition. *Id*. If the court takes jurisdiction over the child, the proceedings enter the dispositional phase, wherein the trial court has broad authority to effectuate orders aimed at protecting the welfare of the child, including ordering the parent to comply with the Department of Human Services (DHS) case service plan and ordering the DHS to file a petition for the termination of parental rights if progress is not being made. *Id*. at 406-407.

Before *Sanders* was decided, under the one-parent doctrine, a trial court was not required to adjudicate more than one parent; instead, a trial court could establish jurisdiction over a minor child by virtue of the adjudication of only one parent, after which it had authority to subject the other, unadjudicated parent to its dispositional authority. *Id*. at 407. See *In re CR*, 250 Mich App 185, 202-203; 646 NW2d 506 (2002), overruled by *In re Sanders*, 495 Mich 394, 422 (2014).

> In simpler terms, the one-parent doctrine permits courts to obtain jurisdiction over a child on the basis of the adjudication of either parent and then proceed to the dispositional phase with respect to both parents. The doctrine thus eliminates the petitioner's obligation to prove that the unadjudicated parent is unfit before that parent is subject to the dispositional authority of the court. [*Sanders*, 495 Mich at 408.]

However, in *Sanders*, our Supreme Court held that the one-parent doctrine violated procedural due process. *Id*. at 422. Recognizing that the right of a parent to make decisions concerning the care, custody, and control of his or her children is fundamental, *id*. at 409, and that due process "demands that minimal procedural protections be afforded an individual before the state can burden a fundamental right," *id*. at 410, our Supreme Court held that a parent must be individually adjudicated as unfit before the state can interfere with his or her parental rights, *id*. at 415, 422. Because the one-parent doctrine allowed a trial court to interfere with the constitutionally protected parent-child relationship without any finding that the parent was unfit, it violated the Due Process Clause of the Fourteenth Amendment. *Id*. at 422. To comply with due process requirements, the state is required to do the following:

> When the state is concerned that *neither* parent should be entrusted with the care and custody of their children, the state has the authority—and the responsibility—to protect the children's safety and well-being by seeking an adjudication against *both* parents. In contrast, when the state seeks only to deprive *one* parent of the right to care, custody and control, the state is only required to adjudicate *that* parent. [*Id*. at 421-422.]

B. RESPONDENT'S CASE

The child protective proceedings in respondent's case began on November 29, 2011, when the DHS filed a petition requesting the removal of the child from the home of his mother,[4] who was not living with respondent at the time. The petition alleged, as grounds for the taking of jurisdiction, that a parent of the child had neglected or refused to provide proper care and support,

[4] The child's mother is not party to this appeal.

MCL 712A.2(b)(1), and that the home environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, had become unfit for the children, MCL 712A.2(b)(2).[5] At the December 1, 2011 preliminary hearing, at which respondent was not present, the trial court found probable cause to determine that one or more of the allegations in the petition was true and authorized the filing of the petition. The court then placed the child with the DHS, which subsequently placed the child in a licensed foster home.

An adjudication hearing was held on January 20, 2012. Respondent was present at the hearing. The child's mother pleaded no contest to the allegations in the petition. The trial court found that grounds for jurisdiction over the child pursuant to MCL 712A.2(b) existed on the basis of the mother's plea and independent evidence substantiating the allegations in the petition.

The trial court in this case clearly applied the one-parent doctrine when subjecting respondent to its dispositional authority, and consequently, under *Sanders*, respondent's due process rights were violated when his parental rights were terminated. The original petition focused on the mother and contained only two allegations concerning respondent—that he was the putative father of the child and that the mother had previously been involved with the DHS because of domestic violence with respondent. The mother entered a no-contest plea to the allegations against her, thereby allowing the trial court to assume jurisdiction over the child. However, petitioner did not pursue any allegations against respondent at the adjudication trial, and respondent did not enter a plea. Consequently, he was

[5] The particular facts of the petition are irrelevant to this issue on appeal.

never adjudicated as unfit by the trial court. In fact, the trial court's February 13, 2012 order of adjudication did not even name respondent himself as a respondent. Nonetheless, respondent was subjected to the trial court's dispositional authority; he was ordered to comply with a parent-agency treatment plan and ultimately his parental rights were terminated. Thus, under *Sanders*, respondent's due process rights were violated.

Despite the merit of respondent's claim, whether he is entitled to relief depends on two questions: first, whether he may now raise the issue for the first time on direct appeal from the order of termination, and, second, whether *Sanders* applies retroactively to his case, which was pending on appeal at the time *Sanders* was decided. We answer these questions in the affirmative.

C. COLLATERAL ATTACK

It is a well-settled rule that "[o]rdinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights" unless "termination occur[ed] at the initial disposition as a result of a request for termination contained in the original, or amended, petition[.]" *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008). Instead, "[m]atters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision[.]" *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005). See also *In re Hatcher*, 443 Mich 426, 437; 505 NW2d 834 (1993) (whether a trial court properly exercised jurisdiction over a child can only be challenged on direct appeal). We have continually invoked this rule to preclude collateral challenges to a trial court's exercise of jurisdiction, including in cases—before *Sanders* was decided—where the challenge related to the trial court's use of the one-parent doctrine. See, e.g., *In re Wangler*,

305 Mich App 438, 445-448; 853 NW2d 402 (2014), application for leave to appeal held in abeyance in unpublished order, entered September 19, 2014 (Docket No. 149537), see *In re Wangler*, 852 NW2d 903 (Mich, 2014) (holding that the respondent's challenge to the trial court's exercise of jurisdiction—based on the fact that a written plea was allegedly invalid and the fact that the respondent was not present at the adjudication trial—was collateral, and therefore precluded); *In re Curran*, unpublished opinion per curiam of the Court of Appeals, issued May 15, 2014 (Docket No. 317470), p 9 (finding that the respondent mother had waived any challenge to the trial court's adjudication, "ostensibly based on the one-parent doctrine," by failing to directly appeal the jurisdictional decision); *In re Coleman*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2013 (Docket No. 313610), p 5 (declining to examine the substance of the respondent's argument that the trial court "misapplied the one-parent doctrine to obtain jurisdiction" because the argument "constitute[d] a collateral attack regarding adjudication-jurisdiction matters").[6]

Assuming that a *Sanders* challenge constitutes an attack on jurisdiction, respondent is generally precluded from now raising the issue because it would constitute a collateral attack: his rights were terminated following a supplemental petition and he did not appeal the initial order of adjudication. However, no case has yet decided whether the rule prohibiting collateral attack of a trial court's exercise of jurisdiction

[6] "Although unpublished opinions of this Court are not binding precedent, they may, however, be considered instructive or persuasive." *Paris Meadows, LLC, v Kentwood*, 287 Mich App 136, 145 n 3; 783 NW2d 133 (2010) (citations omitted).

applies to cases in which the rule announced in *Sanders* applies. In the only case decided since *Sanders* to acknowledge this issue, a panel of this Court expressly declined to address "whether a *Sanders*-related challenge may be raised as a collateral attack on appeal." *In re Cochran*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 2014 (Docket No. 319813), p 5 n 5.[7] Notably, this Court in *Cochran*, *id*., implicitly concluded that a *Sanders* challenge to a trial court's order of termination constitutes a collateral attack on the trial court's exercise of jurisdiction, and other opinions from this Court have expressly declared that a challenge to the trial court's use of the one-parent doctrine constitutes a collateral attack on jurisdiction. See *Curran*, unpub op at 9; *Coleman*, unpub op at 5.

Nonetheless, we conclude that a *Sanders* challenge, raised for the first time on direct appeal from an order of termination, does not constitute a collateral attack on jurisdiction, but rather a direct attack on the trial court's exercise of its dispositional authority. In *Sanders*, our Supreme Court distinguished between adjudicated and unadjudicated parents; it held that "due process requires a specific adjudication of a parent's unfitness before the state can infringe the constitutionally protected parent-child relationship." *Sanders*, 495 Mich at 422. In other words, the Court in *Sanders* held

[7] In *Cochran*, this Court first noted the general rule prohibiting collateral attacks on a trial court's exercise of jurisdiction, after which it concluded that the respondent was "barred from attacking the trial court's adjudication." *Cochran*, unpub op at 5 n 5. However, this Court nevertheless addressed the issue because the respondent's appeal was pending at the time *Sanders* was decided. *Id*. It did so, however, without deciding whether, in other cases, a *Sanders* challenge could be raised on collateral attack from an order of termination. *Id*. This Court ultimately found the respondent's argument to be without merit. *Id*. at 4-5.

that due process protections prevent a trial court from entering dispositional orders—including orders of termination—against an unadjudicated respondent. Under this reasoning, a respondent who raises a *Sanders* challenge on direct appeal from a trial court's order of termination is not collaterally attacking the trial court's exercise of jurisdiction, but rather is directly challenging the trial court's decision to terminate the respondent's parental rights without first having afforded the respondent sufficient due process, i.e., an adjudication hearing at which the respondent's fitness as a parent was decided.

It also noteworthy that, in finding the one-parent doctrine unconstitutional, the Court in *Sanders* recognized the inherent problem in requiring an unadjudicated parent to directly appeal an order of adjudication: "as a nonparty to those proceedings, it is difficult to see how an unadjudicated parent could have standing to appeal any unfavorable ruling." *Id*. at 419. That is the case here. Because respondent was never adjudicated, and in fact was not named as a respondent in the trial court's order of adjudication, it is difficult to see how he could have appealed that order of adjudication. *Id*. The hurdles to a direct appeal from the order of adjudication are further demonstrated by the fact that, in the instant case, respondent did not have an attorney at the time the trial court entered its order of adjudication. Thus, it would have been exceedingly difficult, if not effectively impossible, for respondent to have challenged the trial court's exercise of jurisdiction in a direct appeal from the order of adjudication.

Accordingly, we find that the general rule prohibiting a respondent from collaterally attacking a trial court adjudication on direct appeal from a termination order does not apply to cases in which a respondent raises a

Sanders challenge to the adjudication. Therefore, we hold that respondent is entitled to raise his *Sanders* challenge on direct appeal from the trial court's order of termination, notwithstanding the fact that he never appealed the initial order of adjudication.

D. RETROACTIVITY

Because we conclude that respondent is entitled to raise his *Sanders* challenge on direct appeal from the trial court's order of termination, we must next decide whether the holding in *Sanders* applies to his case.[8] *Sanders* was not decided until June 2, 2014, approximately six months after the trial court in this case terminated respondent's parental rights. However, respondent's appeal was pending before this Court at the time *Sanders* was decided.

" 'The general rule in Michigan is that appellate court decisions are to be given full retroactivity unless limited retroactivity is justified.' " *Jahner v Dep't of Corrections*, 197 Mich App 111, 113; 495 NW2d 168 (1992), quoting *Fetz Engineering Co v Ecco Sys, Inc*, 188 Mich App 362, 371; 471 NW2d 85 (1991). " '[L]imited retroactivity' is the favored approach 'when overruling prior law.' " *Jahner*, 197 Mich App at 114, quoting *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1994). Moreover, "[p]rospective application is warranted when overruling *settled* precedent or deciding cases of first impression whose result was not clearly foreshadowed." *Jahner*, 197 Mich App at 114 (quotation marks and citation omitted). See *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997) ("[W]here injustice might result from full retroactivity, this Court has adopted a

[8] The retroactivity of a court's ruling presents of a question of law reviewed de novo. *People v Maxson*, 482 Mich 385, 387; 759 NW2d 817 (2008).

more flexible approach, giving holdings limited retroactive or prospective effect."). Decisions that are given limited retroactivity apply to pending cases where the issue was raised and preserved. *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 95 n 7; 795 NW2d 205 (2010); *Jahner*, 197 Mich App at 115-116. Decisions that are applied only prospectively "do not apply to cases still open on direct review" or to "the parties in the cases in which the rules are declared." *McNeel*, 289 Mich App at 94. "In deciding whether to give retroactive application, '[t]here are three key factors' to be considered: '(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.' " *Jahner*, 197 Mich App at 114, quoting *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971).

After reviewing these factors and the parties' arguments concerning their application, we conclude that full retroactivity of the rule in *Sanders* is justified. With regard to the first factor, the purpose of the rule articulated in *Sanders* is to safeguard the due process rights of parents who have not been found unfit and to assure that the state shows that a child's parent is unfit before interfering with parental rights. Proper protection of those rights constitutes a substantial and weighty purpose. Indeed, as stated in *Sanders*, the importance of such a purpose "cannot be overstated," *Sanders*, 495 Mich at 415, since the adjudication trial "is the only fact-finding phase regarding parental fitness" and no other phase of the proceedings adequately prevents the possible erroneous deprivation of the fundamental right, *id*. at 417-418. Turning to the second factor, reliance on the old rule, *Jahner*, 197 Mich App at 114, the one-parent doctrine has been relied on in numerous cases since *CR* was decided and, until *Sanders* was decided, the DHS and the trial court would have

been justified in relying on *CR* and the one-parent doctrine. On its face, therefore, this factor weighs against retroactivity, because it would burden the state with additional procedures in cases where it had justifiably relied on the one-parent doctrine. However, petitioner DHS, the state agency with the authority and duty to act in these matters, takes the view that application of *Sanders* to *all* cases still pending on direct appeal would not constitute an administrative burden, at least not one sufficient to outweigh the interests of justice and fairness provided by retroactive application. Moreover, the *Sanders* decision rested, at least in part, on the due process guarantee of the United States Constitution and, where federal law is concerned, full retroactivity is the rule. *Harper v Virginia Dep't of Taxation*, 509 US 86, 97; 113 S Ct 2510; 125 L Ed 2d 74 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

Finally, with respect to the third factor, the effect on the administration of justice, *Jahner*, 197 Mich App at 114, "[t]here is no doubt that requiring adjudication of each parent will increase the burden on the state in many cases." *Sanders*, 495 Mich at 417. However, requiring adjudication of each parent before subjecting that parent to the trial court's dispositional authority also "significantly reduce[s] any risk of a parent's erroneous deprivation of the parent's right to parent his or her children," *id*., a risk which outweighs any burden imposed upon the state, *id*. at 418-419. Accordingly, we hold that *Sanders* should be given full retro-

active effect to all cases pending on direct appeal at the time it was decided.

II. CONCLUSION

We hold that a respondent may raise a *Sanders* challenge to a trial court's adjudication in a child protective proceeding on direct appeal from the trial court's order terminating that respondent's parental rights. That is, such an appeal does not constitute an impermissible collateral attack on the trial court's adjudication. We further hold that *Sanders* is to be given full retroactive effect to all cases pending on direct appeal at the time it was decided. Accordingly, we vacate the lower court's order terminating respondent's parental rights and remand for further proceedings consistent with this opinion and *Sanders*.[9] We do not retain jurisdiction.

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

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[9] In light of our holding, we need not consider respondent's other arguments on appeal.

CITY OF HOLLAND v CONSUMERS ENERGY COMPANY

CITY OF COLDWATER v CONSUMERS ENERGY COMPANY

Docket Nos. 315541 and 320181. Submitted October 7, 2014, at Grand Rapids. Decided January 6, 2015, at 9:00 a.m. Leave to appeal sought.

The city of Holland brought a declaratory judgment action in the Ottawa Circuit Court against Consumers Energy Company, contending that, as a municipal utility, it had the right to supply electric service to property in Park Township owned by the nonprofit corporation Benjamin's Hope. Consumers moved for summary disposition under MCR 2.116(C)(8) and (10), asserting that it had the right to supply electric service to the property because it had previously supplied electric service to the customer. Holland requested summary disposition under MCR 2.116(I)(2). The court, Edward R. Post, J., granted summary disposition in favor of Holland. Consumers appealed in Docket No. 315541.

The city of Coldwater brought a declaratory judgment action in the Branch Circuit Court against Consumers, contending that it had the right to provide electric service to property it had purchased in Coldwater Township. Consumers moved for summary disposition under MCR 2.116(C)(10), asserting that it had the right to supply electric service to the property because it had previously supplied electric service to the property. Coldwater also moved for summary disposition under MCR 2.116(C)(10), arguing that there was no existing electric service when it purchased the property. The court, Patrick W. O'Grady, J., granted summary disposition in favor of Coldwater. Consumers appealed in Docket No. 320181. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

1. Under MCL 124.3(2), a municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility without the consent of the serving utility. The statutory language is in the present tense and, therefore, does not prohibit a municipal utility from providing electric service to customers who received electric service from

another utility at a previous point in time. The word "customer" is not defined in MCL 124.3, but it is defined in a related statute, MCL 460.10y, which indicates that "customer" means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or other entity taking service. In Docket No. 315541, Consumers had provided temporary electric service to a construction trailer on the property in question, but when the contractor removed its trailer from the property, the contractor requested that Consumers remove its facilities from the property, which Consumers did. Benjamin's Hope subsequently requested that Holland provide permanent electric service to the new buildings it had constructed on the property. Because Consumers never provided service to the new buildings, those buildings were not existing customers of Consumers, and Holland was free to provide electric service to them without violating MCL 124.3. In Docket No. 320181, Coldwater sought to provide electric service to property it purchased in July 2011, which, at the time of purchase, contained a vacant pole barn with a service drop owned by Consumers, although the building did not have electric service provided to it at the time of purchase. Coldwater intended to remove the pole barn and build new facilities. Because there were no buildings presently receiving electric service from Consumers when Coldwater acquired the property, Coldwater could provide electric service to the property without violating MCL 124.3(2).

2. Under Public Service Commission (PSC) Rule 411, Mich Admin Code, R 460.3411, the first utility serving a customer pursuant to the PSC's rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load. But under MCL 460.6(1), the PSC does not have jurisdiction to regulate municipal utilities, rendering Rule 411 inapplicable to municipal utilities unless the utility elects to operate in compliance with Rule 411 in accordance with MCL 460.10y(3). Rule 411, therefore, was not controlling in these cases. *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27 (2011)—which held that the right of first entitlement in Rule 411 extends to the entire premises initially served and is not extinguished when a customer is no longer present on the premises—was distinguishable from the facts at issue in both Docket No. 315541 and Docket No. 320181.

Trial court judgments affirmed in both Docket No. 315541 and Docket No. 320181.

SHAPIRO, J., concurring, stated that although the language interpreting Rule 411 in *Great Wolf Lodge* was sweeping, no matter the substantive interpretation of Rule 411, it cannot be enforced against a party that does not fall within the jurisdiction of the PSC. And the Legislature has not given the PSC jurisdiction over municipal power providers. With regard to MCL 124.3(2), the statute refers to customers already receiving the service, a construction that speaks to the present. Therefore, when a customer is not receiving service, it may contract with the provider of its choice even if there was some other entity that was the first utility to serve the premises.

1. PUBLIC UTILITIES — ELECTRIC SERVICE — MUNICIPAL CORPORATIONS — EXISTING CUSTOMERS.

Under MCL 124.3(2), a municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility without the consent of the serving utility; the statutory language does not prohibit a municipal utility from providing electric service to customers who received electric service from another utility at a previous point in time; as used in the statute, the word "customer" means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or other entity taking service.

2. PUBLIC UTILITIES — ELECTRIC SERVICE — JURISDICTION OF THE PUBLIC SERVICE COMMISSION — MUNICIPAL UTILITIES.

Under Public Service Commission (PSC) Rule 411, Mich Admin Code, R 460.3411, the first utility serving a customer pursuant to the PSC's rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load; Rule 411 is inapplicable to municipal utilities unless the utility elects to operate in compliance with it under MCL 460.10y(3).

Docket No. 315541:

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) and *Cunningham Dalman, PC* (by *Andrew J. Mulder* and *Randall S. Schipper*), for the city of Holland.

Michael G. Wilson for Consumers Energy Company.

Amici Curiae:

Dykema Gossett PLLC (by *Albert Ernst* and *Shaun Johnson*) for the Michigan Electric Cooperative Association.

Bruce R. Maters and *Michael Solo, Jr.*, for DTE Energy.

James A. Ault for the Michigan Electric and Gas Association.

Clark Hill PLC (by *Roderick S. Coy*) for the Association of Businesses Advocating Tariff Equity.

Docket No. 320181:

Dickinson Wright PLLC (by *Peter H. Ellsworth* and *Jeffery V. Stuckey*) for the city of Coldwater.

Michael G. Wilson for Consumers Energy Company.

Amici Curiae:

Clark Hill PLC (by *Roderick S. Coy*) for the Association of Businesses Advocating Tariff Equity.

Jim B. Weeks for the Michigan Municipal Electric Association.

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

PER CURIAM. In Docket No. 315541, Consumers Energy Company appeals as of right the trial court's grant of summary disposition in favor of the city of Holland in a declaratory judgment action concerning Holland's right to provide electric service to a customer. In Docket No. 320181, Consumers Energy Company appeals as of right the trial court's grant of summary disposition in

favor of the city of Coldwater in a declaratory judgment action concerning Coldwater's right to provide electric service to property that Coldwater recently purchased. We affirm in both cases.

DOCKET NO. 315541

Holland filed this declaratory action contending that under the Michigan Constitution and by statute, a municipal utility such as itself can supply light and power within and outside its corporate boundaries to any customer not already receiving the service from another utility. According to Holland, it obtained irrevocable franchises for the delivery of electric power to townships adjoining it, including Park Township. A nonprofit corporation, Benjamin's Hope, owned vacant property in Park Township. The property did not have electric service. Benjamin's Hope sought to build a nonprofit, tax-exempt structure on its property and sought to have Holland provide the electric power service for the building. According to Holland, defendant Consumers Energy Company has asserted that it has the exclusive right to serve the property, having served the property some years prior, and that Benjamin's Hope must receive electric power from Consumers pursuant to relevant statutory law. Holland, therefore, sought a declaration that it was authorized to provide electric service to Benjamin's Hope under the Michigan Constitution, its franchise agreement, statute, and the Holland city charter.

In lieu of an answer, Consumers filed a motion for summary disposition premised on MCR 2.116(C)(8) and (10). Consumers claimed that it had previously provided electric service to the customer at issue and was currently doing so and provided an affidavit and copies

of electric bills to support its position. Consumers further asserted that the case of *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27; 799 NW2d 155 (2011), already addressed, in Consumers' favor, most of the issues raised in this case. Finally, Consumers asserted that the Michigan Public Service Commission (PSC) had primary jurisdiction of the claims in this case and that PSC Rule 411[1] required holding in Consumers' favor.

Holland responded that the only service Consumers provided was temporary and requested by a contractor hired by Benjamin's Hope. Consumers provided the electric service to a construction trailer temporarily located on the property. When the contractor removed its trailer from the property, it also requested that Consumers remove its facilities from the property, which Consumers did. Benjamin's Hope thereafter requested quotes from both Consumers and Holland for the provision of permanent electric services, which both provided. Benjamin's Hope chose Holland, as it was allowed to do, given that Consumers was not providing service to the property at that time. Holland further asserted that the PSC does not have jurisdiction over this matter and PSC Rule 411 does not apply to municipal utilities. Holland requested summary disposition in its own favor under MCR 2.116(I)(2).

The trial court granted Holland's motion for summary disposition and denied Consumers' motion. The trial court opined that Holland is not subject to regulation by the PSC and that the customer that Holland began providing power to in April 2012 was not, and had not been, a Consumers' customer, it having never before received power from another utility.

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[1] Mich Admin Code, R 460.3411.

On appeal, Consumers first argues that Holland's provision of electric service to Benjamin's Hope clearly violated MCL 124.3 because Consumers had been providing service to the property at issue when Holland entered into a contract with Benjamin's Hope to provide service to the property. Consumers contends that the trial court's erroneous conclusion otherwise was based on the adoption of an illogical and incorrect definition of the word "customer" for purposes of MCL 124.3. We disagree.

"Issues of statutory interpretation are questions of law that this Court reviews de novo." *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 515; 821 NW2d 117 (2012). We also review de novo a trial court's decision on a motion for summary disposition. See *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the plaintiff's complaint by examining the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). All well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). The motion should be granted only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id*. at 487.

Summary disposition may be granted under MCR 2.116(C)(10) if the documentary evidence submitted by the parties, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 164; 645 NW2d 643 (2002). Summary disposition may be granted

in favor of an opposing party under MCR 2.116(I)(2) if there is no genuine issue of material fact and the opposing party is entitled to judgment as a matter of law. *1300 LaFayette East Coop, Inc v Savoy*, 284 Mich App 522, 525; 773 NW2d 57 (2009).

Benjamin's Hope acquired the property at issue in 2011. Neither party disputes that at the time of acquisition, there were no buildings on the property. Apparently, the prior owner demolished all buildings that had been on the property sometime in 2007. Accordingly, no electric power was being supplied to the parcel at the time of purchase, and for some time prior. Benjamin's Hope retained a contractor, CL Construction, to begin building what was to become a campus for autistic children. According to both parties, around August 2011, CL Construction requested that Consumers provide single-phase electric service to a construction trailer that CL Construction had temporarily placed on the property. CL Construction requested that Consumers send the electric bills to Benjamin's Hope. The first bill, sent to Benjamin's Hope, reflects that the service was for "Electric Temporary Service Overhead." Consumers provided electric service to the construction trailer from September 2011, until April 13, 2012, when CL Construction removed its trailer from the property and requested that Consumers remove its facilities from the property. There is no dispute that Consumers mailed the monthly bills to Benjamin's Hope or that the bills were paid, although there is no indication in the record as to who paid the bills.

In January 2012, Benjamin's Hope requested quotes from both Consumers and Holland for permanent electric service. On the basis of the prices quoted, Benjamin's Hope signed a contract with Holland on January 25, 2012, for electric service. Consumers asserts

that this was a violation of MCL 124.3(2) as it was providing electric service to the premises at the time Holland entered into a contract with Benjamin's Hope.

MCL 124.3 provides:

> (1) A municipal corporation may contract for adequate consideration with a person or another municipal corporation to furnish to property outside the municipal corporate limits any lawful municipal service that it is furnishing to property within the municipal corporate limits. A municipal corporation may sell and deliver heat, power, and light in amounts as determined by the governing body of the utility, except for both of the following:
>
> (a) Electric delivery service is limited to the area of any city, village, or township that was contiguous to the municipal corporation as of June 20, 1974, and to the area of any other city, village, or township being served by the municipal utility as of June 20, 1974.
>
> (b) Retail sales of electric generation service are limited to the area of any city, village, or township that was contiguous to the municipal corporation as of June 20, 1974, and to the area of any other city, village, or township being served by the municipal utility as of June 20, 1974, unless the municipal corporation is in compliance with section 10y(4) of 1939 PA 3, MCL 460.10y.
>
> (2) A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing.
>
> (3) As used in this section:
>
> (a) "Electric delivery service" has the same meaning as "delivery service" under section 10y of 1939 PA 3, MCL 460.10y.
>
> (b) "Electric generation service" means the sale of electric power and related ancillary services.
>
> (c) "Person" means an individual, partnership, association, governmental entity, or other legal entity.

As indicated in MCL 124.3(2), Holland may not provide electric delivery service to customers "already receiving the service from another utility unless the serving utility consents in writing." Notably, the phrase "already receiving" is in the present tense. "Already" is defined in *The American Heritage Dictionary of the English Language* (5th ed) as "[b]y this or a specified time[.]"[2] "Receiving" is the present participle of the verb "receive," which, in turn, is defined by the same source as "[t]o take or acquire (something given or offered); get or be given[.]" *Id*. When construing a statute, the Court's primary obligation is to ascertain the legislative intent that may be reasonably inferred from the words expressed in the statute. *Chandler v Muskegon Co*, 467 Mich 315, 319; 652 NW2d 224 (2002). 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 the Legislature fails to define a term, the intent may be determined by examining the language of the statute itself. *People v Stone*, 463 Mich 558, 563; 621 NW2d 702 (2001).

Plain statutory language must be enforced as written. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). This includes, without reservation, the Legislature's choice of tense. For example, in addressing a family court's subject matter jurisdiction, a panel of this Court concluded that the present tense language in MCL 712A.2(b)(2), granting jurisdiction over a juvenile "[w]hose home or environment, by reason of neglect, cruelty, drunkenness, criminality, or depravity . . . is an unfit place for the juvenile

[2] "We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning." *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007).

to live in," requires the trial court to examine the child's situation at the time the petition for jurisdiction was filed. *In re MU*, 264 Mich App 270, 278-279; 690 NW2d 495 (2004).

In this case, employing the dictionary definitions and the relevant tense to the terms used in the statute, MCL 124.3(2) prohibits Holland from providing electric delivery service to customers presently taking or getting the service from another utility. The statute does not, however, prohibit Holland from providing electric delivery service to customers who "have received" or "had received" the service from another utility at some point in time.

MCL 124.3(3)(a) refers us to MCL 460.10y for the definition of "electric delivery service." MCL 460.10y(12)(a), in turn, defines "delivery service" as "the providing of electric transmission or distribution to a retail customer." As indicated by Consumers, neither MCL 124.3 nor MCL 460.10y(12)(a) makes a distinction between temporary or permanent electric service. Therefore, whether Consumers was providing temporary or permanent service is irrelevant. However, under the definition of "delivery service," referred to in MCL 124.3 (and as defined in MCL 460.10y(12)(a)), Consumers must have been providing the service "to a retail customer." This is an essential phrase, which leads us to our primary issue.

"Customer" is not defined in MCL 124.3. But, "customer" *is* defined in MCL 460.10y(2). MCL 460.10y(2) states, "For purposes of this subsection, 'customer' means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service." "Building" is not defined in this statute, nor is "facilities." We therefore look to the dictionary for guidance.

We consult a lay dictionary when defining common words or phrases. *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007).

"Building" is defined in *The American Heritage Dictionary of the English Language* (5th ed) as "[s]omething that is built, as for human habitation; a structure." "Facilities" is the plural of "facility," which is defined as something "designed to serve a particular function[.]" *Id*. Under the relevant definitions, the building or facility that Consumers was serving, i.e., the customer, was the CL Construction trailer. The buildings and facilities for which Benjamin's Hope contracted with Holland for electric service were not "customers" of Consumers. Consumers never provided service to those buildings, given that they did not previously exist, and Holland was free to provide electric service to them without violating MCL 124.3.

The limiting language, "[f]or purposes of this subsection . . . ." in MCL 460.10y(2) is acknowledged. However, because MCL 124.3(3)(a) refers us back to MCL 460.10y for the definition of "delivery service," and the definition of "delivery service" in MCL 460.10y(12)(a) contains the word "customer," it would make sense to look within that same statute for the definition of that essential word. The doctrine of *noscitur a sociis*, i.e., that "a word or phrase is given meaning by its context or setting," assists us in reaching this conclusion. See *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 420-421; 662 NW2d 710 (2003) (quotation marks and citation omitted). In addition, statutes that relate to the same matter are considered to be *in pari materia*. *People v Perryman*, 432 Mich 235, 240; 439 NW2d 243 (1989). "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). "The general rule of *in pari materia* requires courts to examine a statute in the context of related statutes." *People v Lewis*, 302 Mich App 338, 343; 839 NW2d 37 (2013).

While Consumers argues that "customer" cannot be defined as an inanimate object, Consumers fails to recognize the fact that its own arguments are based on the same premise. Consumers' principal argument is that because it first served the property—that being the land itself—Consumers could claim the property (an inanimate object) as its customer forever, no matter who owned it at any point in time thereafter and whether any buildings stood upon it and were receiving electric service.

The trial court appropriately determined that Holland could provide electric service to Benjamin's Hope without violating MCL 124.3.

Consumers next contends that the trial court erred by allowing Holland to provide electric service to Benjamin's Hope because Consumers was entitled to serve the property under PSC Rule 411(11) and *Great Wolf Lodge*, 489 Mich 27. We again disagree.

MCL 460.6(1) provides, in relevant part:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in [MCL 460.6d] and except as otherwise restricted by law.

"Although broadly stated, § 6(1) is not a grant of specific power. It is merely an outline of the PSC's jurisdiction." *Attorney General v Pub Serv Comm*, 189 Mich App 138, 145; 472 NW2d 53 (1991). Under the express language of § 6(1), the PSC has no jurisdiction over a municipally owned utility such as Holland. Lacking such jurisdic-

tion, it cannot impose its rules upon Holland. That PSC rules are not intended to apply to municipally owned utilities is borne out by the language in the rules themselves.

Rule 411 [Mich Admin Code, R 460.3411.] provides, in relevant part:

> (1) As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.
>
> * * *
>
> (2) Existing customers shall not transfer from one utility to another.
>
> * * *
>
> (11) The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load.

According to Consumers, because it supplied electric service to the Benjamin's Hope property in 2004, 2006, 2008 and then again in 2011 to the CL Construction trailer (which qualified as a "customer"), it was the first utility serving the customer and thus was entitled to serve the entire electric load on the premises of that customer. However, PSC Rule 102(l)[3] defines "utility" as "an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission." Again, a municipal utility does not, by statute, operate under the jurisdiction of the commission. Therefore, a municipal utility such as Holland would never, under Rule 102, meet the definition of

[3] Mich Admin Code, R 460.3102(l).

utility and would, accordingly, never be the first utility to serve a customer. Clearly, Rule 411 was not intended to apply to municipal utilities such as Holland.

The Michigan Legislature also specifically stated as much, giving municipally owned utilities the *option* of complying with Rule 411 if the utility provides service to customers outside its municipal boundaries (as in this case). MCL 460.10y(3) provides:

> With respect to any electric utility regarding delivery service to customers located outside of the municipal boundaries of the municipality that owns the utility, a governing body of a municipally owned utility may elect to operate in compliance with R 460.3411 of the Michigan administrative code, as in effect on June 5, 2000. However, compliance with R 460.3411(13) of the Michigan administrative code is not required for the municipally owned utility.

Given this statute, Rule 411 is inapplicable.

Consumers contends that the holding in *Great Wolf Lodge*, 489 Mich 27, requires a different conclusion. However, that case is factually distinguishable. First and foremost, the plaintiff, Great Wolf Lodge of Traverse City, contracted with Cherryland Electric Cooperative to provide electric service to property where it intended to build a water park resort. Cherryland had provided electric service to the farm buildings located on the property when the plaintiff purchased it. While the plaintiff sought bids from competing electric companies and later indicated that Cherryland coerced it into contracting for electric services to avoid construction delay, the fact remains that the plaintiff did enter into a three-year contract to have Cherryland provide electric services to its newly constructed buildings. A rate dispute followed, two years after which the plaintiff sought a declaratory ruling that it could receive electric

service from whatever provider it chose. In this case, by contrast, Benjamin's Hope did not enter into a contract with Consumers for electric service, receive the service for two years, and then seek to switch providers. Instead, a contractor, CL Construction, contacted Consumers and requested temporary service to its construction trailer located on the Benjamin's Hope property during construction. True, the contractor asked that the bills be sent to Benjamin's Hope, but there is no evidence that there was a contract for services or that the trailer was anything other than a temporary structure owned by a third party.

In addition, *Great Wolf Lodge* was an appeal of a PSC decision. A party aggrieved by a PSC order must show by clear and satisfactory evidence that the PSC's order is unlawful or unreasonable. MCL 462.26(8). A final order of the PSC must be authorized by law and, if a hearing is required, supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *In re Mich Consol Gas Co Application*, 304 Mich App 155, 164; 850 NW2d 569 (2014). The Court's review in *Great Wolf Lodge* was thus deferential and limited and it reinstated the PSC decision, whereas our review here is de novo. We are not so limited.

Next, the Court in *Great Wolf Lodge*, 489 Mich at 39, stated:

> Rule 411(11) grants the utility first serving buildings or facilities on an undivided piece of real property the right to serve the entire electric load on that property. The right attaches at the moment the first utility serves "a customer" and applies to the entire "premises" on which those buildings and facilities sit. The later destruction of all buildings on the property or division of the property by a

> public road, street, or alley does not extinguish or otherwise limit the right. This conclusion is consistent with the rule's purpose of avoiding unnecessary duplication of electrical facilities.

In this case, it could be argued that there would be no unnecessary duplication of electric facilities because it appears both utilities currently stand ready and able to provide the required service. It is Consumers, in fact, that quoted Benjamin's Hope with a $35,000 installation charge for service when Holland quoted no upfront installation charge for electric service.

Finally, there was no dispute that the PSC had jurisdiction over the *Great Wolf Lodge* dispute because Cherryland was a public utility and the disagreement was between the property owner—who sought and received service and submitted to the jurisdiction of the PSC—and the public utility concerning a rate. MCL 460.58 provides that the PSC is to investigate a complaint by a customer that a rate or regulation by a public utility is unjust, inaccurate, or improper. In contrast, the dispute in this case is between a public utility and a municipal utility. The Court in *Great Wolf Lodge*, 489 Mich at 41-42, opined:

> Given that Cherryland is entitled to the benefit of the first entitlement in Rule 411(11), it is irrelevant that TCLP [the utility from which Great Wolf wished to receive service] is a municipal corporation not subject to PSC regulation. Rule 411(11) both grants and limits rights. It grants a right of first entitlement to Cherryland while limiting the right of the owner of the premises to contract with another provider for electric service. Plaintiff put that limitation directly at issue by seeking a declaratory ruling that it is free to contract for electric service with any electricity provider.

Again, it is of utmost importance that the parties before the PSC and then before the *Great Wolf Lodge* Court were

a plaintiff who was receiving or going to receive service and a public utility. The *Great Wolf Lodge* Court's note that Rule 411 limits the rights of the owner of the premises has no bearing on the case at hand where the owner of the premises is not a party to the dispute. We are not called on to determine the rights of the premises owner. Rule 411 may well limit the rights of the premises owner, but it does not limit the rights of a municipal utility such as Holland because the PSC has no jurisdiction over municipal utilities. The *Great Wolf Lodge* Court implicitly acknowledged the distinction:

> Assuming arguendo that MCL 124.3 does not restrict TCLP from contracting with plaintiff to provide electric service, Rule 411(11) restricts plaintiff from seeking that service from any entity other than Cherryland. Plaintiff may not circumvent the limitation of Rule 411(11) by attempting to receive service from a municipal corporation not subject to PSC regulation. Thus, MCL 124.3 has no application to the instant dispute. [*Great Wolf Lodge*, 489 Mich at 42.]

Incidentally, MCL 124.3 would have precluded TCLP, a municipal utility, from contracting with Great Wolf Lodge, because Great Wolf Lodge was undeniably receiving service from Cherryland, under its contract with them, for over two years. But the point to be gleaned from the Supreme Court's decision in *Great Wolf Lodge* is this: even if MCL 124.3 did not so restrict a municipal utility, Rule 411 would still have restricted Great Wolf Lodge because it, as an owner of premises who had service first provided by a public utility, could have its rights limited by Rule 411. Because the instant dispute is between the municipal utility and a public utility, MCL 124.3 applies, but, as previously indicated, it does not restrict Holland from contracting with Benjamin's Hope to provide electric service. We there-

fore affirm the trial court's ruling in Docket No. 315541.

DOCKET NO. 320181

The city of Coldwater filed this declaratory action contending that under the Michigan Constitution and by statute, a municipal utility such as itself can supply light and power within and outside its corporate boundaries to any customer not already receiving the service from another utility. Coldwater sought to provide electric service to a 6.2-acre parcel of land in Coldwater Township it purchased in July 2011 which, at that time, contained a vacant pole barn that had a service drop owned by Consumers attached to it but, according to Coldwater, had no service provided to it since before the time Coldwater purchased the parcel. Coldwater asserted that it intends to remove the pole barn and build new facilities and further intends to provide its own electric supply (through the Coldwater Board of Public Utilities) but that Consumers insists that it has the exclusive right to provide electric power to the property.

Consumers moved for summary disposition under MCR 2.116(C)(10). Consumers argued that when Coldwater purchased the property, there was an existing customer of Consumers on the property and Consumers had a history of providing service to the premises up until roughly a month before Coldwater's purchase of the property. Consumers stated that Coldwater's claims were thus precluded by MCL 124.3 and PSC Rule 411.

Coldwater filed a countermotion for summary disposition in its own favor based on MCR 2.116(C)(10). Coldwater contended that electric service to the existing pole building had been discontinued before Coldwater's acquisition of the property such that there was no existing electric provider to the customer and that

Coldwater's actions conformed to MCL 124.3. Coldwater further asserted that it was not required to operate in compliance with Rule 411 under MCL 460.10y and that the rule therefore had no applicability. Coldwater relied, in part, on the trial court's opinion in the Holland case.

The trial court granted summary disposition in favor of Coldwater. In its opinion, the court noted that municipally owned utilities are exempt from the power and jurisdiction of the PSC and that Coldwater, being both the owner of the premises and a municipal utility, was, as both an owner and provider, not subject to the power of the PSC. The trial court also noted that MCL 124.3 precludes a municipal electric service provider from providing service only if the customer is already receiving service from another provider and that there were no buildings or facilities receiving electric service at the time Coldwater purchased the parcel in question, nor had Coldwater ever received service from Consumers.

On appeal, Consumers argues that the trial court erred by creating an exception to the applicability of PSC Rule 411 on the basis that Coldwater was both a utility and the customer when Rule 411 allows for no such exception. Contrary to Consumers' argument, the trial court did not hold that *because* the owner of the premises is a municipal utility it *also* cannot be regulated by the PSC in its capacity as a customer. It simply held, though its reasoning was inartfully worded, that if Coldwater were simply a premises owner and nothing more, *Great Wolf Lodge* would likely apply. However, that was not the factual scenario before the trial court. The trial court could not disregard that Coldwater was the municipally owned service provider that would be providing service to itself. Its status as a municipally

owned utility had to be taken into consideration when determining whether Rule 411 applied. If Coldwater were not going to be providing the service to itself, the parties would likely not be before the court arguing whether Rule 411 applied. If Coldwater were simply the premises owner and Consumers and another public utility were involved, the application of Rule 411 would be a foregone conclusion.

However, as discussed earlier in this opinion with regard to Holland, Rule 411 does not apply to municipal utilities. Coldwater in this case is a municipally owned utility seeking to provide services to its own property. Its identity as a customer and a municipally owned utility are not separable. This is necessarily so, given that it cannot contract with itself to provide a service to itself.

As thoroughly discussed regarding Docket No. 315541, the PSC has no jurisdiction over municipally owned utilities[4] and thus cannot impose its rules upon municipally owned utilities such as Coldwater. PSC Rule 102(l) defines "utility" as "an electric company, whether private, corporate, or cooperative, that operates under the jurisdiction of the commission" such that a municipally owned utility could never be the first to serve a premises under Rule 411, thus indicating that Rule 411 was never intended to apply to municipally owned utilities. And, MCL 460.10y gives municipally owned utilities the *option* of complying with Rule 411 if the utility provides service to customers outside of its municipal boundaries (as in this case), clearly setting forth the Legislature's recognition that municipally owned utilities are not subject to Rule 411. The application of Rule 411 would be particularly odd in this circumstance given that Coldwater, which owns the

[4] See MCL 460.6.

property, seeks to provide its own electric service to the property and the property at issue is set to contain an electric substation for Coldwater. The trial court did not err by holding Rule 411 inapplicable.

Consumers also asserts that the trial court erred in its interpretation of MCL 124.3 by concluding that there was no "customer" on the premises at issue in this case, given that when Coldwater purchased the property there was an existing customer that had been receiving electric service from Consumers for more than 20 years. We disagree.

MCL 124.3(2) provides that "[a] municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing." As explained with regard to Docket No. 315541, MCL 124.3(2) would prohibit Coldwater from providing electric delivery service to customers presently receiving (taking) the service from another utility. MCL 124.3(3) refers us to MCL 460.10y for the definition of "electric delivery service." MCL 460.10y(12)(a), in turn, defines "delivery service" as "the providing of electric transmission or distribution to a retail customer." "Customer" is not defined in MCL 124.3. But "customer" *is* defined in MCL 460.10y. MCL 460.10y(2) states, "For purposes of this subsection, 'customer' means the building or facilities served rather than the individual, association, partnership, corporation, governmental body, or any other entity taking service."

As indicated by Consumers, the definition of customer set forth in MCL 460.10y(2) is the same as the definition of "customer" set forth in Rule 411. Rule 411(1) [Mich Admin Code, R 460.3411(1)] provides, in relevant part:

> As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation served.

However, Consumers contends that the definition of "customer" should be interpreted, for purposes of MCL 124.3, to mean *the premises* of the buildings and facilities served. Consumers bases this argument on Rule 411(11), which states, "The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer even if another utility is closer to a portion of the customer's load." This provision of Rule 411 does not expand the definition of "customer" in Rule 411(1)(a), let alone the definition in MCL 124.3. It is a separate provision that defines the scope of what the first utility may serve. It distinctly states that the utility may serve the premises *of the customer*—it does not include "premises" within the definition of "customer."

The *Great Wolf Lodge* decision does not direct otherwise. Consumers states that after *Great Wolf Lodge*, the Rule 411 definition of "customer" is the premises of the buildings and facilities that existed at the time service was established. In context, what the *Great Wolf Lodge* Court actually stated was:

> [It is] undisputed that Cherryland was the first utility to provide electric service to buildings and facilities on the Oleson farm. Once Cherryland did so, Rule 411(11) gave it the right to serve the entire electric load on the premises. That right was unaffected by subsequent changes in the "customer," because the right extends to the "premises" of the "buildings and facilities" that existed at the time service was established. Later destruction of the buildings and facilities on the property did not extinguish that right. [*Great Wolf Lodge*, 489 Mich at 41.]

Great Wolf Lodge, therefore, was not defining "customer" for purposes of Rule 411 (and was not expanding the definition) but was explaining the parameters of Rule 411(11) and the rights therein.

Under both MCL 124.3 and Rule 411(1)(a), "customer" means the buildings and facilities served. "Building" is defined in *The American Heritage Dictionary of the English Language* (5th ed) as "[s]omething that is built, as for human habitation; a structure." "Facilities" is the plural of "facility," which is defined as something "designed to serve a particular function[.]" *Id*. Under the relevant definitions, there was no customer already receiving the service from Consumers. According to the evidence, Coldwater purchased the property at a public auction on July 21, 2011. The prior owner of the property had requested that electric service be discontinued to the property (which contained a pole barn) on June 28, 2011. Therefore, at the time Coldwater acquired the property and sought to demolish the pole barn and provide electric service to new buildings, there was no customer (buildings or facilities) already receiving (present tense) the service from Consumers. The trial court did not err in its interpretation of MCL 124.3, nor did it err in deciding there was no "customer" receiving service.

Consumers finally argues that the trial court misinterpreted or failed to apply Rule 411 as interpreted by the Michigan Supreme Court in *Great Wolf Lodge*, 489 Mich 27, and thus erred by allowing Coldwater, a municipal utility, to provide electric service in this case. The same analysis of the *Great Wolf Lodge* case engaged upon and the conclusion reached in Docket No. 315541 apply in this case. The only distinguishing factor in this case is that the property owner and the municipally

owned utility are one and the same. This would appear to still favor Coldwater, however, because these roles cannot be separated.

We affirm the trial court's grant of summary disposition in favor of Coldwater.

Affirmed.

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

SHAPIRO, J. (*concurring*). I concur.

There are two separate issues in this case. The initial question is whether Mich Admin Code, R 460.3411, i.e., Michigan Public Service Commission (PSC) Rule 411, as interpreted in *Great Wolf Lodge of Traverse City, LLC v Pub Serv Comm*, 489 Mich 27; 799 NW2d 155 (2011), bars these plaintiff-municipalities from providing the challenged utility service. If we answer that question in the negative, then we must determine whether MCL 124.3(2) bars the plaintiffs from providing the service.

Defendant Consumers rightly observes that the substantive language in *Great Wolf Lodge* was sweeping and, in that case, it was of no consequence that the utility provider to which the premises owner sought to switch was a municipal power company rather than another PSC-regulated utility. However, the municipalities rightly point out that whatever the *substantive* interpretation of Rule 411, it cannot be enforced against a party that does not fall within the jurisdiction of the PSC. And the Legislature has not given the PSC jurisdiction over municipal power providers. See MCL 460.6(1) ("The public service commission is vested with complete power and jurisdiction to regulate all public utilities . . . except a municipally owned utility . . . ."). Therefore, I conclude that while Rule 411 bars a power

provider from serving a premises previously served by another, the PSC may not order a municipal power provider to comply with Rule 411. In *Great Wolf Lodge*, 489 Mich at 34, this problem did not prevent the aggrieved utility from obtaining relief because the premises owner voluntarily subjected itself to the jurisdiction of the PSC and, accordingly, the PSC could order the premises owner to comply with Rule 411. That is not the case here. While it is unclear whether the Supreme Court considered the instant factual scenario when deciding *Great Wolf Lodge*, I do not see how this Court can require a party to comply with an administrative rule promulgated by an administrative body that does not have jurisdiction over it. Since an absence of jurisdiction trumps any substantive interpretation of Rule 411, I would not apply the rule in this case absent a clear directive to do so from the Supreme Court.

By contrast, there is no jurisdictional problem with application of MCL 124.3(2).[1] However, the language of this statute differs significantly from that of Rule 411. Rule 411 speaks of "the first utility" to serve the premises, a concept that requires a view to the past and a determination of which utility was the first to provide service to the premises regardless of a later cessation of that service. MCL 124.3(2), on the other hand, speaks to "customers . . . already receiving the service," a sentence construction that speaks to the present. Therefore, when a customer is not receiving service, it may contract with the provider of its choice even if there was some other entity that was the first utility to serve the premises.

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[1] MCL 124.3(2) provides that "[a] municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving utility consents in writing."

The issues in this case are complex, but I believe the majority's conclusions are consistent with the intent of the Legislature and *Great Wolf Lodge*. To the degree they are not, the Legislature, the Supreme Court, or both may take appropriate action.

SHIRVELL v DEPARTMENT OF ATTORNEY GENERAL

Docket Nos. 314223, 314227, and 316146. Submitted July 9, 2014, at Lansing. Decided January 8, 2015, at 9:00 a.m. Leave to appeal sought.

Andrew Shirvell was dismissed from his employment as an assistant attorney general in the Department of Attorney General (the department) for conduct unbecoming a state employee. The impetus behind his termination was his actions surrounding his authoring of a public blog that focused, in part, on the openly gay president of the University of Michigan Student Assembly. Shirvell appeared on several local and national television news programs during which he explained that he was speaking as a private citizen; nevertheless, it was disclosed during the interviews that he was an assistant attorney general. The department received many e-mails and telephone calls questioning the department's ability to fulfill its mission while employing a person with an apparent antigay agenda. Shirvell's employment was terminated following a disciplinary hearing. Following his termination, he filed a grievance in the Civil Service Commission (the commission), challenging the grounds for termination and arguing that the department did not have just cause to terminate his employment under the Civil Service Rules. Shirvell also filed a claim to recover unemployment benefits. In the grievance proceeding, the commission determined that the department had just cause for the termination of Shirvell's employment for conduct unbecoming a state employee. Shirvell appealed in the Ingham Circuit Court. The court, James S. Jamo, J., affirmed, reasoning that Shirvell's conduct interfered with the department's mission and effectiveness and therefore was not protected under the First Amendment. The Court of Appeals granted Shirvell's application for leave to appeal that order in an unpublished order entered November 15, 2013 (Docket No. 316146). In the unemployment compensation case, the Department of Licensing and Regulatory Affairs/Unemployment Insurance Agency (the UIA) determined that Shirvell was disqualified for benefits for misconduct under the provisions of the Employment Security Act, MCL 421.1 *et seq*. The Michigan Compensation Appellate Commission (MCAC) affirmed the determination of the UIA. Shirvell appealed that determination in the Ingham Circuit

Court. The court, Paula J. M. Manderfield, J., reversed the order of the MCAC, reasoning that Shirvell had engaged in protected speech and could not be denied benefits on the basis that his activities amounted to misconduct. The Court of Appeals granted applications for leave to appeal that order by the department (Docket No. 314223) and the UIA (Docket No. 314227) in unpublished orders and consolidated the three appeals.

The Court of Appeals *held*:

1. Governmental employees do not forfeit their constitutionally protected free speech interest by virtue of accepting government employment. However, the state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. When a citizen enters government service, the citizen, by necessity, must accept certain limitations on his or her freedom. Governmental employers need a significant degree of control over their employees' words and actions and, without such control, there would be little chance for the efficient provision of public services. Therefore, speech that could not be prohibited by the state if uttered by a private person may be a lawful basis for discharge or other discipline when uttered by a public employee.

2. Resolution of the issue whether a public employee was wrongfully terminated for exercising his or her First Amendment right to free speech requires arriving at a balance between the interest of the employee, as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees. A public employee is entitled to protection under the First Amendment if he or she spoke as a private citizen on a matter of public concern and where the state cannot show that its interest in the efficient provision of public services outweighs the employee's interest in commenting on the matter of public concern.

3. Whether a public employee spoke as a citizen on a matter of public concern involves a question of law for the court to decide considering the content, form, and context of the given statement revealed by the whole record. Public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. But the speech need not address a topic of great societal importance or even pique the interest of a large segment of the public to fit within the orbit of protection. Moreover, the

inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.

4. In this case, Shirvell spoke as a private citizen on a matter of public concern.

5. The state's burden in justifying a particular discharge varies depending on the nature of the employee's expression. In evaluating the government's interests, proper focus is placed on the effective functioning of the public employer's enterprise. It is not necessary for a public employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. The governmental employer may defeat the employee's claim of a free speech violation by demonstrating that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech. Factors that may be considered in balancing the competing interests include consideration of whether the employee's speech impaired discipline by superiors, detrimentally affected close working relationships, undermined a legitimate goal or mission of the employer, impeded the performance of the speaker's duties, and impaired harmony among coworkers.

6. The content of the employee's speech is relevant to determine the degree of disruption or potential disruption necessary to justify the governmental employer's action. The less serious, portentous, political, or significant the genre of expression, the less imposing the justification that the government must put forth in order to be permitted to suppress the expression.

7. Shirvell engaged in deliberate conduct that irreconcilably linked his speech with his employer. The department introduced evidence to show that its interests in the effective provision of governmental services outweighed Shirvell's speech interests and that Shirvell's speech interfered with the department's internal operations and adversely affected the efficient provision of governmental services. The department's evidence supported the determination that Shirvell's speech had, or was reasonably likely to have, a detrimental effect on close working relationships and harmony among coworkers within the office. It was reasonable for the department to conclude that Shirvell's action would negatively impair Shirvell's present and future relationships with coworkers and serve as a detriment to the department's recruiting efforts.

The evidence also showed that Shirvell's conduct undermined one of the department's specific missions—the integrity of its anti-cyberbullying campaign.

8. It was reasonable for the department to conclude that Shirvell's conduct either damaged or had the potential to damage the public's perception of the department's ability to conduct its operations and mission and damaged both Shirvell's ability to perform his responsibilities and the department's ability to perform its mission. The evidence clearly supported the department's conclusion that Shirvell could no longer perform the duties of an assistant attorney general. The department met its burden to prove that its interests in the efficient provision of public services outweighed Shirvell's speech interests. The First Amendment did not require the department to preserve the employment of an individual whose continued harassment and stalking and dissemination of bigoted, homophobic statements risked harming the department's integrity and mission. Shirvell's speech was not protected under the First Amendment for purposes of these proceedings and neither the termination of his employment nor the denial of unemployment benefits offended the constitution.

9. Conduct unbecoming a state employee encompasses any conduct that adversely affects the morale or efficiency of the governmental entity or tends to adversely affect public respect for state employees and confidence in the provision of governmental services. The evidence supported the determination that Shirvell engaged in conduct unbecoming a state employee. The circuit court applied the correct legal principles and did not misapprehend or grossly misapply the substantial evidence test by concluding that there was competent, material, and substantial evidence to support the determination that Shirvell engaged in conduct unbecoming a state employee under the Civil Service Rules so there was just cause to terminate his employment. The decision to terminate his employment was not arbitrary or capricious. The order of the circuit court in Docket No. 316146 was affirmed.

10. There was competent, material, and substantial evidence to support the determination of the UIA that Shirvell engaged in misconduct that disqualified him from receiving unemployment benefits under MCL 421.29(1)(b). Shirvell's behavior, viewed in its totality, showed a willful disregard of the department's interests and the standards of behavior that the department had a right to expect him to follow. There was substantial and compelling evidence to support the finding of the UIA that Shirvell engaged in misconduct. The circuit court erred by concluding otherwise. The order of the circuit court in Docket Nos. 314223 and 314227 was

reversed and the matter was remanded to the circuit court for reinstatement of the order of the MCAC that affirmed the UIA's order denying unemployment benefits.

Docket Nos. 314223 and 314227 reversed and remanded; Docket No. 316146 affirmed.

Andrew L. Shirvell *in propria persona*.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jeanmarie Miller*, Assistant Attorney General, for the Department of Attorney General.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *George G. Constance*, Assistant Attorney General, for the Department of Licensing and Regulatory Affairs/Unemployment Insurance Agency.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Jason Hawkins*, Assistant Attorney General, for the Civil Service Commission.

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

BORRELLO, J. In these consolidated appeals, in Docket Nos. 314223 and 314227, the Department of Attorney General (the Department), and the Department of Licensing and Regulatory Affairs/Unemployment Insurance Agency (UIA), respectively, appeal by leave granted a circuit court order reversing the order of the Michigan Compensation Appellate Commission (MCAC) affirming the UIA's denial of claimant Andrew Shirvell's claim for unemployment benefits. In Docket No. 316146, Shirvell appeals by leave granted a circuit court order affirming a Civil Service Commission (the

Commission) order denying Shirvell's grievance and holding that the Department had just cause to terminate Shirvell's employment under the Civil Service Rules (CSR) for conduct unbecoming a state employee. For the reasons set forth in this opinion, in Docket Nos. 314223 and 314227 we reverse the circuit court's order and remand for reinstatement of the MCAC's order and in Docket No. 316146 we affirm the circuit court's order.

I. BACKGROUND

These cases arise from Shirvell's highly publicized conduct directed at Chris Armstrong in the summer and autumn of 2010. At the time, Armstrong was the president of the University of Michigan (U-M) Student Assembly (MSA) and was the first openly gay individual to hold that position. Shirvell had been an assistant attorney general with the Department since 2007. It is undisputed that Shirvell received good performance evaluations during his tenure with the Department. However, on November 8, 2010, he was dismissed for conduct unbecoming a state employee.

The impetus behind the termination was Shirvell's actions surrounding his authoring of a public blog entitled the "Chris Armstrong Watch." The blog contained various postings concerning Armstrong, his sexual orientation, and his "radical homosexual agenda." For example, one blog entry characterized Armstrong as a "RADICAL HOMOSEXUAL ACTIVIST, RACIST, ELITIST, & LIAR," and another entry contained a rainbow flag with a swastika posted next to a photograph of Armstrong's face with the word "resign" nearby. In one entry, Shirvell referred to Armstrong as a "privileged pervert." Shirvell accused Armstrong of supporting a "radical homosexual agenda"

that included support for rights such as "gay 'marriage' and adoption 'rights' " and a gender-neutral housing policy under which, according to Shirvell, "cross-dressing students will not have to share a dorm room with a member of the same sex" and that would "undoubtedly lead to a massive increase in rapes."

In addition, Shirvell claimed that Armstrong was a "racist liar" because he joined a campus group called the "Order of Angell" and that Armstrong demonstrated "a severe contempt for the First Amendment right to freedom of expression. Much like Nazi Germany's leaders, many of whom were also homosexuals." Shirvell accused Armstrong of engaging in "underage binge-drinking" and using his "sexual preference to advance his ambitions," claimed that Armstrong interned for United States Representative Nancy Pelosi "as a lowly handmaiden," and referred to him as the "grand dragon" of the MSA.

In addition, Shirvell accused Armstrong of hosting a "gay orgy" and asserted that Armstrong had a "tendency to engage in one-on-one casual 'gay' sexual encounters with friends." Shirvell asserted that the "gay orgy" "sheds new light on the deranged character of U of M's new student body president . . . [and] shows that Armstrong's push for 'gender neutral' housing . . . may be part of a broader agenda to allow 'gay residents to more easily engage in 'homosexual shenanigans' (read: orgies, underage binge-drinking, and probably illegal drug use, too)." Shirvell wrote similar things about Armstrong's friends and alleged that one male member of the MSA was Armstrong's "secret boyfriend" who was a "closet homosexual." In a television interview, Shirvell did not deny that on one occasion on a separate Facebook page he referred to Armstrong as "Satan's representative" on the MSA. In addition to authoring

the blog, Shirvell appeared outside Armstrong's residence and at events where Armstrong was present and held protest signs.

Initially, Shirvell maintained the blog under the pseudonym "Concerned Michigan Alumnus"; however, on May 20, 2010, the newspaper *Between the Lines*, published an article identifying Shirvell as an "anti-gay heckler," the author of the blog, and an assistant attorney general. Shortly thereafter, Shirvell and the blog became the subject of intense media scrutiny and in the summer and fall of 2010, Shirvell appeared on local and national news programs, including Cable News Network's (CNN's) *Anderson Cooper 360° (AC-360)* and Comedy Central's *The Daily Show*, to defend the blog. During the interviews, Shirvell explained that he was speaking as a private citizen and he refused to answer questions about his position with the Department. Nevertheless, the media outlets identified Shirvell as an assistant attorney general. In the interviews, Shirvell explained that he was opposed to Armstrong's policies, which he characterized as a "radical homosexual agenda," and denied that he had a personal agenda against Armstrong.

The fallout from the interviews was widespread. Then Michigan Attorney General Michael Cox took measures to clarify that Shirvell did not represent the views of the Department, sending an e-mail to CNN and later appearing on *AC-360* for an interview with Anderson Cooper. Cox explained that, although Shirvell was being a bully and his conduct was "offensive" and "unbecoming of civil discourse," Shirvell nevertheless had a First Amendment right to express his views. Shortly thereafter, the Michigan Civil Rights Commission and the Ann Arbor City Council passed resolutions condemning Shirvell's be-

havior and questioning Shirvell's effect on the Department's ability to fulfill its mission. In addition, U-M barred Shirvell from its campus for a time and Armstrong filed a petition for a personal protection order (PPO), which was later dropped. Furthermore, according to testimony from officials within the Department, the Department was inundated with negative e-mails and telephone calls opposed to Shirvell.

Finally, on November 8, 2010, following a disciplinary hearing, the Department terminated Shirvell's employment for "conduct unbecoming a state employee." The Department issued a termination letter to Shirvell that listed the reasons for the termination as follows:

> Engaging in inappropriate conduct by targeting individual members of the public, both in person and through electronic media, which could reasonably be construed to be an invasion of privacy, slanderous, libelous, and tantamount to stalking behavior unbecoming an Assistant Attorney General.
>
> Engaging in conduct which resulted in filing of a request for a personal protection order against you for alleged stalking behavior.
>
> Conduct which has caused, or has the potential to cause, disruption to the Department's working relationships with its clients, the courts, and local governments.
>
> Conduct that has caused, or has the potential to cause, disruption among members of the Department workforce and could have a negative impact on attracting and retaining the most qualified employment candidates.
>
> Conduct that has damaged, or has the potential to damage, the public's perception of the Department's ability to conduct its operations and mission.
>
> Conduct that compromises your ability to perform your responsibilities as an Assistant Attorney General.
>
> Inappropriate, unprofessional behavior toward your supervisors and co-workers.

> Ignoring advice and counsel of your supervisors.
>
> Conduct which has resulted in a variety of offenses, a criminal violation, and a civil warning regarding various statutes or ordinances including, but not limited to:
>
> Driving under the influence[.]
>
> Trespass[.]

Following his termination, Shirvell filed a grievance challenging the grounds for termination, arguing that the Department did not have just cause to terminate him under the CSR. Shirvell also filed a claim to recover unemployment benefits.

In the grievance proceeding,[1] the circuit court affirmed the Commission's finding that the Department had just cause for termination because Shirvell engaged in "conduct unbecoming a state employee." The circuit court reasoned that Shirvell's conduct interfered with the Department's mission and effectiveness and therefore was not protected under the First Amendment. This Court granted Shirvell leave to appeal the circuit court order in Docket No. 316146.[2]

In the unemployment compensation case,[3] the UIA determined that Shirvell was disqualified for benefits under the "misconduct" provision of the Michigan Employment Security Act (MESA), MCL 421.1 *et seq*. The MCAC affirmed the UIA, but the circuit court reversed the MCAC's order, reasoning that Shirvell engaged in protected speech and therefore could not be denied benefits on the basis that his speech activities amounted to misconduct. This Court granted the De-

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[1] Docket No. 316146 (Ingham Circuit Court Docket No. 12-001089-AA).

[2] *Shirvell v Dep't of Attorney General*, unpublished order of the Court of Appeals, entered November 15, 2013 (Docket No. 316146).

[3] Docket Nos. 314223 and 314227 (Ingham Circuit Court Docket No. 12-000344-AE).

partment and the UIA leave to appeal that order.[4] This Court consolidated the three appeals in separate orders.[5]

We proceed by first setting forth the evidence that was introduced at the grievance hearing before discussing the evidence introduced at the unemployment compensation hearing.[6]

A. GRIEVANCE PROCEEDING

Following his termination, on November 15, 2010, Shirvell filed a grievance with the Department, claiming that his discharge was without just cause and was arbitrary and capricious. On January 18, 2011, the Department denied the grievance. Shirvell appealed the decision to the Commission, and a hearing officer held a hearing on October 19 and October 20, 2011.

At the hearing, Douglas Bramble, the Department's then former human resources manager, testified that he had initiated disciplinary proceedings against Shirvell on the basis of Shirvell's conduct regarding the blog and the television interviews. Bramble explained that the Department was concerned with the content of the blog, including the swastika directed at Armstrong and other accusations Shirvell made against Armstrong and Arm-

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[4] *Shirvell v Dep't of Attorney General*, unpublished order of the Court of Appeals, entered October 11, 2013 (Docket Nos. 314223 and 314227).

[5] *Shirvell v Dep't of Attorney General*, unpublished order of the Court of Appeals, entered August 8, 2014 (Docket Nos. 314223, 314227, and 316146).

[6] The Department cites the proceedings in *Armstrong v Shirvell*, (Case No. 2:11-CV-11921), an action in the United States District Court for the Eastern District of Michigan, which involved a civil defamation claim. However, we will not consider that case in resolving the issues presented because it is an improper expansion of the administrative records. See *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

strong's friends. The Department was also concerned that U-M issued a trespass warning to Shirvell. Bramble stated that the Department began receiving telephone calls and e-mails from people concerned that an employee of the Department would engage in this type of conduct. Bramble testified that the Department received numerous e-mails and telephone calls regarding Shirvell's behavior, which necessitated, for a time, the appointment of an individual to work full-time to handle the complaints. Bramble and other officials within the Department appointed Michael Ondejko, an investigator within the Criminal Division, to conduct a formal investigation.

During his investigation, Ondejko interviewed 40 individuals including Armstrong and several of his friends and associates. Generally speaking, the interviewees recounted their contacts with Shirvell, their reactions to his blog postings pertaining to them, their concerns about the effect his blog would have on their futures, their fear for Armstrong's safety, and their belief regarding the truth or falsity of certain statements Shirvell made about them on Facebook or on his blog. In particular, Ondejko reported that Armstrong claimed that Shirvell had been outside his house on at least three separate occasions. Armstrong told Ondejko that on September 4, 2010, Shirvell was outside taking pictures after the police were called with a loud-party complaint. Ondejko reported that during the disciplinary conference, Shirvell admitted calling the police and photographing their arrival on September 4, 2010. Armstrong also told Ondejko that on September 6, 2010, Shirvell appeared outside his house with a protest sign and that, because he was concerned for his safety, he called the Ann Arbor Police Department and the U-M Department of Public Safety.

Ondejko testified that he was unable to prove that Shirvell had made blog postings on his work computer. Further, he testified that he was unable to determine whether Shirvell used his work computer to post on social media sites like Facebook and Twitter.

Ondejko testified that he felt he was "given a free hand to investigate the case the way [he] saw fit." He testified that no one else helped him investigate the case, although Thomas Cameron, a bureau chief with the Department, reviewed drafts of his report. As part of the investigation, Ondejko testified that the Department forwarded him "thousands" of e-mails and records of telephone calls concerning complaints that citizens made about Shirvell. Ondejko referred to these in the report, but he could not include them all because of the extensive number. He testified that no one told him that they wanted Shirvell fired or that they wanted his report to provide enough ammunition to support termination. Further, he testified that he did not have a bias or prejudice against Shirvell when he conducted the investigation.

When Ondejko completed the report, the Department initiated a disciplinary conference with Shirvell and his counsel present. The conference lasted several hours and was to reconvene several days later. However, in the interim, Bramble and Cameron concluded that Shirvell had engaged in conduct unbecoming a state employee and recommended termination to Cox and Deputy Attorney General Carol Isaacs, who agreed with the recommendation. Bramble explained that the Department always held attorneys within the office to "a very high standard of conduct, both personal and professional conduct." Bramble testified that the Department did not instruct its attorneys on how to carry out their personal lives, but the Department did have a

"long history of expecting [attorneys] . . . to recognize . . . that you are a representative of the Attorney General . . . at all times." Bramble stated that as representatives of the Attorney General, it would show "common sense to behave accordingly . . . ."

Bramble explained that, during his short tenure with the Department, Shirvell was formally disciplined for a loud verbal altercation with Brad Beaver, his immediate supervisor, and for violating the Department's media-contacts policy for failing to inform the Department about his first televised interview. In addition to these violations, Bramble characterized Shirvell's conduct with respect to Armstrong as "very egregious." Bramble concluded that Shirvell had "compromised his ability to engage in the assigned duties and responsibilities of an Assistant Attorney General" to represent clients and the people of the state of Michigan. Bramble explained that it was not reasonable to reassign Shirvell within the Department, and he stated that Shirvell's conduct affected the Department as a whole. He noted that other Department attorneys were being questioned about the conduct during unrelated proceedings.

Cox testified at the grievance hearing and agreed that he had appeared on CNN, where he stated that Shirvell had the right to say whatever he wanted regardless of how offensive his speech was.[7] He agreed

[7] An audio recording of Cox's interview with Cooper was admitted into evidence at the grievance hearing. In the interview, Cox said that Shirvell was still employed at that time "for a number of reasons." Specifically, Cox stated:

> Here in America, we have this thing called the First Amendment, which allows people to express what they think . . . and engage in political and social speech.
>
> And, more on point, the Supreme Court, both the United States Supreme Court in 1995 in a case called *US v Treasury Employees*

that during the Cooper interview he was "very candid and said that he thought Mr. Shirvell's conduct was offensive." He also agreed that he had said that Shirvell was being a bully, but had also stated that Shirvell's conduct did not interfere with the mission of the office. However, Cox testified that, at the time he gave the interview, he had not read the entire blog. After reading the entire blog, Cox was "shocked" at the contents and came to believe that Shirvell's conduct threatened the mission of the Department. Thus, according to Cox, his statements during the Cooper interview were made before he conducted a thorough investigation into Shirvell's comments and writings.

Cox testified that a number of things shocked him about the blog, including Shirvell's seeming "obses-

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said that civil service employees in the federal system, and, by extension, in the state system, have free First Amendment rights outside of the work, as long as it doesn't impact their performance . . . at their job.

And Mr. Shirvell is sort of a front-line grunt assistant prosecutor in my office. He . . . does satisfactory work. And off-hours, he's free to engage, under both our civil service rules, Michigan Supreme Court rulings, and the United States Supreme Court rule . . . to engage in free speech.

When asked if Shirvell's conduct was "unbecoming of a State employee," Cox stated that Shirvell's actions were "offensive" and then added that "conduct unbecoming is one of those empty-vessel statements" and that "what it means has never really been flushed [sic] out." When asked if Shirvell's behavior was generally "unbecoming," Cox answered "certainly" and then elaborated that it was "unbecoming of civil discourse" and that it was "unbecoming of common courtesy." However, he again noted that Shirvell was engaging in speech on a blog and that if there was "conduct that's verified" such as a PPO, then the Department "could start looking at things." When asked if Shirvell was "detracting from [the] agency's effective operation," Cox said that he thought it was "quite a stretch" and that Shirvell's blogging was "not impacting the mission of the office." Finally, Cox stated that Shirvell was being a bully using the Internet, but noted again that the speech was protected under the First Amendment.

sion" and "infatuation" with Armstrong, Shirvell's "outing" of an individual from a small town in Michigan's Upper Peninsula and then "crowing about it," and Shirvell's description of engaging in conduct that Cox, because of his prior experience as a prosecutor, considered stalking behavior. Cox stated that, in his view, merely because the Washtenaw County Prosecutor had not charged Shirvell was not dispositive regarding whether Shirvell had violated Michigan's antistalking statute. Cox testified that when he appeared for the Cooper interview he was also unaware of several things about Shirvell, including the verbal altercation he had had with Beaver. Thus, Cox explained that when he said to Cooper that Shirvell was not affecting the Department's mission, his statement was "accurate from the perch that I was at."Cox explained why he agreed with the recommendation to terminate Shirvell as follows:

> This, in my mind, was in stunning detail, an overwhelming case to terminate Mr. Shirvell. [The investigative report] outlined escalating behavior. It outlined behavior separate from the blog that dealt with not only his behavior in the workplace but also his behavior outside the workplace, some which I would call minimally misdemeanant criminal, meaning stalking. Other behavior that would undermine the office in its daily operations. Some of it nuts and bolts but also some of it, you know, in the sense of it was conduct that one does not expect and should not accept from a state employee, especially a state employee in the Attorney General's office . . . .

Cox testified that Shirvell was engaging in conduct that was "inviting" a civil lawsuit, but was aware that Shirvell was not concerned about a civil lawsuit because he viewed himself as "judgment proof." Cox testified that Shirvell's attitude showed that he "wasn't concerned to the impact he was having on other individuals in the office."

Then Solicitor General Eric Restuccia was ultimately responsible for the Appellate Division where Shirvell worked. Restuccia testified that he first learned of the blog in May 2010, through an e-mail that was sent to him. Restuccia confirmed with the Department's ethics officer that blogging was permissible and he did not attempt to force Shirvell to remove the blog. Instead, he spoke with Shirvell to ensure that Shirvell was not engaging in political activity on state time or using state resources and also to ensure that Shirvell was not identifying himself as an assistant attorney general.

According to Restuccia, he spoke with Shirvell about the blog and explained that it was not helping Shirvell and that it was not good to have people complaining about him to his supervisors. He later added that he told Shirvell that the blog would cause "problems in terms of [his] standing" within the Department. He also testified that he may have suggested that Shirvell take the blog down. However, it is undisputed that he did not order Shirvell to take the blog down. Restuccia explained that he had no authority to order that the blog be taken down.

Restuccia testified about a similar incident that occurred in February 2010, when he spoke with Shirvell about an "ugly" e-mail that Shirvell had sent during work hours. The e-mail was sent to a former state representative in response to the representative's e-mail concerning a planned demonstration on issues involving gay rights. It read:

> You are all sick freaks. Absolutely shameful . . . . Your e-mail is beyond offensive. The grassroots will NEVER let you and your butt-buddies . . . hijack our pro-life, pro-family party in pursuit of your PERVERTED radical homosexual agenda.

Shirvell's e-mail contained another statement directed at a man named Justin, which read as follows:

> P.S. Justin(e), a persistent rumor in D.C. circles is that you and Illinois Log Cabin "Republican" Congress "man" . . . hooked-up together. Sick. Sick. SICK! ! ! ! ! Does your homosexual lover Steve know? Freak.

Shirvell admitted sending the e-mail from his personal e-mail account while he was on his lunch break. Restuccia testified that he and Joel McGormley, division chief at the time, spoke to Shirvell because they were concerned that Shirvell was engaging in political activity on work time. He said that he explained to Shirvell that the e-mail was obviously not work-related and reminded him that employees were not supposed to engage in political activity on work time or use work resources. Restuccia testified that he told Shirvell that the e-mail was not helping him in the Department and that it reflected badly on him. Shirvell testified that the meeting was minor and lasted "maybe less than five minutes." Shirvell stated that Restuccia and McGormley told him that the e-mail was "no big deal" and not to worry about it. To his knowledge, no writing about the incident was prepared or placed in his personnel file.

In August 2010, the Department's communications office informed Restuccia that Shirvell had conducted an interview with WXYZ, a local television news channel in Detroit, and that the Department was receiving media inquiries about its anti-cyberbullying campaign. At that point, Restuccia explained that he "really went through the blog," and "that's when I fully understood that this is exclusively dedicated to Chris Armstrong and that all of the columns were about and related to Chris Armstrong." Restuccia testified that when he looked at the blog, he thought it was "disheartening because it was so angry, caustic." He thought that the

blog was more of an "attack" than something intended to be persuasive. Restuccia explained that he told Shirvell that the blog "undermined his professional credibility." He indicated that at the time of the WXYZ interview, the Department was pushing an anti-cyberbullying policy. He explained that when he spoke with Shirvell, he informed Shirvell that the Department had been "sandbagged by the press" who were examining the connections between Shirvell's behavior and the anti-cyberbullying policy. Restuccia testified that Shirvell "was undermining the Attorney General's efforts to protect the community." Restuccia stated that Cox wanted to "make sure that children in our community are safe and we don't have people who are engaging in inappropriate comment and here you have then one of his assistants who's, you know, directing it toward a 21-year-old . . . ."

Restuccia initially attempted to prohibit Shirvell from conducting any further interviews, but ultimately Cox informed Restuccia that the Department could not restrict Shirvell's speech outside the office. Restuccia told Shirvell that he was not prohibited from conducting interviews, but noted that the interviews would reflect poorly on him. Restuccia added that he tried to make Shirvell understand that he would look "absurd" if he conducted the interviews. Restuccia testified that although Shirvell was humiliated by the WXYZ interview, Shirvell believed that he could be "more effective" on CNN. Restuccia testified that it was "evident" that Shirvell's "whole focus was in on his kind of political crusade and [that he] had lost all sense of proportion for his role in the office." Restuccia testified that he "had no authority as supervisor to limit [Shirvell's] First Amendment right to engage in activity outside the office," so he told him as a friend that it would be bad for him.

According to Restuccia, during the time between the WXYZ and the CNN interviews, Shirvell became "more isolated" and the incident with Beaver occurred. Restuccia explained that the CNN interview was a "disaster" that "disgraced" and crippled the Department. The Department was inundated with a "huge response" from citizens and it received "thousands" of calls and e-mails. Restuccia stated that the situation was "beyond our control."

Other evidence admitted at the hearing illustrated the effect that Shirvell's conduct had on the Department. A bureau chief for the Department asserted that the Department received over 20,000 complaints about Shirvell's conduct. The November 9, 2010 executive summary of the investigative report indicated that the "Department has received over 22,000 emails, over 150 letters, and 940 phone calls — nearly all criticizing AAG Shirvell's conduct." Further, it indicated that "[t]he office has been inundated with media calls, the office has since had to issue several press releases, and the Attorney General has had to appear on national news to defend the integrity of the office."

Restuccia explained that, given all of the events related to Shirvell's blog and the media frenzy that followed,

> there is no role that Andrew Shirvell could provide for the state ever again. He has been irrevocably undermined, he has no credibility. In the eyes of the community and the legal community he is the paradigm of the bigot. There is nothing he could do for our office. If we were forced to somehow retain him or bring him back . . . my recommendation would be that he [be] given no assignment . . . and be given nothing to do because there is nothing that he can do for the office that would not then cast doubt on its credibility and legitimacy. There is nothing further he can do for the office.

Shirvell testified that he worked for both of Cox's campaigns for Attorney General; he also worked in nonattorney roles for the Department from 2003 through 2007, when he was offered a position as an assistant attorney general. Shirvell eventually worked in the Appellate Division, where Beaver, McGormley, and Restuccia were his superiors.

In April 2010, Shirvell started the blog after reading an article about Armstrong in the *Detroit Free Press*. Shirvell admitted that he wrote everything in the blog and stated that he believed that everything he wrote was true at the time he wrote it. Shirvell explained that Restuccia and Isaacs spoke with him about the blog in May 2010, but they did not instruct him to take the blog down.

Shirvell initially agreed to the WXYZ interview on condition that the reporter, Ross Jones, not ask questions about the Department or his role within the Department. Shirvell stated that he received a written reprimand for appearing for the interview without first notifying the Department. He stated that he read the Department's media-contacts policy and did not think that it applied to him.

After the WXYZ interview, according to Shirvell, "things began to change at the office." Shirvell testified that his relationships with his superiors were "much different, much different, much different." Additionally, Shirvell was approached by CNN and Comedy Central about two proposed nationally televised interviews and, ultimately, he agreed to the interviews. Shirvell stated that he agreed to the interviews on condition that he not be asked about his role within the Department. However, he was aware that during the WXYZ interview he was asked about his role as an assistant attorney general and

there was nothing in writing stating that reporters would not ask about the Department.

Shirvell testified that he thought he could work for the Department in some capacity; he explained that his personal views had never interfered with his responsibilities at work. Shirvell noted that, sometime after McGormley learned of his blog, McGormley assigned him to work on a gay-marriage issue. Shirvell explained that McGormley stated that he had done a good job with the assignment and he disputed the contention that McGormley did not know about the blog at the time of the assignment.

Shirvell defended the content of the blog, stating that he had believed everything he wrote on the blog at the time that he wrote it. Shirvell admitted calling Armstrong a "privileged pervert" and stated that he thought that Armstrong engaged in a "perverted" lifestyle by being gay. Shirvell also agreed that he compared one of Armstrong's rallies to those of the Ku Klux Klan (KKK) because there were no minorities at the rally. Shirvell admitted writing a blog post about Armstrong's "secret boyfriend," but denied that he "outed" the boyfriend.

On March 21, 2012, the hearing officer issued a lengthy opinion denying Shirvell's grievance and finding that the Department proved by a preponderance of the evidence that Shirvell's discharge was for just cause. The hearing officer summarized the content of the blog as follows:

> The hearing officer will not in this decision go into great detail regarding these "blog" postings, but review of them makes it clear that the grievant was obsessed with Armstrong, his homosexuality, the fact that he came from a monied [sic] background, and the fact that he had political connections with individuals (such as Speaker of the House Nancy Pelosi . . .) whose politics were diametrically opposed to those of the grievant. Review of the "blog"

> postings reveals that the grievant engaged in some of the most hateful speech imaginable. He sought to and in fact did "out" individuals whose homosexuality had been their private concern until his intervention.
>
> * * *
>
> . . . It is clear from this record, however, that the actual basis for the appalling acts of harassment directed at Armstrong and his acquaintances by the grievant, however, was their homosexuality. It is clear that the Order of Angell issue, while it may have been of some concern to the grievant, was used as a pretext in an effort to couch the most vile hate speech in a constitutionally protected form. All one needs to do is read the "blog" article after article, to realize that the dominant theme is Armstrong's "disgusting" or "perverted" lifestyle.

The hearing officer continued, determining that there was a sufficient nexus between Shirvell's conduct and his employment with the Department so that the termination did not violate the First Amendment. The hearing officer reasoned that Shirvell's interviews cast the Department in a negative light and necessitated Cox's appearing on national television to explain the Department's position. The hearing officer concluded that Shirvell engaged in "conduct unbecoming a state employee" under the CSR that justified his termination, reasoning as follows:

> By accepting the invitations to appear on the Cooper program and The Daily Show, the grievant made a media spectacle of himself and cast the Department . . . in a negative light. He did so paying attention to his own interests and disregarding the interests and reputation of his employer. The testimony in the record indicates that not only did the grievant create a great deal of scrutiny from the media, that scrutiny generated a tidal wave of condemnation from the public in the form of . . . thousands of telephone calls, emails and letters. This impacted the [Department] and its ability to successfully

carry out its mission. . . . [I]t is clear that there was a substantial expression of concern by . . . clientele that an agency who would retain such an employee would be unable to represent their interests.

* * *

. . . The speech engaged in by the grievant is of the most base, hateful sort. . . . This speech, generating the negative publicity that it did . . . is conduct unbecoming any state employee, let alone a state employee working as an Assistant Attorney General.

* * *

The sexual orientation of an individual is a matter protected by Civil Service rules. That protection applies not only to state employees, but also to the general public when it prohibits an appointing authority from engaging in such discrimination in the hiring or recruitment process. The conduct of the grievant in creating a media circus around the hate speech against homosexuals in his "blog" could well impact the ability of the [Department] to recruit and hire otherwise qualified individuals if they felt that their sexual orientation might be an issue with an agency that continued to employ such a truculent, intolerant individual. The focus of the "blog" postings . . . are determined to have been motivated by the grievant's obsession with the sexual orientation of Chris Armstrong and the fact that Armstrong had been elected by the student body to be the leader of their student government. For reasons known but to himself, the grievant could not bear the thought of Armstrong being elected to such a position. . . .

* * *

. . . The hearing officer would not countenance the pursuit and harassment of any member of a group protected by Civil Service rules on the scale demonstrated here as being worthy of any state employee. . . .

* * *

> All State of Michigan employees work for all of the citizens of this state. Assistant Attorneys General not only work for the citizens of this state, but are responsible to assure that the legal rights of those citizens are protected. The citizenry needs to be able to have faith that their government and its employees are there to serve and protect the citizens, all citizens, even those whose conduct may seem repugnant to them.
>
> * * *
>
> The grievant has been determined . . . to have engaged in harassing conduct of the basest sort. . . . The fact that the grievant deliberately made a media spectacle of himself and the department for which he worked without regard for the interests of his employer constitutes conduct unbecoming a state employee.

Shirvell appealed the hearing officer's decision to the Employment Relations Board (ERB) and sought to admit several e-mails that Shirvell claimed amounted to newly discovered evidence. On July 12, 2012, the ERB granted in part and denied in part the motion to admit the e-mails[8] and affirmed the hearing officer's decision. The ERB held that the Department had just cause to terminate Shirvell because Shirvell's conduct interfered with the internal operations of the Department and tarnished the credibility of both Shirvell and the Department. The ERB also found that Shirvell's behavior and disregard for the advice of his superiors made it impossible to trust his judgment.

On August 13, 2012, the Commission approved the recommendations of the ERB and adopted the ERB's decision as its final decision on the matter. Shirvell appealed the Commission's ruling to the circuit court.

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[8] According to Shirvell, the e-mails showed that Armstrong "utilized high-powered Hollywood publicist Howard Bragman to manipulate the media and bring public pressure . . . to terminate [Shirvell]."

Following oral argument, in an April 18, 2013 opinion and order, the circuit court affirmed the Commission's order. The circuit court held that there was competent, material, and substantial evidence on the whole record to support the finding of just cause to terminate Shirvell's employment. The court noted that Shirvell's off-duty conduct resulted in the Department's receiving more than 22,000 e-mails, 150 letters, and nearly 950 phone calls; in addition, the Department was inundated with media contacts and had to assign staff members solely to deal with the outcry resulting from Shirvell's conduct. Further, the court found that there was evidence that demonstrated that the Department's reputation was damaged by Shirvell's off-duty actions. Specifically, there was evidence that the Department's anti-cyberbullying initiative was questioned and that two organizations issued resolutions condemning Shirvell's actions and questioning the Department's ability to carry out its mission. Finally, there was evidence that Shirvell's off-duty conduct damaged the Department's image of employing law-abiding personnel. Specifically, the court noted that Shirvell had multiple contacts with the police, that stalking charges were considered, that Armstrong sought a PPO, and that Shirvell was banned from the U-M campus for a time. The circuit court also concluded that the First Amendment did not preclude the Department from disciplining Shirvell in this case.

Finally, the circuit court concluded that Shirvell's termination was not arbitrary and capricious because even without the information gathered in the allegedly biased internal investigation, there was sufficient evidence in support of his termination. Further, the court noted that Shirvell had not produced any evidence in

support of his assertion that the result of the investigation was preordained. This Court granted Shirvell's application for leave to appeal the circuit court order.

B. UNEMPLOYMENT BENEFITS PROCEEDING

Shirvell filed his claim for unemployment compensation on November 17, 2010. The UIA issued a determination that Shirvell was disqualified for benefits under the "misconduct" provision of the MESA. The UIA found that Shirvell was terminated for "conduct unbecoming a State employee" by targeting individual members of the public in a manner that could be construed as an invasion of privacy, libel, or slander. The agency also found that Shirvell's conduct "has caused or has the potential to cause disruption" to the Department's working relationship with its clients and the courts.

Following Shirvell's protest, the UIA issued a redetermination that Shirvell was disqualified for benefits because of misconduct and Shirvell appealed the redetermination. Thereafter, a hearing referee held a hearing, where both Shirvell and Bramble offered testimony similar to the testimony offered at the grievance hearing discussed earlier in this opinion. Specifically, Bramble testified that the Department received hundreds of telephone calls and e-mails from the public following Shirvell's televised interviews. Bramble also testified that attorneys within the Department were being questioned about Shirvell during unrelated proceedings and noted that the Michigan Civil Rights Commission and the Ann Arbor City Council had passed resolutions condemning Shirvell's conduct. Bramble testified that the Department concluded that Shirvell could no longer serve as an assistant attorney general. In addition, the evidence showed that Shirvell

had given the televised interviews and exhibits were introduced at the hearing, including the termination letter, excerpts from the blog, and a transcript of Cox's CNN interview.

Following the hearing, on September 2, 2011, the referee issued a decision and order affirming the UIA's decision to deny Shirvell unemployment benefits. The referee concluded:

> The claimant . . . was responsible for assisting the Attorney General in performing his official duties. Those duties included serving the State of Michigan and its subordinate agencies and working with municipalities. Without passing on the issue of whether or not the claimant's speech concerning the MSA student president represented activities protected under the First Amendment, it is concluded that the claimant's speech did have an adverse impact on the performance of the employer's duties. The employer had to deal with numerous public inquiries concerning the claimant. At least two of the public entities with which the employer had to deal professionally issued public resolutions critical of the claimant and calling on the employer to take action concerning the claimant. Finally, the Attorney General himself felt it necessary to occupy his time in addressing on national television the claimant and his speaking activities, time which could have been productively spent in addressing other pressing duties.
>
> It is concluded that the claimant's activities, including those concerning the student president, the claimant's violation of the employer's media policy, and his outburst at work against his supervisor, taken individually may not have amounted to statutory misconduct. Taken together, however, they adversely affected the ability of the employer to execute its duties to such an extent that they represented misconduct under the Act. The claimant therefore is disqualified for benefits under the misconduct provision of the Act. Because he is disqualified, he must requalify.

Shirvell appealed the referee's decision to the MCAC. On February 27, 2012, the MCAC affirmed the referee's

decision after reviewing the entire record, concluding that the decision was "in conformity with the facts as developed at the . . . hearing" and that the referee had "properly applied the law to the facts."

Shirvell appealed the MCAC's decision to the circuit court, and the circuit court reversed. The court reasoned that the MESA's misconduct provision, MCL 421.29(1)(b), and the related caselaw were inapplicable because Shirvell's activities amounted to constitutionally protected speech and the government could not deny Shirvell a benefit because of his speech. The circuit court found that it was undisputed that Shirvell was terminated because of his speech and concluded that the blog and related political activities amounted to protected speech. The circuit court further held that Shirvell's actions that led to the other disciplinary actions against Shirvell did not amount to misconduct under the MESA. The Department and the UIA moved for reconsideration, and the circuit court denied the motion. The circuit court expressly declined to apply the First Amendment balancing test set forth in *Pickering v Bd of Ed*, 391 US 563, 568; 88 S Ct 1731; 20 L Ed 2d 811 (1968), holding that the test was inapplicable in the context of unemployment benefits. This Court granted the Department's and the UIA's applications for leave to appeal the circuit court order. This Court consolidated the appeals with Shirvell's appeal in the grievance proceeding.

II. STANDARD OF REVIEW

In Docket No. 316146 (the grievance proceeding), Shirvell contends that the circuit court erred by affirming the Commission's order holding that he was terminated for just cause and he argues that exercising his First Amendment right to free speech cannot constitute

"conduct unbecoming a state employee" under the CSR. Shirvell also contends that his termination was arbitrary and capricious.

In Docket Nos. 314223 and 314227, the Department and the UIA argue that the circuit court erred by holding that Shirvell was entitled to unemployment benefits because his speech was protected under the First Amendment and therefore could not constitute "misconduct" under the MESA.

The circuit court addressed and decided the issues raised by the parties; therefore, they are preserved for our review.[9] *Reed v Reed*, 265 Mich App 131, 163; 693 NW2d 825 (2005).

"A final agency decision is subject to court review but it must generally be upheld if it is not contrary to law, is not arbitrary, capricious, or a clear abuse of discretion, and is supported by competent, material and substantial evidence on the whole record." *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 583; 701 NW2d 214 (2005). "This Court reviews a lower court's review of an administrative decision to determine whether the lower court applied correct legal principles and whether it misapprehended or misapplied the substantial evidence test to the agency's factual findings, which is essentially a clearly erroneous standard of review." *Id*. at 585. "Substantial evidence is that which a reasonable mind would accept as adequate to support a decision, being more than a mere scintilla, but less than a preponderance of the evidence." *Id*. at

[9] In Docket Nos. 314223 and 314227, Shirvell argues that the UIA waived review of the issues in its brief on appeal because it did not file a brief or participate in formal oral argument in the circuit court. However, the issues raised by the Department and the UIA are essentially identical and the circuit court addressed and decided the issues; therefore, we will consider them preserved for our review.

584 (quotation marks and citation omitted). These appeals also involve the proper interpretation and application of relevant statutes and the First Amendment, both of which involve questions of law that we review de novo. *Elba Twp v Gratiot Co Drain Comm'r*, 493 Mich 265, 277-278; 831 NW2d 204 (2013).

III. ANALYSIS

A. FIRST AMENDMENT

The overarching issue in these cases involves whether Shirvell's speech and speech-related activities were protected under the First Amendment. In the event that Shirvell's activities were protected under the First Amendment, then the governmental entities involved could not penalize Shirvell—i.e., either terminate his employment or deny him unemployment benefits—because of his speech. Thus, we proceed with our First Amendment analysis before addressing the statutory and administrative grounds for termination and denial of unemployment benefits.

"The First Amendment protects the speech and association rights of an individual . . . no matter how different, unpopular or morally repugnant society may find his activities." *Melzer v Bd of Ed*, 336 F3d 185, 192 (CA 2, 2003). Governmental employees do not forfeit their constitutionally protected free speech interest by virtue of accepting government employment. See, e.g., *Rankin v McPherson*, 483 US 378, 383; 107 S Ct 2891; 97 L Ed 2d 315 (1987) ("It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech."). However, while an employee does not forfeit his or her free speech interests by virtue of holding governmental employment, "the State

has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Pickering v Bd of Ed*, 391 US 563, 568; 88 S Ct 1731; 20 L Ed 2d 811 (1968). Thus, "[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti v Ceballos*, 547 US 410, 418; 126 S Ct 1951; 164 L Ed 2d 689 (2006); see also *Dishnow v School Dist*, 77 F3d 194, 197 (CA 7, 1996) ("True it is that speech which could not be prohibited by the state if uttered by a private person may be a lawful basis for discharge or other discipline when uttered by a public employee."). This is because "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti*, 547 US at 418. "Public employees, moreover, often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id*. at 419.

In *Pickering*, 391 US at 568, the United States Supreme Court addressed whether a public employee was wrongfully terminated for exercising his First Amendment right to free speech and explained that resolution of the issue required "arriv[ing] at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Under the *Pickering* framework, an employee is entitled to protection under the First Amendment if he or she spoke as a private citizen on a matter of public concern and where the state cannot show that

its interest in the efficient provision of public services outweighs the employee's interest in commenting on the matter of public concern. *Pickering*, 391 US 563; *Rankin*, 483 US at 384. Because these cases involve the denial of benefits because of Shirvell's speech, we proceed by applying the *Pickering* framework.[10]

1. PRIVATE CITIZEN/PUBLIC CONCERN

The first prong of the *Pickering* framework "serves a gatekeeping function" because "[t]he First Amendment protects an employee only when he is speaking 'as a citizen upon matters of public concern' as opposed to when he speaks only on matters of personal concern." *Melzer*, 336 F3d at 193, quoting *Connick v Myers*, 461 US 138, 147; 103 S Ct 1684; 75 L Ed 2d 708 (1983). In the event that an employee's speech involves a matter of personal concern, the government has broad discretion to deal with the employee as it deems fit without "any special burden of justification . . . ." *United States v Nat'l Treasury Employees Union*, 513 US 454, 466; 115 S Ct 1003; 130 L Ed 2d 964 (1995) (*NTEU*), citing *Connick*, 461 US at 148-149. "If, however, the speech does involve a matter of public concern, the government bears the burden of justifying its adverse employment action." *NTEU*, 513 US at 466.

Whether an employee spoke as a citizen on a matter of public concern involves a question of law for the court to decide. *Rorrer v City of Stow*, 743 F3d 1025, 1047 (CA 6, 2014). Resolving this issue requires consideration of "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 US at 147-148. "[P]ublic concern is something that is a sub-

[10] To the extent that the circuit court in Docket Nos. 314223 and 314227 held that *Pickering* did not apply in cases involving unemployment benefits, we hold that that conclusion constituted legal error.

ject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *San Diego v Roe*, 543 US 77, 83-84; 125 S Ct 521; 160 L Ed 2d 410 (2004). "But the speech need not address a topic of great societal importance, or even pique the interest of a large segment of the public . . . ." *Craig v Rich Twp High Sch Dist 227*, 736 F3d 1110, 1116 (CA 7, 2013). "That the public was not large, that the issues were not of global significance . . . [does] not place . . . speech outside the orbit of protection." *Dishnow*, 77 F3d at 197. Moreover, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin*, 483 US at 387.

In this case, the parties do not dispute that Shirvell spoke as a private citizen. Additionally, we need not devote a prominent part of this opinion to determine whether Shirvell's speech touched on a matter of public concern. Assuming, as Shirvell argues, that his speech touched on a matter of public concern, it was a matter of very limited public concern. Our review of the blog postings and Shirvell's "protest" activities leads us to conclude that the vast majority of the speech was dedicated to discussing the sexual orientation of Armstrong and Armstrong's acquaintances. Armstrong was the president of a student body and, consequently, he did not hold a prominent public office. He was not involved in a highly publicized political campaign. Moreover, the evidence showed that the media attention Shirvell received was focused on the fact that Shirvell, an assistant attorney general, was orchestrating a campaign against Armstrong using tactics that could reasonably be construed as harassment and cyberbullying. Nevertheless, for purposes of our analysis, we assume that Shirvell spoke as a private citizen on a matter of public concern.

2. *PICKERING-CONNICK* BALANCING TEST

"An employer does not necessarily violate the First Amendment by discharging an employee that speaks out on a matter of public concern." *Craig*, 736 F3d at 1118. "The government is entitled to restrict speech that addresses a matter of public concern if it can prove that the interest of the employee as a citizen in commenting on the matter is outweighed by the interest of the government employer in promoting effective and efficient public service." *Id*. (quotation marks and citations omitted); see also *Connick*, 461 US at 149-150. "[T]he State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id*. at 150. In evaluating the government's interests, proper focus is placed on the "effective functioning of the public employer's enterprise" and "[i]nterference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest." *Rankin*, 483 US at 388. Furthermore, it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 US at 152. Rather, "the governmental employer may defeat the [employee's] claim by demonstrating that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech." *Pappas v Giuliani*, 290 F3d 143, 146 (CA 2, 2002) (quotation marks and citations omitted).

In balancing the competing interests under *Pickering*, courts consider several factors to guide their analy-

sis; these nonexhaustive factors may include consideration of whether the employee's speech: (1) impaired discipline by superiors, (2) detrimentally affected close working relationships, (3) undermined a legitimate goal or mission of the employer, (4) impeded the performance of the speaker's duties, and (5) impaired harmony among coworkers. *Meyers v City of Cincinnati*, 934 F2d 726, 730 (CA 6, 1991), citing *Rankin*, 483 US at 388. As noted already, it is sufficient if the governmental employer can show a reasonable likelihood that the speech may lead to any of these adverse effects. See *Connick*, 461 US at 152; *Pappas*, 290 F3d at 146. Additionally, the content of the speech is relevant to determine "[t]he degree of disruption or potential disruption necessary to justify [the governmental action]." *Craig*, 736 F3d at 1119. "The less serious, portentous, political, significant the genre of expression, the less imposing the justification that the government must put forth in order to be permitted to suppress the expression." *Eberhardt v O'Malley*, 17 F3d 1023, 1026 (CA 7, 1994).

A brief review of caselaw is illustrative of the degree of disruption or potential disruption that is necessary to justify suppression of a public employee's speech. For example, in *Pickering*, 391 US at 569, a public school teacher wrote a letter to the editor of a local newspaper criticizing the school board's allocation of funds between athletics and education. The school board then terminated the teacher's employment for writing the letter. *Id*. at 566. The Supreme Court held that the termination violated the teacher's First Amendment right to freedom of speech. *Id*. at 574-575. The Court reasoned that the teacher's interests in speaking on a matter of public concern outweighed any interest asserted by the school board when, in part, there was no indication that the speech "interfered with the regular

operation of the schools generally" or affected the teacher's "proper performance of his daily duties in the classroom . . . ." *Id*. at 572-573.

Similarly, in *Rankin*, 483 US 378, the Court held that the respondent's termination violated the First Amendment when the governmental entity, the constable of Harris County, Texas, failed to show that the respondent's speech affected the internal affairs of the office. In that case, the respondent was employed as a clerical worker and she did not have any contact with the public. *Id*. at 380-381. On March 30, 1981, in response to a radio news bulletin on the attempted assassination of President Ronald Reagan, the respondent had remarked to a coworker, " 'if they go for him again, I hope they get him.' " *Id*. at 381. Upon learning of the statement, the constable terminated the respondent's employment, concluding that she was unfit to work for a law enforcement agency. The respondent filed suit. *Id*. at 390. After concluding that the respondent's speech touched on a matter of public concern, the Supreme Court concluded that the constable failed to show that the speech "interfered with the efficient functioning of the office." *Id*. at 389. Specifically, the Court considered the nature of the respondent's role within the office and that the respondent did not have any contact with the public, explaining:

> [I]n weighing the State's interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal. [*Id*. at 390-391.]

In contrast, the United States Court of Appeals for the Second Circuit[11] has held that protecting a governmental agency's reputation can be a legitimate state interest that can outweigh a public employee's right to speak as a private citizen on a matter of public concern. In *Pappas*, 290 F3d 143, an officer of the New York Police Department (NYPD) anonymously replied to several nonprofit mail solicitations with racist and anti-Semitic diatribes. When the officer's identity was revealed, his conduct and the NYPD's subsequent investigation garnered media attention and the officer was ultimately dismissed. *Id*. at 145. In discussing the governmental interests at stake, the court explained:

> The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. . . . If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged. [*Id*. at 146-147.]

The court concluded that the NYPD's interests in preserving its reputation and relationship with the

[11] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

public outweighed any interest the officer had in distributing his racist literature, concluding:

> For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, *tends to promote the view among New York's citizenry that those are the opinions of New York's police officers*. *The capacity of such statements to damage the effectiveness of the police department in the community is immense*. Such statements also have a great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers. In these circumstances, an individual police officer's right to express his personal opinions must yield to the public good. The restrictions of the First Amendment do not require the New York City Police Department to continue the employment of an officer whose dissemination of such racist messages so risks to harm the Department's performance of its mission. In the words of Justice Holmes, "A policeman may have a constitutional right to [speak his mind], but he has no constitutional right to be a policeman." [*Id*. at 147, quoting *McAuliffe v Mayor of New Bedford*, 155 Mass 216, 220; 29 NE 517 (1892) (emphasis added).]

Similarly, in *Locurto v Giuliani*, 447 F3d 159 (CA 2, 2006), the United States Court of Appeals for the Second Circuit held that concerns of the NYPD and the New York Fire Department (FDNY) about potential damage to reputation and potential disruption justified the termination of several former police officers and firefighters for their presentment of a racially offensive parade float. The court explained:

> It [is] . . . obvious . . . that police officers and firefighters who deliberately don "blackface," parade through the streets in mocking stereotypes of African-Americans and, in one firefighter's case, jokingly recreate a recent vicious

> hate crime against a black man, might well damage the relationship between the NYPD and FDNY and minority communities.
>
> . . . The members of the African-American and other minority communities whose reaction to the float the defendants [governmental employers] legitimately took into account . . . cannot properly be characterized as "outsiders seeking to heckle [the plaintiffs] into silence." Rather, effective police and fire service presupposes respect for the members of those communities, and the defendants were permitted to account for this fact in disciplining the plaintiffs.
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> * * *
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> . . . *The First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect*. [*Id*. at 182-183 (citations omitted; emphasis added).]

Turning to the present case, initially, we note that Shirvell appears to contend that the Department had a heightened burden to justify regulating his speech because, according to Shirvell, his speech was not directed at criticizing the Department and was "wholly unrelated to his employer." This argument is unpersuasive.

In *NTEU*, 513 US at 457-459, the Supreme Court addressed whether a federal employer could prohibit a low-level employee from receiving payment for speeches that were unrelated to his employment. In rejecting the prohibition, the Court held that, in order to restrict an employee's speech that "has nothing to do with their jobs," the employer needed to provide a justification that was "far stronger than mere speculation . . . ." *Id*. at 465, 475. To the extent that Shirvell relies on *NTEU*, that reliance is misplaced. Here, unlike in *NTEU*, Shirvell engaged in deliberate conduct that irreconcil-

ably linked his speech with his employer. See *Roe*, 543 US at 80-81 (holding that *NTEU* was inapplicable because the plaintiff in *Roe* deliberately linked his speech to his public employment as a police officer). Specifically, Shirvell sat for televised interviews to defend his speech where he was identified as an assistant attorney general. Importantly, Shirvell agreed to the interviews despite having knowledge that he could be asked about his position as an assistant attorney general. During his first locally televised interview, Shirvell was identified as an assistant attorney general and was asked questions about his position within the Department. Nevertheless, Shirvell subsequently agreed to two additional interviews with CNN and Comedy Central in which he was again identified as an assistant attorney general and asked about his position with the Department. Although Shirvell refused to answer questions about his position, he was inextricably linked to the Department. In agreeing to the public interviews, Shirvell took deliberate steps that linked his speech to his employer. Accordingly, to the extent that Shirvell relies on *NTEU*, we find that reliance erroneous.

In the present case, the Department introduced evidence to show that its interests in the effective provision of governmental services outweighed Shirvell's speech interests. The facts and circumstances involved in this case are dissimilar to *Pickering* and *Rankin* and more akin to *Pappas* and *Locurto*. Here, unlike in *Pickering* and *Rankin*, the Department introduced evidence during both proceedings that showed that Shirvell's speech interfered with the Department's internal operations and adversely affected the efficient provision of governmental services. The Department received numerous e-mails, telephone calls, and letters in response to Shirvell's televised interviews. Department staff members were questioned about Shirvell

during unrelated proceedings and the Michigan Civil Rights Commission and the Ann Arbor City Council issued resolutions condemning Shirvell's behavior and questioning the Department's ability to fulfill its mission. It was clear in both proceedings that Shirvell's speech created a media firestorm, which in turn created a public-relations crisis. The Department dedicated resources to respond to media inquiries about Shirvell and ultimately Cox found it necessary to take time to appear for a nationally televised interview to defend the Department's response to Shirvell's conduct. Furthermore, irrespective of whether the 20,000 plus complaints were part of an "organized campaign" by a "Hollywood publicist," as Shirvell contends, the complaints nevertheless negatively affected the Department's internal operations.

Additionally, in the termination letter, the Department stated that Shirvell's conduct had "caused or has the potential to cause, disruption among members of the Department workforce and could have a negative impact on attracting and retaining the most qualified employment candidates." Evidence introduced at both proceedings supported that Shirvell's speech had, or was reasonably likely to have, a detrimental effect on close working relationships and harmony among coworkers within the office.

At the grievance hearing, Shirvell testified that after his televised interviews, "things began to change at the office," and he stated that his relationship with his superiors was "much different, much different, much different." This, of course, is of no surprise. Clearly, Shirvell's publicity tour created tension within the office. Shirvell's superiors, particularly, Restuccia and Cox, through the public relations department, were forced to defend the integrity of the Department in

general and its anti-cyberbullying initiatives in particular. Ultimately, Cox found it necessary to devote time to appear on CNN to defend the Department's integrity. According to Cox, Shirvell had no concern whether his conduct affected others within the office. Additionally, Restuccia testified that Shirvell had "lost all sense of proportion for his role in the office" and was focused on his own political crusade. Restuccia stated that Shirvell became "more isolated" after the interviews and was involved in a heated verbal altercation with Beaver, his immediate supervisor, for which he was disciplined. Given the tension that Shirvell's publicity tour created within the office, it was reasonable for the Department to conclude that Shirvell's present and future relationships with coworkers would be negatively impaired.

Similarly, evidence at both hearings showed that Shirvell's speech negatively affected, or was reasonably likely to negatively affect, close working relationships and harmony among coworkers. Evidence showed that Shirvell's conduct placed added stress and pressures on his superiors. He was involved in a heated altercation with his immediate supervisor, Beaver, for which he was disciplined. Furthermore, the Department could have reasonably concluded that Shirvell's conduct had the potential to detrimentally affect Shirvell's working relationships and serve as a detriment to the Department's recruiting efforts. Although there was no evidence to support that Shirvell's conduct had negatively affected the Department's recruiting efforts at the time he was terminated, as the *Connick* Court explained, it was not necessary for the Department "to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Connick*, 461 US at 152. It was reasonable for the Department to conclude that Shirvell's conduct could negatively affect the working rela-

tionships within the Department in the future. Indeed, in *Pappas*, 290 F3d at 147, the court explained that an officer's dissemination of racist, bigoted print materials had a "great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers." Like in *Pappas*, here, Shirvell's speech had a great capacity to cause similar harm within the ranks of the Department by potentially promoting distrust from the Department's present or future gay, bisexual, and transgender employees or recruits.

Evidence also showed that Shirvell's conduct undermined one of the Department's specific missions—i.e., the integrity of its anti-cyberbullying campaign. By employing an individual such as Shirvell, whose conduct Cox agreed amounted to bullying, the Department undermined its own message. Common evidence in both proceedings showed that, at the time Shirvell conducted his televised interviews, the Department had promoted an anti-cyberbullying initiative and worked to educate children about cyberbullying. Shirvell's conduct clearly undermined these initiatives and the Department was forced to defend the integrity of the initiatives. Shirvell repeatedly attacked Armstrong in the blog, and, at times, the attacks could reasonably be construed to be directed at Armstrong simply because he is gay. Shirvell placed a swastika flag on a photograph of Armstrong's face, stood outside Armstrong's residence with protest signs, appeared at events that Armstrong attended, and posted private information about Armstrong's personal life on the Internet. Shirvell made numerous demeaning remarks about Armstrong, likening him to a Nazi and a member of the KKK, referring to him as "Satan's representative" on the MSA and a "privileged pervert." Shirvell referred to Armstrong, a male, in the feminine gender when he likened Armstrong to a "handmaiden,"

presumably because of Armstrong's sexual orientation. Cox stated that Shirvell was "clearly a bully" who used the Internet to be a bully and engaged in conduct that was "unbecoming of civil discourse" and "unbecoming of common courtesy." Given the nature of Shirvell's speech and speech-related activities, it was reasonable for the Department to conclude in its termination letter that Shirvell's conduct either damaged or had the potential to damage the public's perception of the Department's ability to "conduct its operations and mission."

Moreover, Shirvell's speech and related conduct damaged both Shirvell's ability to perform his responsibilities and the Department's overall ability to perform its mission. Critically, in this case, unlike the employee in *Rankin*, Shirvell's position as an assistant attorney general required him to make public appearances in court as a representative for *all* the state's citizens. The Department, as the chief law enforcement agency in the state, represents *all* of the citizens of Michigan irrespective of race, gender, sexual orientation, religion, or creed. See MCL 14.28 and MCL 14.35. It has a legitimate interest in facilitating the "respect and trust of the community" and in advancing "the perception in the community that it enforces the law fairly, even-handedly, and without bias." *Pappas*, 290 F3d at 146. Indeed, like the public entities in *Pappas* and *Locurto*, the Department's effective provision of services "presupposes respect for the members of [minority] communities," including gay individuals. *Locurto*, 447 F3d at 182. Irrespective of his attempts to disassociate his role with the Department from his "campaign" against Armstrong, Shirvell's conduct reasonably could have created the impression that neither he nor the Department enforced the law in a fair, even-handed manner without bias. Shirvell was a representative of the De-

partment who appeared in court on behalf of the Attorney General and on behalf of the citizens of Michigan. By appearing on local and national television programs defending speech and conduct that could reasonably be construed as bigoted and homophobic as well as engaging in stalking-like behavior while at the same time being identified as an assistant attorney general, like the officers in *Pappas*, Shirvell first created, then perpetuated the impression that his opinions were the opinions of the Department. See *Pappas*, 290 F3d at 147.

For these reasons, it was reasonable for the Department to conclude in the termination letter that Shirvell was unable to perform his duties as an assistant attorney general. Particularly, the Department could have reasonably concluded that Shirvell compromised his ability to appear in court as a representative of the entire citizenry of the state when, in the words of Restuccia, Shirvell had lost all credibility and had become the "paradigm of the bigot." And, although Shirvell argues that he was assigned to work on a gay-marriage issue and performed the task well, the assignment occurred before the media firestorm had fully erupted and it did not involve a public court appearance. Certainly, after Shirvell engaged in multiple media interviews defending the blog, it would be difficult for Shirvell to credibly appear in court as a representative of the entire citizenry, including segments of the population including gays or victims of harassment and stalking. The evidence presented in this case clearly supported the Department's conclusion that Shirvell could no longer perform the duties of an assistant attorney general.

Shirvell's conduct also jeopardized the Department's ability to effectively perform its overall mission of being

the chief legal enforcement agency for the entire citizenry of the state. Despite Cox's efforts to disavow Shirvell's statements, Shirvell's crusade created the appearance that the Department could not fairly represent the interests of gays or victims of harassment or stalking. If the Department were to appear to treat these segments of the population with contempt or bias, respect for the Department would significantly be diminished not only within the legal profession, but also within the wider public as a whole. Thus, similar to the interests of the officers in *Pappas* and *Locurto*, here, Shirvell's "right to express his personal opinions must yield to the public good." *Pappas*, 290 F3d at 147. The First Amendment did not require the Department to preserve the employment of an individual whose continued harassment and stalking of a minority and dissemination of bigoted, homophobic statements risked harming the Department's integrity and mission. *Id*.

Indeed, this case is very similar to *Pappas*. Like the officer in *Pappas*, who initially disseminated racist literature anonymously, here, Shirvell initially maintained his blog anonymously. Like the offensive content in *Pappas*, here, Shirvell's blog contained offensive content that gave rise to a media firestorm. The governmental concerns noted by the court in *Pappas* apply with equal force here. When an employee of the Department disseminates bigoted, homophobic speech and then trumpets that speech in a media parade, such conduct "tends to promote the view among [Michigan's] citizenry" that "those are the opinions" of the Department. *Id*. The First Amendment did not require the Department to "sit idly by while its employee[] insult[ed] those [he was] hired to serve and protect." *Locurto*, 447 F3d at 183.

In sum, in both proceedings the Department met its burden to prove that its interests in the efficient provision of public services outweighed Shirvell's speech interests. *Pickering*, 391 US 563. Accordingly, Shirvell's speech was not protected under the First Amendment for purposes of these proceedings and neither the termination nor the denial of unemployment benefits offended the Constitution.[12] *Id*.

B. JUST CAUSE FOR TERMINATION

In Docket No. 316146, Shirvell argues that the circuit court erred by affirming the Commission's ruling that the Department had just cause to terminate his employment.

In order to discipline an employee protected by the CSR, the employer must have "just cause." Civ Serv R 2-6.1(a). "Just cause includes . . . [c]onduct unbecoming a state employee." Civ Serv R 2-6.1(b)(2). Permissible discipline includes "[d]ismissal from the classified service." Civ Serv R 2-6.1(c)(6). Although discipline should generally be progressive, "if an infraction is sufficiently serious, an appointing authority has the discretion to impose any penalty, up to and including dismissal, provided the penalty is not arbitrary and capricious." Civ Serv R 2-6.1(d).

In this case, Shirvell was dismissed for conduct unbecoming a state employee. The CSR do not define the phrase "conduct unbecoming a state employee," nor do the parties cite any binding authority interpreting the phrase. *Random House Webster's College Dictionary* (2000) defines "unbecoming" as "detracting from one's

[12] Given our resolution of the First Amendment issue, we need not address the Department's argument in Docket No. 314223 regarding preclusion.

appearance, character, or reputation; unattractive or unseemly." Consistently with this definition, the New Jersey Supreme Court has described the phrase "conduct unbecoming" as "an elastic one, that has been defined as any conduct which adversely affects the morale or efficiency of the bureau . . . [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services." *Karins v Atlantic City*, 152 NJ 532, 554; 706 A2d 706 (1998) (quotation marks and citations omitted). We find that this definition aligns with the commonly understood meaning of the term as set forth in the dictionary and that it encompasses conduct that the CSR intended to discourage. Therefore, we adopt the definition set forth in *Karins* as our own and hold that "conduct unbecoming a state employee" encompasses any conduct that adversely affects the morale or efficiency of the governmental entity or tends to adversely affect public respect for state employees and confidence in the provision of governmental services. *Id*.

In this case, evidence at the grievance hearing supported that Shirvell engaged in conduct unbecoming a state employee in that his speech and speech-related conduct undermined his professional character and reputation, adversely affected the Department's internal operations, and had a tendency to destroy public respect for the Department and confidence in the Department's ability to provide services. *Id*. Here, Shirvell was an assistant attorney general. Generally speaking, the Attorney General represents the state of Michigan, the Governor, the Secretary of State, the Treasurer, and the Auditor General. MCL 14.28; MCL 14.29. In addition, as an elected official, the Attorney General is a representative of the entire citizenry of the state. The Attorney General is obligated to give his or her opinion on all questions of law submitted by the Legislature, the

Governor, the Auditor General, the Treasurer, or any other state officer. MCL 14.32. Further, the Attorney General has supervisory powers over the prosecuting attorneys in this state. MCL 14.30. The Attorney General is permitted by statute to appoint assistant attorneys general who may "appear for the state in any suit or action before any court or administrative body, or before any grand jury, with the same powers and duties and in like cases as the attorney general . . . ." MCL 14.35. Accordingly, it is reasonable that as a legal representative of the state of Michigan, the conduct of an assistant attorney general should be held to a higher standard than the average private citizen.

Shirvell failed to adhere to this standard when he engaged in conduct that brought disrepute to himself and the Department. As already discussed, Shirvell directed numerous personal attacks at Armstrong and Armstrong's acquaintances, attacks that his superior, Cox, characterized as "unbecoming of common courtesy" and "unbecoming of civil discourse." Some of the attacks could reasonably be construed to have been directed at Armstrong at least in part because of Armstrong's sexual orientation. Shirvell equated Armstrong with the KKK and the Nazis. He accused Armstrong of engaging in casual "gay sex," hosting "gay orgies" in his dorm, and being racist and an elitist. Shirvell posted comments identifying individuals as gay and accused individuals of having sexual relations with Armstrong. In doing so, Shirvell showed no concern for Armstrong's privacy and he identified individuals as gay who previously had not announced their sexual orientation. Shirvell freely admitted contacting Representative Pelosi's office to speak against Armstrong. Furthermore, he admitted that he called the police to make a complaint regarding an alleged loud party at Armstrong's home, took photographs of their arrival at

the home, and then posted a blog entry declaring that the police had "raided" Armstrong's party, presumably in an attempt to convey that Armstrong was caught engaging in criminal activity. Additionally, Shirvell appeared on television interviews defending his conduct and the media firestorm and public backlash that followed was not beneficial to the Department's reputation or internal operations. The nature of Shirvell's conduct certainly had a tendency to destroy public respect and confidence in both Shirvell individually and the Department in general. *Karins*, 152 NJ at 554. As already discussed, Shirvell's conduct tended to suggest that neither he nor the Department could enforce the law in a fair and even-handed manner and the Department could reasonably have concluded that Shirvell could no longer credibly represent the entire citizenry of the state. Shirvell cast himself and the Department in a negative light and he showed a disregard for the negative effects that his conduct had on the Department. In doing so, Shirvell engaged in conduct unbecoming a state employee.

In sum, the circuit court applied the correct legal principles and did not misapprehend or grossly misapply the substantial evidence test when it concluded that there was competent, material, and substantial evidence on the record to support the Commission's determination that Shirvell engaged in conduct unbecoming a state employee under the CSR so that there was just cause for termination. *Polania v State Employees' Retirement Sys*, 299 Mich App 322, 327-328; 830 NW2d 773 (2013).

Next, Shirvell argues that, even if there was evidence to support the finding that his conduct amounted to "conduct unbecoming a state employee," his termination was nevertheless arbitrary and capricious.

In the grievance proceeding, the issue before the circuit court was whether the Commission's final decision was authorized by law and supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28. Relevant to this issue, a decision is unauthorized by law if it is in violation of a statute or the Constitution or if it is arbitrary and capricious. *Northwestern Nat'l Cas Co v Ins Comm'r*, 231 Mich App 483, 488; 586 NW2d 563 (1998). A decision is arbitrary if it is "fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance . . . ." *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 141; 807 NW2d 866 (2011) (quotation marks and citation omitted). A decision is "capricious" if it is "apt to change suddenly, freakish or whimsical[.]" *Id*. (quotation marks and citation omitted).

Shirvell argues that irrespective of the First Amendment issues, the decision to discharge him was arbitrary and capricious. He contends that Ondejko was biased and conducted his investigation with a preconceived notion that Shirvell would be discharged. In support of his claim, he asserts: Ondejko read the blog before his investigation and found that it was merely an attack on Armstrong's sexuality, Ondejko had discussed the case with his family, Ondejko's daughter issued an outrageous public message indicating that Ondejko had been "swamped" with the case and expressing relief that "Michigan's gay-bashing, student-stalking assistant AG" was fired. Shirvell also contends that Ondejko spoke with Armstrong's attorney about the matter both before and after completing his internal investigation report. Shirvell further asserts that Ondejko perjured himself at the hearing by testifying that Shirvell posted blog entries on state time using state resources, which

Ondejko was forced to admit on cross-examination was a mistake. The circuit court determined that Shirvell provided no evidence in support of his assertion that the result of the investigation was preordained.

Our review is limited to determining if the circuit court "applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence test to the agency's findings." *Polania*, 299 Mich App at 328. In this case, the circuit court applied the correct legal principles, i.e., the legal standard for what constitutes arbitrary and capricious conduct, to the evidence introduced at the grievance hearing.

Bramble testified that the investigation was not initially started with the aim of discharging Shirvell. He explained that the Department was "very concerned and wanted to see exactly what happened, hear Mr. Shirvell's side of the story, and then review it within . . . the Civil Service Rules of possible disciplinary actions or counseling actions and look at all the different options available." To that end, an internal investigation was launched, a multiple-hour disciplinary conference was convened, and the Department considered moving Shirvell to a different position within the Department.

Further, the Department did not rush to discharge Shirvell because of disagreement with his speech. The record shows that the Department knew about the blog as early as May 16, 2010. The record further demonstrates that, after learning about the blog, Shirvell's superiors discussed with Shirvell the possible ramifications of his words and actions. They tried to persuade Shirvell not to engage in further media discussions. Shirvell chose not to heed their advice. Then, acknowledging Shirvell's constitutional guarantees, his superiors told Shirvell that he was not prohibited from

further discussions with the media. Of importance was that this decision was expressly based on the Department's recognition of Shirvell's First Amendment rights. After Shirvell participated in interviews with national media, Cox initially went on national television and stated that Shirvell had the right to say whatever he wanted regardless of how offensive it may be to a national viewing audience. Thus, the Department clearly did not interfere with Shirvell's First Amendment rights. Rather, the Department went to great lengths to protect his First Amendment rights. Further, in an effort to essentially protect Shirvell, his superiors counseled against conducting further media interviews, though this advice was seemingly offered in friendship and out of a genuine concern for Shirvell's future law-related employment, rather than as an employment directive. The investigation into Shirvell's conduct began after it became clear that Shirvell's conduct was interfering with the Department's internal operations. Though Shirvell argues to the contrary, there is no record evidence to support his factual or legal conclusions. Accordingly, the circuit court applied the correct legal principles and did not err by finding that the termination was neither arbitrary nor capricious. *Northwestern Nat'l*, 231 Mich App at 488.

C. DENIAL OF UNEMPLOYMENT BENEFITS

In Docket Nos. 314223 and 314227, the Department and the UIA argue that the circuit court erred by reversing the MCAC's order affirming the UIA's finding that Shirvell was disqualified for unemployment benefits under the MESA.

A person must be eligible in order to receive unemployment benefits under the MESA. Initially, an individual must meet certain threshold requirements set

forth in MCL 421.28 such as, among others, filing a claim for benefits and seeking employment. See, e.g., MCL 421.28(1)(a), (b), and (c); *Braska v Challenge Mfg Co*, 307 Mich App 340, 352-353; 861 NW2d 289 (2014). However, even if an individual meets the threshold requirements in MCL 421.28, he or she may nevertheless be disqualified from receiving benefits under MCL 421.29, which provides, in relevant part, as follows:

> (1) . . . [A]n individual is disqualified from receiving benefits if he or she:
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> * * *
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> (b) Was suspended or discharged for *misconduct connected with the individual's work* . . . . [Emphasis added.]

Although the statute does not define the term "misconduct," our Supreme Court has construed the term as follows:

> The term misconduct . . . is limited to conduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. [*Carter v Employment Security Comm*, 364 Mich 538, 541; 111 NW2d 817 (1961) (quotation marks and citation omitted).]

A finding of misconduct can be based on a single event or on a "series of derelictions and infractions" that, by themselves, would not rise to the level of misconduct. *Christophersen v Menominee*, 137 Mich App 776, 780; 359 NW2d 563 (1984). Thus, "misconduct" is "established if the series of acts under scrutiny, *considered together*,

evince a wilful disregard of the employer's interests." *Id*. at 781. Furthermore, "Michigan does not require that the employee's conduct arise from his or her official duties, so long as it negatively affects the employer's interests." *Bowns v Port Huron*, 146 Mich App 69, 76; 379 NW2d 469 (1985). Moreover, it is not necessary that the employee intend the precise consequences of his or her actions. *Bell v Employment Security Comm*, 359 Mich 649, 652-653; 103 NW2d 584 (1960).

This Court has previously addressed whether off-duty conduct by a public employee amounted to "misconduct" under the MESA. In *Bowns*, 146 Mich App at 72, the claimant worked as a patrol sergeant for the Port Huron Police Department. The department did not have any rules or regulations governing the behavior of off-duty police officers. *Id*. During an undercover investigation at a local bar where "sports betting, bookmaking and high stakes poker games" were alleged to be taking place, a detective observed the claimant playing a hand of poker and socializing with patrons who appeared to be involved in gambling activities. *Id*. at 72-73. The claimant did not report the activity to his superiors and his employment was later terminated for "conduct unbecoming a police officer and for neglect of duty." *Id*. at 73. The circuit court affirmed the Michigan Employment Security Commission's ruling that the claimant was disqualified for unemployment benefits because he engaged in "misconduct in connection with his work . . . ." *Id*. at 73. This Court affirmed, explaining, "[t]his Court has recognized that illegal *or improper* conduct by employees in positions of public trust may undermine their ability to function in an official capacity and damage the prestige of the public employer." *Id*. at 75-76 (emphasis added). This Court concluded that the claimant committed misconduct connected with his job because his "off-duty association

with, and limited participation in, gambling activities . . . seriously interfered with his employer's interests" and "cast a cloud over his ability to maintain public trust . . . ." *Id*. at 77-78.

In this case, a review of the entire record from the unemployment compensation hearing shows that there was competent, material, and substantial evidence to support a determination that Shirvell engaged in misconduct. When viewed in its totality, Shirvell's behavior showed a willful disregard of the Department's interests and that he disregarded standards of behavior that the Department had a right to expect him to follow. *Carter*, 364 Mich at 541.

Of critical importance in this case is that Shirvell was in a position of public trust. He was appointed by the Attorney General, an elected official in a position of public trust, to assist in carrying out the powers and duties of the Attorney General. See MCL 14.35; *In re Watson*, 293 Mich 263, 270; 291 NW 652 (1940). The Attorney General is tasked with representing the state and its interests in legal proceedings and is the chief law enforcement officer of the state. See MCL 14.28. As an elected official, the Attorney General serves all of the citizens of Michigan, irrespective of race, creed, religion, gender, or sexual orientation. Thus, the Department had a real and substantial interest in maintaining neutrality and conducting its operations in a nonbiased manner. The public actions of its employees, therefore, were critical in protecting this interest. Internally, the Department has an interest in efficiently fulfilling its role, which may include maintaining a harmonious and inclusive work environment, recruiting and hiring top talent, and maintaining good client relationships. Shirvell's public "campaign" against Armstrong undermined all of these interests.

Shirvell's conduct cast a cloud over both his and the Department's ability to maintain the public trust and severely tarnished the Department's reputation. Although Shirvell waged his "campaign" during his own time, he was inextricably linked to the Department. During televised interviews, Shirvell claimed that he spoke as a "private citizen"; however, it was unmistakable that he worked for the Department. Seemingly, what made Shirvell of interest to the national media was the fact that he was employed by the Attorney General. Interviewers consistently referred to Shirvell as an assistant attorney general and Shirvell was asked about his position within the Department. Although Shirvell declined to answer the questions, the Department was inextricably linked to Shirvell and engulfed in a wellspring of negative publicity. The Department was forced to clarify to the public that Shirvell did not represent its views, with Cox ultimately sitting for a nationally televised interview in an attempt to distance the Department from Shirvell.

Evidence presented about the volume of calls to the Attorney General, the large portion of which were decidedly negative, supports the finding that Shirvell's conduct brought negative publicity to the Department and severely damaged the perception that it served all of the people of Michigan. Additionally, other assistant attorneys general were fielding questions about Shirvell's words and actions from judges throughout the state, causing distractions from their work within the courts.

As already noted, as an elected official, the Attorney General serves as a representative for the entire citizenry. It was reasonable for the Department to conclude that Shirvell's conduct made it appear to the public that the Department was unable to fairly represent the

interests of all of the state's citizens. This was reinforced when the Ann Arbor City Council and the Michigan Civil Rights Commission passed resolutions condemning Shirvell's behavior and questioning whether the Department could represent the interests of all Michigan's citizens. In addition, at the time Shirvell was publically defending his blog, the Department had an anti-cyberbullying initiative. Despite Shirvell's contentions to the contrary, it was reasonable for the Department to conclude that Shirvell's conduct had the potential to damage the public's perception of its ability to conduct its operations and mission when, for example, Shirvell's conduct directly undermined its campaign against cyberbullying. Indeed, Cox admitted during his televised interview that Shirvell was using the Internet to be a bully. Furthermore, as already noted, it was reasonable for the Department to conclude that Shirvell's conduct would impair its ability to maintain an inclusive work environment and diverse workforce and recruit the most talented individuals to work for the Department.

Shirvell's conduct also showed a disregard for the Department's interests in maintaining efficiency and good client relationships. As previously stated, the evidence confirmed the Department's contention that Shirvell's behavior had a negative effect on the operations of the Department. An official testified that the Department was "slammed" with a "massive amount" of telephone calls and e-mails expressing concerns about Shirvell's conduct and his role as an assistant attorney general. Shirvell acknowledged at the hearing that he was aware that the Department was receiving communications from various members of the public pertaining to his blogging activities. Moreover, other employees of the Department received questions regarding Shirvell and his conduct even when they were

attending to unrelated matters. As previously stated, various judges and judicial staff made inquiries into the matter and gave "off the cuff opinions" about Shirvell's conduct. Two public entities passed resolutions condemning Shirvell's behavior and calling upon the Department to support legislation prohibiting hate crimes and bullying. These resolutions supported the Department's determination that Shirvell could no longer effectively serve as an assistant attorney general, because the Department could have reasonably inferred that its relationships with clients would be damaged and that future clients would object to having Shirvell represent their interests. In short, Shirvell's conduct negatively affected the Department's ability to maintain efficiency and supported the Department's conclusion that Shirvell was unfit to continue in his role as a representative of the Department.

Furthermore, other factors played a part in the termination. At the same time Shirvell was caught in a wellspring of negative media attention, he was being disciplined for actions connected with his work. Shirvell received a written reprimand for failing to follow the Department's media-contact policy. Then, he received a $2^1/_2$-day suspension without pay after a heated argument with his supervisor involving inappropriate language and threats. Viewing the record in its totality, it is clear that there was substantial and compelling evidence to support the UIA's finding that Shirvell engaged in misconduct for purposes of the MESA and that the circuit court erred by concluding otherwise.

IV. CONCLUSION

To summarize, we conclude that Shirvell's speech was not protected under the First Amendment for purposes of these proceedings. Although Shirvell may

have spoken as a private citizen on a matter of public concern, the Department introduced evidence at both proceedings to show that its interests in the efficient provision of governmental services outweighed Shirvell's speech interests. Accordingly, neither the termination of Shirvell's employment nor the denial of unemployment benefits offended the Constitution. Therefore, in Docket No. 316146, we affirm the circuit court's order wherein the court properly held that there was competent, material, and substantial evidence on the whole record to support the determinations that there was just cause to terminate Shirvell and that the termination was not arbitrary or capricious. However, in Docket Nos. 314223 and 314227, we reverse the circuit court order wherein the court erred by concluding that Shirvell did not engage in misconduct that disqualified him for unemployment benefits under the MESA. Shirvell's speech was not protected and there was competent, material, and substantial evidence introduced at the unemployment compensation hearing to support the UIA's determination that Shirvell engaged in misconduct to the extent that he was disqualified for benefits under MCL 421.29(1)(b); therefore, remand for reinstatement of the MCAC's order in that case is appropriate.

Docket No. 316146 affirmed; Docket Nos. 314223 and 314227 reversed and remanded for further proceedings consistent with this opinion. A public question being involved, no costs are awarded. MCR 7.219(A). *Bay City v Bay Co Treasurer*, 292 Mich App 156, 172; 807 NW2d 892 (2011). We do not retain jurisdiction.

MURRAY, P.J., and O'CONNELL, J., concurred with BORRELLO, J.