MICHIGAN APPEALS REPORTS

CASES DECIDED

IN THE

MICHIGAN

COURT OF APPEALS

FROM

September 25, 2014, through November 6, 2014

CORBIN R. DAVIS
REPORTER OF DECISIONS

VOLUME 307
FIRST EDITION

THOMSON REUTERS™

2015

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

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2019
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2019
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2019
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2019
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2019
DEBORAH A. SERVITTO	2019
JANE M. BECKERING	2019
ELIZABETH L. GLEICHER	2019
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2019
AMY RONAYNE KRAUSE	2015
MARK T. BOONSTRA	2015
MICHAEL J. RIORDAN	2019

Chief Clerk:
JEROME W. ZIMMER, Jr.

Research Director:
JULIE ISOLA RUECKE

SUPREME COURT

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

Commissioners

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

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

ANNE E. ALBERS

State Court Administrator

JOHN A. HOHMAN, Jr.

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

TABLE OF CASES REPORTED

PAGE

COURT OF APPEALS CASES

HENDERSON v DEPARTMENT OF TREASURY

Docket No. 312859. Submitted February 11, 2014, at Lansing. Decided September 25, 2014, at 9:00 a.m.

Paul A. Henderson filed a petition in the Tax Tribunal challenging an assessment against him by the Michigan Department of Treasury for the 2007 tax year. The department alleged that Henderson was liable under MCL 205.27a(5) as a corporate officer of Jefferson Beach Properties, LLC, for taxes and interest totaling $72,286.39. Henderson argued that the tax liability had been discharged by the United States Bankruptcy Court for the Southern District of Florida when that court discharged him from bankruptcy under 11 USC 1141. The department moved for summary disposition, asserting that the tax liability had not been discharged because the liability was for taxes due under Michigan's former Single Business Tax Act (SBTA). The department asserted that the SBTA imposed excise taxes and that, under 11 USC 523(a)(1)(A), a bankruptcy discharge under 11 USC 1141 does not discharge debt for excise taxes. A hearing referee granted summary disposition in favor of the department in a proposed opinion and order. Henderson filed exceptions to the proposed order, but the tribunal affirmed and adopted the proposed order in its final opinion and judgment. Henderson appealed.

The Court of Appeals *held*:

1. Under MCR 2.116(I)(5), the tribunal had to provide Henderson the opportunity to amend his pleadings. Under MCR 2.118(A)(1), Henderson's right to amend his pleadings became discretionary 14 days after he was served with a responsive pleading. Leave to amend pleadings should be denied only for particularized reasons, such as undue delay, bad faith, dilatory motive on the movant's part, repeated failures to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or the futility of amendment. Henderson asserted that the tribunal denied him the right to amend his pleadings, but the assertion was not supported by the record. The tribunal did not err when it indicated that Henderson had failed to demonstrate that amendment would be justified.

2. In the tribunal's order granting the department's motion to abey discovery until the tribunal issued its decision to adopt or

vacate the hearing officer's proposed order, the tribunal indicated that if it entered an order vacating the proposed order, Henderson would have the opportunity for discovery. Contrary to Henderson's assertion, the order did not promise him an opportunity for discovery. Because the tribunal ultimately chose to adopt the proposed order, no discovery was needed. There is no constitutional right to discovery in any judicial or quasi-judicial proceeding, including an administrative proceeding.

3. 11 USC 523 states that a bankruptcy discharge under 11 USC 1141 does not discharge an individual debtor from any debt for a tax of the kind and for the periods specified in 11 USC 507(a)(8). Section 507(a)(8) refers to unsecured claims of governmental units, including certain excise taxes. 11 USC 507(a)(8)(E)(i) specifically refers to excise taxes on a transaction. Under federal bankruptcy law, an excise tax is a tax on the enjoyment of a privilege or the carrying on of an occupation or activity. The SBTA was enacted to provide for a tax on financial activities. A tax on financial activities is a tax on transactions. Under former MCL 208.31(3), the SBTA provided that the tax levied and imposed under the act was imposed on the privilege of doing business in Michigan. Because the tax imposed under the SBTA possessed the characteristics commonly attributed to excise taxes—in that it was a tax on the enjoyment of a privilege or the carrying on of an occupation or activity—and it was imposed on certain financial activities, the SBTA imposed an excise tax on a transaction within the meaning of 11 USC 507(a)(8)(E)(i).

4. MCL 205.27a(5), as amended by 2003 PA 23, stated that if a limited liability company liable for taxes administered under Michigan's revenue collection act, MCL 205.1 *et seq*., failed to pay the taxes due, its officers were personally liable for the failure. Henderson's assertion that because his liability under former MCL 205.27a(5) was derivative, it did not arise from an excise tax and, therefore, was discharged in bankruptcy, was without merit. The plain language of former MCL 205.27a(5) indicated that liability under the statute was for taxes. Because the tax imposed on Henderson was an excise tax on a transaction that was not discharged in the bankruptcy proceedings, the tribunal properly granted summary disposition in favor of the department.

5. MCL 205.27a was amended by 2014 PA 3. In *Shotwell v Dep't of Treasury*, 305 Mich App 360 (2014), the Court of Appeals held that 2014 PA 3 be given retroactive effect. Contrary to Henderson's argument, remand was not necessary in this case to address the amended statutory language given that the issues before the Court of Appeals and the tribunal concerned only the

nature of Henderson's liability, which was not affected by the amendment of the statute.

Affirmed.

TAXATION — BANKRUPTCY — DISCHARGE OF DEBT — EXCISE TAXES.

Under 11 USC 523, a bankruptcy discharge under 11 USC 1141 does not discharge an individual debtor from any debt for a tax of the kind and for the periods specified in 11 USC 507(a)(8), including excise taxes on a transaction; under federal bankruptcy law, an excise tax is a tax on the enjoyment of a privilege or the carrying on of an occupation or activity; Michigan's former Single Business Tax Act imposed an excise tax on a transaction within the meaning of 11 USC 507(a)(8)(E)(i).

Miller, Canfield, Paddock & Stone, PLC (by *Jack Van Coevering*, *Gregory A. Nowak*, and *Colleen M. Healy*), for Paul A. Henderson.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Nate Gambill*, Assistant Attorney General, for the Department of Treasury.

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

STEPHENS, J. Petitioner, a resident of the state of Florida, appeals by right the final opinion and judgment of the Michigan Tax Tribunal (MTT) granting respondent summary disposition and holding petitioner responsible for taxes under Michigan's former Single Business Tax Act, former MCL 208.1 *et seq*.[1] For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

A bill for taxes due, also referred to as the notice of intent to assess (the Notice), was issued by respondent

[1] All references to MCL 208.1 *et seq*. are to sections that were in effect for the 2007 tax year unless otherwise noted.

to petitioner on October 18, 2011. The Notice alleged that petitioner was liable under the act for taxes in the amount of $72,286.39[2] pursuant to MCL 205.27a(5) as a corporate officer of Jefferson Beach Properties, LLC. Liability was for the tax period ending December 2007. Petitioner challenged the Notice in the MTT.

The petition alleged respondent did not make a preliminary determination that petitioner was the individual responsible for paying the taxes and that the tax liability was subject to a bankruptcy plan and ultimately discharged by the United States Bankruptcy Court for the Southern District of Florida on August 3, 2011.[3] Respondent moved for summary disposition before the MTT on the basis of its authority to assess tax liability against corporate officers under MCL 205.27a(5) and the bankruptcy court's decree, which excluded the tax liability from discharge. A hearing referee granted summary disposition in favor of respondent in a proposed opinion and order. Petitioner filed exceptions, but the MTT affirmed and adopted the referee's proposed opinion and order. Before the proposed order had been affirmed, however, petitioner had served respondent with discovery. Respondent, in turn, moved for immediate consideration and to hold discovery in abeyance until the MTT's final order was issued. The MTT denied the motion for immediate consideration, but granted the motion for an abeyance, closing all discovery until the final opinion was issued.

The MTT issued its final opinion and judgment on August 24, 2012. It affirmed the proposed order, holding that the referee properly analyzed state and federal law to determine that Michigan's single business tax (SBT)

---

[2] $61,080 tax due, and $11,206.39 interest.

[3] Petitioner had filed for Chapter 11 bankruptcy in Florida the previous year, November 3, 2010.

was a nondischargeable excise tax under 11 USC 507(a)(8)(E). Petitioner moved for reconsideration of the MTT's opinion on two occasions and was denied both times. At no point did petitioner file a motion to amend his petition. In none of the papers filed with the MTT after his initial petition did petitioner contend there was a material question of fact regarding whether he was a responsible corporate officer and that, regardless of the characterization of the SBT, summary disposition was, therefore, inappropriate.

II. PETITIONER'S RIGHT TO AMEND HIS PLEADINGS

Petitioner argues the MTT denied him the right to amend his pleadings and incorrectly applied MCR 2.116(I)(5). We find no support for this argument in the record. Our standard of review is clear. "Where fraud is not claimed, this Court reviews the tribunal's decision for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). Our decision is equally clear because petitioner never moved to amend his petition. Petitioner cites the following portion of the MTT's order granting respondent's motion for abeyance as support:

> Petitioner has had an opportunity to amend his pleadings and Petitioner has currently failed to timely exercise that "right" or demonstrate why he should be entitled to an extended opportunity to exercise that "right."

Respondent's motion for abeyance came after the referee's proposed order. That order granted summary disposition to respondent and rejected petitioner's claim that his tax liability was discharged by the Florida bankruptcy court. The referee's proposed order stated that the viability of an amendment of petitioner's pleading at that point was poor because, as a matter of

law, petitioner had stated no other claim and no amendment could change the fact that the SBT was nondischargeable by law. The referee was expressing the futility of amendment at that point. See *Tierney v Univ of Mich Regents*, 257 Mich App 681, 687-688; 669 NW2d 575 (2003).[4] Still, the proposed order advised petitioner of his right to amend under MCR 2.116(I)(5), under which a party against whom judgment is entered under MCR 2.116(C)(8) "shall [be] give[n] . . . an opportunity to amend [his or her] pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." The referee did not preclude the filing of a motion to amend. After the referee released his proposed order, respondent moved to hold in abeyance petitioner's first set of interrogatories and requests for production of documents. The motion did not mention amendment of the pleadings. Petitioner, however, referred to the issue of his "right to amend the petition" in his response to respondent's motion for abeyance. The MTT addressed this issue in its order granting respondent's motion for abeyance:

> 3. Although MCR 2.116(I)(5) does require the Tribunal to provide the parties with an opportunity to amend their pleadings, Petitioner has not filed any motion to amend or amended pleadings since the filing of Respondent's January 11, 2012, Motion for Summary Disposition, the Tribunal's April 17, 2012, Proposed Order granting that Motion and the filing of Petitioner's May 7, 2012, exceptions to that Order. In that regard, Petitioner has had an opportunity to amend his pleadings and Petitioner has currently failed to timely exercise that "right" or demonstrate why he should be entitled to an extended opportunity to exercise that "right."

---

[4] "Leave to amend should be denied only for particularized reasons, such as undue delay, bad faith, or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, or where amendment would be futile." *Tierney*, 257 Mich App at 687-688 (citation and quotation marks omitted).

While that order might have implied to petitioner that he was precluded from subsequently filing a motion to amend, the MTT clarified that order later when it addressed petitioner's motion for reconsideration:

> Furthermore, the Tribunal finds that the August 3, 2012 Order does not stand for the proposition that Petitioner *cannot* amend his pleadings, but rather, that Petitioner has failed to demonstrate that an amendment would be justified.

The MTT correctly applied MCR 2.116(I)(5). MCR 2.116(I)(5) only states that the court shall provide the *opportunity* for amendments. The rule does not refer to a limitations period. However, MCR 2.116(I)(5) does refer to the amendment procedure in MCR 2.118 which provides that "[a] party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading . . . ." MCR 2.118(A)(1). Respondent filed its answer to petitioner's petition on December 8, 2012. Approximately nine months later, when the MTT issued its order granting abeyance, petitioner had still not filed an amendment. While MCR 2.116(I)(5) mandates "the court shall give the parties an opportunity to amend," according to MCR 2.118(A)(2), after 14 days the right becomes discretionary:

> Except as provided in subrule (A)(1), a party *may* amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires. [Emphasis added.][5]

There was no error in the MTT's application of MCR 2.116(I)(5) to the facts of this case.

III. PETITIONER'S RIGHT TO DISCOVERY

Petitioner next argues he was promised a later opportunity to conduct discovery by the MTT, but did not receive it. We find no merit in this argument. In order to

properly preserve an issue for appeal, it must be "raised before, and addressed and decided by, the trial court." *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 443; 695 NW2d 84 (2005). Petitioner's motion for reconsideration after the MTT ordered that discovery be closed only addressed the issue of petitioner's right to amend the pleadings. The discovery issue was abandoned. It was not addressed by the MTT and is, therefore, not preserved for appellate review. However, this Court "may review an unpreserved issue if it presents a question of law and all the facts necessary for its resolution are before the Court." *Macatawa Bank v Wipperfurth*, 294 Mich App 617, 619; 822 NW2d 237 (2011). Sufficient facts are present here to discuss and decide the issues.

"We review a trial court's decision to grant or deny discovery for abuse of discretion." *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000). "An abuse of discretion standard is equally applicable with respect to discovery rulings by the MTT." *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 195; 682 NW2d 100 (2004). Petitioner relies on the following language from the MTT's August 3, 2012 order granting respondent's motion for abeyance in support of his position:

> [T]he Tribunal assigned the case to the above-noted Tribunal member for review and entry of a final *order* adopting or modifying the Proposed Order *or* an *order* vacating the Proposed Order and scheduling the case for hearing, which would include an opportunity for conducting discovery. [Emphasis added.]

Petitioner's reliance on this language is misplaced. It is clear that the MTT did not indicate that an opportunity for conducting discovery would be afforded if the MTT decided to adopt or modify the proposed order. To adopt

or modify the proposed order would substantially mean to affirm it, while vacating the order would be the opposite. The word "or" separates the two possibilities. See *People v Nicholson*, 297 Mich App 191, 199; 822 NW2d 284 (2012) ("The word 'or' is disjunctive and, accordingly, it indicates a choice between alternatives.") The MTT's order did not promise petitioner an opportunity for discovery in the event that it adopted or modified the proposed order. The opportunity to conduct discovery would have arisen only if the MTT vacated the proposed order and scheduled the case for a hearing. But the MTT chose to adopt the proposed order; hence, no discovery was needed.

Petitioner also contends he was denied procedural due process when he was not afforded the opportunity to conduct discovery. We disagree. Because this issue was also not preserved before the MTT, plain-error analysis is appropriate. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To establish plain error, petitioner must show "(1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected defendant's substantial rights." *People v Kowalski*, 489 Mich 488, 505; 803 NW2d 200 (2011). The third factor requires petitioner to show he was prejudiced by the error such that it affected the outcome of the proceedings before the MTT. *Carines*, 460 Mich at 763.

The MTT did not err when it granted respondent's motion for abeyance and ordered discovery closed until a final opinion was issued. First, there is no constitutional right to discovery in any judicial or quasi-judicial proceeding, including an administrative proceeding. *In re Del Rio*, 400 Mich 665, 687 n 7; 256 NW2d 727 (1977). Second, the MTT has authority to generate its own rules that "govern practice and procedure in all pro-

ceedings before the tribunal." Mich Admin Code, R 792.10201. See also MCL 205.732.

Petitioner cites no court rule or MTT rule with which the MTT failed to comply. Petitioner argues that a scheduling conference was required to take place, citing Mich Admin Code, R 792.10247. However, Mich Admin Code, R 792.10247 concerns prehearing conferences and provides that discovery is not permitted after the prehearing conference.[5]

Second, petitioner fails to tell this Court how the outcome of his MTT proceeding would have been different with discovery and how discovery would have changed the fact that, as a matter of law, petitioner's tax liability was not dischargeable in bankruptcy.

The MTT did not commit plain error or deny petitioner procedural due process. Even if a prehearing conference did not take place, petitioner had his opportunity to be heard on issues involving discovery by way of his answer to respondent's motion for abeyance and his subsequent motions for reconsideration.

IV. PETITIONER'S TAX LIABILITY

The heart of petitioner's claim is found in the question whether the SBT liability was discharged in bankruptcy as a "non-excise tax." As was the case with our review of petitioner's claimed right to amend his pleadings, our standard of review here is limited and clear. "This Court's review of Tax Tribunal decisions in nonproperty tax cases is limited to determining whether the decision is authorized by law and whether any factual findings are supported by competent, mate-

[5] "Discovery shall not be conducted after completion of the prehearing conference, unless otherwise provided by the tribunal." Mich Admin Code, R 792.10247(11).

rial, and substantial evidence on the whole record." *Toaz v Treasury Dep't*, 280 Mich App 457, 459; 760 NW2d 325 (2008) (citation and quotation marks omitted). "Issues involving the interpretation and application of statutes are reviewed de novo as questions of law." *Id*.

Both parties to this appeal agree that the issue presented is whether Michigan's former SBT was an excise tax. This is an issue of first impression for this Court. Under the United States bankruptcy code, certain excise taxes cannot be discharged in bankruptcy. 11 USC 523(a)(1)(A); 11 USC 507(a)(8)(E). This Court's determination of whether the SBT was an excise tax will answer the ultimate question of whether petitioner's liability for the SBT was discharged in his Florida bankruptcy case. If the SBT was not an excise tax, it was dischargeable in bankruptcy and the MTT erred by granting summary disposition in favor of respondent. On the other hand, if the SBT was an excise tax, it was not dischargeable in bankruptcy and the MTT's grant of summary disposition was proper.

A. PETITIONER'S BANKRUPTCY

On November 3, 2010, petitioner, as an individual debtor, filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of Florida. Petitioner checked under "Types of Priority Claims"[6] the "[t]axes and certain other debts owed to governmental units" box on his bankruptcy petition and listed Michigan business taxes and the Michigan Department of Treasury as creditors holding unsecured priority claims. Petitioner was ordered discharged from bankruptcy on August 3, 2011. The order of discharge

[6] Capitalization altered.

declared, "The discharge does not discharge a debtor from any debt under 11 U.S.C. § 523."

11 USC 523(a) states:

> A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
>
> (1) for a tax or a customs duty–
>
> (A) of the kind and for the periods specified in section 507(a)(3) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed[.]

The bankruptcy court discharged petitioner under 11 USC 1141. Therefore, under § 523, if petitioner had debt for a tax or customs duty of the kind and for the periods specified in either 11 USC 507(a)(3) or (8), that debt was not discharged. Section 507(a) identifies the priority order for claims and expenses. Section 507(a)(3) concerns unsecured claims under 11 USC 502(f). Section 502(f) applies to involuntary cases of bankruptcy whereas petitioner's petition for bankruptcy was filed voluntarily. Section 507(a)(8) concerns unsecured claims of governmental units, including certain excise taxes.

Respondent asserts that its SBT claim against petitioner fits the description of an excise tax under 11 USC 507(a)(8)(E)(i). Section 507(a)(8) refers to

> allowed unsecured claims of governmental units, only to the extent that such claims are for–
>
> * * *
>
> (E) an excise tax on–
>
> (i) a transaction occurring before the date of the filing of the petition for which a return, if required, is last due, under applicable law or under any extension, after three years before the date of the filing of the petition[.]

In this case, petitioner filed for bankruptcy on November 3, 2010, and the return for the 2007 tax year, which respondent claims petitioner is liable for, would have been due in 2008. Petitioner does not dispute that the year 2008 is within the three years of his 2010 bankruptcy filing. There is still, however, the remaining question of whether petitioner's SBT liability was for an excise tax.

B. EXCISE TAXES

Petitioner and respondent disagree over the characterization of an excise tax. Petitioner urges this Court to hold that excise taxes are specific, generally indirect taxes imposed on transactions and consequently that the SBT was not an excise tax. Respondent, contrarily, requests this Court adopt the definition of an excise tax as a privilege tax imposed on a corporation for engaging in business activity in the state and to hold that the SBT was an excise tax. The MTT determined the SBT was "a tax upon the privilege of doing business that is measured by the 'adjusted tax base' of persons with business activity in this state." (Quotation marks and citation omitted; emphasis omitted.)

Petitioner argues that the MTT incorrectly relied on federal law to answer the question whether the SBT was an excise tax. He claims the tax nature of the SBT is a question of state law because there is no "federal or state statutory definition" of the term "excise tax." This argument is meritless given that petitioner's request for relief is cloaked in federal law. In order for this Court to determine whether the SBT was an excise tax dischargeable in a *federal* bankruptcy, it must first analyze what an excise tax is and second, determine whether the SBT met those characteristics. "Whether an obligation is a tax within the meaning of the Bank-

ruptcy Code is determined by federal law." *In re Fagan*, 465 BR 472, 476 (Bankr ED Mich, 2012) (citation and quotation marks omitted). "[T]he Supreme Court [has] held that when the language of the Bankruptcy Code is clear, the sole function of the courts is to enforce it according to its terms." *In re Nat'l Steel Corp*, 321 BR 901, 908 (Bankr ND Ill, 2005) (citation and quotation marks omitted). It is true however, that "[t]he term 'excise tax' is not defined in the Bankruptcy Code." *Fagan*, 465 BR at 477.

As a beginning then, it would be helpful to review how other panels of this Court and our Supreme Court have interpreted excise taxes. The case of *Dooley v Detroit*, 370 Mich 194; 121 NW2d 724 (1963), although it concerned the validity of Detroit's income tax ordinance, provided an extensive discussion on excise taxes. *Dooley* was also decided before the 1975 enactment of the Single Business Tax Act. "It is presumed that the Legislature knows of and intends to legislate in harmony with existing law." *State Bar of Mich v Galloway*, 124 Mich App 271, 277; 335 NW2d 475 (1983). Further, "[t]he Legislature is presumed to know of the existence of the common law when it acts." *Wold Architects & Engineers v Strat*, 474 Mich 223, 234; 713 NW2d 750 (2006).

In *Dooley* the Supreme Court concluded that Detroit's tax on income was a proper excise tax. *Dooley*, 370 Mich at 201. At the time of *Dooley* an excise tax was known to be "variously defined, sometimes in very general language and sometimes in language more specific." *Id*. at 205. The Supreme Court turned to treatises for elaboration, stating:

> "Taxes fall naturally into three classes, namely, capitation or poll taxes, taxes on property, and excises. In general, it may be said that all taxes fall into one or the other of the

> foregoing classes, any exaction which is clearly not a poll tax or a property tax being an excise." [*Dooley*, 370 Mich at 205, quoting 51 Am Jur, Taxation, § 24.]

And further stating:

> "In its modern sense an excise tax is any tax which does not fall within the classification of a poll tax or a property tax, and embraces every form of burden not laid directly upon persons or property. The affirmative definitions of excise or excise tax found in the later decisions exhibit some variety in phraseology." [*Dooley*, 370 Mich at 205, quoting 51 Am Jur, Taxation, § 33. And further citing 16 McQuillin, Municipal Corporations (3rd ed), § 44.190.]

The *Dooley* Court also referred to other taxes the Court had previously found to be excise taxes. In a line of decisions, the Court had held Michigan's corporate franchise tax "was an excise tax on the franchise to do business as a corporation within the State." *Dooley*, 370 Mich at 205-206.[7] In making that determination the Supreme Court had relied on what it described as the "broad definition of an excise," which was "a tax imposed upon the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Id*. at 206 (citation and quotation marks omitted). The *Dooley* Court also concluded the Detroit tax on income was an excise tax because it was not a capitation tax[8] or a poll tax. *Id*. The characteristics of the Detroit tax were that

---

[7] While not dispositive, it is worth knowing that when enacted, the SBT replaced multiple other taxes, including the corporate income tax and the corporate franchise tax. House Fiscal Agency, *Background and History: Michigan's Single Business Tax* (November 2003), p 7. See also *Gillette Co v Department of Treasury*, 198 Mich App 303, 311 n 7; 497 NW2d 595 (1993).

[8] A capitation tax is a direct tax on income. "No Capitation, or other direct, Tax shall be laid, unless in the Proportion to the Census of Enumeration herein before directed to be taken." US Const, art I, § 9. See also *Wikman v Novi*, 413 Mich 617, 680 n 53; 322 NW2d 103 (1982) (LEVIN, J., dissenting).

it imposed a tax "upon net income from the performance of labor or the rendition of services" and on the "use of capital . . . ." *Id*.

Later, in *Continental Motors Corp v Muskegon Twp*, 376 Mich 170, 178; 135 NW2d 908 (1965), the Supreme Court explained the distinction between the ad valorem tax and the excise tax. At issue in *Continental Motors* were corporate taxes paid on the assessed value of personal property in possession of the plaintiff under 1959 PA 266. *Continental Motors*, 376 Mich at 174-175. In *Continental Motors*, an "excise tax" was referred to as a specific tax imposed "upon the privilege of possession and use," whereas an "ad valorem tax" was imposed on the property itself. *Id*. at 177, 181. The Supreme Court also named Michigan's corporate franchise tax, sales tax, use tax, and tax on possessory rights to use another's tax-exempt property as examples of excise taxes. *Id*. at 180. Ultimately, the Court in *Continental Motors* held 1959 PA 266 unconstitutional under the title-object clause of Michigan's 1908 Constitution, reasoning that the public act amended the general property tax law so as to be under the guise of an ad valorem tax, when in actuality it operated as an excise tax. *Id*. at 177-178, 181. The plaintiff's possession and use of the personal property was a privilege, and a tax on the property in its possession would have been a tax on the privilege and, therefore, an excise tax. By contrast, a tax on the property itself would have been an ad valorem tax.

The federal courts have also had an opportunity to define and explain the nature of excise taxes. Petitioner in the instant case chose to appeal in the MTT and subsequently in this Court. Other litigants took the route of appealing in the bankruptcy court and subsequently in the federal circuit courts. In this case, the

hearing referee identified the bankruptcy court as an alternative forum in which petitioner could have sought relief and recognized that the bankruptcy court was "better suited to interpret its own orders and controlling case law." Respondent and the MTT cite *In re Quiroz*, 450 BR 699 (Bankr ED Mich, 2011), as an illustration of how the federal courts have dealt with similar issues. *Quiroz* did have similar facts, but in that case the parties' focus was on whether the SBT was an excise tax "on a transaction" as required for discharge under 11 USC 507(a)(8)(E)(i). *Quiroz*, 450 BR at 700. The nature of the SBT as an excise tax was apparently conceded, and the *Quiroz* court concentrated on the meaning of the term "transaction." *Id*. at 701-702. The *Quiroz* court turned to the case of *In re Nat'l Steel Corp*, 321 BR 901, and its interpretation of the apportionment character of the Texas franchise tax to explain "transaction" in the context of an excise tax. *Quiroz*, 450 BR at 702. The *Quiroz* court concluded the SBT was an excise tax on a transaction because it taxed the "transaction consisting of the act of doing business in the State of Michigan," which was similar to the type of transaction taxed by the Texas franchise tax. *Id*. The MTT followed the logic presented in *Quiroz* regarding the similarities in the apportionment provisions between the Texas franchise tax and the SBT and concluded the SBT was an excise tax as well. The *Quiroz* case, while factually identical to the instant one, misses the analytical mark of the instant case's significance. The question here is preliminary to that of *Quiroz*, namely, is the SBT an excise tax. To that end, *In re Fagan*, 465 BR 472, is more instructive.

In *Fagan*, the debtor, a corporate officer, claimed that the Michigan Department of Treasury continued to collect fuel taxes on the corporation when the tax liability was discharged in the debtor's Chapter 7 bank-

ruptcy. *Fagan*, 465 BR at 473. The department, in a motion to dismiss, argued that the fuel taxes were excepted from discharge under 11 USC 523(a)(1)(A) of the bankruptcy code because they were excise taxes under 11 USC 507(a)(8)(E). *Fagan*, 465 BR at 474. On an issue of first impression, the Bankruptcy Court for the Eastern District of Michigan analyzed the fuel taxes to determine first, whether they were taxes under federal bankruptcy law; second, whether they were excise taxes; and third, whether they were excise taxes on a transaction. *Id*. at 474. While the federal district court's conclusions are not binding on this Court, the analysis of that court is helpful.

The first analytical step in *Fagan* was determining whether an obligation was a tax.[9] However, neither party in the present case questions whether the SBT was a tax under federal bankruptcy law, nor does either party argue that the SBT was something other than a tax. The second and third steps analyze whether the tax is an excise or not.

Fagan recognized there are "two generally accepted definitions of 'excise tax[.]' " *Fagan*, 465 BR at 477. Not surprisingly, petitioner has adopted one and respondent the other. The first, adopted by respondent is from *Black's Law Dictionary*:

> "[a] tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege. A tax on the manufacture, sale, or use of goods or on the carrying on of an occupation or activity, or a tax on the transfer of

[9] There are "requirements that must be met in order for an obligation to the government to qualify for priority as a tax under federal bankruptcy law." *Nat'l Steel*, 321 BR at 907. The requirements have been formulated into a four-part test, under which the obligation must be "(1) an involuntary pecuniary burden; (2) imposed by the state legislature; (3) for a public purpose; (4) under the police or taxing power of the state." *Fagan*, 465 BR at 476 (citation and quotation marks omitted).

> property. In current usage the term has been extended to include various license fees and practically every internal revenue tax except the income tax (*e.g.*, federal alcohol and tobacco excise taxes)[.]" [*Fagan*, 465 BR at 477, quoting *Black's Law Dictionary* (6th ed) (citation and quotation marks omitted; alterations in original; emphasis omitted).]

The second, adopted by petitioner, is from a general dictionary definition:

> "an internal tax, duty or impost levied upon the manufacture, sale, or consumption of a commodity within a country and [usually] forming an indirect tax that falls on the ultimate consumer[;] c: any of various duties or fees levied on producers of excisable commodities[;] d: any of various taxes upon privileges (as of engaging in a particular trade or sport, transferring property, or engaging in business in a corporate capacity) that are often assessed in the form of a license or other fee[.]" [*Fagan*, 465 BR at 477, quoting *Webster's Third New International Dictionary* (citation and quotation marks omitted; alterations in original; emphasis omitted).]

Because both definitions have been employed to describe an excise tax, neither should be counted as "wrong." Instead, the SBT should be analyzed to determine whether it possessed the characteristics commonly attributed to excise taxes.

C. THE SINGLE BUSINESS TAX ACT

When the *Fagan* court analyzed whether fuel taxes were excise taxes under 11 USC 507(a)(8)(E), it first looked to the preface of the act that imposed the fuel taxes to ascertain the act's purpose. The relevant act here, the Single Business Tax Act, provided that it was an act

> to provide for the imposition, levy, computation, collection, assessment and enforcement, by lien or otherwise, of taxes on certain commercial, business, and financial activities; to

> prescribe the manner and times of making certain reports and paying taxes; to prescribe the powers and duties of public officers and state departments; to permit the inspection of records of taxpayers; to provide for interest and penalties on unpaid taxes; to provide exemptions, credits, and refunds; to provide penalties; to provide for the disposition of funds; to provide for the interrelation of this act with other acts; and to provide an appropriation. [1975 PA 228, title.]

"[T]he Single Business Tax Act was enacted to provide for a tax on financial activities beginning January 1, 1976." *Comerica Bank-Detroit v Dep't of Treasury*, 194 Mich App 77, 91; 486 NW2d 338 (1992) (citations omitted). Decisions of the United States Supreme Court "agree that the purpose of the particular enactment is the controlling factor." *In re Mansfield Tire & Rubber Co*, 942 F2d 1055, 1060 (CA 6, 1991) (citation and quotation marks omitted).[10]

> In Michigan, the rationale for adopting the SBT (a modified [value-added tax] VAT) stemmed from three main points. The first is the benefits received principle: because all businesses benefit from government services, all businesses should remit a business tax. The second is that whereas corporate income taxes are levied only on corporations, VATs are levied on all types of businesses (including sole proprietorships, partnerships, and limited liability companies) regardless of organizational structure. The third point is revenue stability: the base of VATs, which consists mainly of compensation, is broad and fairly stable.[11]

---

[10] See *United States v New York*, 315 US 510, 516-517; 62 S Ct 712; 86 L Ed 998 (1942); *Meilink v California Unemployment Reserves Comm*, 314 US 564; 62 S Ct 389; 86 L Ed 458 (1942); *United States v Childs*, 266 US 304; 45 S Ct 110; 69 L Ed 299 (1924); *New York v Jersawit*, 263 US 493, 496; 44 S Ct 167; 68 L Ed 405 (1924).

[11] House Fiscal Agency, *Background and History: Michigan's Single Business Tax* (November 2003), p 37. "Value added taxes are based on the economic activity or the value that businesses add to the production of

Other panels of this Court have analyzed the purpose and process of the SBT. Soon after the SBT was enacted its constitutionality was challenged in *Stockler v Dep't of Treasury*, 75 Mich App 640; 255 NW2d 718 (1977). In addition to upholding the constitutionality of the act, the *Stockler* Court determined that the SBT was not an income tax.[12] *Id*. at 651-652. Section 31 of the Single Business Tax Act provided that the tax levied and imposed under the act was imposed on "the privilege of doing business and not upon income." Former MCL 208.31(3). The Court explained that the SBT "taxes what one has added to the economy in contrast to an income tax which taxes what one has derived from the economy." *Stockler*, 75 Mich App at 643.[13] The *Stockler* Court also determined that the SBT was a specific tax. *Id*. at 652. Indeed, by its own terms the SBT provided that it "imposed a specific tax upon the adjusted tax base of every person with business activity in this state . . . ." Former MCL 208.31(1).

Later in *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 715; 697 NW2d 539 (2005), aff'd in part and rev'd in part on other grounds 477 Mich 170 (2007), the SBT was determined to be a value-added tax, which is a tax imposed on "economic activity itself

---

goods and services. The tax base is final sales less the cost of goods sold or the cost of materials used as inputs." *Id*.

[12] "The appellate courts of this state have rejected the theory that the single business tax is a tax upon income." *Gillette Co v Dep't of Treasury*, 198 Mich App 303, 309; 497 NW2d 595 (1993) citing *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989), aff'd 498 US 358 (1991); *Mobil Oil Corp v Dep't of Treasury*, 422 Mich 473, 493-495; 373 NW2d 730 (1985); *Town & Country Dodge, Inc v Dep't of Treasury*, 152 Mich App 748, 755; 394 NW2d 472 (1986); *Wismer & Becker Contracting Engineers v Dep't of Treasury*, 146 Mich App 690, 696; 382 NW2d 505 (1985).

[13] See also *Columbia Assoc, LP v Dep't of Treasury*, 250 Mich App 656, 666-667; 649 NW2d 760 (2002).

and can be described in two ways: as a tax on the economic actor's use of the scarce resources of society, or as a tax on the value the economic actor adds to the economy." (Citation and quotation marks omitted.) That analysis was affirmed in *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 629; 732 NW2d 116 (2007). This Court has recognized the nature of the SBT as a value-added tax that measured " 'the increase in the value of goods and services brought about by whatever a business does to them between the time of purchase and the time of sale.' " *Cowen v Dep't of Treasury*, 204 Mich App 428, 432; 516 NW2d 511 (1994), quoting *Trinova Corp v Dep't of Treasury*, 433 Mich 141, 149; 445 NW2d 428 (1989), quoting Haughey, *The Economic Logic of the Single Business Tax*, 22 Wayne L Rev 1017, 1018 (1976).

Petitioner argues, although not specifically, that "value added" is synonymous with "ad valorem" and concludes that an excise tax is " 'practically any tax which is not an ad valorem tax.' " (Citation omitted.) First, petitioner's authority for the statement that an excise tax is any tax but an ad valorem tax is taken from *Callaway v Overland Park*, 211 Kan 646, 651; 508 P2d 902 (1973), and therefore, not precedent binding on this Court. Further, the *Callaway* case did not hold the SBT was an ad valorem tax. In fact, there is no case cited by petitioner finding the SBT was an ad valorem tax. Second, petitioner has not shown how the very specific meaning of ad valorem, which is almost always in relation to the taxation of personal property, is related to the SBT outside of his incorrect understanding of the term as the equivalent of value added.[14]

---

[14] Most notably, ad valorem is used in our state's constitution: "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law . . . . The legisla-

The SBT had the characteristics of an excise tax as defined under federal bankruptcy law. That definition of an excise tax is an assessment that taxes the "enjoyment of a privilege" or "the carrying on of an occupation or activity," both of which describe the purposes of the SBT. *Fagan*, 465 BR at 477 (citations and quotation marks omitted; emphasis omitted). The SBT was a tax on the privilege of doing business in the state, *Stockler*, 75 Mich App at 651, and focused "on taxing the economic activity itself rather than the goods." *Ammex*, 273 Mich App at 631. See also former MCL 208.31(3). The United States Supreme Court did add the caveat that the SBT was not a tax on "business activity" per se, but rather, as the statute read, a tax " '*upon the adjusted tax base* of every person *with business activity in this state* which is allocated or apportioned to this state.' " *Trinova Corp v Mich Dep't of Treasury*, 498 US 358, 374; 111 S Ct 818; 112 L Ed 2d 884 (1991), quoting former MCL 208.31(1). The MTT likened the apportioned nature of the SBT to the Texas franchise tax, which was found to be an excise tax, and cited *Nat'l Steel*, 321 BR 901, in support of the SBT also being an excise tax. Petitioner takes issue with that analogy and asserts that "[t]he fact that the SBT is an apportioned tax further distinguishes it from an excise tax." However, petitioner's assertion is unsupported by detailed

---

ture may provide for alternative means of taxation of designated real and tangible personal property in lieu of general ad valorem taxation. Every tax other than the general ad valorem property tax shall be uniform upon the class or classes on which it operates." Const 1963, art 9, § 3. See *Consumers Power Co v Muskegon*, 13 Mich App 334, 343; 164 NW2d 398 (1968) ("[A]d valorem taxes are to be levied upon the State equalized value of property."); *Shivel v Kent Co Treasurer*, 295 Mich 10, 18; 294 NW 78 (1940) ("Property taxes may be either specific or *ad valorem*, although they are almost invariably *ad valorem* and in some States the Constitution forbids property taxes other than *ad valorem*.") (citation and quotation marks omitted).

argument and cites no authority for its conclusion. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001) (citation and quotation marks omitted).

The MTT's analogy of the SBT to the Texas franchise tax is sound. The Texas franchise tax was held to be an excise tax because it met accepted definitions and descriptions of an excise tax. *Nat'l Steel*, 321 BR at 909. The Texas franchise tax was "a tax on the value of the privilege to transact business in the state," *id*. at 910, and so was the SBT, former MCL 208.31(3). Further, the SBT was to be calculated "in lieu of all other privilege or franchise fees . . . ." Former MCL 208.22.

The final analytical step from *Fagan* is determining whether the SBT was an excise tax on a transaction as required by 11 USC 507(a)(8)(E)(i). *Fagan*, 465 BR at 478. Petitioner's argument against the SBT being an excise tax is that the SBT was a general business tax and that excise taxes are specific and related to specific activities. This argument fails for a number of reasons. First, the SBT was enacted with a specific purpose, namely to impose "taxes on *certain* commercial, business, and financial activities . . . ." 1975 PA 228, title (emphasis added). Second, as that quotation illustrates, the SBT was limited to specific activities, those being "financial activities." Third, the reasoning in *Quiroz*, which is helpful on this point, explained that "transactions are not limited to separate and distinct acts or specific taxable events." *Quiroz*, 450 BR at 701. *Nat'l Steel* elaborated this point, stating that an actual "se-

ries of transactions . . . are necessarily required in the carrying on of business." *Nat'l Steel*, 321 BR at 913. The taxing of financial activities implies the taxing of multiple transactions. The SBT was an excise tax on a transaction within the meaning of 11 USC 507(a)(8)(E)(i).

Petitioner disagrees with the state and federal analyses employed by the MTT to determine how to interpret Michigan's Single Business Tax Act. Petitioner asserts the proposed order, which was adopted by the MTT, purported to quote statements from the case of *New York City v Feiring*, 313 US 283; 61 S Ct 1028; 85 L Ed 1333 (1941), that did not actually exist and then erroneously relied on them. The proposed order stated, "Whether a particular obligation is a 'tax is a federal question and is not dependent upon the particular nomenclature used in a state's law.' *City of New York v Feiring*, 313 US 283, 285; 61 S Ct 1028, 1029 (1941)[.]" Petitioner is correct that the quoted material does not exist in *Feiring*. *Feiring* actually states:

> Whether the present obligation is a "tax" entitled to priority within the meaning of the statute is a federal question. Intended to be nation-wide in its application, nothing in the language of § 64 or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law or the state's demand. Hence we look to the terms and purposes of the Bankruptcy Act as establishing the criteria upon the basis of which the priority is to be allowed. [*Feiring*, 313 US at 285 (citations and quotation marks omitted).]

The proposed order and the actual quote from *Feiring* both communicate that federal law determines what is and is not a tax. Because the sentence purportedly quoted in the proposed order was an accurate paraphrase of *Feiring*, petitioner's complaint is reduced to

one of clerical error, a placement of quotation marks where there should have been none.

The second challenged statement in the proposed order purportedly quoting *Feiring* is as follows:

> Some courts have held that an income tax and a property tax are *not* excise taxes. *Id*, [sic] 673, citing, *Jenson v Henneford*, 185 Wash 209; 53 P2d 607, 610 (1936). On the other hand, the United States Supreme Court has held that an "excise tax" is ". . . practically any tax which is not an ad valorem tax . . . , imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege. . . ." *City of New York v Feiring*, 313 US 283, 285; 61 S Ct 1028, 1029 (1941).

Petitioner is correct that the quoted language is not from *Feiring*. The language is instead from *Callaway*, 211 Kan at 651. This error does not, however, eviscerate the analytical soundness of the proposed order as a whole. Nor does it establish that the MTT ignored the common law. The 18-page proposed order cited a myriad of sources, the overwhelming majority of which were correctly cited and supportive of the order's conclusions. The MTT's decision to not accept a particular definition of "excise tax," that would have favored petitioner, is not evidence that the MTT completely ignored the common law on the subject of excise taxes.

D. DERIVATIVE LIABILITY UNDER MCL 205.27a(5)

MCL 205.27a(5) permits the Department of Treasury to collect revenue from officers of limited liability companies. Under MCL 205.27a(5), "[t]he sum due for a liability may be assessed and collected under the related sections of this act." Petitioner never contends that he is not a corporate officer of Jefferson Beach

Properties.[15] He only challenges the type of liability due under the statute, arguing that since the liability did not arise from an excise tax, it was discharged in bankruptcy. Respondent avers, and the MTT agreed, that the officer liability is clearly for taxes due. Petitioner argues the liability is not a tax liability, but merely a derivative liability by which petitioner is held responsible for the debt of another.

The plain language of MCL 205.27a(5) provides that the liability is for taxes:

> If a . . . limited liability company . . . liable for taxes administered under this act fails for any reason to file the required returns or to pay the tax due, any of its officers . . . is personally liable for the failure. . . . The dissolution of a . . . limited liability company . . . does not discharge an officer's . . . liability for a prior failure of the . . . limited liability company . . . to make a return or remit the tax due. The sum due for a liability may be assessed and collected under the related sections of this act. [MCL 205.27a(5), as amended by 2003 PA 23.]

"The words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . .' " *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). The liability referred to in MCL 205.27a(5) must stem from the company's failure to have either (1) filed returns, or (2) paid taxes due. The failure in the instant case was Jefferson Beach Properties' failure to pay taxes due. Under the statute, the corporate officers became personally liable for the company's failure to pay taxes. The language of the statute clearly identifies the liabil-

[15] Respondent alleges petitioner "signed several tax filings, company statements, and checks in the payment of Jefferson Beach's tax liabilities."

ity "for taxes" and the failure "to pay taxes due" and does not use the ambiguous term "debt" that petitioner employs for his own manipulation. Petitioner's characterization of the liability as derivative did not change the nature of the liability for the payment of taxes.

Petitioner erroneously asserts his case is similar to that of *Livingstone v Dep't of Treasury*, 434 Mich 771; 456 NW2d 684 (1990). While petitioner attempts to analogize the derivative liability in *Livingstone* to the derivative liability he contends is present in his own case, the two cases are so distinguishable that any comparison is inappropriate. The Supreme Court's discussion in *Livingstone* related to derivative liability under the Use Tax Act, MCL 205.91 *et seq.*, not the Single Business Tax Act. Specifically, *Livingstone* concerned former MCL 205.96(3), which was different from the derivative-liability statute at issue here. Also, one of the central points in *Livingstone* was how the derivative liability of corporate officers was affected by the period of limitations provided in the Use Tax Act. *Livingstone*, 434 Mich at 795-798 (opinion by ARCHER, J.) *Livingstone* and the instant case are distinguishable to the point that comparison is not helpful and a misapplication of the Supreme Court's holdings in *Livingstone* would result.

E. SUMMARY DISPOSITION

The proposed opinion and order granted respondent's motion for summary disposition under MCR 2.116(C)(8). The MTT's final opinion and judgment affirmed and adopted the proposed order. "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under

MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Id*. at 119. Only the pleadings are considered. MCR 2.116(G)(5).

A motion under MCR 2.116(C)(8) allows dismissal of a claim when "[t]he opposing party has failed to state a claim on which relief can be granted." Petitioner's pleadings only made one claim and it was that he was not liable for taxes under the Single Business Tax Act because those taxes were included in an earlier bankruptcy he had filed in the Southern District of Florida and were discharged by that bankruptcy. Respondent argued that the taxes at issue were excise taxes that were not dischargeable in bankruptcy proceedings. The MTT agreed with respondent. As a matter of law, an excise tax on a transaction is not dischargeable in a bankruptcy proceeding. 11 USC 507(a)(8)(E)(i). The order of discharge and final decree from the Southern District of Florida notified petitioner of this fact. The SBT was an excise tax on a transaction and, therefore, not dischargeable. Petitioner points to no other support adequate to sustain his claim that he is not liable for the taxes. The MTT had no ground to grant petitioner relief, and neither does this Court. Summary disposition was proper.

F. JURISDICTION

Petitioner argues that the MTT lacked jurisdiction to grant summary disposition in favor of respondent as a matter of law. He contends that respondent had a burden to demonstrate it had jurisdiction to seek payment from petitioner after the liability was discharged from bankruptcy in Florida. This issue was not presented to the MTT and is, therefore, new on appeal. Issues not addressed by the trial court are not preserved for this Court's review. *Fast Air, Inc v Knight*, 235 Mich

App 541, 549; 599 NW2d 489 (1999). Further, the issue of jurisdiction was not identified in the petitioner's statement of questions involved. Issues must be raised in the petitioner's statement of questions involved in order to be properly presented for this Court's review. MCR 7.212(C)(5); *Ypsilanti Fire Marshal v Kircher (On Reconsideration)*, 273 Mich App 496, 553; 730 NW2d 481 (2007).

G. RETROACTIVE EFFECT OF 2014 PA 3

As part of the supplemental authority provided to this Court, petitioner has directed our attention to the case of *Shotwell v Dep't of Treasury*, 305 Mich App 360; 853 NW2d 414 (2014), and its holding that 2014 PA 3 be given retroactive effect.

2014 PA 3 amended the language of MCL 205.27a(5). As amended, MCL 205.27a(5), refers its reader to the new Subsection (15), which defines the term "responsible person." In pertinent part, MCL 205.27a(15) reads:

> As used in subsections (5) and (6):
>
> * * *
>
> (b) "Responsible person" means an officer, member, manager of a manager-managed limited liability company, or partner for the business *who controlled, supervised, or was responsible for the filing of returns or payment of any of the taxes* described in subsection (14) during the time period of default and who, during the time period of default, *willfully failed to file a return or pay the tax due* for any of the taxes described in subsection (14). . . .
>
> * * *
>
> (d) "Willful" or "willfully" means the person knew or had reason to know of the obligation to file a return or pay

> the tax, but intentionally or recklessly failed to file the return or pay the tax. [Emphasis added.]

Arguably, petitioner knew of his obligation to pay the SBT because he listed the Michigan Department of Treasury and Michigan business taxes as creditors on his bankruptcy petition in the Southern District of Florida.

Petitioner argues that these new changes to MCL 205.27a(5) support remand to the MTT. Petitioner argues that on remand: (1) respondent should be required to prove petitioner is a responsible person by showing petitioner willfully failed to file a return or pay a tax due, and (2) petitioner should be allowed to conduct more discovery to defend against the assertion that he is a responsible person.

We concur with petitioner only on the points that *Shotwell* did determine 2014 PA 3 was retroactive and that 2014 PA 3 amended portions of MCL 205.27a, the corporate officer liability statute. We do not agree, however, that petitioner's issues, as they are framed before the Court, are affected by the amendment of MCL 205.27a. Petitioner does not argue in this Court that he is not a corporate officer or that he is not responsible for the debts of the corporation. Petitioner concedes his capacity. His request on appeal is for this Court to interpret the liability, which he concedes he owes, as a derivative liability that was discharged in bankruptcy and not as an excise tax. The issues before this Court and the MTT focused on the nature of assessment, which was not affected by the recent amendment of MCL 205.27a.

Affirmed.

SHAPIRO, P.J., and MARKEY, J., concurred with STEPHENS, J.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR RECONCILIATION OF 2009 COSTS (ON RECONSIDERATION)

Docket Nos. 305066 and 305083. Submitted March 12, 2014, at Lansing. Decided September 25, 2014, at 9:05 a.m. Leave to appeal sought.

Consumers Energy Company applied for approval from the Public Service Commission of its 2009 power supply cost recovery (PSCR) reconciliation plan. Several parties intervened in the action including the Attorney General and TES Filer City Station Limited Partnership (TES), which operates a biomass electric generating plant in Filer City. Under Public Act 286 of 2008, biomass plants may recover fuel and operation and maintenance costs that are not covered by existing contracts with electric utilities, and the utilities may recover those additional payments from their ratepayers. TES asserted entitlement under these provisions to $636,073 in costs for nitrogen oxide (NOx) allowances that it was required to purchase. The Attorney General separately challenged Consumers' transfer price calculations, asserting that in the reconciliation proceeding, the transfer costs had to be reduced to reflect actual prices paid. The Public Service Commission ultimately approved Consumers' application with some modifications. The Public Service Commission rejected TES's petition for NOx allowance costs and also rejected the Attorney General's position concerning Consumer's calculation of the transfer price. The Attorney General (Docket No. 305083) and TES (Docket No. 305066) filed separate appeals, which the Court of Appeals consolidated. The Court of Appeals affirmed, but later granted reconsideration.

The Court of Appeals *held*:

1. Biomass plants may recover fuel and operation and maintenance costs that are not covered by existing contracts with electric utilities. MCL 460.6a(8) states that the total aggregate additional amounts recoverable in excess of the amounts paid under the contracts may not exceed $1 million a month for each affected utility, but that general limit does not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the statute. MCL 460.6a(8), thus, compares the effective date of MCL 460.6a(8)—October 6, 2008—with the date of any changes in state

or federal environmental rules. A rule is implemented on its effective date, which may or may not coincide with the date the rule is promulgated. In 2005, the federal Environmental Protection Agency (EPA) promulgated the Clean Air Interstate Rule, which required states to revise their state implementation plans to reduce NOx emissions. Michigan filed its revised regulations, which required TES to begin purchasing NOx allowances, with the Secretary of State on June 25, 2007. The rule at issue—Mich Admin Code, R 336.1803—became effective immediately upon filing. The fact that the rule may not have been enforceable until it was subsequently approved by the EPA in 2009 is not controlling because the rule was substantively changed in 2007. Therefore, the rule was implemented before October 6, 2008, the exception for costs incurred as a result of changes in environmental laws did not apply, and the Public Service Commission did not err by rejecting TES's petition for NOx allowance costs.

2. The Clean, Renewable, and Efficient Energy Act, 2008 PA 295, requires electric utilities to adopt renewable energy plans and provides that utilities may recover renewable energy costs, including by recovering the transfer price, i.e., the estimated cost of the energy if acquired from conventional sources, through a PSCR clause. MCL 460.1047(2)(b)(*iv*) establishes the formula for determining the transfer price. The Public Service Commission correctly rejected the Attorney General's arguments regarding the transfer price. Consumers' calculation of the transfer price was consistent with prior Public Service Commission orders, including the order entered in Consumers' renewable energy plan case, and the act did not give the Public Service Commission authority to change the approved transfer price in this PSCR proceeding.

Affirmed.

WHITBECK, J., concurring in part and dissenting in part, disagreed with the majority's conclusion in Docket No. 305066 that the administrative rules requiring generators to purchase NOx allowances were implemented in 2007, and would have reversed the Public Service Commission's determination that TES was not entitled to recover its costs under MCL 460.6a(8), but he concurred in the majority opinion in all other respects. The word "implemented" means to fulfill, carry out, or to put into effect according to a definite plan or procedure. Although Michigan may have promulgated Rule 336.1803(3) in 2007, Michigan conditioned the rule on EPA approval, and the EPA did not give final approval to Michigan's revised state implementation plan until 2009. Therefore, Rule 336.1803(3) was not effective until 2009. Because the rule was not implemented

until 2009, the exception in MCL 460.6a(8) applied, and TES should have been permitted to recover the costs of purchasing the NOx allowances.

1. PUBLIC UTILITIES — BIOMASS PLANTS — RECOVERY OF FUEL, OPERATION, AND MAINTENANCE COSTS — IMPLEMENTATION OF CHANGES IN ENVIRONMENTAL LAWS OR REGULATIONS.

Biomass plants may recover fuel and operation and maintenance costs that are not covered by existing contracts with electric utilities; under MCL 460.6a(8), the total aggregate additional amounts recoverable in excess of the amounts paid under the contracts may not exceed $1 million a month for each affected utility, but that general limit does not apply with respect to actual fuel and variable operation and maintenance costs that are incurred because of changes in federal or state environmental laws or regulations that are implemented after October 6, 2008; a rule is implemented on its effective date, which may or may not coincide with the date the rule is promulgated.

2. PUBLIC UTILITIES — RECOVERY OF RENEWABLE ENERGY COSTS — TRANSFER PRICE — POWER SUPPLY COST RECOVERY RECONCILIATION PROCEEDINGS.

The Clean, Renewable, and Efficient Energy Act, 2008 PA 295, requires electric utilities to adopt renewable energy plans and provides that utilities may recover renewable energy costs, including by recovering the transfer price, i.e., the estimated cost of the energy if acquired from conventional sources, through a power supply recovery cost (PSCR) clause; MCL 460.1047(2)(b)(*iv*) establishes the formula for determining the transfer price; the act does not give the Public Service Commission authority to change the approved transfer price in PSCR reconciliation proceeding.

Fraser Trebilcock Davis & Dunlap, PC (by *David E. S. Marvin*), for TES Filer City Station Limited Partnership.

Bill Schuette, Attorney General, *S. Peter Manning*, Division Chief, and *Donald E. Erickson*, Assistant Attorney General, for the Attorney General.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal

Counsel, and *Steven D. Hughey* and *Patricia S. Barone*, Assistant Attorneys General, for the Public Service Commission.

John C. Shea and *Raymond E. McQuillan* for Consumers Energy Company.

ON RECONSIDERATION

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

RONAYNE KRAUSE, P.J. In these consolidated cases appellants TES Filer City Station Limited Partnership and the Attorney General claim appeals from an order of the Michigan Public Service Commission (PSC) in Consumers Energy Company's power supply cost recovery (PSCR) case. We affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

On March 31, 2010, Consumers filed an application with the PSC seeking approval of its PSCR and revenues for the calendar year 2009.[1] Consumers sought an underrecovery of $34,378,062, including interest.[2]

---

[1] Generally, an electric utility can recover its power supply costs through either base rates, which are established in a general rate case, MCL 460.6a(2)(b), or a PSCR clause. A PSCR clause is "a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices." MCL 460.6j(1)(a).

[2] The following parties, among others, were granted intervenor status: the Attorney General, the Michigan Environmental Council, and the Biomass Merchant Plants [BMPs] (specifically, Cadillac Renewable Energy, LLC; Genesee Power Station Limited Partnership; Grayling Gen-

The parties raised numerous issues at the hearing stage. However, these consolidated appeals focus on two issues: (1) the eligibility of TES Filer City to recover nitrogen oxide (NOx) allowance costs, and (2) the transfer price calculation.

A. TES FILER CITY NOx COSTS

Biomass plants generate electricity in whole or in part from wood waste. Public Act 286 of 2008, which became effective on October 6, 2008, enacted provisions to allow biomass plants to recover fuel and operation and maintenance (O&M) costs that are not covered by existing contracts with electric utilities. The relevant subsections, MCL 460.6a(7) to (9), provide:

> (7) If, on or before January 1, 2008, a merchant plant entered into a contract with an initial term of 20 years or more to sell electricity to an electric utility whose rates are regulated by the commission with 1,000,000 or more retail customers in this state and if, prior to January 1, 2008, the merchant plant generated electricity under that contract, in whole or in part, from wood or solid wood wastes, then the merchant plant shall, upon petition by the merchant plant, and subject to the limitation set forth in subsection (8), recover the amount, if any, by which the merchant plant's reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that the merchant plant is paid under the contract for those costs. This subsection does not apply to landfill gas plants, hydro plants, municipal solid waste plants, or to merchant plants engaged in litigation against an electric utility seeking higher payments for power delivered pursuant to contract.
>
> (8) The total aggregate additional amounts recoverable by merchant plants pursuant to subsection (7) in excess of

---

erating Station Limited Partnership; Hillman Power Company, LLC; TES Filer City Limited Partnership; Viking Energy of Lincoln, Inc.; and Viking Energy of McBain, Inc.).

the amounts paid under the contracts shall not exceed $1,000,000.00 per month for each affected electric utility. The $1,000,000.00 per month limit specified in this subsection shall be reviewed by the commission upon petition of the merchant plant filed no more than once per year and may be adjusted if the commission finds that the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs exceed the amount that those merchant plants are paid under the contract by more than $1,000,000.00 per month. The annual amount of the adjustments shall not exceed a rate equal to the United States consumer price index. An adjustment shall not be made by the commission unless each affected merchant plant files a petition with the commission. As used in this subsection, "United States consumer price index" means the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics. If the total aggregate amount by which the eligible merchant plants reasonably and prudently incurred actual fuel and variable operation and maintenance costs determined by the commission exceed the amount that the merchant plants are paid under the contract by more than $1,000,000.00 per month, the commission shall allocate the additional $1,000,000.00 per month payment among the eligible merchant plants based upon the relationship of excess costs among the eligible merchant plants. The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection. The $1,000,000.00 per month payment limit under this subsection shall not apply to merchant plants eligible under subsection (7) whose electricity is purchased by a utility that is using wood or wood waste or fuels derived from those materials for fuel in their power plants.

(9) The commission shall issue orders to permit the recovery authorized under subsections (7) and (8) upon

> petition of the merchant plant. The merchant plant shall not be required to alter or amend the existing contract with the electric utility in order to obtain the recovery under subsections (7) and (8). The commission shall permit or require the electric utility whose rates are regulated by the commission to recover from its ratepayers all fuel and variable operation and maintenance costs that the electric utility is required to pay to the merchant plant as reasonably and prudently incurred costs.

Certain provisions in the federal Public Utility Regulatory Policies Act (PURPA) are designed to encourage power production by small power production facilities. The legislation directs the Federal Energy Regulatory Commission (FERC) to promulgate rules requiring electric utilities to sell electricity to and purchase electricity from small facilities, also known as qualifying facilities. 16 USC 824a-3. A regulation promulgated by FERC provides that "[n]othing in this subpart requires any electric utility to pay more than the avoided costs for purchases." 18 CFR 292.304(a)(2) (2014).[3] The BMPs are qualifying facilities (QFs) under PURPA.

MCL 460.6a(8) provides that the $1,000,000 per month payment limit did not apply with respect to costs "incurred due to changes in federal or state environmental laws or regulations that are implemented after the effective date of the amendatory act that added this subsection."[4] TES Filer sought recovery of $636,073, the cost of purchasing seasonal and annual NOx allow-

---

[3] In the FERC regulations, "avoided costs" are defined as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR 292.101(b)(6) (2014).

[4] Federal law requires states to develop state implementation plans (SIPs). 42 USC 7410. These plans are approved by the Environmental Protection Agency. The Michigan Department of Environmental Quality sets state air quality standards. The Clean Air Interstate Rule (CAIR),

ances in 2009. TES Filer claimed that its NOx allowance expenses resulted from Michigan's state implementation plan (SIP); TES Filer asserted that the SIP became effective on October 19, 2009, the date the federal Environmental Protection Agency (EPA) approved rules promulgated by the Michigan Department of Environmental Quality (DEQ), or on November 30, 2009, the date by which generators of NOx emissions were required to have purchased seasonal allowances for 2009.[5]

The PSC concluded that TES Filer was not eligible to recover the costs of the NOx allowances that it purchased in 2009. The PSC acknowledged that the EPA did not approve Michigan's revised SIP (which required TES Filer to begin purchasing NOx allowances) until August 18, 2009; but the changes to state environmental regulations took place on June 25, 2007, the date the revised rules were filed with the Secretary of State. The PSC concluded that Michigan implemented the CAIR requirements when the revised rules were filed with the Secretary of State; therefore, the change in state law took place before October 6, 2008, the date that Public Act 286 was implemented.

B. TRANSFER PRICE CALCULATION

Under 2008 PA 295, a utility may recover the cost of renewable energy that it purchases. A portion of those costs must be recovered through the PSCR process. MCL 460.1047(2)(b)(*iv*) establishes the formula for determining the transfer price, i.e., the estimated cost of the energy

---

which the federal Environmental Protection Agency promulgated in 2005, see 70 Fed Reg 25162 (May 12, 2005), required states to revise their SIPs to reduce emissions of NOx.

[5] TES Filer asserted that "implemented" as used in MCL 460.6a(8) meant "completed, fulfilled, and put into effect."

if acquired from conventional sources. It is the transfer costs that must be recovered through the PSCR process. MCL 460.1047(2)(b)(*iv*) provides in pertinent part:

> After providing an opportunity for a contested case hearing for an electric provider whose rates are regulated by the commission, the commission shall annually establish a price per megawatt hour. In addition, an electric provider whose rates are regulated by the commission may at any time petition the commission to revise the price. In setting the price per megawatt hour under this subparagraph, the commission shall consider factors including, but not limited to, projected capacity, energy, maintenance, and operating costs; information filed under section 6j of 1939 PA 3, MCL 460.6j; and information from wholesale markets, including, but not limited to, locational marginal pricing. This price shall be multiplied by the sum of the number of megawatt hours of renewable energy and the number of megawatt hours of advanced cleaner energy used to maintain compliance with the renewable energy standard. The product shall be considered a booked cost of purchased and net interchanged power transactions under section 6j of 1939 PA 3, MCL 460.6j. For energy purchased by such an electric provider under a renewable energy contract or advanced cleaner energy contract, the price shall be the lower of the amount established by the commission or the actual price paid and shall be multiplied by the number of megawatt hours of renewable energy or advanced cleaner energy purchased. The resulting value shall be considered a booked cost of purchased and net interchanged power under section 6j of 1939 PA 3, MCL 460.6j.

The transfer price is established in annual renewable energy plan reconciliation proceedings. MCL 460.1049(3)(c).

Consumers presented evidence that its average transfer price in 2009 was approximately $44.80 per megawatt-hour (MWh), and asserted that it incurred $90,000 in total transfer costs. The Attorney General sought to reduce Consumers' total transfer cost calculation by $39,715,

arguing that the transfer price should reflect the prices forecast in the plan case and the actual prices Consumers paid during the plan period.

The PSC found that Consumers' calculation of its transfer price was consistent with prior orders and that no further price adjustment was warranted. In addition, the PSC found that it had no statutory authority to recalculate the transfer price in a PSCR case.

The PSC's order concluded as follows:

> The Commission approves Consumers' application for its 2009 PSCR reconciliation, with the following modifications: (1) a disallowance of $2,140,882 related to the Whiting 3 outage; and (2) a disallowance of $263,040 related to the deviation from the 2009 PSCR plan for spot and contract coal purchases. The Commission approves payments to the BMPs in the amount of $14,838,711. In addition, Consumers is directed in its next plan case to provide an analysis of the economic dispatching of its generation assets, and, in its next case in which statutory payments to BMPs are considered, to explore possible objective criteria to apply to BMP costs in evaluating the reasonableness and prudence of those costs.

II. STANDARD OF REVIEW

The standard of review for PSC orders is narrow and well defined. Under MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its

discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). An order is unreasonable if it is not supported by the evidence. *Associated Truck Lines, Inc v Pub Serv Comm*, 377 Mich 259, 279; 140 NW2d 515 (1966).

A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *Attorney General v Pub Serv Comm*, 165 Mich App 230, 235; 418 NW2d 660 (1987).

A reviewing court gives due deference to the PSC's administrative expertise, and is not to substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999). This Court gives respectful consideration to the PSC's construction of a statute that the PSC is empowered to execute, and this Court will not overrule that construction absent cogent reasons. If the language of a statute is vague or obscure, the PSC's construction serves as an aid to determining the legislative intent, and will be given weight if it does not conflict with the language of the statute or the purpose of the Legislature. However, the construction given to a statute by the PSC is not binding on us. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103-109; 754 NW2d 259 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

III. ANALYSIS

A. DOCKET NO. 305066

TES Filer is an electric-generating unit[6] located in

[6] See Mich Admin Code, R 336.1803(1)(a)(i).

Filer City, Manistee County, Michigan. The 2007 rules did not place Manistee County in Michigan's fine grid zone, i.e., the geographical area to which the state and federal rules implemented in 2007 applied. Mich Admin Code R 336.1803(1)(c). However, the rules indicated that electric-generating units such as TES Filer that were located outside the fine grid zone would be subject to the rules for the 2009 NOx season. Mich Admin Code, R 336.1803(3)(o). As a result, TES Filer incurred NOx allowance costs in the amount of $636,073 in November and December 2009.

On appeal, TES Filer argues that the PSC erred by ignoring the significance of the word "implemented" in MCL 460.6a(8). TES Filer asserts that the common meaning of the word "implemented" is "to have fulfilled, carried out, or effectuated a plan." TES Filer notes that the rules promulgated by the DEQ in 2007 did not impose new regulations at that time, but were intended to do so in 2009; accordingly, the PSC should have concluded that the 2007 rules, even if in effect during the relevant period, were not implemented during that same period. Rather, according to TES Filer, the rules were implemented after MCL 460.6a(8) went into effect; therefore, TES Filer was entitled to recover its costs. We disagree.

TES Filer ignores the context surrounding the word "implemented" in the statutory scheme. This Court does not read statutory provisions in isolation, but instead considers them in context. *Robinson v Lansing*, 486 Mich 1, 15; 782 NW2d 171 (2010). The NOx emission rules that were applicable to TES Filer did not change after October 6, 2008, the date that MCL 460.6a(8) went into effect. At issue in this case is not the meaning of the term "implemented," but rather on what date TES Filer was affected by the NOx emission

rules. In context, MCL 460.6a(8) provides that the limit does not apply to specified costs "that are incurred *due to changes* in federal or state environmental laws or regulations that are *implemented after the effective date* of the amendatory act that added this subsection." (Emphasis added.) MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules. It is undisputed that MCL 460.6a(8) went into effect on October 6, 2008. The DEQ promulgated rules by filing them with the Secretary of State on June 25, 2007. MCL 24.246(1). The DEQ's rules became effective before October 6, 2008.

Our dissenting colleague accurately points out that "promulgation" is a term of art, defined as "that step in the processing of a rule consisting of the filing of a rule with the secretary of state." MCL 24.205(9). In turn, " '[p]rocessing of a rule' means the action required or authorized by [the Administrative Procedures Act] regarding a rule that is to be promulgated, including the rule's adoption, and ending with the rule's promulgation." MCL 24.205(8). " 'Adoption of a rule' means that step in the processing of a rule consisting of the formal action of an agency establishing a rule before its promulgation." MCL 24.203(1). Obviously, then, promulgation is simply one step in a process. We cannot find any definition of "implemented" in any relevant statutes, but we agree with our dissenting colleague that it is reasonable to presume that it means something different from "promulgated." We do not, however, perceive any reason why promulgation and implementation cannot occur contemporaneously, particularly because promulgation does *not* establish when a rule goes into effect: absent exceptional circumstances, "a rule becomes effective on the date fixed in the rule, which shall not be earlier than 7 days after the date of its promul-

gation, or if a date is not so fixed then 7 days after the date of promulgation." MCL 24.247(1).

In other words, we agree with our dissenting colleague that a rule is not *necessarily* "implemented" when it is "promulgated," because by statute, promulgation is merely the final procedural stage of processing a rule to the point of filing it with the Secretary of State. Because "implement" is not defined by statute, we consider it to have its common dictionary meaning. *Oakland Co Bd of Co Road Comm'rs v Mich Prop & Cas Guarantee Ass'n*, 456 Mich 590, 604; 575 NW2d 751 (1998). As a verb, to "implement" means "to fulfill," to "carry out," or "to put into effect according to a definite plan or procedure." *Random House Webster's College Dictionary* (2001). We do not believe that any particular person or entity needs to feel the effect of a law or a rule for it to be "implemented." Rather, we conclude that the most principled way to determine when a rule or law has been "implemented" is to refer to the effective date thereof. It may be that this will often coincide with the date it is promulgated, but there is no reason why it must be contemporaneous. We therefore do not treat "implement" and "promulgate" as synonyms.

The DEQ rule at issue, Mich Admin Code, R 336.1803, was published on July 15, 2007, in Volume 12 of the Michigan Register. The Michigan Register states that it was one of several rules that "were filed with Secretary of State on June 25, 2007," and that the rules became effective immediately upon filing.[7] 2007 Mich Reg 12, pp 2-24. Because the DEQ's rules became effective in 2007, we conclude that the rules were

[7] The Michigan Register further provided that any rules adopted under MCL 24.233, MCL 24.244, or MCL 24.245a(6) would become effective 7 days after filing, but no rules adopted under those statutes are at issue here.

"implemented" in 2007. The fact that TES Filer only became subject to those rules in 2009 does not affect when the rules were implemented because no substantive change to the rules occurred at that time. The rules were therefore implemented before October 6, 2008.

In our prior opinion, we neglected to make explicit mention of TES Filer's alternative argument—that the 2007 rules were not enforceable at the time it incurred its first NOx allowance cost because the 2007 rules were unenforceable until approved by the EPA, the EPA had disapproved the 2007 rules, and the NOx costs were incurred pursuant to the revised 2009 rules. We granted reconsideration to correct this oversight. However, TES Filer's argument in part merely restates its previously discussed confusion between the date a law is changed and the date it becomes enforceable, and in fact by the time TES Filer incurred NOx costs, the EPA had explicitly approved the 2007 rules. See 74 Fed Reg 41640 (August 18, 2009). In essence, TES Filer's "alternative" argument is simply a variation on its argument that the rules were "implemented" in 2009 because that was when TES Filer became subject to those rules. As discussed, we find that the rules were substantively changed in 2007, irrespective of when TES Filer became subject to them. Therefore, although we granted reconsideration to correct our failure to specifically address this argument, TES Filer's motion for reconsideration has not established a substantive palpable error, and our conclusions remain unchanged. We conclude that TES Filer was not entitled to recover its NOx emission costs.

B. DOCKET NO. 305083

The Attorney General argues that the PSC erred by transferring more for renewable energy costs than the

amount that reflected actual PSCR expenses incurred during the reconciliation period. According to the Attorney General, the PSC improperly calculated transfer costs that are recoverable under MCL 460.6j and MCL 460.1049(3)(c) and incremental costs that are recoverable under MCL 460.1045(2). The Attorney General states that the PSC must establish a transfer price in renewable energy and PSCR case plans and a per MWh price in renewable energy and PSCR reconciliation cases. We disagree.

The Clean, Renewable, and Efficient Energy Act, 2008 PA 295, MCL 460.1001 *et seq*., became effective on October 6, 2008. The act created renewable energy portfolio standards that utilities such as Consumers were required to meet over the next 20 years. See MCL 460.121(2)(c); MCL 460.1027. Utilities can recover the costs of the renewable energy program. MCL 460.1047(2)(b)(*iv*) allocates renewable energy costs between PSCR costs and incremental costs by establishing a transfer price that may be recovered through a PSCR clause. This subparagraph provides in pertinent part:

> After providing an opportunity for a contested case hearing for an electric provider whose rates are regulated by the commission, the commission shall annually establish a price per megawatt hour. In addition, an electric provider whose rates are regulated by the commission may at any time petition the commission to revise the price. In setting the price per megawatt hour under this subparagraph, the commission shall consider factors including, but not limited to, projected capacity, energy, maintenance, and operating costs; information filed under section 6j of 1939 PA 3, MCL 460.6j; and information from wholesale markets, including, but not limited to, locational marginal pricing. This price shall be multiplied by the sum of the number of megawatt hours of renewable energy and the number of megawatt hours of advanced cleaner energy used to main-

> tain compliance with the renewable energy standard. The product shall be considered a booked cost of purchased and net interchanged power transactions under section 6j of 1939 PA 3, MCL 460.6j. For energy purchased by such an electric provider under a renewable energy contract or advanced cleaner energy contract, the price shall be the lower of the amount established by the commission or the actual price paid and shall be multiplied by the number of megawatt hours of renewable energy or advanced cleaner energy purchased. The resulting value shall be considered a booked cost of purchased and net interchanged power under section 6j of 1939 PA 3, MCL 460.6j.

As noted, the PSC refers to this price as the transfer price. The PSC establishes this price in a utility's annual renewable energy plan reconciliation proceeding. MCL 460.1049(3)(c). Consumers asserted that its transfer price was approximately $44.80 per MWh, and sought recovery of $90,973 in transfer costs.

The Attorney General sought to reduce the amount recovered by Consumers by $39,715. The Attorney General argued that the transfer price used by Consumers to determine PSCR costs in this case should be "reduced by 45% to reflect the difference between the locational marginal prices forecasted in the plan case and the actual prices paid during the plan period." The Attorney General took the position that, because Consumers was obligated to meet its economic dispatch requirements with the lowest-cost energy available, and because transfer costs should not exceed the actual costs that Consumers would have incurred if renewable energy resources had not been available, the transfer price should be recalculated in the instant PSCR case to ensure that Consumers' PSCR customers were not subsidizing the recovery of renewable energy costs.

The Attorney General's arguments are without merit. The PSC determined that Consumers' calculation of the transfer price was consistent with the method used in prior PSC orders, including the order entered in Consumers' renewable energy plan case. See *In re Consumers Energy Co*, order of the Public Service Commission, entered October 13, 2009 (Case No. U-15805). The PSC correctly noted that the act gave it no authority to change the already approved transfer price in a PSCR proceeding. The Attorney General points to no statutory authority that requires the PSC to recalculate the transfer price in a PSCR proceeding. Essentially, the Attorney General argues that the PSC should have adopted the testimony of its expert witness regarding the interpretation and application of the relevant statutes rather than accepting the testimony of Consumers' witness. However, "the PSC can properly rely on the testimony of a qualified expert and that testimony constitutes competent evidence . . . ." *Attorney General v Public Serv Comm*, 174 Mich App 161, 170; 435 NW2d 752 (1988). The Attorney General has not demonstrated the existence of cogent reasons that would support this Court overturning the PSC's application of the relevant statutes. See *Rovas*, 482 Mich at 103-109.

The PSC correctly rejected the Attorney General's assertion that the transfer price relied on by Consumers should be recalculated in the context of the instant PSCR case.

IV. CONCLUSION

In Docket No. 305066, we affirm that portion of the PSC's order that disallowed recovery of NOx allowances requested by TES Filer.

In Docket No. 305083, we affirm the PSC's rejection of the Attorney General's challenge to the calculation of the transfer price relied on by Consumers.

Affirmed.

FITZGERALD, J., concurred with RONAYNE KRAUSE, P.J.

WHITBECK, J. (*concurring in part and dissenting in part*). I respectfully disagree with the majority's conclusion in Docket No. 305066 that the administrative rules requiring generators to purchase nitrogen oxide (NOx) allowances were implemented in 2007. Accordingly, I would reverse with respect to the Public Service Commission's determination that the rules were implemented in 2007 and that TES Filer City Station Limited Partnership (TES Filer) was not entitled to recover its costs under MCL 460.6a(8). In all other respects, I concur in the majority's opinion.

I. STATUTORY INTERPRETATION

A. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation.[1]

B. LEGAL STANDARDS

If the plain and ordinary meaning of a statute's language is clear, we will not engage in judicial construction.[2] When interpreting a statute, our goal is to give effect to the intent of the Legislature.[3] The language

[1] *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 12; 795 NW2d 101 (2009).

[2] *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

[3] *US Fidelity & Guaranty Co*, 484 Mich at 13.

of the statute itself is the primary indication of the Legislature's intent.[4] If the language of the statute is unambiguous, we must enforce the statute as written.[5]

C. APPLYING THE STANDARDS

TES Filer contends that the Public Service Commission erred because MCL 460.6a(8) provides that the $1,000,000 limit does not apply to costs incurred due to changes in the regulatory laws that are implemented after the effective date of 2008 PA 286. According to TES Filer, it could not have incurred its 2009 NOx allowance costs under the Michigan Department of Environmental Quality's 2007 rules because those rules were not in effect when TES Filer purchased its 2009 NOx allowances. I agree with TES Filer.

1. CHANGES IMPLEMENTED AFTER MCL 460.6a

The meaning of the word implemented is crucial to determining whether MCL 460.6a(8) applied to TES Filer's NOx allowance costs because application of the exception in MCL 460.6a(8) hinges on when new laws or regulations are implemented.

MCL 460.6a(8) provides that "[t]he total aggregate additional amounts recoverable by merchant plants . . . shall not exceed $1,000,000.00 per month for each affected utility." However, MCL 460.6a(8) also provides an exception to this limit:

> The $1,000,000.00 limit specified in this subsection, as adjusted, shall not apply with respect to actual fuel and variable operation and maintenance costs that are *incurred*

---

[4] *Id*.

[5] *Id*. at 12-13.

> *due to changes* in federal or state environmental laws or regulations *that are implemented* after [October 6, 2008].[6]

TES Filer's argument hinges around the meaning of the word "implemented" in this exception. If the Legislature has chosen words that "have acquired a peculiar and appropriate meaning in the law," we construe those terms according to their legal meanings.[7] But when the Legislature does not define a term, we may consider a dictionary definition to determine the word's plain and ordinary meaning.[8] We presume that the Legislature is aware of existing statutes.[9] And "[t]he Court may not assume that the Legislature inadvertently made use of one word or phrase instead of another."[10]

The word "promulgation" is a legal term of art. " 'Promulgation of a rule' means that step in the processing of a rule consisting of the filing of the rule with the secretary of state."[11] "To promulgate a rule the state office of administrative hearing and rules shall file in the office of the secretary of state 3 copies of the rule bearing the required certificates of approval and adoption, true copies of the rule without the certificates, and 1 electronic copy."[12] "[A] rule becomes effective on the date fixed in the rule . . . ."[13]

If the Legislature had meant "implemented" to have the meaning of the word "promulgated," the Legisla-

---

[6] Emphasis added.

[7] *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006).

[8] *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

[9] *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993).

[10] *Robinson v Detroit*, 462 Mich 439, 459; 613 NW2d 307 (2000).

[11] MCL 24.205(9).

[12] MCL 24.246(1).

[13] MCL 24.247(1).

ture would have used the word "promulgated." We must presume that the Legislature was aware that the term existed. Indeed, it was defined in another act: the Administrative Procedures Act, MCL 24.201 *et seq*., an act that sets out the procedures for rulemaking. Thus, promulgation is defined in a statute that bears directly on the subject of MCL 460.6a(8).

But the Legislature did not choose to use the word promulgated. Instead, the Legislature used the general term "implemented." We may not presume that this choice was an error. Accordingly, I conclude that the Legislature did not mean for the exception in MCL 460.6a(8) to apply on the basis of when a rule was promulgated, but rather intended it to apply on the basis of when the rule was *implemented*.

When used as a transitive verb, implement means "to fulfill; carry out" or "to put into effect according to a definite plan or procedure."[14] Applying these definitions of the word "implemented," I read MCL 460.6a(8) as stating that the $1,000,000 limit does not apply with respect to costs that are incurred due to changes in laws or regulations that are *put into effect* after October 6, 2008. I conclude that MCL 460.6a(8) controls, and it clearly provides that the limit does not apply to TES Filer if it incurred costs due to a rule change that was *put into effect* after October 6, 2008, the effective date of MCL 460.6a.

2. WHEN WAS THE RULE EFFECTIVE?

The question then becomes: Was the rule that required TES Filer to purchase NOx allowances put into effect before or after October 6, 2008? I conclude that

[14] *Random House Webster's College Dictionary* (2005).

the rule was not effective until 2009, and therefore the rule was not "implemented" until 2009.

The Michigan Department of Environmental Quality adopted the definitions of the Environmental Protection Agency when it promulgated the rule requiring NOx allowances.[15] The Environmental Protection Agency defined "CAIR NOx allowance" as "a limited authorization issued by a permitting authority . . . under provisions of a State implementation plan that are approved [by the Environmental Protection Agency] . . . ."[16]

On December 20, 2007, the Environmental Protection Agency approved the Michigan Department of Environmental Quality's 2007 state implementation plan rules on the condition that the Michigan Department of Environmental Quality would submit a corrected plan to the Environmental Protection Agency within one year.[17] The Michigan Department of Environmental Quality did not submit a corrected plan, and the conditional approval lapsed on December 20, 2008.[18] The Michigan Department of Environmental Quality "completed the State adoption process for the rules" on April 13, 2009.[19] It then submitted the revised state implementation plan to the Environmental Protection Agency for approval on June 10, 2009.[20] The Environ-

---

[15] Mich Admin Code, R 336.1803(3), incorporating by reference definitions in 40 CFR 97.102 and 40 CFR 97.302.

[16] 40 CFR 97.102 (2013).

[17] Environmental Protection Agency, *Approval of Implementation Plans of Michigan: Clean Air Interstate Rule*, 72 Fed Reg 72256, § I (December 20, 2007).

[18] Environmental Protection Agency, *Approval of Implementation Plans of Michigan: Clean Air Interstate Rule*, 74 Fed Reg 41637, 41638, § I (August 18, 2009).

[19] *Id*.

[20] *Id*.

mental Protection Agency approved the June 10, 2009 submittal in conjunction with the July 16, 2007 submittal, and declined to revisit the July 16, 2007 submittal on its own.[21]

I conclude that Rule 336.1803(3) was not effective until 2009. Rule 336.1803(3) adopted the federal definition of the term "NOx allowance." The federal definition provided that such an allowance was a limited authorization *under the provisions of a state implementation plan*.[22] The Environmental Protection Agency did not approve Michigan's state implementation plan until 2009. Accordingly, there was no stated implementation plan under which NOx allowances existed. To put it another way, there were no limited NOx allowances under a state implementation plan because no such plan existed.

Given these provisions, I cannot conclude that the rule was "implemented" in 2007. I do not see how the rule can apply to TES Filer if the Michigan Department of Environmental Quality conditioned the rule on EPA approval, and the EPA did not approve the rule until August 18, 2009. The Michigan Department of Environmental Quality may have promulgated the rules in 2007, but the NOx limitations were not *implemented* until 2009.

II. CONCLUSION

I conclude that the word "implemented" in MCL 460.6a(8) does not have the same meaning as the word "promulgated." I also conclude that the NOx requirements were not implemented until 2009 because they were not effective until 2009. Therefore, the exception

---

[21] *Id*.

[22] 40 CFR 97.102 (2013).

in MCL 460.6a(8) applied to TES Filer. I conclude that the Public Service Commission erred when it determined that TES Filer was not allowed to recover the costs of purchasing NOx allowances. I therefore respectfully dissent from the majority's contrary conclusion in Docket No. 305066.

PEOPLE v VANDENBERG

Docket No. 314479. Submitted June 10, 2014, at Grand Rapids. Decided October 2, 2014, at 9:00 a.m.

Mary E. Vandenberg was convicted by a jury in the Ottawa Circuit Court, Edward R. Post, J., of resisting and obstructing a police officer and making or exciting any disturbance or contention. Defendant appealed, alleging that the phrase "excite any . . . contention" in MCL 750.170 is unconstitutionally vague and overbroad and, consequently, she could resist an arrest unlawfully premised on defendant's exciting of a contention.

The Court of Appeals *held*:

1. The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers or simply because bystanders object to peaceful and orderly demonstrations. The phrase "excite any . . . contention," as used in MCL 750.170, is unconstitutionally overbroad insofar as it criminalizes the peaceful public expression of ideas merely because those ideas may be offensive to others. The "contention" language must be excised from the statute. A conviction under MCL 750.170 premised on exciting a contention may not stand. The facts of this case do not reveal whether defendant was convicted for creating a "disturbance" or exciting a "contention." Because defendant's conviction under MCL 750.170 may rest on an unconstitutional basis, that conviction is reversed and the matter is remanded to the trial court for a new trial at which the "contention" portion of the statute should not be considered.

2. To convict a defendant of resisting and obstructing a police officer under MCL 750.81d(1), the prosecution must show (1) that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, (2) the defendant knew or had reason to know that the person the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties, and (3) the officer's actions were lawful. Because the jury was instructed that exciting any contention constituted a crime, the jury may have concluded that the arresting officer lawfully arrested defendant because her peaceful expression of ideas gave offense to her listeners. An arrest on that basis would be

unlawful because the expression of ideas may not be prohibited merely because those ideas are offensive. Because defendant's conviction under MCL 750.81d(1) may be premised on defendant's resistance to an unlawful arrest, the conviction is reversed and the matter is remanded to the trial court for a new trial.

Reversed and remanded.

CONSTITUTIONAL LAW — CRIMINAL LAW — EXCITING CONTENTIONS.

The phrase "excite any contention" in MCL 750.170 is unconstitutionally overbroad insofar as it criminalizes the peaceful public expression of ideas merely because the ideas may be offensive to others; the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers or simply because bystanders object to peaceful and orderly demonstrations.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Ronald J. Frantz*, Prosecuting Attorney, and *Gregory J. Babbitt*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Katherine L. Marcuz* and *Douglas W. Baker*) for defendant.

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

HOEKSTRA, J. Following a jury trial, defendant appeals as of right her convictions of resisting and obstructing a police officer, MCL 750.81d(1), and making or exciting any disturbance or contention, MCL 750.170. Because the phrase "excite any . . . contention" is unconstitutionally vague and overbroad, we reaffirm the holding of *People v Purifoy*, 34 Mich App 318, 321; 191 NW2d 63 (1971) (opinion by LESINSKI, C.J.), and we reverse and remand for a new trial.

I. FACTS AND PROCEDURAL HISTORY

According to the evidence introduced at trial, defendant went to the 58th District Court in Hudsonville,

Michigan, to pay a traffic ticket. Rather than simply pay the ticket, when defendant approached the clerk's window, she proceeded to read a statement regarding the "need for autonomy" and her "frustration" at having to pay a ticket when, from defendant's viewpoint, the fine had been demanded by "threat or force." Defendant's brother, who had accompanied defendant to the courthouse, videotaped defendant's activities in contravention of posted signs prohibiting the use of cameras. The clerk grew "nervous" as a result of defendant's behavior, and a deputy present at the scene told defendant's brother to stop recording. Defendant then attempted to read her statement to the deputy. Thereafter, when a supervisor came to the clerk's window, defendant attempted to pay her ticket with 145 single dollar bills that she had defaced with black and red markers. Following the directions of the deputy, the employees refused to accept the defaced bills. According to the clerk and her supervisor, defendant then grew "very agitated" and became "argumentative." A bystander in the building testified at trial that defendant began to make a "big scene" and "started exploding," meaning that defendant was "just being loud."

The deputy asked defendant to leave, and other officers arrived to help escort defendant to the exit. They created "a block wall and started walking [defendant] towards the exit." According to one officer's description, defendant "passively resist[ed]" by repeatedly stopping and trying to talk to the officers. After defendant had been escorted past the security checkpoint to the building's vestibule, defendant disobeyed the officers' instructions to leave the building. At that time, one of the officers informed defendant that she was under arrest. Defendant proceeded to struggle, flailing her arms and later stiffening her arms to prevent the officers from handcuffing her. After the

officers stunned defendant with a Taser and sprayed her with pepper spray, they managed to handcuff her.

Defendant was tried before a jury for making or exciting a disturbance or contention, MCL 750.170, and resisting and obstructing a police officer, MCL 750.81d(1). At trial, it was the prosecutor's theory that defendant did not go the courthouse to lawfully conduct business, but, instead, had "confrontation on her mind" and that she "went to the courthouse to create tension and challenge." According to the prosecutor, defendant "became more agitated" when the employees refused to accept her money, and she began to draw the notice of passersby. Defendant was, in the prosecutor's view, "noticeably causing a disturbance in the courthouse lobby." In closing arguments, the prosecutor summarized her theory of the case as follows:

> With disturbing the peace, the defendant made or excited a disturbance or a contention. There's no doubt, ladies and gentlemen, on what she was doing in the lobby that day. You heard from [a passerby], who explained the scene that [defendant] had created; the court clerks . . . explained that she caused a significant contention or disturbance even amongst the clerks alone. The clerks were so disturbed and heard such contention that one of the ones behind the scenes actually went to the branch office and obtained police officer back up. If that's not exciting a disturbance or contention, I don't know what is . . . .

Elsewhere, the prosecutor focused very specifically on the "contention" component of the statute, arguing, for example, that "it still adds up to the defendant causing a contention and that was a contention she planned to cause at least a day in advance." The jury convicted defendant of both resisting and obstructing a police officer and making or exciting any disturbance or contention.

Defendant now appeals her convictions. She argues that MCL 750.170 is unconstitutionally overbroad and that, consequently, she could resist the arrest insofar as it was unlawfully premised on her exciting of a contention. In particular, she asserts that, unless the words "excite any . . . contention" are written out of the statute, MCL 750.170 criminalizes constitutionally protected speech, thereby impinging on First Amendment freedoms. Because the trial court's instructions to the jury included reference to this "contention" language and the prosecutor argued that defendant created a contention, defendant maintains that she may have been unlawfully arrested and convicted for the exercise of constitutionally protected speech. For this reason, defendant argues that her convictions must be reversed.

II. STANDARD OF REVIEW AND RULES OF CONSTRUCTION

On appeal, constitutional questions are generally reviewed de novo. *People v MacLeod*, 254 Mich App 222, 226; 656 NW2d 844 (2002). However, defendant failed to challenge the constitutionality of MCL 750.170 in the trial court, meaning that her constitutional claim is unpreserved and reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Under this standard, defendant bears the burden of demonstrating a "clear or obvious" error and that this error affected her substantial rights. *Id*. at 763-764. To have affected substantial rights, "there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). Even if defendant satisfies this burden, an appellate court will reverse only if the plain error led to the conviction of an innocent defendant or "seriously affect[ed] the

fairness, integrity or public reputation of judicial proceedings . . . ." *Carines*, 460 Mich at 763-764 (quotation marks and citation omitted).

When considering the constitutionality of a statute, we begin with the presumption that statutes are constitutional and we construe statutes consistent with this presumption unless their unconstitutionality is readily apparent. *People v Rogers*, 249 Mich App 77, 94; 641 NW2d 595 (2001). The party challenging a statute's constitutionality bears the burden of proving its invalidity. *People v Malone*, 287 Mich App 648, 658; 792 NW2d 7 (2010). A statute may be challenged as unconstitutionally vague for three reasons: "(1) the statute is overbroad and impinges on First Amendment freedoms, (2) the statute fails to provide fair notice of the proscribed conduct, and (3) the statute is so indefinite that it confers unfettered discretion on the trier of fact to determine whether the law has been violated." *Rogers*, 249 Mich App at 94-95.

To ascertain whether a statute is unconstitutionally vague or overbroad, we consider the entire text of the statute and any related judicial constructions. *Id*. at 94. A law may be found to be unconstitutionally overbroad only where it "reaches a substantial amount of constitutionally protected conduct." *People v Rapp*, 492 Mich 67, 73; 821 NW2d 452 (2012) (quotation marks and citation omitted). "[C]riminal statutes must be scrutinized with particular care, and those that prohibit a substantial amount of constitutionally protected conduct may be facially overbroad even if they have a legitimate application." *Id*. (citations omitted). However, a facially overbroad statute may be saved "where it has been or could be afforded a narrow and limiting construction by state courts or if the unconstitutionally overbroad part of the statute can be severed." *Rogers*, 249 Mich App at 96.

III. CONSTITUTIONALITY OF MCL 750.170

Relevant to defendant's arguments, in broad terms, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v Stevens*, 559 US 460, 468; 130 S Ct 1577; 176 L Ed 2d 435 (2010) (quotation marks and citation omitted). The recognized function of this freedom of speech is to invite dispute and enable "free trade in ideas," including those ideas many may find distasteful or challenging. *Virginia v Black*, 538 US 343, 358; 123 S Ct 1536; 155 L Ed 2d 535 (2003) (quotation marks and citation omitted); *Terminiello v Chicago*, 337 US 1, 4; 69 S Ct 894; 93 L Ed 1131 (1949). Accordingly, "it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers . . . or simply because bystanders object to peaceful and orderly demonstrations." *Bachellar v Maryland*, 397 US 564, 567; 90 S Ct 1312; 25 L Ed 2d 570 (1970). (quotation marks and citations omitted).

Specifically at issue in this case is the constitutionality of MCL 750.170, which provides:

> Any person who shall make or excite any disturbance or contention in any tavern, store or grocery, manufacturing establishment or any other business place or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor.

The present case is not the first occasion on which this Court has considered the constitutionality of this statutory provision. Most notably, in *Purifoy*, 34 Mich App at 320 (opinion by LESINSKI, C.J.), the defendant was arrested after throwing a rock at police officers at

the scene of a public disorder and he was convicted in a bench trial of making or exciting a disturbance or contention under MCL 750.170. On appeal, the defendant challenged the constitutionality of MCL 750.170, asserting it was unconstitutionally vague and overbroad. *Id*. This Court agreed with the defendant's claims that the statute was overbroad as written, and, because the defendant's conviction may thus have rested on an unconstitutional basis, the Court reversed the conviction and remanded for a new trial. *Id*. at 321-322 (opinion by LESINSKI, C.J.). See also *id*. at 324 (DANHOF and V. J. BRENNAN, JJ., concurring in part and dissenting in part). In reaching this conclusion, Chief Judge LESINSKI specifically recognized that the "excite any contention" language must be read out of the statute, and in doing so the Court relied on the reasoning of a special three-judge panel in federal court, which had previously determined that the words "excite any contention" must be read out of MCL 750.170 to accord with the principle that public expression of ideas may not be prohibited merely because the ideas are themselves offensive to others. *Id*. at 321-322 (opinion by LESINSKI, C.J.), citing *Detroit Metro Welfare Rights Org v Cahalan*, unpublished memorandum opinion of a special three-judge panel of the United States District Court for the Eastern District of Michigan, issued May 29, 1970 (Civil Action No. 34006), available at <http://perma.cc/A3LQ-BXEU?type=pdf>.[1] See also *Purifoy*, 34 Mich App at 324 (DANHOF and V. J. BRENNAN, JJ., concurring in part and dissenting in part) (recognizing that application of the decision of the three-judge federal panel necessitated the reversal of the defendant's conviction).

---

[1] Discussions of the opinion can also be found in *Purifoy*, 34 Mich App at 321-322 (opinion by LESINSKI, C.J.), and *People v Mash*, 45 Mich App 459, 462-463; 206 NW2d 767 (1973).

More fully, relying on *Bachellar*, 397 US at 567, the three-judge federal panel referred to in *Purifoy* described the unconstitutional overbreadth of MCL 750.170 as follows:

> Our careful inspection of the statute herein attacked convinces, however, that a portion of its language is, on its face, so vague and overbroad as potentially to threaten First Amendment rights. That portion of state law which purports to make it a crime to "excite any . . . contention . . . in any street, land, alley, highway[,] public building, grounds or park" is subject to the logical construction that peaceful protest activity may be the subject of criminal sanction simply because it excites strong or possibly violent opposition from others.
>
> The United States Supreme Court has very recently dealt with this same problem in *Bachellar* . . . . It said in part:
>
> > Any shock effect caused by the placards, remarks, and peaceful marching must be attributed to the content of the ideas being expressed, or to the onlookers' dislike of demonstrations as a means of expressing dissent. But "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers["] . . . or simply because bystanders object to peaceful and orderly demonstrations.
>
> * * *
>
> It appears to this Court that the portions of the Michigan Statute cited above are similarly repugnant to the First Amendment of the Federal Constitution. . . .
>
> * * *
>
> So that there is no possibility of our being misconstrued, with the elision of the constitutionally offensive language, the Michigan Statute would read as follows:

> Any person who shall make any disturbance in any tavern, store or grocery, manufacturing establishment or any other business place or in any street, lane, alley, highway, public building grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor. [*Detroit Metro Welfare Rights Org*, pp 4-6 (citations omitted).]

As noted, in *Purifoy*, both the lead opinion and the concurring/dissenting opinion followed the three-judge federal panel's excise of the "contention" language. *Purifoy*, 34 Mich App at 321-322 (opinion by LESINSKI, C.J.), citing *Bachellar*, 397 US 564. See also *Purifoy*, 34 Mich App at 324 (DANHOF and V. J. BRENNAN, JJ., concurring in part and dissenting in part). Since that time, this Court has adhered to this interpretation, recognizing that the constitutional problems identified in *Purifoy* may be avoided, provided that the contention language is not included in instructions to the jury involving MCL 750.170. See *Mash*, 45 Mich App at 462-463. More recently, another federal court considering the statute similarly found it to be overbroad insofar as it infringes constitutionally protected speech. See *Leonard v Robinson*, 477 F3d 347, 360 (CA 6, 2007). In sum, for more than four decades, this Court and federal courts have acknowledged that the reference in MCL 750.170 to "exciting a contention" unconstitutionally infringes protected speech by criminalizing the peaceable public expression of ideas, merely because those ideas might be offensive to others.

Today, consistent with the reasoning of these past decisions, we reaffirm *Purifoy*'s central holding.[2] That

[2] In urging this Court to reach a different conclusion than the numerous cases that have consistently identified the exciting of a "contention" language as repugnant to constitutionally protected speech, the prosecutor cites *People v Weinberg*, 6 Mich App 345, 351; 149 NW2d 248 (1967).

is, we again recognize that the phrase "exciting a contention" as used in MCL 750.170 is unconstitutionally overbroad insofar as it criminalizes the peaceable public expression of ideas, merely because those ideas may be offensive to others. See *Purifoy*, 34 Mich App at 321-322 (opinion by LESINSKI, C.J.), citing *Bachellar*, 397 US at 567. Consequently, the contention language must be excised from the statute in the manner detailed in *Purifoy* and by the three-judge panel in *Detroit Metro Welfare Rights Org*, and a conviction under MCL 750.170 premised on "exciting a contention" may not stand.

On the facts of this case, as in *Purifoy*, we cannot discern whether defendant was convicted for creating a "disturbance" or exciting a "contention." The prosecutor argued both that defendant had created a disturbance and that she had excited a contention, and the trial court's instructions to the jury included reference to both a disturbance and a contention. A jury instructed in this manner may well have convicted defendant because it determined that her words and actions, though peaceable, were offensive to others and therefore constituted the exciting of a contention. Because defendant's conviction may rest on an unconstitutional

---

Weinberg has little value in the present case because it did not provide much guidance on the constitutionality of the "contention" language at issue. Instead, *Weinberg* mainly considered whether the defendants in that case—students who interrupted the business of a bank by sitting on the floor in front of the teller's windows—had created a "disturbance" within the meaning of the statute. In any event, as a decision of this Court decided before November 1, 1990, it does not constitute binding precedent, MCR 7.215(J)(1), and any persuasive value *Weinberg* might have had was thoroughly undermined by *Purifoy*, which, in light of *Bachellar*, persuasively identified the contention language as overbroad insofar as it plainly could be construed to prohibit the public expression of ideas, merely because those ideas are offensive to others. In short, the prosecutor's reliance on *Weinberg* is misplaced.

basis, we must reverse and remand for a new trial that shall not involve the "contention" portion of MCL 750.170. See *Purifoy*, 34 Mich App at 321-322 (opinion by LESINSKI, C.J.). See also *Terminiello*, 337 US at 5 (holding that reversal of a conviction is required where "one part of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that part"); *People v Gilbert*, 55 Mich App 168, 174; 222 NW2d 305 (1974) ("When the defendant stands convicted on one of two theories, one of which is permissible and one of which is not, the inability to say for sure on which the conviction rests demands reversal.").

IV. RESISTING AND OBSTRUCTING

Recognizing that the trial court's instructions on MCL 750.170 were unconstitutionally overbroad, we are also persuaded that, on the present facts, reversal of defendant's conviction under MCL 750.81d(1) for resisting and obstructing a police officer is also required. To convict defendant for resisting and obstructing a police officer, the prosecution was required to show that: "(1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Quinn*, 305 Mich App 484, 491; 853 NW2d 383 (2014) (quotation marks and citation omitted). In addition, "the prosecution must establish that the officers' actions were lawful." *People v Moreno*, 491 Mich 38, 51-52; 814 NW2d 624 (2012). In other words, pursuant to *Moreno*, the lawfulness of the arrest was an

element of the offense, and it presented a factual question for the jury.[3] *Quinn*, 305 Mich App at 491-492, 494.

For an arrest to be lawful, the police officer making the arrest must have probable cause, either that a felony or misdemeanor was committed by the individual in the officer's presence, or that a felony or specified misdemeanor (i.e., a misdemeanor punishable by imprisonment for more than 92 days) occurred outside the officer's presence and that the individual in question committed the offense. *People v Chapo*, 283 Mich App 360, 366-367; 770 NW2d 68 (2009); MCL 764.15(1). See also *People v Freeman*, 240 Mich App 235, 236; 612 NW2d 824 (2000) ("An arrest is legal if an officer has reasonable cause to believe that a crime was committed by the defendant."). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

In this case, as discussed, the jury instructions and the prosecutor's theory at trial encompassed the erroneous, overly broad premise that exciting any contention constituted a crime. Given these instructions, the jury may have concluded that the arresting officer lawfully arrested defendant because her peaceful ex-

[3] On appeal defendant challenges the adequacy of the jury instructions relating to the elements of resisting and obstructing a police officer. Given our conclusion that defendant's conviction under MCL 750.81d(1) must be reversed, we find it unnecessary to address this jury instruction argument. We note, however, that in keeping with *Moreno*, 491 Mich at 51-52, the lawfulness of an officer's arrest is an element of the offense on which the jury must be instructed. See *Quinn*, 305 Mich App at 491-492, 494.

pression of ideas gave offense to her listeners. But, an arrest on this basis would be unlawful because the expression of ideas may not be prohibited merely because those ideas are offensive. See *Leonard*, 477 F3d at 360-361 (recognizing that the mere advocacy of an idea cannot support a conviction and it cannot create probable cause for an arrest). Because defendant's conviction for resisting and obstructing a police officer may have been premised on resistance to an unlawful arrest, reversal of her conviction, and remand for a new trial, is warranted. See *Gilbert*, 55 Mich App at 174.

Reversed and remanded for a new trial. We do not retain jurisdiction.

RONAYNE KRAUSE, P.J., and WHITBECK, J., concurred with HOEKSTRA, J.

CHEBOYGAN SPORTSMAN CLUB V CHEBOYGAN COUNTY PROSECUTING ATTORNEY

Docket No. 313902. Submitted March 12, 2014, at Lansing. Decided October 2, 2014, at 9:05 a.m.

The Cheboygan Sportsman Club brought an action in the Cheboygan Circuit Court, seeking a declaratory judgment that would preclude the Cheboygan County Prosecuting Attorney from enforcing the statutory prohibition against discharging a firearm within 150 yards of an occupied building without written permission, currently codified at MCL 324.40111(6), against plaintiff's shooting range on the ground that that provision, read in context, applied only to hunters. Both parties moved for summary disposition. The National Rifle Association filed a brief amicus curiae arguing that if MCL 324.40111 applied, plaintiff was entitled to immunity from civil suit under the sport shooting ranges act, MCL 691.1541 *et seq*. On this basis, the court, Scott L. Pavlich, J., granted plaintiff's motion for summary disposition, denied defendant's motion for summary disposition, and granted plaintiff's request for a declaratory judgment, ruling that MCL 691.1542 was incompatible with MCL 324.40111 and that MCL 691.1542, being later enacted and more specific, controlled. Defendant appealed.

The Court of Appeals *held*:

1. The trial court erred by applying the sport shooting ranges act. Although the act gives shooting ranges immunity from civil liability or criminal prosecution in matters relating to noise or noise pollution, actions for nuisance, and injunctions based on noise or noise pollution under certain circumstances, the threatened criminal liability in the instant matter had nothing to do with noise or nuisance. Further, while the act provides immunity to shooting ranges for violation of ordinances under some circumstances, the threatened criminal liability in this case involved violation of a statute. Moreover, the threat of prosecution was to plaintiff's members, not to plaintiff itself.

2. The trial court reached the correct result, albeit for the wrong reason, because MCL 324.40111(6), when read in context

and considering its legislative history, applies to hunting and not to shooting ranges.

Affirmed.

Judge WHITBECK, concurring in part and dissenting in part, agreed that the trial court erred by applying the sport shooting ranges act, but he would have reversed and remanded the case for further proceedings without reaching plaintiff's alternative ground for affirmance. He also disagreed with the majority's method of statutory interpretation, which relied on legislative history and analyses to restrict the application of MCL 324.40111(6) to the hunting context in contravention of the clear wording of the statute.

STATUTES — NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION ACT — DISCHARGE OF FIREARMS NEAR OCCUPIED BUILDINGS — SHOOTING RANGES.

The prohibition in MCL 324.40111(6) against discharging a firearm within 150 yards of certain buildings without the written permission of the owner applies only in the context of hunting and not to shooting ranges.

Patrick, Kwiatkowski & Hesselink, PLLC (by *Joseph P. Kwiatkowski*), for plaintiff.

Young, Graham, Elsenheimer & Wendling, PC (by *Bryan E. Graham)*, for defendant.

Amicus Curiae:

Michael T. Jean for the National Rifle Association of America.

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

RONAYNE KRAUSE, P.J. Defendant, the Cheboygan County Prosecuting Attorney, appeals by right an order of declaratory judgment stating that the prohibition against discharging firearms within 150 yards of occu-

pied residences in MCL 324.40111(6),[1] which is part of the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., is inapplicable to plaintiff's shooting range. We affirm, albeit on different grounds.

The underlying facts in this matter are not in any serious dispute. Plaintiff, the Cheboygan Sportsman Club, owns and operates a shooting range for both long guns and handguns, and it has done so since approximately 1952. At the time it commenced operations, no residences were located in its vicinity. Over the years, plaintiff has improved the range and received a safety certification from the National Rifle Association (NRA). According to the Michigan Department of Licensing and Regulatory Affairs, the "Sportsman Subdivision" was platted in 1974, due north of plaintiff's shooting range, in a fairly isolated wooded area near the shore of Lake Huron. At some point—the record does not disclose when, nor can we discover it from public information of which we may take judicial notice pursuant to MRE 201—a residence was constructed on Lots 43 and 44 of the Sportsman Subdivision. That residence is within the 150-yard zone specified by MCL 324.40111(6). Only Lot 45 would have been closer to the shooting range. It appears that no other occupied structures are within 150 yards of the range.

That residence came to be owned by Roger Watts. We again do not know when, although the records available

[1] This provision states that "[a]n individual shall not hunt or discharge a firearm within 150 yards of an occupied building, dwelling, house, residence, or cabin, or any barn or other building used in connection with a farm operation, without obtaining the written permission of the owner, renter, or occupant of the property." At the time the trial court granted summary disposition, this subsection was located, with identical language, at MCL 324.40111(5). It was relocated to § 40111(6) by 2012 PA 340, and we will refer to its present location.

to us from the Cheboygan County Register of Deeds suggest that he may have acquired the property in 2004 or 2005. Watts was, in fact, formerly one of plaintiff's members. We note that plaintiff contends in its brief on appeal that Watts was "aware of the ranges and activities associated with the Club prior to moving to the area," a fact not explicitly stated in the record insofar as we can find. Nonetheless, it would be absurd to contend that any individual purchasing Lots 43 and 44, or building on those lots, could possibly have been unaware of the existence and nature of the shooting range at the time. It is therefore unambiguous and not seriously disputable that Watts came to the vicinity of the range, rather than the opposite. However, Watts executed a handwritten statement contending, among other things, the more recent users of the shooting range appeared no longer to appreciate the need to use "lighter" shooting loads.

On June 19, 2012, Watts reported to the Cheboygan County Sheriff Department that he had found a bullet on his property that he believed had come from plaintiff's range. The investigating officer opined that it appeared to be a nine-millimeter bullet. Although Watts allowed the bullet to be photographed, he refused to turn it over. Watts noted that this was not the first time he had found a stray bullet on his property. Further investigation determined that only one person had been shooting a handgun on the range recently, and that had been a .22 caliber pistol that was being fired in an easterly direction and not toward Watts's property, which was located to the north. The matter was turned over to the prosecutor's office, which informed plaintiff that "any individual discharging a firearm within 150 yards of a residence should face criminal prosecution for violating MCL 324.40111."

Plaintiff then commenced the instant litigation, seeking to preclude defendant from enforcing MCL 324.40111 against its members. Plaintiff asserted that, when read in context, MCL 324.40111 only prohibits a hunter from discharging a firearm within 150 yards of an occupied dwelling. The NRA, in an amicus brief, contended that even if MCL 324.40111 applied outside the context of hunting, the Cheboygan Sportsman Club was entitled to immunity from civil suit under the sport shooting ranges act, MCL 691.1541 *et seq*. The trial court agreed with the NRA's contention, ruling that the two statutes were incompatible and the latter, being the more specific, prevailed. The trial court concluded that, unless defendant could show that plaintiff did not comply with the sport shooting ranges act, defendant could not prosecute plaintiff's members. The trial court thus granted summary disposition in favor of plaintiff.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). This Court likewise reviews de novo questions of statutory construction, with the fundamental goal of giving effect to the intent of the Legislature. *Weakland v Toledo Engineering Co*, *Inc*, 467 Mich 344, 347; 656 NW2d 175, amended on other grounds 468 Mich 1216 (2003). The goal of statutory interpretation is to determine and give effect to the intent of the Legislature, with the presumption that unambiguous language should be enforced as written. *Gladych v New Family Homes*, *Inc*, 468 Mich 594, 597; 664 NW2d 705 (2003). If the language is unambiguous, "the proper role of a court is simply to apply the terms of the statute to the circumstances in a particular case." *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002). However, "the provisions of a statute

should be read reasonably and in context." *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012). Even if a trial court fails to address an issue, it is preserved for appeal and thus proper for this Court to consider if it was raised before the trial court and is pursued on appeal. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

We first conclude that the trial court erred by applying the sport shooting ranges act. It is inapposite not because it is more or less specific, but because it simply has no relevance to the facts at issue in this case. The act gives shooting ranges that "conform[] to generally accepted operation practices" several immunities. MCL 691.1542(1). In ostensibly relevant part, under MCL 691.1542, such ranges are immune to "civil liability or criminal prosecution in any matter relating to noise or noise pollution," "an action for nuisance," and an injunction against "the use or operation of a range on the basis of noise or noise pollution" if those ranges were in compliance with "any noise control laws or ordinances" to which they were subject when they commenced operation. The threatened criminal liability in the instant matter has nothing to do with noise or nuisance. Under MCL 691.1542a, such ranges are immune, under certain circumstances, to violations of ordinances. The threatened criminal liability in the instant matter involves violations of a statute, not an ordinance. In any event, plaintiff *itself* is not being threatened with any criminal liability; rather, the threat of prosecution is to any *individuals* who discharge firearms there. The sport shooting ranges act does not confer upon plaintiff any immunity relevant to this matter.

Plaintiff and amicus contend in the alternative that MCL 324.40111(6) was never intended to apply to

shooting ranges, but rather to hunters.[2] There is a considerable amount of evidentiary support for this contention in the history and context of the statute.

The first predecessor statute, MCL 312.10b, was enacted by 1968 PA 61, which amended what was then the Game Law of 1929, and it read as follows:

> (1) For the purpose of this section, "safety zone" means any area within 150 yards of any occupied dwelling house, residence, or any other building, cabin, camp or cottage when occupied by human beings or any barn or other building used in connection therewith.
>
> (2) No person, other than the owner, tenant or occupant, shall shoot or discharge any firearm or other dangerous weapon, or hunt for or shoot any wild bird or wild animal while it is within such safety zone, without the specific permission of the owner, tenant or occupant thereof.
>
> (3) The provisions of this section shall not apply to any landowner, tenant or occupant thereof or their invited guest while hunting on their own property, or to any riparian owner or their tenant or guest while shooting waterfowl lakeward over water from their upland [sic] or lakeward from a boat or blind over their submerged soil.

MCL 312.10b has only been mentioned once in any published opinion that we can find, and in that case this Court only observed what is obvious, that "the statute is intended to protect the occupants of, or animals housed in, certain structures . . . ." *Holliday v McKeiver*, 156 Mich App 214, 217; 401 NW2d 278 (1986).

However, then Michigan Attorney General Frank J. Kelley issued an opinion interpreting MCL 312.10b and concluded, in relevant part, that the Game Law was

---

[2] Our dissenting colleague would decline to address this issue because the trial court failed to do so. As noted, the trial court's failure to consider a matter that was properly raised by the parties is immaterial to whether an issue was preserved for our consideration. *Peterman*, 446 Mich at 183.

intended by the Legislature to regulate hunting and that MCL 312.10b in particular was intended to regulate "the control and limitation of the discharge of weapons in the hunting and taking of wild birds and wild game and not the discharge of weapons in target practice activities." OAG, 1981-1982, No. 5960, p 322 (August 18, 1981). Consequently, the 150-yard "safety zone" was inapplicable to landowners engaging in target practice on their own property. *Id.*[3] The statute explicitly exempted hunting activities on the landowner's own property.

Former MCL 312.10b was repealed by 1988 PA 256. See former MCL 300.269. As part of the same public act, the Legislature enacted former MCL 300.262(5), which was almost identical to the present-day MCL 324.40111(6).[4] This revised statute now reads:

---

[3] We note with interest that portions of former MCL 312.10 forbidding transportation or possession in an automobile of uncased or loaded firearms were supposedly declared unconstitutional for failing to explicitly specify that they applied only to game areas. In response, the Legislature enacted 1980 PA 451, which amended former MCL 312.10(1)(g) and (h) to explicitly "specify that the regulations covering the transportation of hunting weapons applied only in areas 'frequented by wild birds and wild animals'." House Legislative Analysis, SB 1200 and 1201, September 29, 1980; see also House Legislative Analysis, HB 4688, February 10, 1982. According to the legislative analysis, the failure to so specify caused "several courts" to find those portions of the statute unconstitutional "because their prohibitions extend beyond the purpose of the act's title, causing the law to embrace more than one object." See Const 1963, art 4, § 24. Such a holding would be consistent with a determination that the Game Act generally applied only to hunting. Unfortunately, the legislative analysis did not specify which "several" court cases so held, and we have been unable to discover them despite engaging in a diligent and exhaustive search. Criminal statutes now exist that accomplish the same purpose. See *People v Quinn*, 440 Mich 178, 191 n 16; 487 NW2d 194 (1992), citing MCL 750.227c and MCL 750.227d.

[4] Former MCL 300.262(5), which was moved without any other change to MCL 300.262(4) by 1990 PA 276, referred to "a person" rather than

> An individual shall not hunt or discharge a firearm within 150 yards of an occupied building, dwelling, house, residence, or cabin, or any barn or other building used in connection with a farm operation, without obtaining the written permission of the owner, renter, or occupant of the property.

1988 PA 256 was the former Wildlife Conservation Act, MCL 300.251 *et seq*. Its title stated that its purpose was, in pertinent part, "to provide for the conservation of animals and the method and manner in which animals may be taken in this state[.]" The legislative history of 1988 PA 256 further reflects that the intention of the Legislature was essentially to recodify the Game Law of 1929, which had been amended extensively, with a less "patchwork" regime of game laws. See Senate Legislative Analysis, SB 374, July 12, 1988.

The Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*., was enacted by 1994 PA 451. Its title provided that it was

> to protect the environment and natural resources of the state; to codify, revise, consolidate, and classify laws relating to the environment and natural resources of the state; to regulate the discharge of certain substances into the environment; to regulate the use of certain lands, waters, and other natural resources of the state; to prescribe the powers and duties of certain state and local agencies and officials; to provide for certain charges, fees, and assessments; to prescribe penalties and provide remedies; to repeal certain parts of this act on a specific date; and to repeal certain acts and parts of acts.

"an individual" and lacked a comma after the words "farm operation." Although changes to a statute are often presumed to change its meaning, we think it obvious that these two changes were at most intended merely as clarification. See *Detroit Edison Co v Janosz*, 350 Mich 606, 614; 87 NW2d 126 (1957). Consequently, we will in the remainder of this opinion treat these two minor differences as being effectively nonexistent.

Shortly thereafter, the Legislature enacted a series of public acts recodifying a long list of "current natural resources management statutes concerning wildlife conservation, recreation, habitat protection, and environmental issues" by "inserting them into the NREPA." Senate Legislative Analysis, HB 4348 through 4351 and 4385, April 6, 1995. Among many other provisions, 1995 PA 57 recodified 1988 PA 256 as Part 401 of NREPA, under "wildlife conservation." See *id*. Thus, MCL 300.262(4) became MCL 324.40111(4), which is now at MCL 324.40111(6) with irrelevant changes.[5]

It has always been the law that statutes must be construed in such a way as to reflect the intention of the Legislature as derived from a strict reading of the language of the statute at issue, but at the same time, that language must not be "construed so strictly as to defeat the obvious intention of the legislature." *United States v Wiltberger*, 18 US (5 Wheat) 76, 95; 5 L Ed 37 (1820). As noted, "the provisions of a statute should be read reasonably and in context," *McCahan*, 492 Mich at 739, particularly "in the context of the entire legislative scheme," *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014). Part of that context is the titles of their acts, and they may not exceed the scope of those titles. *Bankhead v River Rouge Mayor*, 387 Mich 610, 613-615; 198 NW2d 414 (1972), relying on Const 1963, art 4, § 24. Further context is any other statutes that are *in pari materia*, relating to the same common purpose, which should be read together. See *Apsey v Mem Hosp*, 477 Mich 120, 129 n 4; 730 NW2d 695 (2007). An act's title is not itself authority of any sort, but it is properly considered to assist in determining the act's purpose and scope. *Malcolm v East Detroit*, 437

[5] See note 4 of this opinion.

Mich 132, 143; 468 NW2d 479 (1991). Although legislative analyses are of very little value in reading a statute, they have some value to courts as casting light on the reasons that the Legislature may have had and the meaning they intended for an act. *Kinder Morgan Mich, LLC v City of Jackson*, 277 Mich App 159, 170; 744 NW2d 184 (2007).

Our dissenting colleague takes issue with our approach to understanding MCL 324.40111(6). To some extent, we can appreciate our colleague's concerns: in particular, we agree that if MCL 324.40111(6) is read strictly in isolation, that provision does not itself provide any exceptions for hunting on one's own property. It is true that "or" is a disjunctive term, and were we to consider the statute without regard to its history or its surrounding statutory framework, our colleague's conclusion would be inescapable. However, as discussed, statutory provisions must be read in context, which we do not believe constitutes "ignoring" any portion thereof. Beyond that, our colleague's exegesis of legislative analysis is an impressive academic exercise. We do not share our colleague's willingness to depart from established precedent that recognizes that collective entities can be, through simple and well-understood principles of group dynamics, effectively discrete entities unto themselves and subject to analysis in their own right. We decline to depart from that precedent.

Were we to disregard any established legal principle that could conceivably be thought of—inaccurately in this case, we believe—as a "fiction," the result would be chaos. In any event, we also decline to adopt our colleague's approach of analyzing MCL 324.40111(6) divorced from its context. Considering statutes in the contexts of the remainder of any cohesive statutory provisions of which they are a part and of their history

is also a cherished principle of statutory analysis. *Robinson v City of Lansing*, 486 Mich 1, 15-16; 782 NW2d 171 (2010); *Arrowhead Development Co v Livingston Co Road Comm*, 413 Mich 505, 516; 322 NW2d 702 (1982). Ultimately, the goal of *all* such principles is to determine the intent of the Legislature, and an overly mechanical application of such principles can be counterproductive. See *Dagenhardt v Special Machine & Engineering, Inc*, 418 Mich 520, 544 n 24; 345 NW2d 164 (1984). We prefer an organic approach to what is really an organic challenge.

It is inescapable that MCL 324.40111 is part of NREPA, and for the entire history of it and its predecessors the relevant provision has been a small part of a large statutory framework governing hunting, which successively came to be incorporated into increasingly larger statutory frameworks governing natural resources of all kinds. It has never been part of a general penal statutory framework or a framework governing firearms. Under MCL 324.40118(1), which makes violation of MCL 324.40111 a misdemeanor, any issued permit is also to be revoked, further indicating that the statute at issue is part of a hunting regulation scheme. We are of the opinion, as was Attorney General Frank J. Kelley regarding the predecessor statute, that the context of MCL 324.40111 is an inextricable part thereof. Furthermore, although changes to a statute are presumed to reflect an intention to change meaning, that presumption is not a strong one and will not overcome other indications to the contrary. See *People v Harrison*, 194 Mich 363, 370; 160 NW 623 (1916). In this case, it is clear that every relevant change made to the statute since its inception was for the purpose of recodification or streamlining.

In short, we are convinced that the 1981 opinion of Attorney General Frank J. Kelley regarding former MCL 312.10b was correct at the time and continues to be correct regarding the modern version thereof, MCL 324.40111: "The focus of this section is the hunting and taking of wild birds and wild animals" and it was intended to "control and limit[] . . . the discharge of weapons in the hunting and taking of wild birds and wild game and not the discharge of weapons in target practice activities."[6] We note also that although courts cannot consider the wisdom, fairness, or sensibility of a statute when evaluating its meaning, we believe any other conclusion would be not only somewhat nonsensical given the statute's inclusion in NREPA, but also deeply unjust to a business and individuals who have apparently undertaken to comply with the law and whose actions would become illegal *because of the unilateral act of someone else who was entirely aware of plaintiff's activities and even participated therein*. Put simply, it shocks our sense of fundamental fairness for the Legislature to have effectively handed Watts the sole power to decide whether plaintiff and its members could continue their historical use of their property the moment he became tired of their doing so. In conclusion, although the trial court erred by finding the sport shooting ranges act applicable, the trial court correctly found plaintiff and its members immune from prosecution for violating MCL 324.40111 under the facts alleged.

We emphasize that our holding today does *not* immunize property owners from potential criminal or civil liability for discharging firearms on their own property

[6] OAG, 1981-1982 at 322. Our Court has held that "while not binding on this Court, [Attorney General opinions] can be persuasive authority." *People v Woolfolk*, 304 Mich App 450, 492; 848 NW2d 169 (2014).

merely because the discharge was for some purpose other than hunting. For example, the letter written by the Cheboygan County Prosecuting Attorney regarding plaintiff referred not only to MCL 324.40111 but also to the possibility of criminal liability for recklessly discharging a firearm contrary to MCL 752.863a, a general penal statute. The latter statute was not made a part of the instant litigation, and we have not been asked to render an opinion as to its possible applicability to the facts at bar, so we do not. However, we do note that nothing in our opinion today necessarily precludes a potential criminal proceeding against any of plaintiff's members, or indeed any other person, under that or any other statute we have not explicitly discussed. We hold *only* that MCL 324.40111 applies to hunting contexts and not to target practice contexts, so the act of conducting target practice shooting on plaintiff's premises does not violate MCL 324.40111. We express no opinion, and none should be implied, as to whether any of the activities on plaintiff's premises are either permitted or prohibited by any other statute or law.

Affirmed.

FITZGERALD, J., concurred with RONAYNE KRAUSE, P.J.

WHITBECK, J. (*concurring in part and dissenting in part*). I agree that the trial court erred by applying MCL 691.1541 *et seq*. (the "Sport Shooting Ranges Act"). The majority has ably stated the background facts and procedural history in this case, and I agree that the Sport Shooting Ranges Act does not confer immunity in this case because this case does not concern an issue of noise control or noise pollution.

However, I write separately because I would not address Cheboygan Sportsman Club's alternative

ground for affirmance and because I strongly disagree with the majority's method of statutory interpretation to determine that issue. Accordingly, I dissent from that portion of the majority's opinion. I would reverse and remand for further proceedings.

I. THE SPORT SHOOTING RANGES ACT AND IMMUNITY

A. THE SPORT SHOOTING RANGES ACT

The Legislature originally enacted the Sport Shooting Ranges Act in 1989, in response to the conflicts that the development of rural areas created between shooting ranges and new neighbors.[1] The Sport Shooting Ranges Act provides "various forms of protection to shooting ranges, including providing immunity from certain nuisance actions to shooting ranges that comply with generally accepted operation practices."[2] The Sport Shooting Ranges Act specifically provides civil and criminal immunity from prosecution or nuisance actions involving noise control or noise pollution laws or ordinances:

> Notwithstanding any other provision of law, and in addition to other protections provided in this act, a person who owns or operates or uses a sport shooting range that conforms to generally accepted operation practices in this state *is not subject to civil liability or criminal prosecution in any matter relating to noise or noise pollution* resulting from the operation or use of the range if the range is in compliance with any noise control laws or ordinances that applied to the range and its operation at the time of construction or initial operation of the range.[3]

---

[1] *Ray Twp v B & BS Gun Club*, 226 Mich App 724, 727; 575 NW2d 63 (1997).

[2] *Id*.

[3] MCL 691.1542(1) (emphasis added).

B. THE WILDLIFE CONSERVATION ACT

The Wildlife Conservation Act provides the authority under which the Department of Natural Resources regulates the taking of game animals.[4] The Wildlife Conservation Act provides in part that "[a]n individual shall not hunt or discharge a firearm within 150 yards of an occupied building . . . without obtaining the written permission of the owner, renter, or occupant of the property."[5]

C. APPLICATION OF THE SPORT SHOOTING RANGES ACT

The prosecutor contends that the trial court erred by concluding that the Sport Shooting Ranges Act applied here because this matter does not concern noise or noise pollution. I agree.

The trial court concluded that the more specific Sport Shooting Ranges Act took precedence over the Wildlife Conservation Act because both statutes involve the discharge of firearms, and thus both were applicable in this case. However, the Sport Shooting Ranges Act provides shooting ranges immunity against noise complaints. This case does not involve noise complaints. It requires a determination of whether a prohibition against discharging a firearm within 150 yards of an occupied building is an issue of public safety or a hunting regulation under the Wildlife Conservation Act. Neither party's argument concerns noise or noise pollution. Thus, this suit is plainly not a matter "relating to noise or noise pollution," and the Sport Shooting Ranges Act does not apply. The trial court erred when it determined that the Cheboygan Sportsman Club was entitled to immunity from civil suit under the Sport Shooting Ranges Act.

---

[4] MCL 324.40105.

[5] MCL 324.40111(6).

I would therefore conclude that the trial court erred when it determined that the Cheboygan Sportsman Club was entitled to immunity from prosecution under the Sport Shooting Ranges Act because this action does not involve noise or noise pollution. I would reverse and remand on this ground.

II. APPLICATION OF THE WILDLIFE CONSERVATION ACT

A. OVERVIEW

As an alternative ground for affirmance, the Cheboygan Sportsman Club contends that the Wildlife Conservation Act does not apply because, when read in context, the statute limits only the discharge of firearms related to hunting, not range shooting. The prosecutor responds that the plain language of the provision at issue is not that specific in scope, and prohibits anyone from discharging a firearm within 150 yards of an occupied building. I note that, while the Cheboygan Sportsman Club made this argument below, the trial court failed to address it and it is not the focus of the parties' briefs on appeal.

For these reasons, and although the issue is purely legal in nature, I would decline to interpret the Wildlife Conservation Act. However, because the majority chooses to address the interpretation of Wildlife Conservation Act, I will also address the issue in order to dissent from the majority's method of interpretation.

B. LEGAL STANDARDS OF STATUTORY INTERPRETATION

We in the legal profession hold firm to the belief, to the point of reducing the words to a cliché, that the primary and overriding rule of statutory interpretation is that our goal is to give effect to the intent of the

Legislature.[6] At the risk of being labelled a judicial heretic, I must say that I have often found the repeated incantation of this hoary formula to be more than a little at odds with reality. The basic premise of the formula is that there is some objective, collective legislative intent that is capable of being ascertained through rational analysis.

But is this really true? Certainly, when a bill passes the Legislature, that passage is the result of collective action by both houses of that Legislature. But in each house, that *collective* action is itself the result of the *individual* actions of *individual* legislators, each casting his or her own vote. And that individual legislator may cast his or her vote for a very, very wide variety of reasons. For example:

• The legislator and his or her staff may analyze the bill carefully and reach a conclusion about the proper way to cast his or her vote. I have no doubt that that this frequently occurs.

• But the legislator may also vote aye or nay for reasons of party loyalty; the legislator's caucus may have taken a position on the bill and the legislator may vote in concert with that caucus position without a great deal of further analysis.

• Or the legislator may perceive that an important constituency favors or opposes the bill and may vote accordingly.

• Or the language of the bill may be the product of amendment and compromise and the legislator, while having considerable doubts about the wording in one portion of the bill, may nevertheless strongly favor the

[6] See, for example, *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

provisions of another portion and may vote for the bill despite having reservations about some of its provisions.

• Or the legislator may simply follow the lead of another legislator who is a recognized authority—such as a committee chair or a ranking member—in the particular area of the law with which the bill deals.

• Or, finally, the legislator may think that the bill is unimportant and vote for it just as a means of clearing the deck for other legislation in which he or she may be more interested.

My point is a simple one: the legislative process is almost infinitely complex and the reasons for an individual legislator's vote on a particular piece of legislation can be almost infinitely variable. To suppose that a *collective* intent somehow arises out of this welter of varied individual motives is to elevate fiction over reality. It may be a useful fiction—perhaps even a necessary fiction—but it is a fiction nonetheless.

To assist us in dealing with this fiction, we have developed over the years certain conventions designed to lead us to legislative intent. Statutes provide some of these rules. For instance, MCL 8.3a provides that common words and phrases should be construed according to common meanings while technical words and phrases should be construed according to their particular meanings, and MCL 8.4b provides that catchline headings are not part of a statute.

The judiciary has created other rules of statutory interpretation, some of which have their basis in logic. For instance, when the Legislature includes language in one part of a statute that it omits in another, we make the logical assumption that the omission was inten-

tional.[7] Similarly, we make the equally logical assumption that a more recent statute has precedence over an older statute.[8]

Other rules have their basis in grammar. For instance, we conclude that the Legislature's use of the present perfect tense indicates that an action was started in the past and continues or has been recently completed,[9] and that a modifying clause modifies only the last antecedent clause.[10]

As I stated earlier, this Court and the Michigan Supreme Court state, endlessly and perhaps even liturgically, that our goal is simply to give effect to the intent of the Legislature.[11] Again, this presumes a collective intent when, as I suggest, no such collective intent may exist. But—fortunately and perhaps because we know we are not really Galahads searching for the Holy Grail of collective legislative intent—we often follow that statement with a qualifier: the language of the *statute itself* is the primary indication of the Legislature's intent.[12] Thus, I suggest the statement that we are actually searching for a "statutory purpose" that we can glean from the words expressing that purpose is a better expression of what courts do than relying on the catchphrase of "legislative intent."

But whatever label we use—and I acknowledge that the concept of legislative intent is firmly embedded in

---

[7] See *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011).

[8] See *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991); *Parise v Detroit Entertainment*, 295 Mich App 25, 28; 811 NW2d 98 (2011).

[9] See *People v Kolanek*, 491 Mich 382, 407; 817 NW2d 528 (2012).

[10] See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999).

[11] See *US Fidelity & Guaranty Co*, 484 Mich at 13.

[12] *Id*. at 13.

our jurisprudence—the problem lies in how we express the concept rather than how we apply it. Michigan courts have consistently stated that if the plain and ordinary meaning of a statute's language is clear, we will not engage in judicial construction.[13] If the statute's language is unambiguous, we must enforce the statute as written.[14]

C. INTERPRETATION OF THE WILDLIFE CONSERVATION ACT

In very simple language, the Wildlife Conservation Act prohibits hunting *or* discharging a firearm within 150 yards of an occupied building:

> An individual shall not hunt *or* discharge a firearm within 150 yards of an occupied building, dwelling, house, residence, or cabin, or any barn or other building used in connection with a farm operation, without obtaining the written permission of the owner, renter, or occupant of the property.[15]

The majority uses the statute's title, legislative history, and legislative analyses to reach the conclusion that this statute does not mean what it says, but rather only means that a person may not discharge a firearm within 150 yards of an occupied building *while hunting*. Indeed, the majority's very statement of the case—that this matter involves a declaratory judgment holding that the "prohibition against discharging firearms within 150 yards of occupied residences . . . is inapplicable to plaintiff's shooting range"—illustrates the fundamental problem here. The statute does not simply prohibit discharging a firearm within 150 yards of an occupied building. It prohibits hunting *or* discharging a

---

[13] *Id*. at 12.

[14] *Id*. at 13.

[15] MCL 324.40111(6) (emphasis added).

firearm in such a fashion. By changing the word "or" to the word "and"—and this is exactly what the majority's interpretation does—the majority is able to affirm the trial court's holding that the Wildlife Conservation Act is inapplicable to the Cheboygan Sportsman Club.

This interpretation runs afoul of a number of the conventions—those basic and time-honored rules of statutory interpretation—that we by necessity follow when we pursue the chimera of collective legislative intent.

Here, as I have noted, the statute provides that an individual may not "hunt *or* discharge a firearm within 150 yards of an occupied building . . . ." The Michigan Supreme Court has very recently emphasized that this Court may not ignore statutory language in favor of a more "reasonable" interpretation:

> It is well established that
>
> "[w]e have no authority to treat any part of a legislative enactment, which is not ambiguous in itself and is capable of reasonable application, as so far unimportant that it is a matter of indifference whether it is complied with or not. We must suppose the legislature saw sufficient reason for its adoption, and meant it to have effect; and whether the reason is apparent to our minds or not, we have no discretion to dispense with a compliance with the statute."[16]

That the statute appears to be inconvenient, unnecessary, or unwise is not a reason for this Court to avoid the application of plain statutory language.[17] The word "or" is a disjunctive term that causes the statute to prohibit

---

[16] *In re Bail Bond Forfeiture*, 496 Mich 320, 336; 852 NW2d 747 (2014), quoting *Hoyt v East Saginaw*, 19 Mich 39, 46 (1869).

[17] *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012); *Mich Basic Prop Ins Ass'n v Office of Fin & Ins Regulation*, 288 Mich App 552, 560; 808 NW2d 456 (2010).

either action.[18] Generally, this Court should follow the literal use of the term "or" unless it renders the statute dubious.[19]

In this case, the word "or" does not render the statute dubious. Accordingly, there is no reason to avoid giving effect to the word "or." Were we to give effect to the word "or," it would prohibit both actions—hunting *or* discharging a firearm within 150 yards of an occupied building—not merely hunting. Contrary to the majority's holding, therefore, such an interpretation would mean that the Wildlife Conservation Act is applicable to the Cheboygan Sportsman Club's shooting range and prohibits target shooting on that range.

This distinction also illuminates how the majority's opinion runs afoul of another of our cherished conventions: that courts must avoid interpretations that render parts of a statute surplusage.[20] By failing to interpret the word "or" as a disjunctive term, the majority limits the application of the Wildlife Conservation Act only to hunting, and not to discharging a firearm. The majority's interpretation thus renders "discharging a firearm" surplusage.

And, by limiting the application of the Wildlife Conservation Act to "hunting contexts and not to target practice contexts," the majority's interpretation runs afoul of yet another basic rule of statutory interpretation: that this Court may not read provisions into a

---

[18] *State of Michigan v McQueen*, 293 Mich App 644, 671; 811 NW2d 513 (2011); *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011).

[19] *Root v Ins Co of North America*, 214 Mich App 106, 109; 542 NW2d 318 (1995).

[20] *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980); *Johnson*, 492 Mich at 177.

statute that the Legislature chose to omit.[21] The statute does not provide any exception for target shooting on one's own property. The majority instead creates one. But had the Legislature wished to create such an exception, it could have done so. It did not create such an exception, and this Court should not read such an exception into an unambiguous statute.

In creating this exception, the majority's reliance on legislative history and legislative analyses is most troubling. The Michigan Supreme Court has expressed disapproval of reliance on legislative analyses in the past, particularly when it creates a conflict with an unambiguous statute's plain language.[22] In no uncertain terms, the Court stated that, "In Michigan, a legislative analysis is a feeble indicator of legislative intent and is therefore a generally unpersuasive tool of statutory construction."[23] As the Court has noted, a legislative analysis does not necessarily reflect the view of the Legislature:

> The problem with relying on bill analyses is that they do not necessarily represent the views of even a single legislator. Rather, they are prepared by House and Senate staff. Indeed, the analyses themselves note that they do not constitute an official statement of legislative intent.[24]

There is no reason in the language of the statute itself to ignore the placement and use of the word "or" between the phrases "hunt" and "discharge a firearm." This Court should *particularly* not rely on legislative analyses to do so. Rather clearly, we are simply not free

---

[21] See *In re Hurd-Marvin Drain*, 331 Mich 504, 509; 50 NW2d 143 (1951); *Mich Basic Prop Ins Ass'n*, 288 Mich App at 560.

[22] *People v Davis*, 468 Mich 77, 79 n 1; 658 NW2d 800 (2003).

[23] *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587; 624 NW2d 180 (2001).

[24] *Id*. at 587 n 7.

to ignore the plain language of the statute and create an exception to remake the statute into a form we find more reasonable.

III. RESPONSE TO THE MAJORITY'S COMMENTS

The majority makes several comments in its opinion to which I am obligated to respond. First, the majority asserts that we must read statutes "in context." I take this to mean that we are obliged to consider not only the "surrounding statutory framework" but also legislative history and, presumably, legislative analyses. But if I am right, or mostly right, about the dubious nature of the concept of a collective legislative intent, then this context is conceptually irrelevant. And I note that I am not alone in this critique; see Justice Antonin Scalia's comment that "with respect to 99.99 percent of the issues of construction reaching the courts, there *is* no legislative intent, so that any clues provided by the legislative history are bound to be false."[25]

Second, the majority categorizes my analysis in this dissent as "an impressive academic exercise." I appreciate the kind words. But I do not regard my analysis to be at all academic in nature. Rather, I suggest, it is grounded in practical reality. Only the most innocent observer would conclude that the chaos that occurs in the rotunda of the Capitol on the last day of a legislative session—with bills flying from one chamber to the other, with every available arm being twisted and every possible political chit being called in, with compromises being made and then unmade within a matter of minutes—is capable of producing a rational and understandable collective legislative intent as to each indi-

[25] Scalia, *A Matter of Interpretation* (Princeton: Princeton University Press, 1997), p 32.

vidual piece of legislation. This is not an academic observation; it reflects reality as I have seen it.

Third, the majority states, "Were we to disregard any established legal principle that could conceivably be thought of—inaccurately in this case, we believe—as a 'fiction,' the result would be chaos." I am not a proponent of chaos, nor do I propose to disregard established legal principles. Rather, my critique of the majority's approach is that it disregards time-honored principles of statutory construction to reach a result contrary to the actual words of the statute construed according to such principles.

Finally, the majority states, "We prefer an organic approach to what is really an organic challenge."[26] I am not certain that I understand what this sentence means. But if it means that the word "or" in a statute actually means "and" when considered organically, I obviously disagree.

IV. CONCLUSION

I agree with the majority that the trial court erred when it determined that the Cheboygan Sportsman Club was entitled to immunity from prosecution under the Sport Shooting Ranges Act because this action does not involve noise or noise pollution. On that basis, I would reverse and remand for further proceedings.

But I would not graft an interpretation onto the Wildlife Conservation Act (1) that suggests that a person may not discharge a firearm within 150 yards of an occupied building *while hunting*, (2) that thereby

[26] See, similarly, the majority's statement, "We do not share our colleague's willingness to depart from established precedent that recognizes that collective entities can be, through simple and well-understood principles of group dynamics, effectively discrete entities unto themselves and subject to analysis in their own right."

limits the application of the Wildlife Conservation Act only to hunting, and not to discharging a firearm, rendering the "discharging a firearm" language of the statute surplusage, (3) that reads provisions into the statute that the Legislature chose to omit, and (4) that relies on the exceedingly frail reeds of legislative history and legislative analyses to reach this result.

The majority states, "We hold *only* that MCL 324.40111 [the Wildlife Conservation Act] applies to hunting contexts and not to target practice contexts, so the act of conducting target practice shooting on [Cheboygan Sportsman Club's] premises does not violate MCL 324.40111." Actually, the majority's opinion is simply that the Wildlife Conservation Act applies *only* to hunting and *therefore* target practice shooting is not prohibited. The clear wording of the statute is otherwise. I therefore respectfully dissent from the majority's method of interpretation of the Wildlife Conservation Act.

PEOPLE v KAMMERAAD

Docket No. 315114. Submitted June 3, 2014, at Grand Rapids. Decided October 7, 2014, at 9:00 a.m. Leave to appeal sought.

Dylan J. Kammeraad was convicted following a jury trial in the Allegan Circuit Court, Kevin W. Cronin, J., of aggravated assault, three counts of resisting, obstructing, or assaulting a police officer, two counts of assault of a prison employee, and one count of refusing or resisting the collection of biometric data (fingerprints). He was also held in contempt of court. Defendant appealed.

The Court of Appeals *held*:

Defendant, being competent, forfeited his constitutional rights to counsel, self-representation, and to be present in the courtroom during his trial because of the severity of his misconduct and his absolute refusal to participate in any manner in the proceedings. Because, under the circumstances, defendant was not constitutionally entitled to counsel in the first place, any finding that appointed counsel entirely failed to subject the prosecution's case to any meaningful adversarial testing does not warrant reversal. Defendant was free to refuse the assistance of counsel, to refuse self-representation, and to refuse to appear at or participate in his trial, forfeiting the associated constitutional rights. The circuit court's decision not to order a competency examination of defendant did not constitute an abuse of discretion. That issue does not serve as a valid basis to reverse defendant's convictions on the basis of ineffective assistance of counsel. Defendant's double jeopardy argument was inadequately briefed and is waived. There were no double jeopardy violations with respect to the various convictions. The evidence was sufficient to support two of the three convictions of resisting, obstructing, or assaulting a police officer and the prosecutor conceded that error occurred with regard to the third conviction, therefore, the third conviction is vacated. Defendant's First Amendment rights and the right to allocution were not violated when defendant was held in contempt of court.

1. A criminal defendant has both a statutory and a constitutional right to be present during his or her trial but may waive the right. Although defendant did not waive his right to be present for

trial through a voluntary relinquishment of the right when he asked to be removed from the courtroom, defendant lost his right to be present because of his disorderly and disruptive behavior. The circuit court's conclusion that defendant would continue to behave and conduct himself inappropriately and in a disruptive, defiant, and disorderly fashion once the trial commenced was fully supported by the record. The circuit court properly excluded defendant from the courtroom during his trial.

2. This case presented a unique situation in which a defendant in a criminal prosecution indisputably and defiantly refused to participate in the trial and other judicial proceedings, refused to accept the services of appointed counsel or to communicate with counsel, refused to engage in self-representation, refused to promise not to be disruptive during trial, and refused to remain in the courtroom for his trial. Defendant's constitutional protections were forfeited and there was no constitutional obligation to impose a court-appointed attorney. If defendant wished to present no defense and to allow the prosecution to present its case absent the presence of defendant or defense counsel in the courtroom, he was free to so proceed without offense to his state and federal constitutional rights to counsel or self-representation.

3. Although the right to counsel is constitutionally protected, the right can be relinquished by waiver or by forfeiture. Defendant forfeited his constitutional right to counsel because of his refusal to accept, recognize, or communicate with appointed counsel, his refusal of self-representation, and his refusal to otherwise participate in the proceedings. Defendant had the free choice to refuse both appointed counsel and self-representation, forfeiting these constitutional rights.

4. Defendant was competent for the purposes of forfeiting his right to counsel.

5. Defendant failed to overcome the presumption that he was competent to stand trial.

6. The circuit court did not abuse its discretion by holding defendant in contempt of court. Disruptive, contemptuous behavior in a courtroom is not protected by the First Amendment.

Affirmed in part and vacated in part.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Judy Hughes Astle*, Assistant Prosecuting Attorney, for the people.

Alane & Chartier, PLC (by *Mary Chartier*), for defendant.

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

MURPHY, C.J. Defendant was convicted by a jury of one count of aggravated assault, MCL 750.81a(1), three counts of resisting, obstructing, or assaulting a police officer, MCL 750.81d(1), two counts of assault of a prison employee, MCL 750.197c(1), and one count of refusing or resisting the collection of biometric data (fingerprints), MCL 28.243a. He was also held in contempt of court. Defendant appeals his convictions and the contempt ruling as of right. We affirm, except with respect to one of the convictions of resisting, obstructing, or assaulting an officer, which conviction we vacate on the basis of the prosecution's concession that there was insufficient evidence to sustain the conviction. In this opinion, we hold that defendant, being competent, forfeited his constitutional rights to counsel, self-representation, and to be present in the courtroom during his trial, given the severity of his misconduct and his absolute refusal to participate in any manner in the proceedings. Although the circuit court ordered appointed counsel to represent defendant during the trial, over counsel's strenuous objections and despite defendant's refusal to work with counsel, we conclude that, under the circumstances, defendant was not constitutionally entitled to counsel in the first place. Therefore, even assuming that counsel entirely failed to subject the prosecution's case to any meaningful adversarial testing, reversal is not warranted. Defendant was free to refuse the assistance of counsel, to refuse self-representation, and to refuse appearing at or participating in his trial, forfeiting the associated constitutional rights. He cannot now complain that counsel's perfor-

mance was deficient for failing to adequately defend against the prosecution's case, considering that it was always defendant's expressed wish not to present any type of defense to the charges.

I. HISTORY

A. UNDERLYING FACTS

The charges in this case stem from an incident at a dance hall in which defendant punched the unsuspecting victim in the face. The police arrived at the scene, and patrons identified defendant as the person who committed the assault. Defendant was arrested and transported to the county jail for booking. Defendant was evasive and uncooperative, refusing to give the police his full name or otherwise answer questions and resisting attempts to have his fingerprints taken. As three officers tried to escort defendant to a segregated unit of the jail, defendant "went to the floor" and started to kick and flail his arms at the officers. Defendant was subdued by the police and carried to a segregation cell, at which time the officers searched defendant. Defendant again physically resisted and kicked at the police during the search. The officers removed a lanyard from around defendant's neck that held a small folding knife.

B. DISTRICT COURT PROCEEDINGS

The lower court record indicates that defendant refused to sign various standard district court forms and that he refused to attend a "pre-exam" conference. At the subsequent preliminary examination, the district court asked defendant if he wished to have a court-appointed attorney, and defendant responded:

> I take exception. I refuse any and all court appointed attorneys and their services. I refuse any and all trials. I refuse any and all juries. I refuse any and all court services. I take exception to this process. And I take exception to these unlawful proceedings. Have the prosecution swear in and certify the false charges, the fake charges they are holding. . . .
>
> * * *
>
> I do not trust that man.[1] . . . [T]hat man does not speak for me. I refuse any and all court appointed attorneys, and their services.

Defendant repeated parts of this mantra in response to almost every statement made and question posed by the district court, regularly interrupting the court. The district court finally threatened to have defendant gagged. When the first witness was called to testify, defendant blurted out, "I take exception. That man has a license to lie." After some more interruptions, the district court directed the bailiff to gag defendant, but the bailiff was apparently unsuccessful, and defendant exclaimed:

> That is not my attorney. I take exception. That is not my attorney. I take exception to that. I'm here under duress of imprisonment, taken by force, and violent threat. Made good. I take exception to this process, and I take exception to these unlawful proceedings. Have the prosecution swear and certify the fake charges they are holding.
>
> Pardon me, Judge. You wouldn't be trying to use the prestige of your office to have me sign into a one-sided contract, would you? Did you or did you not swear an oath to uphold the laws of the people? If you did, you're in dereliction of your duties. If you did not, that speaks for

[1] This was a reference to an attorney appointed by the court to assist defendant and to answer any questions defendant might have relative to the preliminary examination. This same attorney would later be appointed by the circuit court to represent defendant.

itself. I'm without an LEP[2] interpreter, and I do not understand.

At this point, the district court had defendant removed to the bailiff's office where defendant could view and listen to the preliminary examination. As he was escorted out of the courtroom, defendant continued his rantings. After the testimony was completed, defendant returned to the courtroom, where he again repeatedly stated that he took exception to the proceedings. Defendant was bound over to the circuit court.

C. CIRCUIT COURT ARRAIGNMENT

At his circuit court arraignment, defendant essentially carried on in the same manner as at the preliminary examination. Defendant refused to face forward towards the bench. Here are some excerpts of defendant's statements at the arraignment:

I take exception, I am one of the people of the Republic of Michigan . . . in this office [sic] State of the Union.

* * *

I do not understand nor do I speak the English of this Court.

* * *

I demand immediate emergency discharge and full pay for my time and energy at $20.00 an hour, 16 hours a day since April 29, 2012.

* * *

I take exception, I refuse any and all court appointed attorneys and their services. I refuse any and all jury services. I refuse any and all Court services. I refuse any services, any and all services. I take exception.

---

[2] It appears that LEP stands for Limited English Proficiency.

After repeatedly interrupting the circuit court with the same machinations, the following colloquy occurred:

> *Court*: Have you given this right to counsel significant serious thought Mr. Kammeraad?
>
> *Defendant*: I take exception, I take exception.
>
> *Court*: Mr. Kammeraad is not responding to the Court's inquiries.
>
> *Defendant*: And without an LEP interpreter I do not understand nor do I speak the English of this Court.
>
> *Court*: Mr. Kammeraad is choosing not to respond to the Court's questions. I'm finding therefore that he has waived his right to the assistance of counsel either retained by him and paid by him or appointed by the Court. Similarly he's has [sic] waived his right to assistance by a legal advisor who would not represent him or advocate for him but serve as a provider of legal advice and guidance at his request. . . .
>
> *Defendant*: . . . [I] refuse to become a party to and join in the acts of entrapment, extortion, exploitation of vulnerable victims, [coercion] and human trafficking and human bondage.

When asked how he pleaded to the charges and whether he wished to be heard with regard to a bond, defendant stated that he took exception. The circuit court noted that defendant was refusing to communicate and that it would enter on defendant's behalf a plea of not guilty. Defendant continued to assert that he was refusing any and all court-appointed attorneys and court services and that he took exception to the proceedings.

D. PRETRIAL MOTION HEARINGS

At a hearing to amend the felony information, the circuit court initially asked defendant whether he waived his right to counsel or refused to be represented

by counsel. Defendant responded, "I take exception." The court proceeded to review the pending charges and the possible punishment for each charge. The circuit court next informed defendant that if he wished to represent himself, he would be expected to follow the rules of procedure and evidence and the court could not assist defendant as his advocate. When asked if he understood, defendant responded:

> I take exception, I'm without a LEP interpreter, I do not understand what is going on here. I am not an attorney, I've never agreed to be in pro per and I have never agreed to represent myself in your venue.

At this stage in the hearing, the circuit court noted that defendant was "in a wheelchair and . . . half naked from the elbows up." A deputy chimed in that defendant refused to get dressed and that there was no physical reason for him to use a wheelchair.[3] The circuit court then expressed its belief that defendant was determined to disrupt the proceedings and had demonstrated an unwillingness to cooperate in any material way, including responding to the court's inquiries. The circuit court made an attempt to have defendant clearly and unequivocally waive his right to counsel, but defendant was entirely uncooperative. After defendant went on a diatribe that was consistent with his earlier remarks, the circuit court stated that it was convinced that defendant was determined to disrupt the proceedings, and it decided that it was necessary to appoint counsel for defendant. When asked by the court whether he would fill out a form regarding his financial situation for purposes of determining indigency status, defendant

[3] The circuit court stated that defendant had made claims that he was unable to walk. The court indicated, however, that there was nothing to suggest that there was anything physiologically or medically wrong with defendant.

responded that he took exception. When informed by the court of the identity of the attorney that the court would be appointing, defendant stated:

> I take exception, I . . . can see that you are relentless in your efforts to entrap me and to help you write an illegal . . . one sided contract. I refuse to be a part, I refuse to be a party, I will not join your organization[']s criminal enterprise to become a . . . part of your criminal actions. I don't understand what is going on here. I am without an LEP interpreter.

Defendant later commented that he did not "associate with anyone that advocates the obnoxious doctrine of criminal syndicalism," that he did not "understand the legal language that's being used against" him, and that no one had his "authority to speak or do anything on [his] behalf." These and other remarks were made in an interruptive manner. The day after the hearing, the circuit court formally entered an order appointing counsel on behalf of defendant.

In a subsequent pretrial hearing, the circuit court addressed a motion to further amend the information and appointed counsel's motion to withdraw as defendant's attorney.[4] Appointed counsel alleged that defendant refused all efforts by counsel to communicate with defendant, that defendant was completely uncooperative, and that defendant refused counsel's services. The circuit court made the following initial observations:

> The record will reflect that Mr. Kammeraad is present

[4] While the motion itself is not contained in the lower court record, the circuit court stated that it was also hearing a motion for self-representation. At the hearing, appointed counsel acknowledged that he had unilaterally prepared the motion for self-representation, which was to be read in conjunction with his motion to withdraw as counsel. There is nothing in the record suggesting that defendant himself filed any motion or request for self-representation, nor that he was in agreement with counsel's decision to file the motion for self-representation.

> today in the same costume, if you call [it] that, as he presented himself at the last hearing. Namely[,] he is naked from the waist up. He's in what seems like a partial[] dress[] covering his lower torso in a blanket, might be the suicide gown that the jail administration issues to . . . some inmates and he's in a wheel chair and he's handcuffed and belted. And I take it as with the last hearing he's arrayed in the fashion he is because he refused to walk here voluntarily, or walk into the courtroom and he refused to dress in a more appropriate fashion.

The circuit court noted its belief that defendant fully intended to disrupt the proceedings and to burden the court. The court stated that if defendant's behavior persisted, the court would exclude him from the scheduled trial. The circuit court proceeded to raise the subject of waiver of counsel. When asked by the court if he understood that he was entitled to an attorney, defendant renewed his campaign of being nonresponsive, reiterating the statements he made at all of the prior proceedings. The circuit court attempted to obtain a formal waiver of counsel from defendant under MCR 6.005, which provides, in relevant part:

> (D) . . . The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

The circuit court carefully and thoroughly touched on all of the requirements set forth in MCR 6.005(D), giving an extensive explanation regarding the trial process and the risks involved in self-representation.

Following the court's compliance with MCR 6.005(D), the court gave defendant an opportunity to speak, and defendant, consistently with his history in the proceedings, stated:

> I take exception, I am not Mr. Kammeraad, I'm not the defendant, I'm not a patron of nor subscriber to the legal arts. I'm without an LEP interpreter; I do not understand the legal language that you are using against me.

The circuit court proceeded to further elaborate on the dangers inherent in self-representation and then voiced the following thoughts:

> I won't permit you to appear in this courtroom on an indefinite basis clothed as you are and brought in a wheel chair when you can walk on your own feet. I don't want the jury misperceiving that . . . you are being mistreated by the authorities in jail or that you're unable to walk and therefore you're a legitimate recipient of sympathy and understanding.
>
> That's about everything I can say. I am increasingly . . . convinced that the defendant is determined to disrupt this proceeding[] and all future proceedings and burden the Court with his antics. And much to his counter intuitive and counterproductive lack of benefit and even harm to the merits of this case. So having covered that, is there any additional statement you want to make Mr. Kammeraad in response?

Defendant responded, of course, in the same manner as before, interjecting nothing new. The circuit court then directly asked defendant if he wished to represent himself, and defendant replied:

> I take exception. I am unauthorized and without license to practice law. I'm not qualified to represent myself, I take exception. This man is not my attorney; I refuse all court appointed attorneys and their services. I do not want any of your Court services. I refuse to take part in this scam, I will not take part in this scam. I am under duress of false

> imprisonment. I am without an LEP interpreter; I do not understand the legal language that you are using against me. I take exception.
>
> * * *
>
> I demand immediate unconditional discharge so I may fulfill my contractual obligation to the Vatican Independent Press.

When asked about the nature of that contractual obligation, defendant again stated that he took exception. The circuit court, showing a great deal of patience, reiterated the risks of going to trial absent an attorney, and it explained all of the benefits that defendant would receive through representation by counsel. Defendant responded as before, stating, in part, that he had not agreed to proceed pro se, that appointed counsel was not his attorney, and that he refused all court services. The circuit court next asked defendant if he would give any assurances that it was not his intent and desire to disrupt the proceedings, and defendant responded with the identical nonresponsive chatter as before. The court then stated, once again, that defendant had demonstrated with his behavior an intent to disrupt the proceedings and to burden the court. The circuit court indicated, therefore, that it would exclude defendant from future hearings, subject to reconsideration should defendant change his ways and behave appropriately.

Appointed counsel then expressed his wish to withdraw given defendant's absolute refusal to cooperate and communicate in regard to preparing a defense and defendant's refusal to otherwise recognize and engage in the proceedings; defendant had simply chosen not to participate in the case. Appointed counsel asserted that defendant refused to even acknowledge his presence and therefore there was no way to fashion a defense.

Counsel questioned the constitutionality and ethics of preparing a defense based simply on what counsel believed would be a sound defense, especially when defendant did not want to defend against or respond to the charges. During discussions between appointed counsel and the circuit court, defendant regularly interrupted, declaring that counsel was not his attorney and had no right to speak on his behalf. At one point, counsel asked defendant if it was his handwriting on certain materials that were being examined in order to determine if defendant could write. And the circuit court noted for the record defendant's so-called response, "He's silent; he's just staring forward as if mimicking [a] catatonic state and not responding in any way." Shortly thereafter, defendant conveyed that he did not trust or even know counsel. When appointed counsel asked defendant whether he wished to address authentication of the materials, defendant remained silent. Interestingly, the prosecutor repeatedly indicated that defendant, as a citizen of the United States and under the freedoms of the United States Constitution, should be permitted to do as he desired relative to his defense, which was essentially to go to trial and present no defense, with no representation by counsel and no self-representation. The circuit court voiced its frustration, stating:

> I recognize for example that the defendant has a perfect right to represent himself but he won't commit to that course, he won't tell me that's what he wants. He tells me he's unqualified to represent himself and yet he's unwilling to accept representation . . . . He speaks in gibberish and riddles; he won't clearly and unequivocally waive his right to counsel or even consider retaining counsel . . . .

The circuit court denied appointed counsel's motion to withdraw and ordered him to represent defendant at trial. Accordingly, the court also denied the motion for

self-representation. The court opined that it was necessary to have an attorney in the courtroom representing defendant, considering that defendant might be excluded from the courtroom because of disruptive behavior, given that the court was unable to procure a clear and unequivocal waiver of counsel from defendant, and in light of the fact that defendant did not wish to represent himself. The circuit court's view was that even if defendant refused to communicate with appointed counsel, counsel was still permitted and had the ability to test and defend against the charges pursued by the prosecution. The circuit court moved on to address the prosecutor's motion to amend the information, and when appointed counsel spoke to address the motion, defendant repeatedly interrupted, claiming that counsel was not his attorney and had no right to speak on his behalf. The court demanded that defendant be silent, and it threatened to find him in contempt. The hearing concluded shortly thereafter.

E. PRETRIAL CONFERENCE

The circuit court conducted a pretrial conference on the record absent the presence of defendant. The court indicated that a video connection to the jail had been set up in order to allow defendant's participation; however, the court had been notified by an officer at the jail that defendant refused to leave his cell and would not go to the room in the jail where the video equipment was housed. The circuit court stated that defendant's right to be present in the courtroom for the upcoming trial was in grave jeopardy given his past conduct, but the court would allow him to be present should he change his behavior. The court also informed defense counsel: "You're going to represent him [as] zealously as you would any other defendant and even if he instructs you

not to take action on his behalf, you will take action on his behalf if you think it's prudent and reasonable to do so and serves his best interest." Defense counsel noted his belief that, ethically, he was not permitted to present a defense or engage in any type of strategy, considering that defendant did not wish for him to act on defendant's behalf.

F. TRIAL

At the start of the first day of trial, the following colloquy took place between the circuit court, the prosecutor, defense counsel ("Counsel"), and defendant himself:

> *Court*: I'm calling forward the case of People versus Dylan James Kammeraad . . . . This is the date and time to conduct a jury trial in this matter. I inquire of the counsel whether they're going to make a motion to sequester witnesses. . . .
>
> *Prosecutor*: We don't—all of our witnesses are not in the courtroom.
>
> *Court*: Okay. [defense counsel]?
>
> *Counsel*: I am not aware of any witnesses on behalf of the defendant.
>
> *Court*: Okay.
>
> *Defendant*: I take exception. This man is not my attorney.
>
> *Court*: Mr. Kammeraad is present with us by my recollection for the third time in the courtroom during the pendency of this case. He's in a wheelchair, he's handcuffed, he's naked from the waist up and it was his voice that was heard just a moment ago.
>
> Mr. Kammeraad[,] the Court had made a determination at an earlier date after your first two live appearances in the court, attired and seated as you are now, that it would be impermissible and improper for you to appear before the

jury in your present condition. Do you want to give the Court any assurance of your willingness to dress appropriately and behave in a non-disruptive fashion during this trial?

Defendant: I take exception. I am under extreme duress of an unlawful and false imprisonment. I am without an LEP interpreter. I do not understand the legal language that is being used against me by you.

Kevin Cronin[5] you are fully aware that I am not an attorney, I am not a defendant, I am not a juvenile, I am not Mr. Kammeraad, I am not a member of your society. I am a natural person. I have never agreed to join you or your accomplices, the prosecutor and your court appointed attorney in any criminal proceedings in your courtroom forum and venue.

I am not the consideration on a contract being constructed here. I am not — I am not a patron of your goods or services. I am [neither] a patron of nor subscriber to the legal arts. I have never agreed to be in pro per. I refuse the assignment and appointment for fraud and inducement to entrapment. I am unauthorized and without license to practice law. I am not qualified to represent myself. Kevin Cronin you are intentionally trying to deceive me into believing I can engage in the law business without license. I take exception to this process. This process is undue to me. I take exception to these proceedings as they are unlawful. In good conscience I refuse to associate with the B[ar] and its members. I will not join you in your criminal enterprise. I will not willingly, intentionally or knowingly become a party to your criminal actions. I am not a member of your society. I will not take part in this scam. I'd rather not be here. I am not here voluntarily. Kevin Cronin you are threatening me with further legal abuse and continued detainment in an effort to unduly influence me to invoke the unknown jurisdiction of your court and to help you in an illegal and one sided contract.

---

[5] This is the name of the presiding circuit court judge.

Kevin Cronin you have used predatory conduct and abused your authority status to exploit my vulnerabilities. This whole scam that you are knowingly attempt[ing] to coerce me into joining you in is entrapment.

Kevin Cronin you have let the procedure of your office over to the prosecution to affect the desired outcome.

Kevin Cronin you have solicited a professional legal service on behalf of [defense counsel]. [Defense counsel] does not have my license or my authority to employ my title and his fraudulent misrepresentations. I do not want [defense counsel's] services. I do not want a court appointed attorney. I do not want court appointed services. I refuse any and all of your court services. I'm not a patron of nor a subscriber to the legal arts. I have never agreed to any of this.

Kevin Cronin you have intentionally—you have prosecuted me, the natural person from the bench without any regard to my safety. You have caused me irreparable physical damage and emotional distress [in] a cooperative effort with the prosecutor . . . and your court appointed attorney . . . to break my will and . . . my political and religious beliefs. You have stifled my First Amendment guarantee in your courtroom forum and venue. You have destroyed the integrity and credibility of your office by the continued legal abuse and predatory prosecution actions you have willingly set up conducted against me, the natural person, for your extortion its rewards. Everything that you have done, I mean everything that you continue to do to me under color of authority has been well documented and will continue to be recorded throughout these sham prosecutions. I will never join you in your criminal activities. I demand immediate unconditional discharge right now. Do you understand me?

Court: Oh, I understand you and I reject your arguments and statements and you're not going to be granted any immediate or unconditional release, or any release on any other terms. The trial is going to begin.

Defendant: I take exception. I'd like to be removed.

Court: Okay. Well—

Defendant: I take exception. I refuse your jury services, I refuse your jury trial, I will not take part.

Court: Do you want to represent yourself in this trial?

Defendant: I take exception.

Court: If you are not Dylan Kammeraad who are you?

Defendant: I take exception.

Court: Okay. Deputies the defendant can be removed where he can watch the proceedings on video.

Defendant was removed from the courtroom. Defense counsel again brought a motion seeking to allow him to withdraw, but the court denied the request. On two occasions during jury voir dire, defense counsel left the courtroom in an attempt to confer with defendant, only to return and "defer" to the circuit court without questioning or challenging any jurors. Defense counsel also declined to give an opening statement after trying to confer with defendant. Thereafter, various witnesses for the prosecution testified regarding the charged crimes. After the direct examination of each witness, defense counsel attempted to confer with defendant, but counsel ultimately declined to cross-examine any of the state's witnesses following counsel's interactions with defendant. The prosecution then rested. After again endeavoring to confer with defendant, defense counsel declined to present any evidence. He also declined to give a closing argument and offered no objections to the jury instructions. After the court administered the jury instructions, defense counsel stated for the record, outside the presence of the jury, that he had attempted to communicate with defendant and to apprise him of his options several times throughout the course of the trial, but each time defendant mostly remained silent and refused to acknowledge counsel.

Defendant was convicted by the jury on all of the charges. He was sentenced to 275 days in jail for the convictions on the three counts of resisting, obstructing, or assaulting a police officer, one year in jail for the aggravated assault conviction, 19 to 60 months' imprisonment for the convictions on the two counts of assaulting a prison employee, and to 90 days in jail for the conviction related to defendant's refusal to provide fingerprints. In addition to these sentences, defendant was also ordered to serve an extra 30 days in jail at the conclusion of his other sentences, after the circuit court held defendant in contempt of court at the sentencing hearing. Defendant attended the sentencing hearing in a wheelchair and half-clothed, as he had done previously, and when he interrupted the proceeding and began to once again spout the commentary known all too well by the circuit court, the court held him in contempt and had him removed from the courtroom. Defendant appeals as of right.

II. ANALYSIS

A. CONSTITUTIONAL AND STATUTORY RIGHT TO BE PRESENT AT TRIAL

Defendant maintains that the circuit court improperly removed him from the courtroom during defendant's trial. Defendant argues that his appearance at trial, while bothersome, was not disruptive and did not justify his removal. Thus, according to defendant, his statutory and constitutional right to be present during his trial was violated, necessitating reversal and remand for a new trial.

A criminal defendant has a statutory right to be present during his or her trial. MCL 768.3 ("No person indicted for a felony shall be tried unless personally present during the trial[.]"). "Similarly, an accused's

right to be present at trial is impliedly guaranteed by the federal and state Confrontation Clauses, US Const, Am VI; Const 1963, art 1, § 20, the Due Process Clauses, US Const, Am XIV; Const 1963, art 1, § 17, and the right to an impartial jury, Const 1963, art 1, § 20." *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984) (case citations omitted). However, " 'a defendant may waive both his statutory and constitutional right to be present during his trial.' " *People v Buie (On Remand)*, 298 Mich App 50, 56-57; 825 NW2d 361 (2012), quoting *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). The *Buie* panel explained:

> Waiver is defined as the intentional relinquishment or abandonment of a known right. A defendant can waive his right to be present by (1) voluntarily being absent after the trial has begun, or (2) being so disorderly or disruptive that his trial cannot be continued while he is present[.]
>
> It is not seriously questioned that a defendant has the power to waive *constitutional* rights, provided he does so intelligently, understandingly and voluntarily. A valid waiver of a defendant's presence at trial consists of a specific knowledge of the constitutional right and an intentional decision to abandon the protection of the constitutional right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error. [*Buie*, 298 Mich App at 57 (citations and quotation marks omitted).]

Here, while defendant expressly asked to be removed from the courtroom before the start of trial, the record does not reflect that defendant was ever 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. See *id.* at 58 (whether the defendant

knowingly or understandingly waived his constitutional right to be present during trial could not be determined when the record was silent "as to whether he was ever specifically apprised of his constitutional right to be present"). Accordingly, and hesitantly, we conclude that defendant did not waive his right to be present for trial through a voluntary relinquishment of the right when he asked to be removed from the courtroom. However, we hold that defendant lost his right to be present because of his disorderly and disruptive behavior.[6]

In *Illinois v Allen*, 397 US 337, 338; 90 S Ct 1057; 25 L Ed 2d 353 (1970), the United States Supreme Court addressed the question "whether an accused can claim the benefit of th[e] constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial." While emphasizing that "courts must indulge every reasonable presumption against the loss of constitutional rights," the Court nevertheless held "that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Id*. at 343. The *Allen* Court elaborated:

---

[6] Although the *Buie* panel spoke in terms of "waiver" in regard to losing the right to be present in the courtroom during trial because of disorderly or disruptive conduct, we believe that the more accurate expression is "forfeiture" of the right, given that, as *Buie* itself acknowledged, "waiver" involves the intentional relinquishment of a "known" right, yet *Buie* eventually analyzed the disorderly or disruptive issue despite no indication that the trial court apprised the defendant of his constitutional right to be present. *Buie*, 298 Mich App at 57-59. Later in this opinion, we thoroughly discuss the distinctions between waiver and forfeiture of constitutional rights.

> It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case. . . .
>
> * * *
>
> The trial court in this case decided under the circumstances to remove the defendant from the courtroom and to continue his trial in his absence until and unless he promised to conduct himself in a manner befitting an American courtroom. As we said earlier, we find nothing unconstitutional about this procedure. . . . Prior to his removal [the defendant] was repeatedly warned by the trial judge that he would be removed from the courtroom if he persisted in his unruly conduct, and . . . the record demonstrates that [the defendant] would not have been at all dissuaded by the trial judge's use of his criminal contempt powers. [The defendant] was constantly informed that he could return to the trial when he would agree to conduct himself in an orderly manner. Under these circumstances we hold that [he] lost his right guaranteed by the Sixth and Fourteenth Amendments to be present throughout his trial.
>
> It is not pleasant to hold that the respondent . . . was properly banished from the court for a part of his own trial. But our courts, palladiums of liberty as they are, cannot be treated disrespectfully with impunity. Nor can the accused be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him. It would degrade our country and our judicial system to permit our courts to be bullied, insulted, and humiliated and their orderly progress thwarted and obstructed by defendants brought before them charged with crimes. As guardians of the public welfare, our state and federal judicial systems strive to administer equal justice to the rich and the poor,

> the good and the bad, the native and foreign born of every race, nationality, and religion. Being manned by humans, the courts are not perfect and are bound to make some errors. But, if our courts are to remain what the Founders intended, the citadels of justice, their proceedings cannot and must not be infected with the sort of scurrilous, abusive language and conduct paraded before the Illinois trial judge in this case. The record shows that the Illinois judge at all times conducted himself with that dignity, decorum, and patience that befit a judge. [*Id*. at 343, 345-347.]

In the case at bar, before the day of trial and throughout the proceedings in the district and the circuit courts, defendant showed nothing but contempt for the courts and the judicial proceedings. He defiantly refused to participate in the process or to accept any and all services, regularly interrupted the courts with his denunciation of the justice system, made far-fetched claims that had no basis in fact or law, and refused to answer questions posed to him by the courts. Furthermore, defendant defiantly showed up in inappropriate attire and in a wheelchair that was not needed, given that he was ambulatory, accused the courts of being derelict in their duties, needlessly demanded an interpreter, as it is quite evident that defendant is fluent in the King's English, and generally engaged in disrespectful, disorderly, and disruptive behavior.

Despite this history, the circuit court allowed him yet another chance on the day of trial to show that he could conduct himself properly and merit an opportunity to remain present during trial. Defendant, however, decided to continue with the same disrespectful, rebellious, combative, disorderly, and disruptive antics that he had practiced from the inception of the court proceedings. At trial, defendant again showed up in a wheelchair and he was naked from the waist up, reflect-

ing utter contempt for the court and the trial process.[7] When the circuit court expressly asked defendant whether he wished to give any assurances of a willingness to dress and behave appropriately and to act in a nondisruptive manner, defendant proceeded to conclusively establish that he was not willing to do so, as shown by defendant's launching into a tirade against the system and the circuit court judge himself. Defendant spoke directly to the circuit court, disrespectfully calling the judge by his first and last name, improperly accusing the court of being part of a scam, "criminal enterprise," and sham prosecution, and charging the court with engaging in abusive and predatory conduct. Defendant continued to stubbornly defy the court by not answering questions asked of him, interrupting the court, and making spurious claims and ridiculous demands in general. Defendant's combative, rhetorical, and disrespectful question to the court, "Do you understand me?" reflected his complete disdain for the court and the proceedings. The circuit court's conclusion that defendant would continue to behave and conduct himself inappropriately and in a disruptive, defiant, and disorderly fashion once the trial commenced was fully supported by the record. As the Supreme Court expressed in *Allen*, 397 US at 343, "trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case." Defendant epitomized the type of defendant alluded to in *Allen*, and the circuit court confronted him appropriately. We hold that the circuit court properly excluded defendant from the courtroom during his trial.

---

[7] We note that Canon 3(A)(2) of the Michigan Code of Judicial Conduct provides that "[a] judge may require lawyers, court personnel, and litigants to be appropriately attired for court and should enforce reasonable rules of conduct in the courtroom."

B. CONSTITUTIONAL RIGHT TO COUNSEL

Defendant argues that he was denied the effective assistance of counsel given counsel's complete failure to subject the prosecution's case to meaningful adversarial testing. Defendant contends that in such cases there is no requirement to establish prejudice; therefore, he is entitled to reversal of his convictions and remand for a new trial.

We review de novo the constitutional question whether a defendant was denied his or her Sixth Amendment right to the effective assistance of counsel; however, underlying factual findings are reviewed for clear error. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). The Sixth Amendment of the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." The analogous provision of the Michigan Constitution provides that "[i]n every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense[.]" Const 1963, art 1, § 20. " '[T]he right to counsel is the right to the effective assistance of counsel.' " *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court recited the well-established principles that are generally applicable when analyzing an ineffective-assistance claim:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a

> convicted defendant must satisfy [a] two-part test . . . . First, the defendant must show that counsel's performance was deficient.[8] This requires showing that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [Citations and quotation marks omitted.]

In *Cronic*, 466 US at 653-658, the United States Supreme Court eloquently explained in detail the importance and underpinnings of the constitutional right to counsel, which is worthy of repeating here:

> An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases "are necessities, not luxuries." Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."
>
> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of coun-

---

[8] Establishing deficient performance requires a showing that counsel's "representation fell below an objective standard of reasonableness[.]" *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

sel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."

* * *

The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[Truth]," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing

> envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. . . . "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." [Citations omitted.]

The *Cronic* Court then acknowledged that, in general, it is necessary to establish that prejudice was incurred by a defendant in addition to showing deficient performance by counsel in order to establish a claim on the basis of ineffective assistance of counsel. *Id.* at 658 ("Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."). The Court, however, recognized that there are instances in which prejudice is presumed, including the following examples:

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. [*Id.* at 659.]

Our Supreme Court in *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), noted that *Cronic* identified certain "rare situations in which the attorney's performance is so deficient that prejudice is presumed."

For purposes of our analysis, we shall assume that defense counsel failed entirely to subject the prosecution's case to any meaningful adversarial testing. Typically, such a conclusion would end the analysis, mandating reversal of defendant's convictions. A necessary

component underlying the analysis in *Cronic*, however, is that the criminal defendant was indeed constitutionally entitled to the assistance of counsel and had not waived or forfeited the right.[9] Although we appreciate that defendant here had appointed counsel, the circumstances presented lead us to conclude that defendant had forfeited his right to counsel, thereby undermining any *Cronic*-based argument and rendering irrelevant our assumption that counsel failed entirely to subject the prosecution's case to meaningful adversarial testing. Defendant simply did not want counsel. And while a defendant would ordinarily have to be afforded the opportunity to appear pro se at trial upon waiver or forfeiture of counsel, defendant refused to participate in the trial and was steadfastly adamant that he would not represent himself, which certainly would have been the case even had the circuit court ruled that defendant was not entitled to counsel. Defendant wanted no part in the proceedings.

This case presented a unique situation in which a defendant in a criminal prosecution indisputably and defiantly refused to participate in the trial and other judicial proceedings, indisputably and defiantly refused to accept the services of appointed counsel or to communicate with counsel, regardless of counsel's identity, indisputably and defiantly refused to engage in self-representation, indisputably and defiantly refused to promise not to be disruptive during trial, and indisputably and defiantly refused to remain in the courtroom for his jury trial. Under those circumstances and setting aside for the moment any issue about defendant's competency, which issue is addressed later in this opinion, defendant's constitutional protections were

[9] There is a difference between waiver of counsel and forfeiture of counsel, which we shall explore later in this opinion.

forfeited and there was no constitutional obligation to impose a court-appointed attorney upon the unwilling defendant. If defendant wished to present no defense or challenge to the criminal charges and simply allow the prosecution to present its case-in-chief absent counsel or defendant's presence in the courtroom, whether for purposes of ideology, protestation, or otherwise, he was free to so proceed without any offense to his state and federal constitutional rights to counsel or self-representation. By appointed counsel's assumed complete failure to subject the prosecution's case to meaningful adversarial testing, defendant received exactly what he desired, and we refuse to reward defendant with a new trial on the basis of an alleged constitutional deficiency that was of defendant's own making.

In the usual scenario wherein a criminal defendant wishes to waive the right to counsel, the accompanying question that must be answered is whether the defendant should be permitted to represent himself or herself, because this is often the reason that a defendant declines the assistance of counsel. The interrelationship between the waiver of counsel and self-representation is illustrated by the following passage in our Supreme Court's decision in *Russell*, 471 Mich at 190-192:

> In *People v Anderson* [398 Mich 361; 247 NW2d 857 (1976)], this Court applied the *Faretta* standard for self-representation and established requirements regarding the judicial inquest necessary to effectuate a valid waiver and permit a defendant to represent himself.[10] Upon a defendant's initial request to proceed pro se, a court must

[10] In *Faretta v California*, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975), the United States Supreme Court indicated that a state generally cannot force an attorney on an unwilling defendant, and it held that a defendant has a constitutional right to self-representation as long as the defendant intelligently, understandingly, and voluntarily waives counsel and chooses to appear pro se.

determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.

In addition, a trial court must satisfy the requirements of MCR 6.005(D), which provides in pertinent part as follows:

> The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first
>
> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In [*People v Adkins* (*After Remand)*, 452 Mich 702; 551 NW2d 108 (1996)], this Court clarified the scope of judicial inquiry required by *Anderson* and MCR 6.005(D) when confronted with an initial request for self-representation. *Adkins* rejected a "litany approach" in favor of a "substantial compliance" standard:

> We hold, therefore, that trial courts must substantially comply with the aforementioned substantive requirements set forth in both *Anderson* and MCR 6.005(D). Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of

> the problems associated with requiring courts to engage in a word-for-word litany approach. Further, we believe this standard protects the "vital constitutional rights involved while avoiding the unjustified manipulation which can otherwise throw a real but unnecessary burden on the criminal justice system."
>
> Completion of these judicial procedures allows the court to consider a request to proceed in propria persona. If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record. The defendant should then continue to be represented by retained or appointed counsel, unless the judge determines substitute counsel is appropriate.
>
> Under *Adkins*, if the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel. In addition, the rule articulated in *Adkins* provides a practical, salutary tool to be used to avoid rewarding gamesmanship as well as to avoid the creation of appellate parachutes: if any irregularities exist in the waiver proceeding, the defendant should continue to be represented by counsel. [Emphasis omitted.]

In the present case, the circuit court attempted to obtain a formal waiver of counsel by defendant, along with the attendant invocation of the right to self-representation, carefully imparting the information encompassed by MCR 6.005(D) and then directly querying defendant with respect to whether he wished to represent himself. Defendant, however, vigorously voiced a refusal to represent himself, and he refused to expressly acknowledge, let alone accept, the right-to-counsel and waiver-related information conveyed to him by the court. The circuit court was unable to make an express finding that defendant fully understood, recognized, and agreed to abide by the waiver of counsel proce-

dures. Under *Russell* and the authorities cited therein, the required waiver procedures were not met, ostensibly dictating that appointed counsel continue to represent defendant.

Despite, however, the ineffective *waiver* of counsel, we take this opportunity to recognize, adopt, and employ the principle or doctrine of forfeiture of counsel. While the right to counsel is constitutionally protected, this constitutional right can be relinquished by waiver *or* forfeiture. *People v Ames*, 2012 Ill App (4th) 110513, ¶¶ 17-37; 978 NE2d 1119 (2012); *State v Jones*, 772 NW2d 496, 504 (Minn, 2009); *State v Pedockie*, 2006 Utah 28, ¶¶ 23-28; 137 P3d 716 (2006). In *State v Mee*, 756 SE2d 103 (NC App, 2014), the North Carolina Court of Appeals confronted a very similar situation to the one presented to us:

> On 25 March 2013, defendant was before the trial court for trial. He refused to state a clear position regarding counsel and told the trial court that he did not want his retained counsel to represent him at trial, did not want to represent himself at trial, did not want standby counsel to take any role in the trial, and would not remain in the courtroom or otherwise "participate" in his trial. Defendant refused to remain in the courtroom and was confined to a holding cell near the courtroom during trial. [*Id*. at 104.]

The state's witnesses were not subjected to cross-examination, nor was any evidence presented by the defendant, and he was found guilty of various drug offenses. *Id*. at 105. The appeals court reached the conclusion that "[r]eview of the defendant's actions during the fourteen months between his arrest and trial reveal[ed] that he engaged in behavior which resulted in the forfeiture of the right to counsel." *Id*. As we have done in this opinion, the North Carolina Court of Appeals carefully scrutinized the lower court record,

noting all of the defendant's defiant conduct from the commencement of the criminal proceedings forward, which record draws many parallels to the record here. *Id*. at 106-113.[11] The *Mee* Court stated that it could not condone the defendant's purposeful tactics and conduct that were employed to delay and frustrate the orderly process of the lower court's proceedings. *Id*. at 114. The North Carolina Court of Appeals held that the "[d]efendant, by his own conduct, forfeited his right to counsel and the trial court was not required to determine . . . that defendant had knowingly, understandingly, and voluntarily waived such right[.]" *Id*. The court noted that willful conduct by a defendant that results in the absence of defense counsel constitutes a forfeiture of the right to counsel. *Id*. The court cited with approval *State v Leyshon*, 211 NC App 511, 518-519; 710 SE2d 282 (2011), and its ruling that the right to counsel was forfeited when the defendant there willfully delayed and obstructed lower court proceedings by regularly refusing to state whether he desired an attorney or would represent himself when questioned on the matter by the trial court at multiple hearings. *Mee*, 756 SE2d at 114. In this case, we conclude that defendant also forfeited his constitutional right to counsel, considering his refusal to accept, recognize, or communicate with

[11] For example, when the defendant in *Mee* was asked by the trial court about the nature of his objection to appointed counsel's representation, the defendant responded in part, "I'm the proper person. . . . He is not my attorney. I'm a sovereign nation. He is not my attorney." *Mee*, 756 SE2d at 106. Amongst numerous remarks made by the defendant in *Mee* when interacting with the trial court, he stated: "I do not understand what you're trying to charge me with. The only reason I'm here for is the jurisdiction"; "I will not sign any contracts [waiver of counsel]. I will not take any oaths"; "I will never participate in this"; "We will not go forward. I told you I understand no trial"; "I'm not going to proceed"; "I'm an improper person. I am myself. I don't have to represent myself"; "I'm not understanding anything you're talking about"; and "I won't be a part of the proceedings, is what I'm saying." *Id*. at 106-110.

appointed counsel, his refusal of self-representation, and his refusal to otherwise participate in the proceedings.

In *United States v McLeod*, 53 F3d 322, 325 (CA 11, 1995), the United States Court of Appeals for the Eleventh Circuit acknowledged that the right to counsel can be forfeited, expressing:

> The appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected. Nonetheless, the right to assistance of counsel, cherished and fundamental though it may be, may not be put to service as a means of delaying or trifling with the court.
>
> Courts thus have recognized that a criminal defendant may forfeit constitutional rights by virtue of his or her actions. The Sixth Amendment right to counsel, for example, may be forfeited by a defendant's failure to retain counsel within a reasonable time, even if this forfeiture causes the defendant to proceed *pro se*. Additionally, a defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial. . . .
>
> * * *
>
> . . . [A] defendant who is abusive toward his attorney may forfeit his right to counsel. [Citations and quotation marks omitted.]

In *United States v Goldberg*, 67 F3d 1092, 1099 (CA 3, 1995), the United States Court of Appeals for the Third Circuit distinguished "waiver" from "forfeiture" relative to the right to counsel, first indicating that waiver constitutes "an intentional and voluntary relinquishment of a known right," which typically occurs under the Sixth Amendment when a defendant makes an affirmative request to proceed pro se or to plead guilty. Here, while defendant made clear that he did not want the services of appointed counsel, defendant made

no request to appear pro se at trial, expressly declined to proceed pro se, and provided a nonresponsive answer when specifically asked by the circuit court whether he understood that he had a right to an attorney. Consistently with our earlier discussion of *Russell*, 471 Mich at 190-192, a true waiver of counsel was never successively accomplished, which was also the conclusion by the circuit court. Forfeiture, unlike waiver, "results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *Goldberg*, 67 F3d at 1100.[12] In the present case, we reiterate that although the circuit court informed defendant of his right to counsel, defendant refused to expressly acknowledge the right, and even though he rejected the services of appointed counsel, defendant never explicitly stated that he intended to relinquish the constitutional right. Accordingly, this case fits more comfortably within the doctrine of forfeiture of counsel rather than the doctrine of waiver of counsel.

The *Goldberg* court also discussed the hybrid situation of "waiver by conduct," which combines elements of forfeiture and waiver, such as where a defendant is warned that he or she will lose counsel if the defendant engages in dilatory tactics, with any misconduct thereafter being treated as an implied request for self-representation. *Id.* at 1100. Our defendant was not warned that he might lose his right to counsel as a result of his conduct, and it would be illogical to conclude that defendant implicitly requested self-representation given his express rejection of proceeding

[12] Alluding back to our discussion of the right to be present at trial and whether defendant lost that right, the *Goldberg* definition of "forfeiture" supports our view that losing the right to be present at trial for disruptive or disorderly behavior constitutes forfeiture and not waiver when the right was never explicitly made known to defendant.

pro se. Therefore, we do not view this case as a true "waiver by conduct" case. Finally, the Third Circuit in *Goldberg* acknowledged another variant that seems more fitting in relation to the case at bar:

> Suffice it to say that the Court has approved a trial court's decision to deprive a defendant of a fundamental constitutional right at least where the defendant is aware of the consequences of his actions, but regardless of whether the defendant affirmatively wishes to part with that right.
>
> These are not "waiver" cases in the true sense of the word. In many situations there will be defendants who engage in dilatory conduct but who vehemently object to being forced to proceed *pro se*. These defendants cannot truly be said to be "waiving" their Sixth Amendment rights because although they are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed *pro se*. . . . Thus, instead of "waiver by conduct," this situation more appropriately might be termed "forfeiture with knowledge." [*Id*. at 1101.]

Whether we call it "forfeiture with knowledge" or simply "forfeiture," we conclude that defendant lost his right to counsel as a result of his conduct and statements.

Honoring a defendant's wishes within reason with respect to declining counsel is a principle that was accepted in *Faretta v California*, 422 US 806, 817; 95 S Ct 2525; 45 L Ed 2d 562 (1975), wherein the Supreme Court acknowledged the "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." The *Faretta* Court further observed:

> [I]t is one thing to hold that every defendant, rich or poor, has the right to the assistance of counsel, and quite another to say that a State may compel a defendant to accept a lawyer he does not want. The value of state-appointed

> counsel was not unappreciated by the Founders, yet the notion of compulsory counsel was utterly foreign to them. And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice. [*Id*. at 833-834.]

Defendant had the free choice to refuse the services of appointed counsel, but, as opposed to the circumstances in *Faretta*, he also refused self-representation. Nevertheless, we conclude that defendant had the free choice to refuse both appointed counsel and self-representation, forfeiting these constitutional rights. We note that such was the case in *Mee*, 756 SE2d 103, cited and discussed at length earlier in this opinion. In general, "[a] defendant can also forfeit his right to represent himself." *Allen v Commonwealth*, 410 SW3d 125, 134 (Ky, 2013). In *Commonwealth v Thomas*, 2005 Pa Super 245, ¶ 22; 879 A2d 246 (2005), the Pennsylvania court rejected the defendant's claim that his constitutional right to self-representation was denied:

> Appellant's next constitutional claim is that he was denied his right to self-representation. This claim is baseless, as it is completely contradicted by the record. On June 20, 2002, appellant filed a motion to appear *pro se*, which the court granted after conducting a full colloquy on October 10, 2002. In an order filed on November 15, 2002, the court appointed attorney Zang as stand-by counsel. Five months later, at trial, appellant made clear that his "strategy" was not to appear and not to present a defense. . . . Appellant's refusal to conduct a defense--either *pro se* or by cooperation with his stand-by counsel--can not now be twisted into a claim of deprivation of constitutional right.

Thomas reflects that a defendant can decide to both refuse the assistance of counsel and refuse self-representation, *collectively* forfeiting these constitutional rights and effectively allowing a prosecutor's case

to go unchallenged. As in *Thomas*, we will not allow defendant's reprehensible conduct to now be twisted into a claim that he was deprived of his constitutional rights.

Finally, we deem it necessary to examine and contemplate any potential effect here of the United States Supreme Court's decision in *Indiana v Edwards*, 554 US 164, 177-178; 128 S Ct 2379; 171 L Ed 2d 345 (2008), in which the Court held:

> We . . . conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

In the case sub judice, defendant did not seek self-representation and refused to participate in the trial. However, *Edwards*, by analogy, might suggest that if defendant were not competent because of severe mental illness, forfeiture of the constitutional rights at issue cannot be recognized and imposing or forcing counsel upon defendant as was done was constitutionally permissible or even necessary. To the extent that *Edwards* supports such a proposition, we conclude that defendant was competent for purposes of finding forfeiture. We base this conclusion on the reasons given in the following part of our opinion in support of affirming the circuit court's ruling that defendant was competent to stand trial and that a competency examination was unnecessary. In sum, we hold that defendant forfeited his right to counsel by his remarks and conduct; therefore, *Cronic* is not implicated and reversal is unwarranted.

As a final comment on the topic of forfeiture of counsel, we emphasize that a finding of forfeiture of this venerable constitutional right should only be made in the rarest of circumstances and as necessary to address exceptionally egregious conduct.

C. DEFENDANT'S COMPETENCY TO STAND TRIAL

Defendant argues that, given the nature of his actions and comments, the circuit court erred by failing to order a competency examination for defendant and that defense counsel was ineffective for failing to seek a competency determination.

"[T]he failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial." *Drope v Missouri*, 420 US 162, 172; 95 S Ct 896; 43 L Ed 2d 103 (1975), citing *Pate v Robinson*, 383 US 375; 86 S Ct 836; 15 L Ed 2d 815 (1966). To protect this right to due process, Michigan has enacted statutes and a court rule regarding the competency of criminal defendants. MCL 330.2020(1) provides:

> A defendant to a criminal charge shall be presumed competent to stand trial. He shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner. The court shall determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.

"A defendant who is determined incompetent to stand trial shall not be proceeded against while he is incompetent." MCL 330.2022(1). MCR 6.125 addresses mental competency hearings in criminal cases, and subrule (B) provides:

> The issue of the defendant's competence to stand trial or to participate in other criminal proceedings may be raised at any time during the proceedings against the defendant. The issue may be raised by the court before which such proceedings are pending or being held, or by motion of a party. Unless the issue of defendant's competence arises during the course of proceedings, a motion raising the issue of defendant's competence must be in writing. If the competency issue arises during the course of proceedings, the court may adjourn the proceeding or, if the proceeding is defendant's trial, the court may, consonant with double jeopardy considerations, declare a mistrial.

"The issue of incompetence to stand trial may be raised by the defense, court, or prosecution." MCL 330.2024. "On a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial." MCR 6.125(C)(1); see also MCL 330.2026(1).

With respect to whether a trial court has an obligation to raise the issue of competency and order an examination, and in regard to our standard of review, this Court in *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990), observed:

> Although the determination of a defendant's competence is within the trial court's discretion, a trial court has the duty of raising the issue of incompetence where facts are brought to its attention which raise a "bona fide doubt" as to the defendant's competence. However, the decision as to the existence of a "bona fide doubt" will only be reversed where there is an abuse of discretion. [Citations omitted.]

"[T]he test for such a bona fide doubt is whether a reasonable judge, situated as was the trial court judge

whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." *Maxwell v Roe*, 606 F3d 561, 568 (CA 9, 2010) (citation and quotation marks omitted). Evidence of a defendant's irrational behavior, a defendant's demeanor, and a defendant's prior medical record relative to competence are all relevant in determining whether further inquiry in regard to competency is required. *Drope*, 420 US at 180. "There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id*.

The circuit court raised the issue of defendant's competency at a pretrial motion hearing, making the following observations:

> So far I think what he's doing is purposeful, it is not to me, just on the face of it evidence of mental illness or inability from a mental illness standpoint to represent himself. He seems articulate, he seems capable of writing, he seems familiar with concepts even though he refuses to do more than state them or invoke them. . . . I think this is purposeful behavior of someone who believes he has been treated unfairly but is . . . unwilling because he has so little respect for the legal system, unwilling to engage in any conversation about what his reactions are. I don't think he's really catatonic for example even though he gives that appearance, and I don't think he's nodding off now even though his chin is down to his chest. You know, I think this is part of the performance art that accompanies an intelligent philosophical display of disrespect and contempt for everybody in the room and everybody involved in the process. . . .
>
> * * *

> I am not going to order a psychiatric or forensic evaluation of the defendant because my conclusion having engaged with him is that he is in a posture of purposeful and decisive civil disobedience for lack of a better phrase. That even though his strategic course of action [may be] putting him at increasing risk I think he's made that choice knowingly, voluntarily and intelligently and purposefully because he has no respect for the entire legal system and genuinely believes that no one has any jurisdiction to reign him in on any criminal offense no matter what his behavior is. He thinks . . . this is the correct strategic course to take to make that argument. It is an argument detached from legal reality but he's aware of the reality of this courtroom and his incarceration and he's been offered an attorney. I think this is more or less a strategic game, it is not an expression of mental illness or denial of reality. So, I'm not going to order a forensic examination[.]

We hold that the circuit court did not abuse its discretion by failing to order a competency examination. "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007). On the basis of the facts in the record, the circuit court's conclusion that defendant was capable of understanding the nature of the charges brought against him and capable of rationally assisting in his defense did not fall outside the range of reasonable and principled outcomes. A reasonable judge, situated as the circuit court judge here, could logically have rejected the proposition that defendant was "incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." MCL 330.2020(1). A reasonable and principled decision included a finding that defendant intentionally and purposefully, and not because of a mental condition or illness, acted in a defiant and dilatory

manner in an attempt to disrupt the proceedings and to show contempt and disrespect for the court and the criminal justice process. The circuit court, not us, was able to personally observe defendant's behavior and conduct, hear live defendant's remarks and the tone of and inflections in his voice, and directly assess defendant's demeanor, attitude, and comments, and we generally defer to the court's findings on such matters. See MCR 2.613(C) ("regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it").

Moreover, the record reflected that defendant is intelligent, articulate, has an expansive vocabulary, and is knowledgeable of some legal terminology ("I've never agreed to be in pro per and I have never agreed to represent myself in your venue"[;] "consideration on a contract"). Defendant clearly had the *capacity* to understand the nature of the charges and to rationally assist in his defense; he showed the "ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial." MCL 330.2020(1). However, despite this capacity and ability, defendant chose not to acknowledge or participate properly in the proceedings. To the extent that defendant made occasional statements that were nonsensical or engaged in odd behavior, which might suggest the lack of capacity to understand the charges and rationally assist in his defense because of his mental condition, we again defer to the circuit court's determination following its personal observation of defendant that this was a matter of theatrics, feigning, gamesmanship, defiance, disrespect, and contempt, and not true incompetence. Defendant has failed to overcome the presumption that he was competent to stand trial. The circuit court's decision not to order a competency examination was not an abuse of discretion. Furthermore, on the

basis of the record and our findings above, we cannot conclude that defense counsel's failure to request a competency examination constituted deficient performance, i.e., that counsel's performance fell below an objective standard of reasonableness. *Carbin*, 463 Mich at 599-600; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

D. DOUBLE JEOPARDY AND SUFFICIENCY OF THE EVIDENCE

Defendant contends that the two counts of assaulting a prison employee, MCL 750.197c(1), which were added by amendment of the information, were meant to be alternative counts to two of the three counts of resisting, obstructing, or assaulting a police officer, MCL 750.81d(1). Defendant points out that the three counts of resisting and obstructing pertained to conduct directed at three different police officers and that the two counts of assaulting a prison employee pertained to the same conduct directed at two of those officers already covered by the resisting and obstructing counts. As acknowledged by defendant, regardless of any suggestion at the hearings on the motions to amend the information that the counts were in the alternative, the counts were not presented to the jury in the alternative, and we note that the amended information itself did not frame the counts as being in the alternative. Defendant also complains that the prosecutor argued that the resisting and obstructing charges entailed, in part, defendant's failure to cooperate in providing his fingerprints, yet this was already addressed in the charge of resisting the collection of biometric data, MCL 28.243a. Defendant further maintains that the prosecutor argued that the resisting and obstructing charges involved, in part, defendant's refusal to give the police his name.

Defendant presents the preceding arguments to set up the following appellate claims: (1) the conviction on the biometric data or fingerprinting charge was barred by double jeopardy because the charged conduct was encompassed by the resisting and obstructing charges; (2) the convictions on all three of the resisting and obstructing charges must be vacated on insufficiency grounds because refusal to give one's name cannot constitute resisting and obstructing an officer as a matter of law; and (3), even if the evidence was sufficient to support the convictions on the three counts of resisting and obstructing, double jeopardy protections barred convictions on two of those counts and on the prison-employee assault charges, given that the same underlying conduct formed the basis of those charges.

We initially reject the double jeopardy arguments. First, other than to simply claim that his constitutional protection against double jeopardy was violated, defendant provides no legal analysis or supporting citations regarding the double jeopardy arguments. Accordingly, defendant's double jeopardy arguments have been waived. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) (" 'It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.' ") (citation omitted). Moreover, even on substantive review, defendant's double jeopardy arguments are unavailing. In *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007), the Michigan Supreme Court ruled that the "same elements" test enunciated in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether

multiple punishments are barred by Const 1963, art 1, § 15." "The *Blockburger* test focuses on the statutory elements of the offense, without considering whether a substantial overlap exists in the proofs offered to establish the offense." *People v Baker*, 288 Mich App 378, 382; 792 NW2d 420 (2010), citing *Smith*, 478 Mich at 307, and *People v Nutt*, 469 Mich 565, 576; 677 NW2d 1 (2004). "If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved." *Baker*, 288 Mich App at 382; see also *Smith*, 478 Mich at 296 ("Because each of the crimes for which defendant here was convicted, first-degree felony murder and armed robbery, has an element that the other does not, they are not the 'same offense' and, therefore, defendant may be punished for each.").

MCL 28.243a(1) provides that "[a] person shall not refuse to allow or resist the collection of his or her biometric data if authorized or required under this act."[13] On the other hand, "[u]nder MCL 750.81d(1), the elements required to establish criminal liability are: (1) the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered a police officer, and (2) the defendant knew or had reason to know that the person that the defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered was a police officer performing his or her duties." *People v Corr*, 287 Mich App 499, 503; 788 NW2d 860 (2010). MCL 28.243a(1) requires that the prosecution establish that the refusal or resistance relates to the collection of biometric data, whereas such

[13] "Biometric data" includes "[f]ingerprint images recorded in a manner prescribed by the" Michigan Department of State Police. MCL 28.241a(b)(*i*).

an element is not part of the proofs necessary to obtain a conviction for resisting and obstructing a police officer. Further, with a charge of resisting and obstructing a police officer, there is a required *mens rea* element of knowledge and a police officer must be involved, which do not appear to be required to establish a crime under MCL 28.243a.[14] Additionally, as specifically charged here, assault formed part of the basis for the resisting and obstructing charges, and assault is not an element of the offense of resisting collection of biometric data. Thus, there was no double jeopardy violation.

With respect to the crimes of resisting and obstructing an officer and assaulting a prison employee, the elements of the latter crime require proof that the defendant (1) was lawfully imprisoned in a place of confinement, (2) used violence, threats of violence, or dangerous weapons to assault an employee of the place of confinement or other custodian, and (3) knew that the victim was an employee or custodian. *People v Williams*, 173 Mich App 312, 318; 433 NW2d 356 (1988), citing MCL 750.197c. Accordingly, assault of a prison employee contains elements not included in resisting or obstructing, e.g., that the defendant was lawfully imprisoned in a place of confinement. Moreover, resisting or obstructing contains an element not necessarily included in assault of a prison employee; namely, that the victim is a police officer. Thus, there was no double jeopardy violation.

With respect to defendant's argument that the convictions on all three of the resisting and obstructing charges must be vacated on insufficiency grounds because refusal to give one's name cannot constitute

[14] We do not take a definitive position, nor is this opinion to be cited as precedential, with respect to a potential question whether a *mens rea* element must, for constitutional purposes, be read into MCL 28.243a.

resisting and obstructing an officer as a matter of law, two of the charges pertained solely to acts of physical resistance and obstruction against two of the officers and had nothing to do with defendant's failure to provide his name. Accordingly, defendant's argument does not reach those two convictions, and they are affirmed. The prosecution agrees on appeal that the third resisting and obstructing conviction relative to the remaining officer was not supported by the evidence, and we will accept that concession and vacate the conviction on that particular count.

E. CONTEMPT OF COURT

Finally, defendant argues that the circuit court's contempt ruling at the sentencing hearing violated his constitutional right to free speech under the First Amendment and his right to allocution. Defendant maintains that his conduct was not sufficiently egregious to justify a contempt finding that effectively precluded him from exercising his right to freedom of speech and his opportunity to allocute in regard to sentencing.

We review a trial court's decision to hold an individual in contempt of court for an abuse of discretion. *In re Contempt of Dudzinski*, 257 Mich App 96, 99; 667 NW2d 68 (2003). However, we review de novo questions of law, such as constitutional issues. *Id*. In *In re Contempt of Auto Club Ins Ass'n*, 243 Mich App 697, 707-708; 624 NW2d 443 (2000), this Court discussed a court's contempt powers:

> If the artillery is the queen of battle, then the power to punish contempt is its functional equivalent in the stylized combat of modern litigation. The power to hold a party, attorney, or other person in contempt is the ultimate sanction the trial court has within its arsenal, allowing it to

> punish past transgressions, compel future adherence to the rules of engagement, i.e., the court rules and court orders, or compensate the complainant. . . . [W]e [have] defined contempt of court as a willful act, omission, or statement that tends to . . . impede the functioning of a court. Indeed, the primary purpose of the contempt power is to preserve the effectiveness and sustain the power of the courts. Because the power to hold a party in contempt is so great, it carries with it the equally great responsibility to apply it judiciously and only when the contempt is clearly and unequivocally shown. [Citations and quotation marks omitted.]

MCL 600.1701 provides, in relevant part:

> The supreme court, circuit court, and all other courts of record, have power to punish by fine or imprisonment, or both, persons guilty of any neglect or violation of duty or misconduct in all of the following cases:
>
> (a) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings or impair the respect due to its authority.

"When any contempt is committed in the immediate view and presence of the court, the court may punish it summarily by fine, or imprisonment, or both." MCL 600.1711(1). Summary punishment under MCL 600.1711 "accords due process of law." *In re Contempt of Warriner*, 113 Mich App 549, 554-555; 317 NW2d 681 (1982), mod and remanded 417 Mich 1100.26 (1983). The contempt "power is essential to preserve the authority of the courts and to prevent the administration of justice from falling into disrepute." *Contempt of Warriner*, 113 Mich App at 555. A finding of contempt is appropriate when necessary to restore order in the courtroom and to ensure the proper respect for the judicial proceedings. *Contempt of Dudzinski*, 257 Mich App at 108-109.

Here, the transcript reflected that defendant, as he had done several times previously, showed up at his sentencing hearing in a wheelchair "undressed from the hip area up." When defense counsel began answering a question asked of him by the circuit court, defendant interrupted, "I take exception . . . ." When the court later informed defendant that he could now make a statement, defendant responded:

> I take exception, I am not the defendant, I am not in pro per, I'm disabled. I'm not Mr. Kammeraad, I'm not that person. In a firm and honest belief, I believe that this Court has engaged in acts of entrapment and in good conscience I've refused to be associated with or a party to these criminal actions. I've done my best to avoid all acts taken against me and have endured[.]

The circuit court then halted defendant's remarks, stating, "you're presentation to the Court is insulting and contemptuous. It ends right there." The court then held defendant in contempt of court, tacking on 30 days in jail to defendant's sentences.

Given defendant's actions, appearance, and comments at the sentencing hearing, which must be viewed in the context of his behavior throughout the entirety of the proceedings, we hold that the circuit court did not abuse its discretion by holding defendant in contempt of court. Defendant's conduct during sentencing was disorderly, contemptuous, and insolent, directly tending to impair the respect due the court and reflecting the culmination of disorderly, contemptuous, insolent, and disrespectful behavior, MCL 600.1701(a), all of which was directly witnessed by the court firsthand. The circuit court had been remarkably patient with defendant throughout the course of the judicial proceedings, and defendant's continued defiant conduct compelled the court's contempt response

in order to restore some order to the courtroom and to ensure some level of respect for the proceedings.

With respect to the First Amendment argument, "[d]isruptive, contemptuous behavior in a courtroom is not protected by the constitution." *Contempt of Warriner*, 113 Mich App at 555 (rejecting the defendant's argument "that his conduct amounted to constitutionally protected symbolic speech"). And defendant's actions and remarks tended to disturb the administration of justice. *Contempt of Dudzinski*, 257 Mich App at 101-102. There was no violation of defendant's First Amendment rights.

With respect to defendant's right of allocution, MCR 6.425(E)(1)(c) provides that at sentencing, the court is required on the record to give defendants "an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence[.]" A trial court must strictly comply with the rule, "and the trial court must separately ask the defendant whether the defendant wishes to address the court before sentencing." *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999). "Where the trial court fails to comply with this rule, resentencing is required." *Id.* In the present case, the circuit court gave defendant every opportunity to allocute. However, as opposed to advising the court of the circumstances that the court should consider in imposing sentence, MCR 6.425(E)(1)(c), defendant engaged in a nonsensical rant that had absolutely nothing to do with his sentencing. The circuit court did not violate MCR 6.425(E)(1)(c); rather, defendant chose not to properly exercise his rights under the court rule. Resentencing is unwarranted.

III. CONCLUSION

In summation, defendant, being competent, forfeited his constitutional and statutory rights to be present at

trial, forfeited his right to counsel, and forfeited his right to self-representation. Therefore, the alleged inadequacy of appointed counsel's performance is irrelevant. Defendant adamantly rejected counsel, self-representation, being present at trial, and presenting a defense to the charges, and we are merely honoring his wishes. We refuse to reward defendant with a new trial on the basis of his alleged constitutional wounds that were entirely self-inflicted. Furthermore, the circuit court's decision not to order a competency examination did not constitute an abuse of discretion, and the issue does not serve as a valid basis to reverse defendant's convictions on the associated claim of ineffective assistance of counsel. Next, defendant's double jeopardy argument was inadequately briefed and thus waived. Moreover, there were no double jeopardy violations with respect to the various convictions. With respect to defendant's sufficiency arguments and the convictions on three counts of resisting and obstructing an officer, the evidence was sufficient on two of the counts, and the prosecution concedes error on the third count, which conviction we vacate. Finally, defendant's First Amendment rights and his right to allocution were not violated when the circuit court held him in contempt of court.

Affirmed in part and vacated in part.

SHAPIRO and RIORDAN, JJ., concurred with MURPHY, C.J.

PEOPLE v GALLOWAY

Docket No. 316262. Submitted September 9, 2014, at Lansing. Decided October 7, 2014, at 9:05 a.m. Leave to appeal sought.

John A. Galloway was convicted after a jury trial in the Crawford Circuit Court of two counts of second-degree criminal sexual conduct, MCL 750.520c(2)(b) on the basis of allegations by his girlfriend's 10-year-old daughter. After several hours of deliberation, the jury sent the judge a note asking what would happen if they could not reach a unanimous verdict. The court, Janet M. Allen, J., read the jury the standard instruction to be given in case of deadlock, and also instructed the jury that the foreperson could poll them to determine whether a majority believed a unanimous verdict could be reached and inform the court of the result. Defense counsel stated that she was satisfied with these instructions. The jury returned a verdict of guilty on both counts shortly thereafter, and the court sentenced him to concurrent terms of 2 to 15 years' imprisonment. Defendant appealed his convictions and sentences.

The Court of Appeals *held*:

1. Defense counsel's decision to approve the court's instructions to the jury did not constitute ineffective assistance. The court's invitation to poll the jury to determine whether a unanimous verdict could be reached did not seek to reveal the numerical split of the jury and was not an unduly coercive substantial departure from the standard instructions, and defendant therefore cannot establish that he was prejudiced by defense counsel's waiver. However, the safest course for trial courts remains to read the standard instructions without deviation.

2. Defendant did not establish that the jury's verdicts were against the great weight of the evidence. The evidence was not so incredible or contradicted as to warrant judicial interference with the jury's decision to deem complainant's accusations credible.

3. Defendant's sentences were not impermissibly increased by judicial fact-finding in violation of the holding of *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013). Under *People v Herron*, 303 Mich App 392 (2013), *Alleyne* does not apply to Michigan's sentencing scheme.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Joyce F. Todd*, Special Assistant Attorney General, for the people.

State Appellate Defender Office (by Susan M. Meinberg) for defendant.

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM. A jury convicted defendant of two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b) (sexual contact with victim younger than 13), and the trial court sentenced him to concurrent terms of 2 to 15 years' imprisonment. Defendant now challenges the instructions given by the court upon the jury's query of what would occur in the event it was unable to reach a verdict. Defendant contends that his convictions are against the great weight of the evidence because the complainant's testimony was contradicted and impeached. He further asserts that his minimum sentence was improperly enhanced by judicial fact-finding.

Although the trial court unnecessarily supplemented the standard deadlocked-jury instruction, the instruction was not coercive and does not warrant reversal. Further, the jury was presented with adequate information to judge the credibility of the witnesses, and we may not interfere with its assessment. Moreover, this Court has already rejected the application of *Alleyne v United States*, 570 US ___; 133 S Ct 2151; 186 L Ed 2d 314 (2013), to the Michigan sentencing guidelines. Accordingly, we affirm defendant's convictions and sentences.

I. BACKGROUND

Defendant's convictions are based on the accusations of the 10-year-old daughter of his long-term, live-in girlfriend. The complainant claimed that defendant employed tickling as an opportunity to touch her breasts. She asserted that when she sat on defendant's lap, he would move her around and his penis would become "boney." The complainant further alleged that she awoke one morning and found defendant's cell phone propped up in her bedroom doorframe, set to video record. Defendant countered that the child had never liked him and falsified her allegations to get him out of her mother's life. The child complainant and her mother corroborated defendant's claim that the child did not like defendant for reasons completely separate from the sexual contact allegations.

II. DEADLOCKED-JURY INSTRUCTION

Defendant contends that the trial court committed reversible error by giving a coercive deadlocked-jury instruction and that defense counsel was ineffective in accepting that improper instruction.

A. THE INSTRUCTIONS

At 11:35 a.m. on the third day of trial, the court released the jury to begin its deliberations. At 2:50 p.m., the jury asked to review the complainant's testimony and the recording was played in the courtroom. At 3:08 p.m., the jury returned to the jury room to continue its deliberations. At 4:08 p.m., the jury asked to review defendant's testimony and the same procedure was followed. The jury continued its deliberations at 5:05 p.m. Then, at 5:44 p.m., court reconvened and the trial judge stated on the record:

> All right. Counsel, . . . I talked to the two of you in chambers and I've got a note indicating, "What happens if we cannot not [sic] unanimously decide on a verdict?" So what I propose, and I think you both agree with me, is that I will give the deadlocked jury instruction 3.12. In addition, I will indicate to them that if they have reached a unanimous verdict on one of the counts, . . . the Court can accept a unanimous verdict on one of the two counts, and then invite them to also return to the jury room and direct the foreman to poll the jury in private, and then advise me only whether a majority of the jury believes a verdict can be reached or a majority does not after they've done their further deliberation. Should I just give 'em all three options at the same time?

The prosecutor answered in the affirmative. Defense counsel objected to "the third option as you just read it, is that you invite them to go back and poll" and asked that the court "maybe remove the invitation part of it."

The trial court defended its choice of instruction and the following colloquy ensued:

> *The Court*: . . . Now, this is People v Luther and that's 53 Mich App 648, it's a 1974 case. . . . I'm just looking at the Bench Book, the latest version I had, which was 2010. Now, paragraph five . . . was added in September 2011 to comply with the court rule . . . 2.513.
>
> * * *
>
> *The Court*: . . . Okay, so let's take a look at what MCR 2.513(N)(4) says here. All right, that is entitled:
>
> > Clarifying or amplifying . . . final instructions. When it appears that a deliberating jury has reached an impasse, or is otherwise in need of assistance, the court may invite the jurors to list the issues that divide or confuse them in the event that the judge can be of assistance in clarifying or amplifying the final instructions.

[*Defense Counsel*]: Judge, that People v Luther is still good law.

The Court: Okay. All right. Well, let's bring 'em in.

The jury returned to the courtroom for additional instruction. The court inquired:

The Court: Okay. Members of the jury, you had sent out a note a little bit ago indicating, "What happens if we cannot unanimously decide on a verdict?" Is that still the question?

* * *

Female Juror: Yes, and we want to clarify that is just a question; that's not our official answer, if that makes sense. We're still deliberating.

The Court: Oh, okay.

Female Juror: We want to know what would happen if we don't come up with a verdict.

The Court: Okay. Well, at this point I'm supposed to give you a certain instruction, and . . . I'll give you some additional instructions. Okay? So let me give you the jury instruction.

You have returned from deliberations indicating that you believe you cannot reach a verdict. That may or . . . may not be true but I'm still gonna give this to you. I'm going to ask you to please return to the jury room and resume your deliberations in the hope that after further . . . discussion you will be able to reach a verdict.

Now, as you deliberate, please keep in mind the guidelines I gave you earlier. Remember, it is your duty to consult with your fellow jurors and try to reach an agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

Now, as you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of . . . fairness and frankness. Naturally

there will be . . . differences of opinion. You should each not only express your opinion, but also give the facts and the reasons on which . . . you base it. By reasoning the matter out, jurors can often reach agreement.

Now, if you think it would be helpful, you may submit to the bailiff a written list of the issues that are dividing or confusing you. It will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.

Now, when you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong. However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your. . . fellow jurors think or only for the sake of reaching agreement.

Now, the other thing I want to advise you of is a couple of different things. Now, if you have reached a unanimous verdict on one count -- there are two counts here -- but you have not reached or cannot reach a unanimous verdict on another count, then you can give me your verdict -- once you're sure about that . . . -- I can accept your verdict on any count that you're unanimous on. But you have to also tell me that . . . you're unable to reach a unanimous verdict on the other count.

Now, the other suggestion I would have for you is you could re- -- you know, I want you to go back and attempt to continue deliberations. But at some point if you want to come back to me, I will direct the foreperson of your jury to poll the jury in private and advise me only that a majority of the jury believes a verdict can be reached or a majority does not. Does everybody understand that? Do you want me to repeat that? You can't tell me how your voting stands; you can't tell anybody how your voting stands on anything. But you can tell me whether or not a majority of you believe that you'll be able to reach a verdict or a majority thinks that you won't be able to reach a verdict.

Now, the other option I will give to you folks is if you want to continue deliberating tonight, that's fine with me. If you would prefer to come back in the morning and

> continue your deliberations, that would be fine. So I'm gonna let you all retire to the jury room, discuss it amongst yourselves, and send me a note out as to what you would like to do.

The jury was excused to the jury room at 5:59 p.m. Defense counsel indicated that she was "[s]atisfied" with the court's instructions. Nineteen minutes later, the jury returned a verdict of guilty on both charged counts.

B. STANDARDS OF REVIEW

"A party must object or request a given jury instruction to preserve the error for review. . . . Absent an objection or request for an instruction, this Court will grant relief only when necessary to avoid manifest injustice." *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000). Where counsel expresses satisfaction with the jury instructions, however, any claim of error is deemed waived, leaving nothing for this Court's review. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000).

Defendant contends that defense counsel's decision to approve the jury instructions, and thereby waive his claim of appellate error, rendered her performance constitutionally deficient. Defendant failed to preserve this challenge by seeking a new trial or requesting a *Ginther*[1] hearing below. Our review is therefore limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

" '[T]he right to counsel is the right to the effective assistance of counsel.' " *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct

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

1441; 25 L Ed 2d 763 (1970). An ineffective assistance claim includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish the deficiency component, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have been different. *Id*. at 663-664. The defendant also must overcome the strong presumptions that "counsel's conduct [fell] within the wide range of reasonable professional assistance" and that counsel's actions were sound trial strategy. *Strickland*, 466 US at 689.

C. PROPRIETY OF INSTRUCTION

The trial court deviated from the standard instructions by advising the jury that it could conduct an internal poll to determine whether its members believed they could reach a verdict. M Crim JI 3.11 provides the general instruction a court should provide to the jury before releasing them for deliberation:

> (3) A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you will have to make up your own mind. Any verdict must represent the individual, considered judgment of each juror.

(4) It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reasons for them, but keep an open mind as you listen to your fellow jurors. Rethink your opinions and do not hesitate to change your mind if you decide you were wrong. Try your best to work out your differences.

(5) However, although you should try to reach agreement, none of you should give up your honest opinion about the case just because other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own, and you must vote honestly and in good conscience.

In the event the jury advises the court that it is unable to reach a unanimous verdict, the court should read the jury M Crim JI 3.12, which provides:

(1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.

(2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

(3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.

(4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

(5) If you think it would be helpful, you may submit to the bailiff a written list of the issues that are dividing or confusing you. It will then be submitted to me. I will

attempt to clarify or amplify the instructions in order to assist you in your further deliberations.

(6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

(7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

In deciding to supplement the deadlocked-jury instructions, the trial court relied on *People v Luther*, 53 Mich App 648; 219 NW2d 812 (1974). In *Luther*, the court returned the jury to the courtroom shortly before 5:00 p.m. to determine whether to recess for the day. *Id.* at 649-650. In doing so, the court asked, " 'Do you feel it's possible to reach a verdict by five o'clock?' " and the jury foreperson responded in the negative. *Id.* at 650. The following ensued:

The Court: How many of the jurors think you can't reach a verdict by five?

(Juror Number 5 and Juror Number 12 raised their right hand.)

The Court: How many think you can?

(Several jurors raised their right hand.)

The Court: All but two.

(Addressing the foreman of the jury): Mr. Kelly, do you still think you can't?

The foreman of the jury: Perhaps we can.

The Court: Well, let's try it.

The foreman of the jury: Okay. [*Id.* (quotation marks omitted).]

Fifteen minutes later, the jury returned a guilty verdict. *Id.*

This Court advised, "Trial judges are hereafter prohibited from asking any questions of jurors the answer to which might reasonably be expected to disclose the numerical division of the jury." *Id*. Yet the Court discerned "that no numerical division of the jury was revealed" in *Luther*. *Id*. at 651. Rather, "[t]wo jurors expressed the view that a verdict could not be reached by a given time. The balance had a contrary view or expressed none at all." *Id*. This Court concluded:

> If the orderly supervision of a docket requires that the trial court inform itself as to the probability of a verdict by some ascertainable time the procedure to be followed is to return the jury to the jury room, and direct the foreman to poll the jury in private and then advise the court only that a majority of the jury believes a verdict can be reached or a majority does not. The only virtue this solution has is that it establishes uniformity, unless of course another panel of this Court takes a contrary view or the Supreme Court speaks with finality. In this case we find no explicit revelation of the numerical division of the jury and hence no reversible error. [*Id*.]

The discourse between the court and the jury in *Luther* stands in stark contrast with that in *People v Wilson*, 390 Mich 689; 213 NW2d 193 (1973). In *Wilson*, the jury returned to the courtroom after only 90 minutes of deliberation and advised the court that it was unable to agree on a verdict. *Id*. at 690. The trial court queried, " 'Well, without saying for whom, how do you stand numerically?' " *Id*. The response was 11 to one. The court instructed the jury to resume deliberations because " 'that is not very far from a verdict.' " *Id*. This was reversible error because "the trial judge's inquiry into the numerical division of the jury had the tendency to be coercive . . . ." *Id*. at 691, citing *Brasfield v United States*, 272 US 448; 47 S Ct 135; 71 L Ed 345 (1926). Moreover, the Supreme Court stated, "The clear impli-

cation of the trial judge's remark was that only one more juror remained to be convinced in order to permit the return of a unanimous verdict." *Id*. This was reversibly coercive:

> It cannot be supposed that a jury is closer to agreement—in point of time—when it stands at 11 to 1 than when it stands at 8 to 4 or 6 to 6.
>
> In fact, the disposition of a single juror to stand against all of his fellows indicates a stronger conviction upon his part than if the division were more equal. Experience tells us that the holdout juror, standing alone, is often more difficult to convince, and indeed may never be persuaded to agree with the majority.
>
> It follows that the court's characterization of the jury as being "not very far from a verdict", was impermissibly coercive with respect to the single reluctant juror. At the same time, the comment would have had the unhappy effect of confirming the 11 majority jurors in their tentative agreement.
>
> Whenever the question of numerical division of a jury is asked from the bench, in the context of an inquiry into the progress of deliberation, it carries the improper suggestion that the state of numerical division reflects the stage of the deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority. [*Id*. at 691-692.]

Three months after this Court's opinion in *Luther*, and eight months after *Wilson*, our Supreme Court considered the appropriate form of an instruction regarding jury deliberations and how to handle a deadlocked jury situation, also known as an *Allen*[2] charge. "The optimum instruction," the Court mused, "will generate discussion directed towards the resolution of the case but will avoid forcing a decision." *People v*

[2] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

Sullivan, 392 Mich 324, 334; 220 NW2d 441 (1974). Within the instruction given by the *Sullivan* trial court was the following:

> And, if on the one hand if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one which makes no impression upon the minds of so many men equally honest, equally intelligent with himself and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth and under the sanction of the same oath.
>
> If, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves whether they may not reasonably, and ought not to doubt the correctness of a judgment which is not concurred in by most of those with whom they are associated and distrust the weight of sufficiency of that evidence which fails to carry conviction to the minds of their fellows. [*Id*. at 328-329 (quotation marks omitted).]

The Court declined to find this instruction "coercive per se." *Id*. at 342. To prevent future hazards, the Court adopted ABA Standard Jury Instruction 5.4, which is substantially similar to the current M Crim JI 3.11. *Sullivan*, 392 Mich at 335, 342. And the Supreme Court warned, "Any substantial departure therefrom shall be grounds for reversible error." *Id*. at 342.

Following *Sullivan*, our Supreme Court faced many challenges to deviations in jury deliberation and deadlocked-jury instructions. In *People v Goldsmith*, 411 Mich 555, 558; 309 NW2d 182 (1981), the trial court added a variant of the deadlocked-jury instruction as part of its main instructions before deliberations. The court included an objectionable supplement, however:

> Let me remind you that when a jury is unable to reach a verdict, the jury has not accomplished its purpose. A jury unable to agree, therefore, is a jury which has failed in its

> purpose. Each time such an indecisive jury fails, ammunition is given to those who oppose the jury system as we know it, a system that requires a unanimous vote of all 12 jurors for either conviction or acquittal. As you deliberate, please bear this in mind. [*Id*. at 558 (quotation marks omitted).]

This was a "substantial departure" from the ABA instruction approved in *Sullivan* and amounted to reversible error. *Id*. at 561. It was "a call for the jury, as part of its civic duty, to reach a unanimous verdict and contain[ed] the message that a failure to reach a verdict constitutes a failure of purpose." *Id*.

In *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984), the Supreme Court clarified that "an undue tendency of coercion" is the core of any "substantial departure" inquiry, not a deviation from the instruction language approved in *Sullivan*. An instruction is not coercive per se even if it varies in substance from that approved in *Sullivan*. *Hardin*, 421 Mich at 321. The Court enumerated that substantial departures include those that " 'cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement,' " "require[], or threaten to require[], the jury to deliberate for an unreasonable length of time or for unreasonable intervals," or admonish a jury that the inability to reach a unanimous verdict amounts to a failure of one's civic duty. *Id*. at 316, quoting *Sullivan*, 392 Mich at 334. And the instruction must be read in context and with the instructions as a whole to determine whether its effect was to coerce or "to stress the need to engage in full-fledged deliberation." *Id*. at 321.

In *People v Pollick*, 448 Mich 376, 380; 531 NW2d 159 (1995), the trial court instructed the jury before deliberations that it had two duties: to choose a foreperson and " 'to agree upon a unanimous verdict.' " After only

39 minutes of deliberation, the jury convicted the defendant of the greatest charged offense. *Id*. at 378. This Court found this instruction to be a reversibly coercive substantial departure from the standard instructions. *Id*. at 380-381. The Supreme Court reinstated the jury conviction:

> It requires no special insight to see that there is a greater coercive potential when an instruction is given to a jury that already believes itself deadlocked. Instructions given to a jury that has not yet begun to deliberate are less likely to weigh on a dissenting juror, or to be understood as a request that a particular dissenting juror abandon the view that is preventing an otherwise unanimous jury from reaching its verdict.
>
> In the present case, the instruction preceded the jury's deliberations, and thus the coercive potential was reduced. Further, this case does not involve any improvidently added language, such as was found in *Goldsmith*. Indeed, the challenged instruction—that the jury had a "duty" to return a unanimous verdict—would be entirely unremarkable if this Court had not adopted in *Sullivan* a prophylactic rule designed to cure a problem that did not even arise in the present case. Probably for that reason, there was no objection from defense counsel.
>
> We said in *Sullivan* that courts are to give an instruction that is substantially in the form of CJI2d 3.11. That is a sound instruction, and we continue to direct that it be given. However, the teaching of *Hardin* is that an instruction on this subject requires reversal only if it has an "undue tendency of coercion," not if it merely fails to contain the same words as the ABA standard.
>
> In the context of this case, considering the timing and full content of the instructions, we see no significant possibility that the jury found the instruction to be unduly coercive. The whole jurisprudence of *Sullivan*, including the cases and instructions that followed, is based on the need to avoid coercing jurors who are having a difficult time reaching a decision. Here, no such problem had arisen

> at the time of the instruction, nor did the jurors ever experience such a difficulty. Their deliberations were brief, and they did not choose any of the intermediate verdicts that were offered. [*Id*. at 385-386.]

Here, the challenged instruction was given mid-deliberation and therefore had heightened coercive potential. *Id*. at 385. And the "suggestion" that the jury conduct an internal poll to ascertain whether a majority believed a verdict could be reached clearly deviated from the language of M Crim JI 3.11 and 3.12 and the ABA instruction adopted in *Sullivan*, 392 Mich at 335, 342.

However, the instruction was not a reversible "substantial departure." It did not have the potential to cause a juror to bend his or her will to that of the majority simply for the sake of reaching an agreement. See *Hardin*, 421 Mich at 316. Rather, after giving the standard deadlocked-jury instructions, the trial court gave the jury the option of retiring for the day or of continuing deliberations that evening. If the jury found itself still unable to agree, it could conduct an internal poll to determine whether a majority believed a unanimous verdict could never be reached. The additional instruction in no way sought to reveal the numerical split of the jury as in *Wilson*. Accordingly, the provision of this instruction was not reversible error, and defendant can establish no prejudice as a result of defense counsel's waiver.

Yet we do not condone the use of the challenged instruction. Our Supreme Court has made clear in the years since *Luther* that the safest course to avoid juror coercion is to read the standard jury instructions. See *Pollick*, 448 Mich at 386; *Goldsmith*, 411 Mich at 560-561; *Sullivan*, 392 Mich at 342. There was no need to deviate in this case, especially as the jury foreperson

informed the court that the jury was not actually deadlocked. Accordingly, we recommend that the trial court avoid this additional instruction in the future.

III. GREAT WEIGHT OF THE EVIDENCE

Defendant also contends that the jury's guilty verdicts were against the great weight of the evidence. Defendant failed to preserve his challenge by seeking a new trial below. *People v Cameron*, 291 Mich App 599, 618; 806 NW2d 371 (2011). We would generally review a great-weight challenge to determine "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 617. Absent a motion for new trial, our review is limited to plain error affecting defendant's substantial rights. *Id*. at 618.

When analyzing a great-weight challenge, no court may sit as the "13th juror" and reassess the evidence. *People v Lemmon*, 456 Mich 625, 636; 576 NW2d 129 (1998). Therefore, "conflicting testimony or a question as to the credibility of a witness are not sufficient grounds for granting a new trial." *Id*. at 643 (quotation marks and citation omitted). To support a new trial, the witness testimony must "contradict[] indisputable physical facts or laws," be "patently incredible or def[y] physical realities," be "so inherently implausible that it could not be believed by a reasonable juror," or have been "seriously impeached" in a case that was "marked by uncertainties and discrepancies." *Id*. at 643-644 (quotation marks and citations omitted).

The evidence in this case was not so incredible or contradicted as to warrant judicial interference. The jury was well aware that the complainant had never liked defendant. The complainant even told the forensic interviewer in great detail about her dislike of defen-

dant. The complainant's mother corroborated that the complainant had disliked defendant since the onset of their relationship. And defense counsel posited that this dislike led the complainant to fabricate the charges. The jury rejected this defense and deemed credible the complainant's accusations. We may not interfere with that assessment.

IV. SENTENCING

Finally, defendant argues that the trial court impermissibly increased the "floor" of defendant's minimum sentencing range through judicial fact-finding, contrary to the rule announced in *Alleyne v United States*, 570 US ___; 133 S Ct 2151, 2155; 186 L Ed 2d 314 (2013). In that case, the Supreme Court held that any fact that increases a mandatory minimum sentence is an "element" of the crime that must be submitted to the jury. However, as this Court recently held in *People v Herron*, 303 Mich App 392, 403; 845 NW2d 533 (2013), app for lv held in abeyance 846 NW2d 924 (2014), *Alleyne* does not implicate Michigan's sentencing scheme because "judicial fact-finding within the context of Michigan's sentencing guidelines [is] not used to establish the mandatory minimum floor of a sentencing range." Accordingly, we reject this claim of error.

We affirm.

FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ., concurred.

STONE V AUTO-OWNERS INSURANCE COMPANY

Docket No. 314427. Submitted June 3, 2014, at Detroit. Decided August 5, 2014. Approved for publication October 17, 2014, at 9:10 a.m.

William Stone brought an action in the Wayne Circuit Court against Auto-Owners Insurance Company, seeking survivors' loss benefits under the no-fault act, MCL 500.3101 *et seq*., for the death of his wife, Stephanie Stone, in an automobile accident. Stephanie owned and had registered the automobile, but neither she nor plaintiff had obtained an insurance policy for it. Plaintiff's parents, John and Linda Stone, however, had added Stephanie's automobile to their existing no-fault policy with defendant. While plaintiff and Stephanie were listed as drivers under that policy, it continued to list John and Linda as the insured parties. Linda testified that she told the insurance agent over the phone that Stephanie owned the automobile and was not living with her and John, and she paid defendant a premium to cover it, which defendant accepted. Defendant moved for summary disposition. The court, John H. Gillis, Jr., J., denied defendant's motion on the ground that defendant had accepted premiums from John and Linda knowing that Stephanie did not live with them. Defendant appealed by leave granted.

The Court of Appeals *held*:

1. Plaintiff was not entitled to no-fault benefits under MCL 500.3114(1), which provides that a personal protection insurance policy applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household. Stephanie was not living with John or Linda, who were named as the insureds under the policy. The term "person named in the policy" in MCL 500.3114(1) is synonymous with the "named insured," and persons designated merely as drivers under a policy (such as plaintiff and Stephanie) are neither named insureds nor persons named in the policy.

2. Plaintiff was also not entitled to survivors' loss benefits under MCL 500.3114(4), which allows vehicle occupants to claim benefits from the insurer of a vehicle's owner, registrant, or operator. MCL 500.3114(4) applies when the injured person is not covered under MCL 500.3114(1) by his or her own insurance or the

insurance of a relative domiciled in the same household. Plaintiff argued that Stephanie would have been entitled to benefits under MCL 500.3114(4) because she was the owner, registrant, and operator of the automobile at the time of the accident causing her death and defendant was her insurer under the policy. Even if the owner, registrant, or operator of a vehicle is not a named insured in a policy, the named insured's insurer might nonetheless constitute an insurer of the automobile's owner, registrant, or operator under MCL 500.3114(4) if the policy expands the definition of "insured person" beyond the named insured so that it includes those persons. Neither Stephanie nor plaintiff was a named insured in the policy, however, and plaintiff identified no policy language showing the intent of any of the contractual parties to include plaintiff or Stephanie as contractual insureds.

3. Plaintiff argued on appeal that the plain language of the policy should be ignored and that plaintiff should be permitted to recover benefits on Stephanie's behalf because (1) Linda requested a new policy in Stephanie's name, (2) Linda thought she was receiving such a policy given her conversation with her insurance agent, and (3) Linda paid defendant premiums that defendant accepted while knowing that Stephanie did not live with John or Linda. Plaintiff, however, did not allege in his complaint or argue in response to defendant's motion for summary disposition that defendant should be estopped from enforcing the plain language of the policy or that the policy contained a latent ambiguity, and he did not request that the policy be reformed to comport with the contracting parties' true intent. Therefore, the legal basis for plaintiff's requested relief and the trial court's decision was unclear because plaintiff failed to cite or rely on any legal theory apart from MCL 500.3114(4). Accordingly, defendant was entitled to judgment as a matter of law. Courts must enforce a policy as written absent some highly unusual circumstance, such as a contract in violation of law or public policy, which plaintiff did not allege. Further, because neither plaintiff nor Stephanie was a party to the contract between John, Linda, and defendant, plaintiff could not obtain reformation of that contract. Nor could plaintiff satisfy the requirements for equitable estoppel because any representations made were to Linda, who was not a party to the lawsuit.

Order vacated and case remanded for entry of an order granting summary disposition in defendant's favor.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — RECOVERY BY PERSONS NOT COVERED UNDER NO-FAULT POLICY.

MCL 500.3114(4) allows vehicle occupants to claim personal protection insurance benefits under the no-fault act, MCL 500.3101 *et*

> *seq*., from the insurer of a vehicle's owner, registrant, or operator when the injured person is not covered under MCL 500.3114(1) by his or her own insurance or the insurance of a relative domiciled in the same household; even if the owner, registrant, or operator of a vehicle is not a named insured in a policy, the named insured's insurer might constitute an insurer of the automobile's owner, registrant, or operator for purposes of MCL 500.3114(4) if the policy expands the definition of "insured person" beyond the named insured so that it includes those persons.

Mindell, Malin, Kutinsky, Stone & Blatnikoff (by *Alan G. Blatnikoff* and *Matthew G. Gauthier*) for plaintiff.

Secrest Wardle (by *Mark E. Morley*, *Mark C. Vanneste*, and *Sidney A. Klingler*) for defendant.

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

WILDER, P.J. In this action for survivor's loss benefits under the no-fault act, MCL 500.3101 *et seq*., our Supreme Court remanded the case to this Court for consideration as if on leave granted.[1] Defendant challenges the trial court's order denying its motion for summary disposition under MCR 2.116(C)(8) (failure to state a claim) and MCR 2.116(C)(10) (no genuine issue of material fact). We vacate the order and remand.

I

Plaintiff seeks payment of survivors' loss benefits from defendant as the widower of Stephanie Stone, who died in an automobile accident in October 2010 while driving a 2002 Ford Taurus, which she had owned and registered. Neither plaintiff nor Stephanie obtained an insurance policy with defendant, or any other insurer, for the Taurus. However, in August 2010, plaintiff's

[1] *Stone v Auto-Owners Ins Co*, 495 Mich 912 (2013).

parents, John and Linda Stone, added Stephanie's Taurus to their existing no-fault policy with defendant. Plaintiff and Stephanie had been listed as drivers under that policy since 2008. After the 2010 addition of Stephanie's Taurus, the policy continued to list "John & Linda Stone" as the "insured."

The Morris W. Smith Insurance Agency (Morris Smith) facilitated the addition of Stephanie's Taurus to the policy on Linda's behalf. Linda and Tina Abbey, the owner of Morris Smith, were each deposed. Linda said she had told an agent at Morris Smith over the phone that Stephanie owned the Taurus and was not living with her and John. According to Linda, she thought she would be receiving a new policy in plaintiff's and Stephanie's names, and she paid defendant a six-month premium to cover Stephanie's vehicle, which defendant accepted. She acknowledged, however, that she received a copy of the policy listing only "John & Linda Stone" as the "insured" and delivered a copy to plaintiff. Abbey averred that, on the basis of her review of the agency's activity notes, it was fair to say that when the Taurus was added to John and Linda's policy, no one at the agency was aware that it was owned by anyone other than John or Linda.

Following a hearing, the trial court denied defendant's motion for summary disposition on the basis that defendant had accepted premiums from John and Linda and knew that Stephanie did not live with them. The trial court later denied defendant's motion for reconsideration.

II

Defendant argues that the trial court erred by denying its motion for summary disposition because Stephanie would not have been entitled to no-fault

benefits under MCL 500.3114. This Court reviews de novo matters of statutory and contract interpretation, as well as the trial court's decision to grant or deny a motion for summary disposition. See *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012).[2]

As this Court stated in *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200, 206-207; 828 NW2d 459 (2012):

> 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." Summary disposition under subrule (C)(8) is appropriate "if no factual development could justify the plaintiff's claim for relief." A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support of a plaintiffs' claim." In reviewing a motion under subrule (C)(10), we consider "the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." [Citations omitted.]

And as our Supreme Court stated in *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002):

> 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.

---

[2] Despite plaintiff's assertions to the contrary, we conclude that each of defendant's arguments in support of reversal was properly preserved for appellate review.

> Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. Further, we give undefined statutory terms their plain and ordinary meanings. In those situations, we may consult dictionary definitions. [Citations omitted.]

"Insurance policies are contracts and, in the absence of an applicable statute, are 'subject to the same contract construction principles that apply to any other species of contract.' " *Hyten*, 491 Mich at 554 (citation omitted). "The primary goal in the construction or interpretation of any contract is to honor the intent of the parties," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473; 663 NW2d 447 (2003),[3] but "unambiguous contracts, including insurance policies, are to be enforced as written unless a contractual provision violates law or public policy," *Rory v Continental Ins Co*, 473 Mich 457, 491; 703 NW2d 23 (2005).

A

MCL 500.3114(1) provides in relevant part as follows:

> Except as provided in subsections (2), (3), and (5), a personal protection insurance policy described in [MCL 500.3101(1)] applies to accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident.

Defendant argues that plaintiff is not entitled to survivors' loss benefits[4] under the plain language of

---

[3] Citation and quotation marks omitted.

[4] See MCL 500.3108 (discussing survivors' loss benefits). See also *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 255; 293 NW2d 594 (1980) ("[I]t is necessary to infer from the language of [MCL 500.3114 and MCL 500.3115] that where an injured person is given the right to

MCL 500.3114(1), and plaintiff does not argue to the contrary. There is no dispute that, at the time of the accident, Stephanie was neither married to nor living with John or Linda, and the policy at issue only names "John & Linda Stone" as the "insured." As this Court has held, the "person named in the policy" under MCL 500.3114(1) is synonymous with the "named insured," and persons designated merely as drivers under a policy (such as plaintiff and Stephanie) are neither named insureds nor persons named in the policy. *Transamerica Ins Corp of America v Hastings Mut Ins Co*, 185 Mich App 249, 254-255; 460 NW2d 291 (1990); see also *Dairyland Ins Co v Auto Owners Ins Co*, 123 Mich App 675, 685; 333 NW2d 322 (1983). Accordingly, plaintiff is not entitled to no-fault benefits under MCL 500.3114(1).

B

Rather, plaintiff argues that he is entitled to survivors' loss benefits under MCL 500.3114(4), which allows vehicle occupants to claim benefits from the insurer of a vehicle's owner, registrant, or operator:

> Except as provided in subsections (1) to (3), a person suffering accidental bodily injury arising from a motor vehicle accident while an occupant of a motor vehicle shall claim personal protection insurance benefits from insurers in the following order of priority:
>
> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied.

Our Supreme Court discussed the scope of coverage under MCL 500.3114 in *Belcher v Aetna Cas & Surety Co*, 409 Mich 231, 251-253; 293 NW2d 594 (1980):

---

recover benefits from a specific insurer, his surviving dependents have the same right of recovery for their losses.").

> [MCL 500.3114 and MCL 500.3115] constitute both entitlement provisions and priority provisions in certain respects. They are entitlement provisions in the sense that they are the only sections where persons are given the right to claim personal protection insurance benefits from a specific insurer. They are priority provisions in that they define the circumstances in which a particular insurance source is liable to provide personal protection insurance benefits. In most situations, where an injured person is insured or where an injured person's family member is insured under a no-fault insurance policy, the injured person seeks benefits from his own insurer [under MCL 500.3114(1)]. In situations where [MCL 500.3114(1)] does not operate, the determination as to which insurer, if any, is liable to pay personal protection insurance benefits is made by considering the circumstances in which the injury occurred. In these instances, the relationship between the injured person and motor vehicles involved in the accident determines which insurance source is liable for the payment of benefits. [Citations omitted.]

MCL 500.3114(4) applies when the injured person is not covered by his or her own insurance or the insurance of a relative domiciled in the same household under MCL 500.3114(1) and permits the injured person to seek benefits from the no-fault insurers of others, including the vehicle's owner, registrant, or operator. Here, however, plaintiff argues that Stephanie would have been entitled to benefits under MCL 500.3114(4) because she was the owner, registrant, and operator of the Taurus at the time of the accident causing her death and defendant was her insurer under the policy.

This Court has held that even if the owner, registrant, or operator of a vehicle is not a named insured under a policy, the named insured's insurer may also constitute an "insurer" of the owner, registrant, or operator under MCL 500.3114(4) if the policy expands the definition of "insured person" beyond the named

insured so that it includes those persons. See *Dobbelaere v Auto-Owners Ins Co*, 275 Mich App 527, 532-533; 740 NW2d 503 (2007) ("[T]his Court has held that whether the issuer of a no-fault insurance policy is the 'insurer' of a household member or family member for purposes of MCL 500.3114(4) 'depends on the language of the relevant insurance policy.' "), quoting *Amerisure Ins Co v Coleman*, 274 Mich App 432, 436 n 1; 733 NW2d 93 (2007). The policy at issue here names "John & Linda Stone" as the insured," and plaintiff does not identify any policy language expanding the meaning of "insured" to include Stephanie.

In *Coleman*, 274 Mich App at 435, the Court used *Black's Law Dictionary* (7th ed) to define "insurer" as one "who agrees, by contract, to assume the risk of another's loss and to compensate for that loss." (Quotation marks omitted.) The Court then held that the insurer of the named insured was also an insurer of the named insured's family member because the policy stated that the insurer agreed to insure the named insured and a spouse residing in the same household and also defined "insured" as including "[y]ou or any family member." *Coleman*, 274 Mich App at 436 (quotation marks omitted).

But when a policy only provides for a named insured and does not extend coverage to other persons, the insurer is only an "insurer" of the named insured. See *id*. at 437-438; *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 15; 684 NW2d 391 (2004) (holding that a named insured's insurer was not an insurer of the vehicle's owner and operator under MCL 500.3114(4) when the policy did not expand the definition of "insured" to include the vehicle's owner or operator). This is true even if the vehicle's owner, registrant, or operator could derivatively obtain no-

fault benefits under MCL 500.3114(1) through a third person's policy. In *Dobbelaere*, 275 Mich App at 531-532, the plaintiff was injured as an occupant of a vehicle being driven by its owner, and the vehicle's owner was entitled to benefits under MCL 500.3114(1) through a no-fault policy issued to the vehicle owner's resident relative. Nevertheless, the Court held that the named insured's insurer was not the insurer of the vehicle owner under MCL 500.3114(4) because the owner was not a named insured under the policy. *Id.* at 534. In so ruling, the Court stated that unlike the policy at issue in *Coleman*, the relevant policy did not define who was an insured and its plain language did not indicate any intent by either contracting party to render the vehicle owner a contractual insured. *Id*.

Similarly, there is no dispute here that neither Stephanie nor plaintiff was a named insured in the policy at issue. Again, plaintiff does not identify any policy language evidencing the intent of either contractual party to have plaintiff or Stephanie included as a contractual insured. Further, plaintiff's argument that defendant bears the burden of demonstrating policy language that affirmatively denounces Stephanie's status as an insured is without merit in light of the controlling decisions in *Dobbelaere*, 275 Mich App 527, *Coleman*, 274 Mich App 432, and *Amerisure*, 262 Mich App 10, which require contractual language extending coverage beyond the named insured. As this Court stated in *Coleman*, it is a "well-established rule" that PIP coverage applies to the *insured person*, not the vehicle. *Coleman*, 274 Mich App at 438. Accordingly, because plaintiff has failed to identify policy language evidencing an intent to include Stephanie as an insured, plaintiff is not entitled to survivors' loss benefits under MCL 500.3114(1) or (4).

C

Last, plaintiff argues that this Court should ignore the plain language of John and Linda Stone's policy and permit plaintiff to recover benefits on Stephanie's behalf because (1) Linda requested a new policy in Stephanie's name, (2) Linda thought she was receiving such a policy given her conversation with her insurance agent, and (3) Linda paid defendant premiums for such a policy, which defendant accepted while knowing that Stephanie did not live with John or Linda. But in his complaint and response to defendant's motion for summary disposition, plaintiff did not allege or argue that defendant should be estopped from enforcing the plain language of the policy or that the policy contained a latent ambiguity, and he did not request that the policy be reformed to comport with the contracting parties' true intent. Thus, the legal basis for plaintiff's requested relief and the trial court's decision is unclear, as plaintiff has failed to cite or rely on any legal theory apart from MCL 500.3114(4). For this reason alone, defendant was entitled to judgment as a matter of law under MCR 2.116(C)(8) and (10) with respect to this portion of plaintiff's argument.

In any event, "a policyholder cannot be said to have reasonably expected something different from the clear language of the contract," and "courts are to enforce [an] agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy," which plaintiff does not allege in this case. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51, 62; 664 NW2d 776 (2003) "[I]f there is more than one way to reasonably interpret a contract, i.e., the contract is ambiguous, and one of these interpretations is in accord with the reasonable expectations of the insured, this interpretation should prevail," *id.* at 60, but again,

plaintiff did not argue that the policy here is ambiguous—either patently or latently. Further, because neither plaintiff nor Stephanie was a party to the contract between John, Linda, and defendant, plaintiff cannot obtain reformation of that contract. *Mate v Wolverine Mut Ins Co*, 233 Mich App 14, 25; 592 NW2d 379 (1998); *Harwood v Auto-Owners Ins Co*, 211 Mich App 249, 253-254; 535 NW2d 207 (1995).

Further,

> [e]quitable estoppel may arise where (1) a *party*, by representations, admissions, or silence intentionally or negligently induces *another party* to believe facts, (2) the *other party* justifiably relies and acts on that belief, and (3) the *other party* is prejudiced if the first party is allowed to deny the existence of those facts. [*West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998) (emphasis added).].

As defendant points out, there is no evidence that defendant made any representation to Stephanie or plaintiff, who is the "other party" in this case. Whatever representations were made, they were made to Linda, who is not a party to this action. And when an insurance policy is "facilitated by an independent insurance agent or broker," such as Morris Smith, "the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer." *Id.* at 310. Thus, the representations of Morris Smith were not representations of defendant. Therefore, even if plaintiff had relied on an equitable estoppel theory below, it would have had no merit.

III

We vacate the trial court's order denying defendant's motion for summary disposition and remand for entry of an order granting the motion. We do not retain

jurisdiction. Defendant, as the prevailing party, may tax costs pursuant to MCR 7.219.

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

WILLIAMS v ENJOI TRANSPORTATION SOLUTIONS

FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN v ENJOI TRANSPORTATION

Docket Nos. 312872 and 312882. Submitted February 12, 2014, at Detroit. Decided October 9, 2014, at 9:00 a.m. Leave to appeal sought.

Jake Williams, Jr., brought an action in the Wayne Circuit Court against Enjoi Transportation Solutions and others, seeking personal protection insurance benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries he suffered when he fell from his motorized wheelchair while being transported in a van owned and operated by Enjoi and insured by American Guarantee and Liability Insurance Company. American Guarantee disputed whether Williams was entitled to no-fault benefits, and Williams's claim was assigned to Farm Bureau Insurance Company by the assigned claims facility. Farm Bureau filed a separate action in the Wayne Circuit Court, seeking a declaratory judgment that it was entitled to reimbursement under MCL 500.3172(1) from American Guarantee for the benefits it had provided to Williams. The trial court, Prentis Edwards, J., consolidated the cases and granted summary disposition in Farm Bureau's favor.

The Court of Appeals *held*:

The trial court properly determined that Farm Bureau was entitled to reimbursement from American Guarantee under MCL 500.3172(1), regardless of whether Williams was entitled to the benefits he received, because Farm Bureau's statutory right to reimbursement was independent of Williams' claim and was not based on a subrogation theory.

Affirmed.

INSURANCE — NO-FAULT — ASSIGNED CLAIMS — REIMBURSEMENT FROM DEFAULTING INSURER — MERITS OF UNDERLYING CLAIM FOR BENEFITS.

An insurer to which a claim was assigned by the Michigan assigned claims facility is entitled to reimbursement from the defaulting insurer under MCL 500.3172(1) independently of the merits of the underlying claim for no-fault benefits.

Anselmi & Mierzejewski, PC (by *John D. Ruth* and *Michael D. Phillips*), for Farm Bureau Insurance Company.

Ward, Anderson, Porritt & Bryant, PLC (by *David S. Anderson* and *Nicolette S. Zachary*), for American Guarantee and Liability Insurance Company.

Before: O'CONNELL, P.J., and WILDER and METER, JJ.

PER CURIAM. In this automobile-insurance dispute, defendant American Guarantee and Liability Insurance Company appeals[1] the September 24, 2012, order granting summary disposition to defendant Farm Bureau Insurance Company and granting in part and denying in part summary disposition to Trinity Physical Therapy, Inc. We affirm.

These appeals arise from lawsuits surrounding a claim for no-fault personal protection insurance benefits made by Jake Williams, Jr. Enjoi Transportation Solutions is a company that provides nonemergency transportation to the elderly and disabled. Enjoi transported Williams to dialysis appointments multiple times a week because Williams had ambulatory difficulties and was commonly confined to a motorized "scooter" wheelchair. On January 19, 2010, Walter Slaughter picked Williams up in an Enjoi van at approximately 2:30 p.m.; Williams remained in the scooter while being transported. At some point during the transport, Williams fell from his scooter and sustained injuries; he claimed that Slaughter had not secured the scooter in the van and had been "hitting corners" on the freeway and that this caused Williams to fall. Slaughter, on the other hand, testified that he had secured the scooter in the van and that the only way Williams could have

[1] One appeal is by leave granted and one appeal is an appeal of right; the difference relates to the facts that separate lawsuits were filed below and the order in question was a final order concerning only one of the lawsuits. We note that the parties to the appeals have each filed only one brief in this Court.

fallen in the manner he did was if he had intentionally unlatched himself. Slaughter believed that Williams had intentionally tried to hurt himself.

On September 10, 2010, Farm Bureau filed a declaratory judgment action against Enjoi, alleging that, as a result of the above-mentioned incident, Williams filed a claim with the assigned claims facility of the Michigan Department of State; Farm Bureau had been assigned Williams's claim; and, as a result, Farm Bureau had incurred costs. On March 2, 2011, Farm Bureau filed its first amended complaint, naming American Guarantee as Enjoi's insurer and alleging that Farm Bureau was entitled to recover from American Guarantee all no-fault benefits paid to Williams because American Guarantee was a higher priority insurer.

On April 5, 2011, American Guarantee filed its answer to Farm Bureau's amended complaint and its affirmative defenses. American Guarantee stated that Williams's alleged injuries were not covered injuries because they "did not arise out of the ownership, operation, or maintenance of a motor vehicle as a motor vehicle" and Williams "did not suffer any accidental bodily injuries" on the date of the incident.

On October 6, 2011, Williams filed a complaint against Enjoi, Farm Bureau, and American Guarantee. The complaint alleged negligence against Enjoi and breach of contract against Farm Bureau and American Guarantee for failure to pay no-fault benefits. The two lawsuits were thereafter consolidated.

On June 19, 2012, Farm Bureau filed a motion for summary disposition under MCR 2.116(C)(8) and (10). In response, American Guarantee argued that there were material factual disputes regarding whether Williams's injuries actually arose out of a motor vehicle accident and regarding whether the injury was acciden-

tal. The trial court, without much explication, granted summary disposition to Farm Bureau.[2]

"This Court reviews de novo a trial court's decision on a motion for summary disposition." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). The trial court's statements on the record make clear that it granted summary disposition under MCR 2.116(C)(10). A motion for summary disposition 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 grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

We review de novo issues of statutory interpretation. *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 566; 702 NW2d 539 (2005).

The no-fault act, MCL 500.3101 *et seq.*, provides, in pertinent part:

> (1) Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out

[2] The proceedings below also included claims concerning Trinity Physical Therapy, Inc., which claimed that it was entitled to be reimbursed for physical therapy services provided to Williams. Initially, the present appeals encompassed issues related to Trinity. However, at oral argument, the attorney for American Guarantee indicated without equivocation that "the Trinity part of the case is gone" and that the only remaining issue concerned Farm Bureau's claim against American Guarantee.

> of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.
>
> * * *
>
> (4) Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. [MCL 500.3105.]

A person who is entitled to benefits because of an accidental bodily injury arising out of an automobile accident may obtain personal protection insurance benefits through the assigned claims plan if no personal protection insurance is applicable to the injury, no applicable insurance can be identified, the personal protection insurance applicable to the injury cannot be ascertained because of a dispute between automobile insurers, or the only identifiable personal protection insurance is inadequate to cover the loss because of the insurer's inability to fulfill its financial obligations. MCL 500.3172(1). The insurer of the owner or registrant of the vehicle involved in the accident has the highest priority for payment of benefits. MCL 500.3114(5)(a).

Unpaid benefits may be collected under the assigned claims plan, and the insurer to which the claim is assigned "is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility." MCL 500.3172(1); see also Mich Admin Code, R 11.105 ("[t]he assigned claims facility or the servicing insurer to which the claim is assigned is entitled to reimbursement for the personal protection insurance benefits which are provided and appropriate loss adjustment costs which are incurred from an insurer who is obligated to provide the personal protection insurance

benefits under a policy of insurance, but who fails to pay such benefits"). This right to reimbursement of paid benefits is independent of the rights of the party to whom the benefits were paid and is not based on a subrogation theory. *Allen v Farm Bureau Ins Co*, 210 Mich App 591, 596-597; 534 NW2d 177 (1995).

The primary task in construing the language of a statute is to discern and give effect to the intent of the legislature. *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). "If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted." *Id*. Courts must give undefined statutory terms their plain and ordinary meanings, and in those situations, dictionary consultation is proper. *Koontz v Ameritech Servs*, *Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

In MCL 500.3172(1), the Legislature used the word "reimbursement." According to *Random House Webster's College Dictionary* (1997), "reimburse" means "to make repayment to for expense or loss incurred," or "to pay back; refund; repay." Given the plain meaning of "reimburse," an assigned claims insurer, such as Farm Bureau, is entitled to repayment for the expense or loss incurred, not subject to other limitations that may apply to a direct suit from a claimant. We emphasize that the assigned claim statutes obligated Farm Bureau, as the servicing insurer, to adjust Williams's claim. See 500.3175(1); see also, generally, *Spencer v Citizens Ins Co*, 239 Mich App 291, 304-305; 608 NW2d 113 (2000). It did so and is thus entitled to be reimbursed for the amounts paid, even assuming that a genuine issue of material fact existed regarding whether Williams truly was entitled to benefits. Farm Bureau's payment of

benefits "entitled [it] to reimbursement for the personal protection insurance benefits which [were] provided . . . ." Mich Admin Code, R 11.105; see also *Allen*, 210 Mich App at 596-597 (indicating that the statutorily created right to reimbursement is independent of the claimant and not a subrogation action). MCL 500.3172(1) indicates that the insurer to which the claim is assigned "is entitled to reimbursement from the defaulting insurers to the extent of their financial responsibility." In this case, American Guarantee's "financial responsibility" is necessarily tied to manner in which Farm Bureau, as the initial adjusting insurer, adjusted the claim.

Because American Guarantee admitted that it insured the Enjoi vehicle at the time of the incident, the court properly determined that American Guarantee had priority to pay for Williams's benefits. The strength of Williams's underlying claim for no-fault benefits was no longer at issue. Therefore, there was no genuine issue of material fact that Farm Bureau was entitled to reimbursement from American Guarantee, and the trial court correctly granted summary disposition to Farm Bureau.

Affirmed.

O'CONNELL, P.J., and WILDER and METER, JJ., concurred.

TAYLOR v MICHIGAN PETROLEUM TECHNOLOGIES, INC

Docket No. 314534. Submitted September 4, 2014, at Detroit. Decided October 14, 2014, at 9:00 a.m.

Gregory Taylor and John Digicomo brought an action in the Genesee Circuit Court against Michigan Petroleum Technologies, Inc., alleging that its negligence led to an explosion and fire at one of its petroleum-product storage facilities, necessitating the evacuation of more than 4,500 people. Michigan Petroleum filed an answer, asserting as an affirmative defense that any damages resulting from the fire were caused by the electrical services or equipment supplied by Consumers Energy. Michigan Petroleum stipulated the entry of an order allowing Taylor to file an amended complaint that would substitute James Nieznajko for John Digicomo as plaintiff, add claims against Consumers Energy, and request that the matter be certified as a class action. Consumers Energy moved for summary disposition under MCR 2.116(C)(7), arguing that plaintiffs' allegations against it were barred by the three-year limitation period set forth in MCL 600.5805(1). The court, Judith A. Fullerton, J., denied the motion, ruling that although Michigan Petroleum had not served plaintiffs with a formal notice of nonparty at fault under MCR 2.112(K), its affirmative defense that Consumers Energy might be at fault substantially complied with the notice requirements of MCR 2.112(K), which rendered plaintiffs' claims against Consumers Energy timely under the relation-back provision in MCL 600.2957(2). After the Court of Appeals denied Consumers Energy's application for leave to appeal this ruling, Consumers Energy applied for leave to appeal in the Supreme Court, which, in lieu of granting the application, remanded the case to the Court of Appeals for consideration as on leave granted. 495 Mich 983 (2014).

The Court of Appeals *held*:

The trial court erred when it determined that Michigan Petroleum had provided plaintiffs with the notice required under MCR 2.112(K)(3). Because the notice requirements regarding affirmative defenses and notices of nonparty at fault serve distinct purposes and involve different criteria, a party may not properly join these notices into a single section. Even if a party could serve

a notice of nonparty at fault in its affirmative defenses, the notice in this case did not comply with the requirements of MCR 2.112(K)(3) because it did not identify Consumers Energy as a nonparty at fault, did not cite MCR 2.112(K), and did not otherwise state that it was asserting its right to have the finder of fact allocate fault to Consumers Energy. Because proper notice under MCR 2.112(K) is a prerequisite to the application of MCL 600.2957(2), that statutory provision did not apply to save plaintiffs' otherwise untimely claims against Consumers Energy.

Reversed and remanded for entry of an order dismissing plaintiffs' claims against Consumers Energy.

NEGLIGENCE — FAULT OF NONPARTIES — NOTICE — STATUTES — COURT RULES.

The filing of an affirmative defense alleging that a nonparty may have been at fault in a negligence action that does not meet the separate notice requirements of MCR 2.112(K) does not allow a plaintiff to avoid an otherwise applicable statutory limitation period by applying the relation-back provision in MCL 600.2957(2).

Hertz Schram PC (by *Elizabeth C. Thomson*, *Patricia A. Stamler*, and *Matthew J. Turchyn*) for Gregory Taylor, James Nieznajko, and others.

Michael G. Wilson for Consumers Energy Company.

Amicus Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Irene Bruce Hathaway* and *Paul Hudson*), for Michigan Defense Trial Counsel.

Before: METER, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM. In this class action to recover damages related to an explosion and fire, defendant Consumers Energy Company appeals by leave granted the trial court's order denying its motion to dismiss the claims alleged against it by plaintiffs, Gregory Taylor and James Nieznajko. On appeal, Consumers Energy argues

that Taylor and Nieznajko amended their complaint to include claims against Consumers Energy after the expiration of the applicable period of limitations. Although Taylor and Nieznajko filed their amended complaint after defendant Michigan Petroleum Technologies, Inc., indicated its belief that Consumers Energy was a third party at fault, Consumers Energy maintains that, because Michigan Petroleum did not comply with the requirements applicable to a notice of nonparty at fault, Taylor and Nieznajko could not rely on MCL 600.2957(2) to extend the period of limitations and the trial court should have dismissed the claims as untimely. We conclude that the trial court erred when it determined that the identification of Consumers Energy as a potential third party at fault met the notice requirements stated under MCR 2.112(K). Because the identification did not satisfy the notice requirements, Taylor and Nieznajko could not rely on MCL 600.2957(2) to avoid application of the three-year period of limitations and the trial court, accordingly, should have dismissed the claims against Consumers Energy under MCR 2.116(C)(7). For these reasons, we reverse and remand for entry of an order dismissing the claims against Consumers Energy.

I. BASIC FACTS

Michigan Petroleum owned and operated a facility in Clio, Michigan, which was part of its White Oil Division. The White Oil facility had several buildings, including a building on the north end of the property that was used to store petroleum products. On August 4, 2009, there was an explosion and fire at the north building. Because of the hazardous nature of the materials involved in the fire, emergency personnel evacuated more than 4,500 people from nearby homes and businesses.

In June 2012, John Digicomo and Taylor sued Michigan Petroleum. They alleged that Michigan Petroleum negligently operated the White Oil facility and that Michigan Petroleum's operation of the facility amounted to a nuisance that interfered with their use and enjoyment of their own property. They further alleged that Michigan Petroleum's improper operation of the White Oil facility led to the explosion and fire, which harmed them. Finally, they asked the trial court to certify them as representatives for all similarly situated persons who might have been harmed by the explosion and fire at the White Oil facility.

On August 2, 2012, just days before the three-year anniversary of the explosion and fire, Michigan Petroleum filed its answer. In a separate section at the end of its answer, Michigan Petroleum listed various allegations that it characterized as "Affirmative and/or Special Defenses." In the third paragraph, Michigan Petroleum alleged that any damages resulting from the fire "were caused by . . . Consumers Energy, its employees and suppliers, who supplied and/or failed to service defective electrical equipment, or who otherwise failed to anticipate or alleviate an electrical power event which caused the fire . . . suddenly and without warning."

In October 2012, Michigan Petroleum stipulated the entry of an order allowing Taylor to file an amended complaint that would substitute Nieznajko for Digicomo as plaintiff and include claims against Consumers Energy. In that same month, Taylor and Nieznajko filed their amended complaint. They asserted a claim of negligence against Michigan Petroleum and added a claim that Consumers Energy had negligently failed to inspect, maintain, or repair its electrical equipment at the White Oil facility, which caused the explosion and

fire. They also alleged that both Michigan Petroleum and Consumers Energy's actions amounted to a nuisance. Finally, they asked the trial court to certify them as the representatives of all similarly situated persons who might have been harmed by the explosion and fire at the White Oil facility.

Consumers Energy responded by moving for summary disposition in November 2012. Consumers Energy argued—in relevant part—that the allegations in the complaint by Nieznajko and Taylor demonstrate that their claims involved injuries to persons or property that must be filed within three years.[1] See MCL 600.5805(10). Nieznajko and Taylor, Consumers Energy stated, did not amend their complaint to include claims against it until more than three years after the explosion and fire. Consumers Energy maintained that the three-year period was not extended under MCL 600.2957(2), because Michigan Petroleum did not serve Nieznajko and Taylor with a notice of nonparty at fault that complied with MCR 2.112(K). Accordingly, it asked the trial court to dismiss the claims against it as untimely under MCR 2.116(C)(7).

Nieznajko and Taylor disagreed that Michigan Petroleum failed to give notice of nonparty at fault. Specifically, they argued that Michigan Petroleum gave them notice that Consumers Energy might be at fault through the allegations stated in the third paragraph of its affirmative defenses.

The trial court held a hearing on the motion in January 2013. It agreed that Michigan Petroleum had substantially complied with MCR 2.112(K) by notifying Nieznajko and Taylor in its affirmative defenses that

[1] Consumers Energy moved for summary disposition on other grounds, which the trial court also denied. The trial court's decision as to these alternate bases for relief is not before us.

Consumers Energy might be at fault. Because Nieznajko and Taylor filed their amended complaint within 91 days of the notice and filed their original complaint before the expiration of the applicable period of limitations, the trial court determined that the claims against Consumers Energy were timely under MCL 600.2957(2). Accordingly, it denied Consumers Energy's motion in an order entered that same month.

At Consumers Energy's request, the trial court stayed further action to allow Consumers Energy to appeal its decision.

In January 2013, Consumers Energy sought leave to appeal in this Court, which this Court denied. See *Taylor v Mich Petroleum Tech, Inc*, unpublished order of the Court of Appeals, entered October 18, 2013 (Docket No. 314534). Consumers Energy then applied for leave to appeal in our Supreme Court and, in lieu of granting leave, the Supreme Court remanded the case to this Court for consideration as on leave granted. See *Taylor v Mich Petroleum Tech, Inc*, 495 Mich 983 (2014).

II. NOTICE OF NONPARTY AT FAULT

A. STANDARDS OF REVIEW

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 whether the trial court properly interpreted and applied statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012).

B. COMPARATIVE FAULT AND NONPARTIES

In 1995, the Legislature generally abolished joint and several liability in favor of several liability. See 1995 PA

161. The Legislature gave effect to this policy change through several statutes, including MCL 600.2957 and MCL 600.6304.

Under MCL 600.6304(1), in an "action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties," a trial court must instruct the jury—or make independent findings after a bench trial—to answer special interrogatories assigning the "percentage of the total fault of all persons that contributed to the" injury at issue. MCL 600.6304(1)(b). The allocation of fault must include the fault of "each plaintiff" and should be allocated without regard to whether the "person was or could have been named as a party to the action." *Id*. The liability is "several only and not joint," and no person may be "required to pay damages in an amount greater than his or her percentage of fault . . . ." MCL 600.6304(4). The trial court may only enter a judgment against a party to the suit. See MCL 600.6304(3).

Similarly, MCL 600.2957(1) provides that "the trier of fact" must allocate "the liability of each person" involved in an "action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death," subject to the provisions of MCL 600.6304, "in direct proportion to the person's percentage of fault." As with MCL 600.6304(1)(b), the finder of fact must allocate fault in proportion to the person's percentage of fault "regardless of whether the person is, or could have been, named as a party to the action." MCL 600.2957(1). Thus, the finder of fact must allocate fault even for nonparties, but the allocation does not give rise to liability:

> Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action. [MCL 600.2957(3).]

Because the finder of fact must allocate fault even to nonparties, the Legislature provided plaintiffs with an opportunity to bring the nonparty into the litigation: "after identification of a nonparty," the plaintiff may sue the nonparty by moving for permission to amend his or her complaint to allege "1 or more causes of action against that nonparty" within 91 days of the identification, which motion the trial court must grant. MCL 600.2957(2). Moreover, the Legislature provided that the plaintiff's "cause of action added under" MCL 600.2957(2) "is not barred by a period of limitation" if the cause of action would have been timely "at the time of the filing of the original action." *Id*. That is, if during the course of the litigation the plaintiff receives an "identification of a nonparty," who may be at fault, the plaintiff may sue the nonparty and the amended complaint will—for all practical purposes—relate back to the date that the plaintiff filed his or her original complaint.

With these statutory provisions, the Legislature enacted substantive changes to the law of torts by altering the balance of two competing principles: the principle that every person injured by another person or persons has the right to be fully compensated for the harm, and the principle that those who cause a particular harm should only be responsible for his or her share in producing the harm. See *McDougall v Schanz*, 461 Mich 15, 30-31; 597 NW2d 148 (1999) (distinguishing substantive laws from procedural rules). By permitting the allocation of liability to nonparties, the Legislature

decreased the risk that a particular defendant would be required to pay compensation for another party's share of the harm caused to the plaintiff, but increased the risk that the plaintiff would not receive full compensation for his or her injuries. This might occur when the plaintiff learns about a nonparty's role during discovery, but after the passage of the period of limitations. To mitigate the risk that an injured party would not be fully compensated, the Legislature provided plaintiffs with an opportunity to amend their complaints to include those nonparties who are identified during the course of the litigation and further provided that the amendment would be deemed timely if the claims would have been timely had the plaintiffs included them in their original complaints. Accordingly, with the enactment of MCL 600.2957(2), the Legislature made a clear policy choice in favor of allowing a plaintiff to amend his or her complaint to include a nonparty within 91 days of the "identification of [the] nonparty" and have that amendment relate back to the filing of the original complaint for purposes of the applicable period of limitations. See *Trentadue v Buckler Lawn Sprinkler Co*, 479 Mich 378, 403-405; 738 NW2d 664 (2007) (stating that the Legislature has the unquestioned right to enact periods of limitation and provide for tolling under specified conditions).

C. MCR 2.112(K)

The Legislature did not define what constitutes an "identification of a nonparty" for purposes of MCL 600.2957(2) and did not address who must make the identification under that provision. Because the Legislature chose not to limit the phrase "identification of a nonparty" to acts done by any particular party and did not define what constitutes an identification within the

meaning of MCL 600.2957(2), the statute could refer to any identification—formal or informal—by any party, if the words used were given their common and approved usage. See *Ford Motor Co v Woodhaven*, 475 Mich 425, 439; 716 NW2d 247 (2006) (noting that courts must normally give the words used in a statute their common and approved usage); *The Oxford English Dictionary* (2d ed, 1991) (defining "identification" to mean the "action of identifying or fact of being identified"). However, after the Legislature enacted these changes, our Supreme Court promulgated an amendment to MCR 2.112, which addressed the procedures applicable to the allocation of liability to nonparties. See 453 Mich cxix.

That rule "applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which MCL 600.2957 and MCL 600.6304" apply. MCR 2.112(K)(1). The Supreme Court specified in MCR 2.112(K)(2) that the trier of fact "shall not assess the fault of a nonparty unless notice has been given as provided" under MCR 2.112(K)(3). The notice must be filed by a party "against whom a claim is asserted" and must assert that the nonparty is "wholly or partially at fault." MCR 2.112(K)(3)(a). The notice must "designate the nonparty and set forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault." MCR 2.112(K)(3)(b). Finally, the notice must be filed within 91 days after the party files its first responsive pleading. MCR 2.112(K)(3)(c).

As can be seen, the court rule provides the procedures with which a "party against whom a claim is asserted"—a defendant—must comply before a "trier of

fact" will be permitted to allocate fault to a nonparty. MCR 2.112(K)(2); MCR 2.112(K)(3)(a). That is, a defendant's failure to give the notice required under the court rule amounts to a procedural waiver of the right to have a nonparty assigned fault as provided under MCL 600.6304 and MCL 600.2957. In addition, the court rule recognizes that service of the notice required under MCR 2.112(K)(3) triggers the plaintiff's right to file a claim under MCL 600.2957(2): if a party receives "a notice under this subrule," the party served "may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty." MCR 2.112(K)(4). The rule also clarifies that, if there are multiple notices under the court rule for the same nonparty, the plaintiff must exercise its right to amend under MCL 600.2957(2) within 91 days of the first notice. Thus, the court rule impliedly limits a plaintiff's ability to take advantage of MCL 600.2957(2)—notwithstanding that there may have been an identification within the meaning of that statute—on the basis of a defendant's failure to give the notice required under MCR 2.112(K). And, indeed, this Court has held that a plaintiff may not take advantage of that statute unless a defendant provides the plaintiff with a notice of nonparty at fault that complies with MCL 600.2957(2). See *Staff v Johnson*, 242 Mich App 521; 619 NW2d 57 (2000).

In *Staff*, the lawyer for defendants, Curtis C. Marder, M.D., and his professional corporation, informally notified the plaintiff, John L. Staff, that another physician may have been responsible for the administration of the drug that formed the basis of his medical malpractice claim. *Id*. at 524-526. The trial court later gave Staff permission to amend his complaint to include claims against Joel A. Johnson, M.D., and his professional corporation, who were identified as "prospective non-

party defendants." *Id*. at 526. Johnson moved for summary disposition on the grounds that Staff's claim against him and his professional corporation was untimely and was not entitled to the relation-back provision in MCL 600.2957(2) because there had not been a formal notice of nonparty at fault. *Id*. at 527. The trial court acknowledged that there had been no formal notice, but determined that such notice was not required. *Id*. There was also evidence that Staff's lawyer stipulated to forgo the notice requirement. *Id*. at 529.

On appeal, this Court rejected the notion that Staff's lawyer could stipulate to forgo the notice requirement and concluded that the failure by Marder's lawyer to provide formal notice was purposeful because he "could not establish reasonable diligence for failing to timely name [Johnson and his professional corporation]." *Id*. The Court also rejected the contention that the provisions of MCL 600.2957(2) governed despite the time limit provided under MCR 2.112(K)(3)(c). *Id*. at 530-531. It explained that statutes governing a period of limitations are procedural, not substantive, and that therefore the Supreme Court's rules prevail when there is a conflict between a statutory provision governing the period of limitations and a related court rule. *Id*. at 533. The Court further justified its holding on the basis of public policy: "Parties could use the statute to add parties years after the litigation commenced to delay trial or encourage resolution by increasing the potential for settlement without regard to the rights of additional parties to be free from fear of litigation." *Id*. Because the parties must strictly comply with the court rule's notice provisions before a party may be added under MCL 600.2957(2), which was not done, the Court in *Staff* reversed the trial court's decision to deny the defendants' motion for summary disposition under MCR 2.116(C)(7). *Id*. at 533-534.

D. APPLICATION OF THE LAW

In this case, Michigan Petroleum did not serve Taylor and Nieznajko with a formal notice of its intent to have the finder of fact allocate fault to Consumers Energy, as required under MCR 2.112(K). Rather, it alleged—under the heading of affirmative or special defenses—that any damages "were caused by circumstances beyond [Michigan Petroleum's] control," which included "the intervening and superseding acts of negligence" by "Consumers Energy, its employees and suppliers, who supplied and/or failed to service defective electrical equipment, or who otherwise failed to anticipate or alleviate an electrical power event which caused the fire . . . ." Although the court rule does not require the party giving notice to give notice in a separate document, by referring to "a notice" and "the notice" that has been "filed," our Supreme Court indicated that the requirements of that rule must be met by a notice that is filed under the rule—that is, the filing must be identified as one purporting to give notice that the defendant is asserting his or her right to have the finder of fact allocate fault to a third party under the court rule. See, e.g., MCR 2.112(K)(3).

When Michigan Petroleum identified Consumers Energy as the party responsible for the harm, it did so in its affirmative defenses. Affirmative defenses must be stated under a "separate and distinct heading" and must include a statement of the facts constituting the defense. MCR 2.111(F)(3). The notice provisions applicable to affirmative defenses also serve a purpose that is distinct from that served by MCR 2.112(K). With an affirmative defense, the defendant does not challenge the plaintiff's prima facie case, but denies that the plaintiff is entitled to the requested relief. *Stanke v State Farm Mut Auto Ins Co*, 200 Mich App 307, 312; 503 NW2d 758 (1993). By requiring

the party asserting such a defense to state the facts constituting the defense under a separate and distinct heading, the court rules ensure that the adverse party will have sufficient information to take a responsive position. *Id*. at 317. By contrast, a notice of nonparty at fault notifies the plaintiff that the defendant intends to have the finder of fact consider the fault of a third party and ensures that the plaintiff will have the opportunity to timely assert a claim against that party. Because the notice requirements serve distinct purposes and involve different criteria, a party may not properly join these notices into a single section. Rather, each notice must be separately stated under a distinct heading, if not in a separate document.

In any event, even if Michigan Petroleum could properly give notice of nonparty at fault along with its notice of affirmative defenses, its notice was still deficient in several respects. Michigan Petroleum did not identify Consumers Energy as a nonparty at fault, did not cite MCR 2.112(K), and did not otherwise state that it was asserting its right to have the finder of fact allocate fault to Consumers Energy. The actual statement—at best—gave notice that Michigan Petroleum would argue that its acts or omissions did not proximately cause the injuries at issue or that there was an intervening unforeseeable act that cut off liability. See, e.g., *Veltman v Detroit Edison Co*, 261 Mich App 685, 694-696; 683 NW2d 707 (2004) (holding that a defendant's failure to file a notice of nonparty at fault under MCR 2.112(K) did not preclude the defendant from presenting evidence that the injury at issue was caused by a nonparty because that evidence pertained to causation). Therefore, it did not serve as the notice required by MCR 2.112(K).

In addition, in order to comply with the court rule, the party giving notice must "designate the nonparty and set

forth the nonparty's name and last known address, or the best identification of the nonparty that is possible, together with a brief statement of the basis for believing the nonparty is at fault." MCR 2.112(K)(3)(b). Michigan Petroleum did not, however, "designate" Consumers Energy as a nonparty at fault, did not provide an address for Consumers Energy—despite the fact that it is a well-known business, and did not provide a "basis for believing" that Consumers Energy was at fault beyond its bald assertion that Consumers Energy caused the explosion and fire. Even if a party could serve a notice of nonparty at fault in its affirmative defenses, the notice here plainly did not comply with the requirements stated under MCR 2.112(K)(3). Accordingly, the trial court erred when it determined that Michigan Petroleum complied with the notice requirements stated under MCR 2.112(K)(3).

III. CONCLUSION

The trial court erred when it determined that Michigan Petroleum had provided Taylor and Nieznajko with the notice required under MCR 2.112(K)(3). Moreover, because proper notice under that rule is a prerequisite to the application of MCL 600.2957(2), the trial court could not apply that provision to save Taylor and Nieznajko's otherwise untimely claims against Consumers Energy. The trial court should have dismissed those claims under MCR 2.116(C)(7).

Reversed and remanded for entry of an order dismissing Taylor and Nieznajko's claims against Consumers Energy. We do not retain jurisdiction. As the prevailing party, Consumers Energy may tax its costs. MCR 7.219(A).

METER, P.J., and K. F. KELLY and M. J. KELLY, JJ., concurred.

DIEM v SALLIE MAE HOME LOANS, INC

Docket No. 317499. Submitted October 7, 2014, at Lansing. Decided October 16, 2014, at 9:00 a.m.

Philip J. Diem brought an action in the Washtenaw Circuit Court against Sallie Mae Home Loans, Inc. (formerly known as Pioneer Mortgage, Inc.), Orlans Associates, PC, Danielle Jackson, Mortgage Electronic Registration Systems, Inc. (MERS), JPMorgan Chase Bank, and Federal National Mortgage Association (Fannie Mae). In 2003, as security for a loan from Pioneer, plaintiff and his wife executed a mortgage on their home. The mortgage identified MERS as the mortgagee. Plaintiff defaulted on the loan in 2010, and Orlans commenced mortgage foreclosure proceedings. In February 2011, Jackson, an Orlans attorney, filed an affidavit of scrivener's error to correct a mistake in the legal description of the property. The affidavit further stated that the mortgage was last assigned to JPMorgan. Other documents indicated that the assignment from MERS to JPMorgan did not take place until October 2011, several months after Jackson signed the affidavit. JPMorgan purchased the property at a sheriff's sale on February 23, 2012. JPMorgan subsequently conveyed its interest to Fannie Mae. Two days before the redemption period expired, plaintiff filed the three-count complaint, alleging wrongful foreclosure by advertisement, negligence, and fraud and conversion. Defendants moved for summary disposition. The court, David S. Swartz, J., entered a stipulated order dismissing Orlans and Jackson from the suit without prejudice. On the day of the summary disposition hearing, plaintiff moved to amend his complaint in order to assert new claims under the Fair Debt Collection Practices Act (FDCPA), 15 USC 1692k. Plaintiff subsequently sought to add a claim alleging a violation of his due process rights. The court denied plaintiff's motion to amend and granted summary disposition in favor of the remaining defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. Defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*. A mortgagor seeking to set aside a foreclosure by advertisement must allege facts to support three essential elements of the claim: (1) fraud or

irregularity in the foreclosure procedure, (2) prejudice to the mortgagor, and (3) a causal relationship between the alleged fraud or irregularity and the alleged prejudice. In this case, plaintiff alleged that JPMorgan was neither the mortgage holder nor the servicing agent and that the foreclosure thus violated MCL 600.3204. Assuming that allegation was sufficient to support the first element of plaintiff's claim, plaintiff failed to establish prejudice. Plaintiff alleged that defendants' actions caused him to lose an opportunity to challenge the foreclosure before the sheriff's sale, but he failed to support the conclusory allegation. Similarly, plaintiff's claim of negligence failed because he did not present any facts indicating that defendants' breaches of duty proximately caused any damage to him, and his claim of fraud failed because he did not allege any actionable prejudice resulting from defendants' representations. The trial court did not err by granting summary disposition with regard to these claims.

2. A party opposing a motion for summary disposition on the basis that discovery is not complete must provide independent evidence of a factual dispute. In this case, plaintiff failed to suggest what information might be within defendants' knowledge that could have demonstrated a causal connection between defendants' actions and any prejudice to plaintiff. When there is no reasonable indication that additional discovery will provide factual support for a mortgagor's challenge to a foreclosure by advertisement, a circuit court is within its discretion to deny further discovery.

3. A motion to amend may be denied on the basis of (1) undue delay, (2) bad faith or dilatory motive, (3) repeated failure to cure deficiencies, (4) undue prejudice to the opposing party, or (5) futility of the amendment. In this case, plaintiff exhibited undue delay in presenting the motion to amend. Plaintiff's attempt to add claims appeared to be an effort to circumvent the stipulated dismissal and prolong the summary disposition arguments. The delay in asserting the FDCPA claim, which arose from the same facts as plaintiff's other claims, prejudiced defendants in their ability to defend the claims and conduct efficient litigation. Plaintiff's attempt to add a due process claim was meritless because a mortgagor cannot pursue a due process claim against government-sponsored entities such as Fannie Mae. The trial court did not abuse its discretion by denying plaintiff's motions to amend.

Affirmed.

William E. Maxwell, Jr., for Philip J. Diem.

David M. Dell for Orlans Associates, PC, and Danielle Jackson.

Kullen & Kassab, PC (by *John A. Kullen* and *Andrew M. White*), for Mortgage Electronic Registration Systems, Inc., JPMorgan Chase Bank, and Federal National Mortgage Association.

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

O'CONNELL, J. This challenge to a mortgage foreclosure by advertisement is one of the spate of actions that have arisen in Michigan. Mortgagors, mortgagees, mortgage servicing agents, and the courts have contended with statutes, caselaw, and procedural rules attempting to lay bare the proper method of challenging foreclosure. Plaintiff's claims in this case present several issues the courts have previously addressed and have determined to be insufficient to state a claim. Having reviewed the issues in this case, we affirm the circuit court's dismissal of plaintiff's claims, and we reconfirm the high substantive and procedural standards a mortgagor must meet to state a claim challenging a foreclosure by advertisement.

I. FACTS AND PROCEDURAL HISTORY

In March 2003, plaintiff and his wife signed a 30-year note for a $300,000 loan from defendant Pioneer Mortgage, Inc. Paragraph 1 of the note established that the lender could transfer the note: "I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the 'Note Holder.' " Paragraph 6(B) of the note established that plaintiff and his wife had to make monthly payments on

the loan: "If I do not pay the full amount of each monthly payment on the date it is due, I will be in default."

As security for the loan, plaintiff and his wife executed a mortgage on their home, naming defendant Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee and Pioneer as the lender. The mortgage stated: "MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns."[1] The mortgage was recorded in the Washtenaw County Register of Deeds on April 10, 2003.

In 2010, plaintiff defaulted on the loan. In January 2011, defendant Orlans Associates informed plaintiff that mortgage foreclosure proceedings would be commenced. The following month, defendant Danielle Jackson—who was an Orlans attorney—recorded an affidavit of scrivener's error to correct a mistake in the mortgage's legal description of the property.[2] In Paragraph 5 of the affidavit, Jackson attested, "A review of the public record reveals that said mortgage was last assigned to JPMorgan Chase Bank, National Association by assignment submitted to and recorded by the Washtenaw County Register of Deeds." The pleadings in this case indicate that an assignment from MERS to JPMorgan Chase took place on October 5, 2011, several months after Jackson signed the affidavit. The assignment was recorded in October 2011.

On October 17, 2011, Orlans sent a certified letter informing plaintiff that JPMorgan Chase intended to initiate mortgage foreclosure proceedings. The parties did not attain a modification of the mortgage, and the

[1] In 2004, Pioneer changed its name to Sallie Mae Home Loans, Inc. Six years later, in June 2010, Sallie Mae dissolved.

[2] A word had been omitted in the legal description in the mortgage.

foreclosure by advertisement proceeded. JPMorgan Chase purchased the property at a sheriff's sale on February 23, 2012. The applicable statutory redemption provision allowed plaintiff to redeem the property before August 23, 2012.

Plaintiff did not redeem the property. Two days before the redemption period expired, plaintiff filed a three-count complaint against Pioneer, Orlans, Jackson, JPMorgan Chase, MERS, and defendant Federal National Mortgage Association (Fannie Mae).[3] In Count 1, entitled "Wrongful Foreclosure by Advertisement,"[4] plaintiff alleged that the assignment of the mortgage and note from MERS to JPMorgan Chase was invalid. Plaintiff further alleged that as a result the foreclosure and sheriff's sale were invalid, because the foreclosure and sale were initiated by an entity that did not own the note or the mortgage and had no record chain of title. In Count 2, entitled "Negligence," plaintiff alleged essentially the same acts against defendants and asserted that the acts violated defendants' duty to the public and to plaintiff.

Against specific defendants, plaintiff alleged that Jackson's affidavit falsely represented the date that MERS had assigned the mortgage to JPMorgan Chase. Plaintiff further alleged that MERS lacked legal ownership of the loan and that JPMorgan Chase should not have accepted the assignment from MERS. Plaintiff alleged that any assignments of the mortgage were invalid, because the mortgage terms required the note and mortgage to be maintained as a unit, rather than sold as separate interests.

---

[3] The record indicates that on August 16, 2012, JPMorgan Chase conveyed its interest to Fannie Mae by quitclaim deed.

[4] The capitalization and boldface of quoted titles from the complaint have been altered.

In Count 3, entitled "Fraud & Conversion," plaintiff alleged that defendants falsely represented they were the holders of plaintiff's note and mortgage and that defendants falsely represented themselves as proper parties to foreclose. Plaintiff went on to allege, "Defendants, with their false representations, intended to induce, and did induce Plaintiff to forebear from asserting his legal rights to challenge this fraudulent foreclosure." Plaintiff further alleged that he relied on defendants' "publications and sworn filings" and that this reliance caused him to lose an opportunity to challenge the foreclosure before the sheriff's sale.

On August 29, 2012, Fannie Mae filed a district court action for possession of the property. On plaintiff's motion, the circuit court consolidated the district court case with plaintiff's circuit court case. Defendants moved for summary disposition in November 2012. Because of various delays in the litigation, the circuit court did not hear arguments on the motion until March 6, 2013. On that date, the circuit court entered a stipulated order of dismissal without prejudice, which dismissed Orlans and Jackson from plaintiff's suit. On the same day, plaintiff filed a motion to amend his complaint to assert new claims against Orlans, Jackson, and the other defendants under the Fair Debt Collection Practices Act, 15 USC 1692k.

In May 2013, the circuit court denied plaintiff's motion to amend and granted summary disposition in favor of the remaining defendants. Citing *Kim v JPMorgan Chase Bank, NA*, 493 Mich 98; 825 NW2d 329 (2012), the circuit court determined that the foreclosure sale was voidable and that plaintiff was required to show he was prejudiced by the alleged defects in the foreclosure procedure. The circuit court concluded that plaintiff's claims were clearly unenforceable and that

no factual development could establish a cognizable claim. Plaintiff moved for reconsideration, which the court denied.

II. ANALYSIS

A. FAILURE TO STATE A CLAIM

We review de novo the circuit court's summary disposition ruling. *LaFontaine Saline, Inc v Chrysler Group, LLC*, 496 Mich 26, 34; 852 NW2d 78 (2014). "Summary disposition under MCR 2.116(C)(8) is appropriate where the complaint fails to state a claim on which relief may be granted." *Id*. We must accept the plaintiff's allegations as true. *Bosanic v Motz Dev, Inc*, 277 Mich App 277, 279 n 2; 745 NW2d 513 (2007). In addition, we draw any reasonable inferences from the alleged facts. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). However, "[c]onclusory statements, unsupported by factual allegations, are insufficient to state a cause of action." *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003).

Our Supreme Court identified the substantive requirements for a mortgagor to challenge a foreclosure by advertisement in *Kim*, 493 Mich 98. The *Kim* Court held that "defects or irregularities in a foreclosure proceeding result in a foreclosure that is voidable, not void *ab initio*." *Id*. at 115. The Court also explained that

> to set aside the foreclosure sale, plaintiffs must show that they were prejudiced by defendant's failure to comply with MCL 600.3204. To demonstrate such prejudice, they must show that they would have been in a better position to preserve their interest in the property absent defendant's noncompliance with the statute. [*Id*. at 115-116.]

The *Kim* decision established that a mortgagor seeking to set aside a foreclosure by advertisement must allege

facts to support three essential elements of the claim: (1) fraud or irregularity in the foreclosure procedure, (2) prejudice to the mortgagor, and (3) a causal relationship between the alleged fraud or irregularity and the alleged prejudice, i.e., that the mortgagor would have been in a better position to preserve the property interest absent the fraud or irregularity. See *Kim*, 493 Mich at 115-116.

The *Kim* Court cited three cases as examples of the nature of prejudice needed to support a foreclosure challenge. *Kim*, 493 Mich at 116 n 33. In the earliest case, *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23; 268 NW 797 (1936), the Court upheld a sheriff's sale against the plaintiff-borrower's challenge. The Court first noted that the plaintiff had not been misled about whether the sale had occurred. *Id*. at 26. The Court concluded, "[t]he total lack of equity in plaintiff's claim, his failure to pay anything on the mortgage debt and his laches preclude him from any relief . . . ." *Id*. at 27. In the next case, *Jackson Investment Corp v Pittsfield Prod, Inc*, 162 Mich App 750; 413 NW2d 99 (1987), this Court upheld a sheriff's sale against a challenge that the sale had occurred five days early. The Court noted that at no time during the redemption period had the mortgagor attempted to redeem the property. *Id*. at 757. Similarly, in *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492; 739 NW2d 656 (2007), this Court upheld a sheriff's sale when the mortgagors made no effort to redeem the property and delayed their challenge to the sale. *Id*. at 503.

Justice MARKMAN's concurring opinion in *Kim* summarized these three cases as follows:

> Although a nonexhaustive listing, some of the factors that might be relevant in [demonstrating prejudice] would include the following: whether plaintiffs were "misled into

> believing that no sale had been had," *Kuschinski v Equitable & Central Trust Co*, 277 Mich 23, 26; 268 NW 797 (1936); whether plaintiffs "act[ed] promptly after [they became] aware of the facts" on which they based their complaint, *id.;* whether plaintiffs made an effort to redeem the property during the redemption period, *Sweet Air Investment, Inc v Kenney*, 275 Mich App 492, 503; 739 NW2d 656 (2007); [and] whether plaintiffs were "represented by counsel throughout the foreclosure process," *Jackson Investment Corp v Pittsfield Prod, Inc*, 162 Mich App 750, 756; 413 NW2d 99 (1987) . . . . [*Kim*, 493 Mich at 121 (MARKMAN, J., concurring).]

In this case, plaintiff alleges that defendant JPMorgan Chase was neither the mortgage holder nor the servicing agent and that the foreclosure thus violated MCL 600.3204. Even assuming this allegation is true for the purposes of summary disposition, and assuming the allegation is sufficient to support the first element of a claim challenging a foreclosure, the circuit court correctly determined that plaintiff's remaining allegations are insufficient to support the prejudice elements of his claim.

Plaintiff's allegations of prejudice in this case are conclusory, and he has not alleged a causal connection between the alleged fraud or irregularity in the foreclosure procedure and any ability he might have had to preserve his property interest. Nothing in the pleadings indicates that plaintiff was qualified for a modification of the mortgage or to redeem the property. He does not claim that he was misled regarding whether a sheriff's sale would occur. Consequently, plaintiff has not alleged any facts that our Supreme Court suggested might support the prejudice element of a wrongful foreclosure claim.

Instead, plaintiff alleged that defendants' actions caused him to lose an opportunity to challenge the

foreclosure before the sheriff's sale. Specifically, plaintiff alleged that defendants' conduct misrepresented the ownership interests in the mortgage during the foreclosure process, as follows: in February 2011, Jackson recorded an affidavit falsely representing that JPMorgan had an ownership interest in the property; in March 2011, he was informed that Fannie Mae was an "investor" in the mortgaged property; on October 7, 2011, he checked Fannie Mae's website and learned that Fannie Mae owned a loan at the property address; and on October 17, 2011, plaintiff received a certified letter notifying him of mortgage foreclosure proceedings by JPMorgan Chase. Plaintiff alleged that he relied on these publications and sworn filings to his detriment, in that "the fraud of Defendants covered the truth about the legal and proper transfers . . . and the identity of the foreclosing party . . . ."

Viewed in the light most favorable to plaintiff, there is no indication of how or why the foreclosure initiated by JPMorgan Chase—rather than another entity—precluded plaintiff from challenging the foreclosure. Plaintiff makes no allegations in this regard other than the conclusory statement that he lost an opportunity to challenge the foreclosure before the mortgage sale. Given that plaintiff's complaint confirms he knew of the changes with regard to the mortgage holders by mid-October 2011, nothing in his pleadings supports his contention that defendants' actions prevented him from challenging the foreclosure before the February 2012 sheriff's sale. In sum, plaintiff failed to present sufficient allegations to support his claim that defendants' conduct prejudiced his ability to preserve an interest in the mortgaged property. See *Conlin v Mtg Electronic Registration Sys, Inc*, 714 F3d 355, 359-360 (CA 6, 2013).

For the same reason, plaintiff's negligence and fraud claims fail. A cause of action for negligence must include allegations to support each of four elements: "(1) the defendant owed the plaintiff a legal duty, (2) the defendant breached the legal duty, (3) the plaintiff suffered damages, and (4) the defendant's breach was a proximate cause of the plaintiff's damages." *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157, 162; 809 NW2d 553 (2011). Even assuming that plaintiff's allegations are sufficient regarding the first three elements of negligence, plaintiff has not presented facts to support his allegation that defendants' breaches of duty proximately caused any damage to plaintiff. Similarly, to state a claim for fraud, a plaintiff must assert, among other elements, that the plaintiff sustained damages as a result of having relied on the defendant's false representation. *Lucas v Awaad*, 299 Mich App 345, 363; 830 NW2d 141 (2013). Although plaintiff attempts to support his fraud allegations with references to various Michigan statutes, he does not argue that the statutes allow him to avoid alleging the elements of fraud. Plaintiff has failed to allege any actionable prejudice resulting from defendants' representations. Accordingly, plaintiff has failed to state any actionable claim against defendants in this case.[5]

B. PLAINTIFF'S REQUEST FOR ADDITIONAL DISCOVERY

Plaintiff argues that the circuit court erred by denying his request for additional discovery, which plaintiff contends could yield additional facts to support his claim. This Court reviews for abuse of discretion a

[5] Defendants argue that plaintiff lacks standing to sue. We need not address this issue, because even if we assume for purposes of this case that plaintiff has standing, plaintiff has failed to state a claim.

circuit court's decision to grant or deny discovery. *King v Mich State Police Dep't*, 303 Mich App 162, 175; 841 NW2d 914 (2013).

We conclude that the circuit court was within its discretion to deny plaintiff's request for additional discovery. This Court has explained, "[A] party opposing a motion for summary disposition because discovery is not complete must provide some independent evidence that a factual dispute exists." *Mich Nat'l Bank v Metro Institutional Food Serv, Inc*, 198 Mich App 236, 241; 497 NW2d 225 (1993). In this case, plaintiff has not suggested what information might be within defendants' knowledge that could plausibly demonstrate a causal connection between defendants' actions and any prejudice to plaintiff. As defendants point out, plaintiff himself is in the best position to determine whether he was prejudiced by any of defendants' actions. Where, as here, there is no reasonable indication that additional discovery will provide factual support for a mortgagor's challenge to a foreclosure by advertisement, a circuit court is within its discretion to deny further discovery. See *VanVourous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004); see also *Holliday v Wells Fargo Bank, NA*, 569 F Appx 366, 371-372 (CA 6, 2014) (concluding that the mortgagor was not entitled to additional discovery to establish the prejudice element of her wrongful foreclosure claim).

C. PLAINTIFF'S MOTION TO AMEND THE COMPLAINT

After nearly a year of litigation, plaintiff sought to amend his complaint to add a claim under the federal Fair Debt Collection Practices Act (FDCPA) 15 USC 1692 *et seq*. Even later in the litigation, plaintiff sought to add a claim alleging violation of due process rights. We review for abuse of discretion the circuit court's

denial of the motions to amend. *Wormsbacher v Seaver Title Co*, 284 Mich App 1, 8; 772 NW2d 827 (2009).

We find no abuse of discretion in the circuit court's denial of the proposed amended claims. We recognize that in ordinary cases, motions to amend are generally granted. *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). The record in this case demonstrates that the litigation was not typical. Plaintiff did not redeem the property as provided by law. Instead, plaintiff sought to avoid eviction by alleging fraud, but without proof of prejudice. When the litigation had progressed to the point of summary disposition, plaintiff suddenly sought to add an additional federal claim. In our view, this approach to litigation warranted denial of the proposed amended complaint. As this Court explained in *Lane*, a motion to amend may be denied for the following reasons:

> (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure to cure deficiencies by amendments previously allowed, (4) undue prejudice to the opposing party by virtue of allowance of the amendment, or (5) futility of the amendment. Absent bad faith or actual prejudice to the opposing party, delay, alone, does not warrant denial of a motion to amend. [*Id*. (citation omitted).]

Plaintiff argues that his proposed amendments to the complaint were designed to provide proof of prejudice, as required by *Kim*, 493 Mich 98. However, plaintiff does not identify which of the proposed amendments presented facts to support his allegation of prejudice. There are no allegations in the proposed amendments to establish that defendants' conduct caused plaintiff to lose an opportunity to preserve an interest in the property. Absent any proposed amendments that could support a causal connection between defendants' con-

duct and the alleged prejudice to plaintiff, the circuit court correctly denied the proposed amendment.

Plaintiff also argues that he opted to assert the FDCPA claim in reliance on a decision issued in 2013: *Glazer v Chase Home Fin LLC*, 704 F3d 453 (CA 6, 2013). In *Glazer*, the United States Court of Appeals for the Sixth Circuit recognized that mortgage foreclosure may constitute debt collection within the meaning of the FDCPA. Contrary to plaintiff's representation on appeal, however, the *Glazer* decision was not the first decision on this issue. The *Glazer* Court recognized that "confusion has arisen on the question whether mortgage foreclosure is debt collection under the Act" and that "[o]ther courts have taken varying approaches on the issue." *Id*. at 460. In Michigan, this Court recognized as early as 2008 that a mortgagor might challenge a foreclosure under the FDCPA, if the mortgagor properly alleged that the defendant was a debt collector and properly alleged violations of the FDCPA. See *Jackson v Flagstar Bank*, unpublished opinion per curiam of the Court of Appeals, issued December 16, 2008 (Docket No. 281333).

Notwithstanding the existing law on FDCPA claims, plaintiff did not attempt to assert the claims until the day of the stipulated dismissal of Orlans and Jackson, which was also the day the circuit court first held a motion hearing on defendants' summary disposition motion. The attempt to add claims appeared to be an effort to circumvent the stipulated dismissal and to prolong the summary disposition arguments. Plaintiff exhibited undue delay in presenting the motion to amend. Moreover, the delay in asserting the FDCPA claims, which arose from the same facts as plaintiff's other claims, prejudiced defendants both in their ability to defend the claims and in their ability to conduct

efficient litigation. On the grounds of undue delay and prejudice, the motion to amend was properly denied. See *Franchino v Franchino*, 263 Mich App 172, 190; 687 NW2d 620 (2004); see also *Glazer*, 704 F3d at 459 (stating with regard to certain claims that the mortgagor "waited too long to seek leave to amend, and the delay unduly prejudiced [the mortgagee].").

Plaintiff's attempt to add a due process claim was similarly improper and was meritless. This Court has determined that a mortgagor cannot pursue a due process claim against a government-sponsored entity akin to Fannie Mae. *Federal Home Loan Mtg Ass'n v Kelley (On Reconsideration)*, 306 Mich App 487; 858 NW2d 69 (2014). The Sixth Circuit Court of Appeals recently cited *Kelley* and determined that Fannie Mae is not a governmental actor, and that the plaintiff-mortgagor's attempt to challenge Fannie Mae's foreclosure on due process grounds failed as a matter of law. *Rubin v Fannie Mae*, 587 F Appx 273 (CA 6, 2014) (Case No. 13-1010).

D. REAL PARTY IN INTEREST

Plaintiff argues that JPMorgan Chase was not the proper party to foreclose by advertisement, and that Fannie Mae was not the proper party to bring a possession action. The circuit court rejected these arguments on summary disposition. We review de novo the circuit court's summary disposition ruling, and will uphold the ruling under MCR 2.116(C)(8) if the complaint fails to state a claim on which relief may be granted. *LaFontaine*, 496 Mich at 34.

We find no error in the summary disposition ruling. Under *Kim*, 493 Mich 98, even if the foreclosure was procedurally incorrect, a mortgagor cannot state a claim unless there was prejudice arising from the pro-

cedural flaw. Plaintiff in this case has not alleged or demonstrated any prejudice arising from any procedural flaw in the foreclosure by advertisement. Accordingly, summary disposition was appropriate.

III. CONCLUSION

The circuit court's order granting summary disposition, denying amendment of the claim, and resolving the possession action is affirmed.

SAAD, P.J., and MURRAY, J., concurred with O'CONNELL, J.

STEPHENS v WORDEN INSURANCE AGENCY, LLC

Docket No. 314700. Submitted July 8, 2014, at Detroit. Decided October 16, 2014, at 9:05 a.m. Leave to appeal sought.

Jennifer Stephens, as assignee of Jack E. Fritz, brought an action in the St. Clair Circuit Court against the Worden Insurance Agency, LLC, and David Shamaly. Fritz operated a construction company under workers' compensation and general liability insurance policies issued by Hastings Mutual Insurance Company that he obtained through Shamaly, an agent at Worden. Fritz had informed Shamaly that his company operated in several states and that he needed multistate coverage. On June 7, 2008, one of Fritz's employees, Charles Becker, fell from a ladder and was killed while working on a construction project in Florida. Hastings informed Fritz that the accident was not covered because the workers' compensation policy only applied to accidents occurring in Michigan. Stephens, Becker's widow and the personal representative of his estate, filed suit against Fritz in Florida. As part of their settlement agreement, Fritz assigned to Stephens his right to pursue indemnification against Worden, Hastings, and any other appropriate parties. Stephens subsequently filed her St. Clair Circuit Court complaint on May 31, 2011. Defendants moved for summary disposition, asserting that Stephens's claims sounded in malpractice and were therefore barred by a two-year statute of limitations. In the alternative, defendants asserted that even if subject to a three-year statute of limitations, Stephens's action was barred because her claims accrued on April 21, 2008, when Fritz's insurance policy was last renewed before Becker's accident. The court, Daniel J. Kelly, J., granted defendants' motion, concluding that Stephens's complaint was subject to the malpractice statute of limitations. Stephens appealed, and Worden cross-appealed.

The Court of Appeals *held*:

1. The Court of Appeals has characterized an insurance agent's failure to procure requested insurance as a tort. MCL 600.5838(1) governs the accrual of a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state-licensed profession. But the Legislature did not

intend by that accrual provision to subject every member of a state-licensed profession to malpractice claims. Rather, the statute of limitations applicable to malpractice actions, MCL 600.5805(6), applies to those professions subject to malpractice liability under the common law at the time the Judicature Act, 1915 PA 314, was enacted— including physicians, attorneys, surgeons, and dentists. There are no precedentially binding Michigan cases holding insurance agents or agencies liable under a malpractice theory. Instead, those cases in which an insurance agent failed to procure the type or level of insurance sought by the client or provided negligent advice to the client have sounded in ordinary negligence, and the same is true of cases addressing the issue in other states. Declining to extend malpractice liability to insurance agents is also consistent with the educational requirements for insurance agents, which are not commensurate with the educational requirements for the professions generally deemed subject to malpractice liability. Because there was no common-law basis for subjecting insurance agents to professional malpractice liability, the circuit court erred by applying the malpractice statute of limitations in this case. Stephens's claims sound in ordinary negligence, for which the limitations period was three years.

2. Under MCL 600.5805(10), the limitations period for a claim sounding in ordinary negligence expires 3 years after the time of the death or injury. Because Stephens's claims were not covered by the accrual provisions in MCL 600.5829 to MCL 600.5838, they accrued, in accordance with MCL 600.5827, at the time the wrong on which the claims were based was done regardless of the time when the damage resulted. For purposes of MCL 600.5827, the term "wrong" refers to the date on which the plaintiff was harmed by the defendant's act. In Michigan, a negligent-procurement or -advice claim accrues when the insurer denies the insured's claim because on that day any speculative injury becomes certain and the elements of a negligence action are complete. In this case, the insurance claim must have been filed and denied after Becker's death. Therefore, Fritz had until at least June 7, 2011, to file a negligent-procurement or -advice claim against defendants. As Fritz's assignee, Stephens filed her complaint on May 31, 2011, at least a week before the earliest possible expiration of the limitations period. The complaint was timely, and the trial court erred by granting summary disposition in favor of defendants under MCR 2.116(C)(7).

3. The doctrine of respondeat superior is well established in Michigan. An employer is generally liable for the torts its employees commit within the scope of their employment. Although an act

may be contrary to an employer's instructions, liability will attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. In this case, Shamaly was acting in the interest of his employer. Shamaly's sale of insurance resulted in profit for Worden and he was acting within the scope of his job description when he procured the Hastings policy for Fritz. Therefore, Stephens presented sufficient evidence to overcome summary disposition on the alternative ground that Worden could not be held vicariously liable for Shamaly's actions.

Reversed and remanded for further proceedings.

TORTS — NEGLIGENCE — INSURANCE AGENTS AND AGENCIES — NEGLIGENT-PROCUREMENT OR -ADVICE — STATUTE OF LIMITATIONS — ACCRUAL.

A claim against an insurance agent or agency alleging a failure to procure the type or level of insurance sought by the client or alleging that the client was provided negligent advice sounds in ordinary negligence, not malpractice, and is subject to a three-year period of limitations; such a negligent-procurement or -advice claim accrues when the insurer denies the insured's claim (MCL 600.5805(10); MCL 600.5827).

Law Offices of John R. Monnich, PC (by *John R. Monnich*), for Jennifer Stephens.

Merry, Farnen & Ryan, PC (by *John J. Schutza*), for Worden Insurance Agency, LLC.

Worsfold Macfarlane McDonald, PLLC (by *James H. Lohr*), for David Shamaly.

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

PER CURIAM. At issue in this appeal is the statute of limitations applicable to a claim that an insurance agent secured insurance coverage other than that sought by the insured, leaving the insured liable under circumstances where he expected coverage. Such negligent-procurement and -advice claims sound in ordinary negligence, not malpractice. Accordingly, the three-year statute of limitations found

in MCL 600.5805(10) applies. The claim accrued when the insurer denied the insured's claim. As this lawsuit was brought within three years of the accrual date, we reverse the circuit court's summary dismissal on statute of limitations grounds and remand for continued proceedings.

I. BACKGROUND

In 1998, Jack Fritz first approached agent David Shamaly at the Worden Insurance Agency to secure workers' compensation and general liability insurance for his construction company. Fritz informed Shamaly that his company operated in several states, not just Michigan, and that he required multistate coverage. From 1998 through 2008, Fritz operated under workers' compensation and general liability insurance policies issued by Hastings Mutual Insurance Company, the latest taking effect on April 21, 2008. And Fritz apparently experienced no loss outside of Michigan leading to a claim against the workers' compensation policy.

On June 7, 2008, Fritz's company was engaged in a construction project in Florida. Fritz's employee, Charles Becker, fell from a ladder and was killed. Fritz contacted Shamaly to report the accident, and Shamaly directed him to contact Hastings directly. When Fritz did so, he learned that the accident would not be covered under the workers' compensation policy because it applied only to accidents occurring in Michigan.

On December 2, 2008, Becker's widow and the personal representative of his estate, Jennifer Stephens, filed suit against Fritz in a Florida circuit court. On September 22, 2010, Fritz and Stephens reached a settlement, under which Fritz was liable for $5,000,000 to Stephens. Stephens promised not to pursue collection against Fritz in exchange for assignment of Fritz's right

to pursue indemnification against Worden, Hastings, and any other appropriate entity or person liable in the coverage dispute.

As a result of the settlement agreement, Stephens filed the current action against Worden and its agent, Shamaly, in the St. Clair Circuit Court on May 31, 2011. Following defendants' first and unsuccessful motion for summary disposition on statute of limitations grounds, the court permitted Stephens to file a three-count amended complaint. Stephens's first count is labeled "negligence"[1] and alleged that Shamaly and Worden "provided coverage which [they] specifically represented included the state of Florida," despite that it did not. Stephens asserted that Fritz relied upon that representation, as well as certificates of insurance "specifically expressing the fact that there was appropriate insurance coverage as required by Florida laws." Stephens accused Shamaly and Worden of breaching "the standard of care of a reasonable and prudent agent" by failing to make sufficient inquiry to ensure the proper level of coverage was in place. Worden breached its duty by failing to adequately supervise its agent, Stephens complained. And Stephens suggested that the Hastings certificates of insurance did not indicate that Florida coverage was in place when those certificates arrived at the Worden agency and that defendants "xeroxed and whited out" the documents to make it appear that coverage was available in Florida.

Stephens's second count is entitled "special relationship." Stephens contended that a special relationship arose because Shamaly and Worden "negligently misrepresented the nature and extent of the insurance coverage in Florida." Defendants also voluntarily took

[1] The boldface and capitalization of the quoted titles from Stephens's complaint have been altered.

on the duty to advise Fritz regarding the adequacy of his coverage, rendering them liable for their negligence. Moreover, defendants "entered into an agreement whereby [they] promised to provide coverage" extending to Florida occurrences. Defendants expressed an expertise in this field but then selected an insurance provider that does not write policies in Florida. Based on this special relationship, Stephens continued, Fritz repeatedly relied upon defendants' advice and purchased whatever policies they recommended. The lack of coverage upon Becker's death "was secondary to the negligence and/or misrepresentation and/or breach of contract and/or breach of the special relationship," Stephens concluded.

The third count in the amended complaint alleged that Worden was vicariously liable for Shamaly's acts. Shamaly was acting within the scope of his employment and had implied actual authority to act on Worden's behalf, rendering his employer liable. Stephens asserted that Worden knew about and acquiesced in Shamaly's acts as well. Stephens noted that Shamaly "was the only person writing commercial accounts, including workers compensation" and made decisions on behalf of the agency "concerning the practices of issuing Certificates of Insurance . . . ." Each policy was produced on Worden's behalf. And Shamaly forwarded copies of Fritz's certificate of issuance to many job sites in other states, including Florida, despite that coverage did not actually exist in those states. Moreover, Worden placed Shamaly in a position of authority in which he directed other employees to issue certificates of insurance for work in other states when no such coverage existed. Stephens further alleged that Shamaly violated company policies and industry practices under Worden's supervision, including by failing to confirm where work would be conducted before issuing a certificate of insur-

ance and failing to verify the existence of coverage. Worden was liable for Shamaly's transgressions because it allowed him too much freedom, presented him "as its sole commercial producer to customers and clothed him in the appearance of knowledge and experience," and endorsed his representations. In addition, Stephens asserted, Worden ratified Shamaly's acts because it received a commission for the sale of insurance made on Shamaly's misrepresentations.

Defendants' renewed their summary disposition motion contending that Stephens's claims sounded in malpractice and therefore were subject to the two-year statute of limitations. MCL 600.5805(6); MCL 600.5838(1). In the alternative, defendants contended that Stephens's claims were subject to a three-year statute of limitations as an action seeking recovery for damages to a person. MCL 600.5805(10). Under defendants' alternative theory, Stephens's claims accrued on April 21, 2008, when Fritz's insurance policy was last renewed before Becker's accident, and the statute of limitations therefore expired five weeks before Stephens filed her suit.

Stephens responded that her claims sounded in negligence, breach of contract, and fraud, rather than professional malpractice. She argued that her claims against the insurance agent were common-law negligence claims that historically did not fall within the rubric of malpractice. Therefore three and six-year statutes of limitations applied. Her claims were timely, Stephens retorted, because they accrued either on June 7, 2008, when Becker died, or October 26, 2010, when a judgment was entered in the Florida circuit court based on the Fritz-Stephens settlement agreement.

The circuit court found that Stephens's complaint was barred by the statute of limitations and summarily dis-

missed her action under MCR 2.116(C)(7). Reviewing the manner in which Stephens fashioned her claims, the court determined that they sounded in malpractice. Specifically, Stephens cited the standards of care for an insurance agent and named expert witnesses to testify to that standard. As her claims were filed beyond the two-year statute of limitations, the court found them untimely.

II. APPLICABLE LEGAL STANDARDS

We review de novo the circuit court's resolution of defendants' summary disposition motion. *Kincaid v Cardwell*, 300 Mich App 513, 522; 834 NW2d 122 (2013).

> Summary disposition under MCR 2.116(C)(7) is appropriate when the undisputed facts establish that the plaintiff's claim is barred under the applicable statute of limitations. Generally, the burden is on the defendant who relies on a statute of limitations defense to prove facts that bring the case within the statute. . . . Although generally not required to do so, a party moving for summary disposition under MCR 2.116(C)(7) may support the motion with affidavits, depositions, admissions, or other admissible documentary evidence, which the reviewing court must consider. . . . If there is no factual dispute, whether a plaintiff's claim is barred under the applicable statute of limitations is a matter of law for the court to determine. [*Id.* at 522-523 (citations omitted).]

In reviewing a motion under Subrule (C)(7), the circuit court "must accept the nonmoving party's well-pleaded allegations as true and construe the allegations in the nonmovant's favor . . . ." *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

We also review de novo the question whether a claim is barred by the statute of limitations and the issue of the proper interpretation and applicability of the limitations periods. See *City of Taylor v Detroit Edison Co*,

475 Mich 109, 115; 715 NW2d 28 (2006); *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 708; 742 NW2d 399 (2007).

III. STATUTES OF LIMITATIONS

The statutes of limitations for various tort actions brought in Michigan courts are set forth in MCL 600.5805. That statute provides in relevant part:

> (1) A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.
>
> * * *
>
> (6) Except as otherwise provided in this chapter, the period of limitations is 2 years for an action charging malpractice.
>
> * * *
>
> (10) Except as otherwise provided in this section, the period of limitations is 3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property. [MCL 600.5805.]

MCL 600.5807(8) provides a six-year statute of limitations for general contract actions. "All other personal actions" are subject to a six-year statute of limitations "unless a different period is stated in the statutes." MCL 600.5813.

IV. THE NATURE OF STEPHENS'S CLAIMS

The resolution of this case hinges on the proper characterization of Stephens's claims. It is well estab-

lished under Michigan jurisprudence that a court is not bound by the label a party assigns to its claims. Rather, we must consider "the gravamen" of the suit based on a reading of the complaint as a whole. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012). In this manner, we prevent a party from avoiding an applicable statute of limitations through "artful drafting." *Simmons v Apex Drug Stores, Inc*, 201 Mich App 250, 253; 506 NW2d 562 (1993).

We reject Stephens's argument that her claims could be characterized as sounding in breach of contract. Such a claim would have to be founded on defendants' breach of a contract with Fritz to secure insurance that would cover his work in other states. Although the Supreme Court has described "the relationship between the insurer and insured" as "a contractual one," *Harts v Farmers Ins Exch*, 461 Mich 1, 7; 597 NW2d 47 (1999), it has not held that the provision of negligent advice or the negligent procurement of insurance may support a claim for breach of contract. Rather, this Court has characterized an insurance agent's failure to procure requested insurance as a tort. *Holton v A + Ins Assoc, Inc*, 255 Mich App 318, 324-325; 661 NW2d 248 (2003). See also *Zaremba Equip, Inc v Harco Nat'l Ins Co*, 280 Mich App 16, 37-38; 761 NW2d 151 (2008) (holding that an insurance agent who does not procure the insurance coverage requested breaches his or her duty, suggesting a negligence claim). Accordingly, the six-year statute of limitations described in MCL 600.5807 does not apply.

Stephens's contention that her complaint sounded in fraud is equally without merit. Fraud claims must be pleaded with particularity, addressing each element of

the tort. *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008). To properly plead a fraud claim, the plaintiff must allege that (1) the defendant made a representation that was material, (2) the representation was false, (3) the defendant knew the representation was false, or the defendant's representation was made recklessly without any knowledge of the potential truth, (4) the defendant made the representation with the intention that the plaintiff would act on it, (5) the plaintiff actually acted in reliance, and (6) the plaintiff suffered an injury as a result. *Titan Ins Co v Hyten*, 491 Mich 547, 555; 817 NW2d 562 (2012).

Stephens did allege that defendants made a material representation that ultimately proved false: that the workers' compensation policy secured for Fritz would cover occurrences in Florida. She also alleged that defendants intended Fritz to rely upon this representation in purchasing insurance, which he did. Fritz suffered an injury as a result of the misrepresentation when he was denied coverage for Becker's Florida accident. However, Stephens did not plead with particularity that defendants either knew the representation was false, or made it recklessly without any knowledge of the potential truth. Stephens implies recklessness in her complaint by asserting that defendants failed to contact Hastings Mutual and make proper inquiries when they discovered that Fritz's certificates of insurance did not mention Florida coverage. Stephens alleges that defendants instead "xeroxed and whited out rather than investigated" information on Fritz's certificates of insurance. But Stephens never particularly states that those actions were taken to defraud Fritz or any customer requesting Fritz's insurance information. She never even identifies the information that was allegedly "whited out." Absent assertions supporting the third

element with particularity, we cannot conclude that Stephens properly pleaded a fraud claim.[2]

The question remaining is whether Stephens's claims sound in ordinary negligence or malpractice. There is no statute within the Revised Judicature Act defining malpractice. Defendants, citing MCL 600.5838(1), contend that malpractice liability adheres to licensed professionals in this state. MCL 600.5838(1) governs the accrual of "a claim based on the malpractice of a person who is, or holds himself or herself out to be, a member of a state licensed profession . . . ." Relying on this provision for a definition of malpractice would be "erroneous," our Supreme Court has concluded. *Sam v Balardo*, 411 Mich 405, 420; 308 NW2d 142 (1981). "[T]he Legislature did not intend by [MCL 600.5838(1)] to state that every member of a state licensed profession is necessarily subject to malpractice . . . ." *Dennis v Robbins Funeral Home*, 428 Mich 698, 704; 411 NW2d 156 (1987).[3] Moreover, the Legislature's decision to categorize a claim against a state licensed architect as "an action charging malpractice" logically defeats defendants' argument that actions

[2] Stephens may of course seek to amend her complaint to remedy its deficiency and plead fraud with particularity. MCR 2.118(A)(2). If she can plead a fraud claim with particularity, it is indisputable that the claim would not be time-barred as the statute of limitations for fraud claims is six years. MCL 600.5813; *Boyle v Gen Motors Corp*, 468 Mich 226, 228; 661 NW2d 557 (2003).

[3] The United States Court of Appeals for the Sixth Circuit has conflated the accrual provision for nonmedical malpractice actions with the definition of "malpractice," see *Kutlenios v Unumprovident Corp*, 475 Fed Appx 550, 553 (CA 6, 2012), as has this Court in unpublished opinions, see *Malburg v Dagenais*, unpublished opinion per curiam of the Court of Appeals, issued April 24, 2007 (Docket No. 275229). However, we are not bound by decisions of lower federal courts or unpublished opinions of this Court. *Petipren v Jaskowski*, 494 Mich 190, 210; 833 NW2d 247 (2013); MCR 7.215(C)(1).

against all state-licensed professionals automatically qualify as malpractice actions. MCL 600.5805(14).

Absent a statutory definition, our Supreme Court has repeatedly held that "malpractice" must be given its common-law meaning. *Local 1064, RWDSU AFL-CIO v Ernst & Young*, 449 Mich 322, 329; 535 NW2d 187 (1995), citing *Sam*, 411 Mich at 424. In *Sam*, the Supreme Court held that the statute of limitations now found in MCL 600.5805(6)[4] applies to those professions subject to malpractice liability under the common law at the time the Judicature Act, 1915 PA 314, was enacted, i.e. 1915, including physicians, attorneys, surgeons, and dentists. *Sam*, 411 Mich at 424-425, 436.

In *Local 1064*, the Supreme Court provided further analysis for a court considering whether a professional could be held liable under a malpractice theory. *Local 1064* defined "the common law" as "[t]hose rules or precepts of law in any country, or that body of its jurisprudence, which is of equal application in all places, as distinguished from local laws and rules," as well as

> [t]he embodiment of principles and rules inspired by natural reason, an innate sense of justice, and the dictates of convenience, and voluntarily adopted by men for their government in social relations. The authority of its rules does not depend on positive legislative enactment, but on general reception and usage, and the tendency of the rules to accomplish the ends of justice. [*Local 1064*, 449 Mich at 329-330 (quotation marks and citations omitted).]

This "embodiment of principles and rules inspired by natural reason" cannot be limited to a review of only Michigan caselaw. *Id*. at 330 (quotation marks and

[4] MCL 600.5805 has been amended several times, resulting in renumbering of the relevant subsection concerning the period of limitations for actions charging malpractice.

citation omitted). Rather, "the traditional nature and origin of the common law make it clear that a consideration of judicial decisions from other jurisdictions is not prohibited . . . ." *Id*.

There are no precedentially binding Michigan cases holding insurance agents or agencies liable under a malpractice theory. Rather, those cases in which an insurance agent failed to procure the type or level of insurance sought by the client or provided negligent advice have sounded in ordinary negligence.[5] The same is true throughout many of our sister states.[6]

Declining to extend malpractice liability is also consistent with the role of insurance agents. To become licensed as an insurance agent, a person must complete either 20 or 40 hours of instruction through an accred-

---

[5] See *Zaremba*, 280 Mich App at 37-38; *Holton*, 255 Mich App at 324-325; *Haji v Prevention Ins Agency*, 196 Mich App 84, 87; 492 NW2d 460 (1992); *Century Boat Co v Midland Ins Co*, 604 F Supp 472, 482 (WD Mich, 1985).

[6] See *Alfa Life Ins Corp v Colza*, 159 So 3d 1240 (Ala, 2014) (Docket No. 1111415); *Flemens v Harris*, 323 Ark 421; 915 SW2d 685 (1996); *Mark Tanner Constr, Inc v Hub Int'l Ins Servs, Inc*, 224 Cal App 4th 574, 584-585; 169 Cal Rptr 3d 39 (2014); *Bayly, Martin & Fay, Inc v Pete's Satire, Inc*, 739 P2d 239 (Colo, 1987); *Kaufman v CL McCabe & Sons, Inc*, 603 A2d 831, 834 (Del, 1992); *Miles v AAA Ins Co*, 771 So 2d 607, 608 (Fla App, 2000); *Peagler & Manley Ins Agency, Inc v Studebaker*, 156 Ga App 786; 275 SE2d 385 (1980); *Macabio v TIG Ins Co*, 87 Hawaii 307, 318-319; 955 P2d 100 (1998); *Lee v Calfa*, 174 Ill App 3d 101, 110; 123 Ill Dec 791; 528 NE2d 336 (1988); *Indiana Restorative Dentistry, PC v Laven Ins Agency, Inc*, 999 NE2d 922, 933-934 (Ind App, 2013); *Plaza Bottle Shop, Inc v Al Torstrick Ins Agency, Inc*, 712 SW2d 349 (Ky App, 1986); *Graff v Robert M Swendra Agency, Inc*, 800 NW2d 112 (Minn, 2011); *Busey Truck Equip, Inc v American Family Mut Ins Co*, 299 SW3d 735, 738 (Mo App, 2009); *Chase Scientific Research, Inc v NIA Group, Inc*, 96 NY2d 20; 725 NYS2d 592; 749 NE2d 161 (2001); *Baldwin v Lititz Mut Ins Co*, 99 NC App 559, 561; 393 SE2d 306 (1990); *Robson v Quentin E Cadd Agency*, 2008 Ohio 5909, ¶¶ 18-21; 179 Ohio App 3d 298; 901 NE2d 835; *Avery v Diedrich*, 2006 Wis App 144, ¶ 1; 294 Wis 2d 769; 720 NW2d 103 (2006).

ited home study course, an insurance trade association program, an authorized insurer, or an educational institution. MCL 500.1204a(1). At the conclusion of that instruction, the applicant must pass a licensing exam. MCL 500.1204. Such limited educational and licensing requirements are not commensurate with the professions generally deemed subject to professional negligence liability, i.e., malpractice. As described in *Garden v Frier*, 602 So 2d 1273, 1275 (Fla, 1992), a vocation is considered a profession subject to professional malpractice if a higher level of education, such as a graduate degree, is required before a license may be granted. Similarly, in *Plaza Bottle Shop, Inc v Al Torstrick Ins Agency, Inc*, 712 SW2d 349, 350-351 (Ky App, 1986), the Kentucky Court of Appeals reasoned that entry into an occupation had to be more strenuous than simple licensure provisions before professional malpractice liability could attach. To hold otherwise would have created malpractice actions against such unintended fields as cosmetology and realty. The Kentucky court held that insurance agents "who need have no more education than a high school diploma to qualify for a license" could not be held to a professional standard of care. *Id.* at 351. The Michigan Supreme Court has even refused to extend malpractice liability to some professions with high educational requirements for licensure, such as mortuary science. See *Dennis*, 428 Mich at 704-705.

Absent a common-law basis for subjecting insurance agents to professional malpractice liability, the circuit court erred by applying the malpractice statute of limitations in this case. Rather, Stephens raised an ordinary negligence claim. And the statute of limitations for ordinary negligence claims is three years. *Lemmerman v Fealk*, 449 Mich 56, 63-64; 534 NW2d 695 (1995); MCL 600.5805(10).

V. THE TIMELINESS OF STEPHENS'S CLAIMS

The parties also do not agree on the date on which Stephens's claim accrued.[7] MCL 600.5805(10) describes that the limitations period expires "3 years after the time of the death or injury for all actions to recover damages for the death of a person, or for injury to a person or property." The accrual of claims subject to this statutory period is governed by MCL 600.5827. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 387; 738 NW2d 664 (2007). MCL 600.5827 describes that a "claim accrues at the time provided in [MCL 600.5829 to MCL 600.5838], and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." None of the cited statutes relates to general negligence claims or more specifically to negligent-procurement or -advice claims against an insurance agent. Accordingly, Stephens's claims accrued "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827.

"For purposes of MCL 600.5827, the term 'wrong' refers to *the date on which the plaintiff was harmed by the defendant's act*, not the date on which the defendant acted negligently because that would permit a cause of action to be barred before any injury resulted." *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 512; 739 NW2d 402 (2007) (emphasis added). A tort claim accrues "when all the elements of the claim have occurred and can be alleged in a proper complaint." *Id.* See also *Stephens v Dixon*, 449 Mich 531, 534-535; 536 NW2d 755 (1995). Damages may recur after a claim

[7] As Fritz assigned his rights to Stephens in settlement of her Florida lawsuit, Stephens's claims against the current defendants accrued on the date Fritz's claims would have done so. MCL 600.5841.

accrues. But there must be an initial injury for a claim to exist and it is that injury that triggers the running of the limitations period. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 289-290; 769 NW2d 234 (2009).

The accrual of a negligent-procurement or -advice claim is an issue of first impression in Michigan. And the issue has received diverse treatment nationwide. Some jurisdictions have held that the "wrong" occurs when the insurance agent commits his negligence by procuring deficient coverage. See *Kaufman CL McCabe & Sons, Inc*, 603 A2d 831, 834-835 (Del, 1992); *Filip v Block*, 879 NE2d 1076, 1082 (Ind, 2008). Other jurisdictions delay the date of the injury because "[i]f no accident produces a claim, the failure will have been negligence in the abstract." *Int'l Mobiles Corp v Corroon & Black/Fairfield & Ellis, Inc*, 29 Mass App 215, 219; 560 NE2d 122 (1990). Therefore, some jurisdictions have held that the claim accrues when the insured experiences the event for which no coverage is available. *Id.* See also *Cunningham v Ins Co of North America*, 521 F Supp 2d 166, 172 (ED NY, 2006), recon gtd on other grounds 521 F Supp 2d at 173 (2007). Others assert that the claim accrues when insurance coverage is ultimately denied. *Broadnax v Morrow*, 326 Ill App 3d 1074, 1081; 261 Ill Dec 225; 762 NE2d 1152 (2002); *Johnson & Higgins of Texas, Inc v Kenneco Energy, Inc*, 962 SW2d 507, 514 (Tex, 1998). Still others wait until the underlying coverage dispute has been resolved by litigation before starting the clock on a negligent-procurement claim. *Blumberg v USAA Cas Ins Co*, 790 So 2d 1061; 1065 (Fla, 2001); *Kosa v Ferderick*, 136 Ohio App 3d 837, 840; 737 NE2d 1071 (2000).

Today we hold that a negligent-procurement or -advice claim accrues when the insurer denies the insured's claim.

On that date any speculative injury becomes certain, and the elements of the negligence action are complete.

In this regard, we find *Holton* instructive. In *Holton*, 255 Mich App at 324, this Court noted that "Michigan law recognizes a cause of action in tort for an insurance agent's failure to procure requested insurance coverage . . . ." For comparative fault purposes, this Court described the negligent-procurement action "as arising out of an insurance *claim* . . . ." *Id*. at 325 (emphasis added). No negligence action can exist until a claim is made because, until that moment, there can be no actual damage. See *id.* ("[P]laintiffs' claim is that their damages occurred because of inadequate insurance coverage, not because of the home fire."). As the underlying event is not the trigger for the cause of action, Becker's death cannot be the accrual date for Stephens's claims. Similarly, the date on which defendants advised Fritz or procured the insurance policy, or on which the policy took effect cannot be deemed the accrual date because any injury or damage was merely speculative at that point.

Delaying accrual until the resolution of any coverage litigation is also insupportable under Michigan law. The elements of the negligence claim are complete when the claim is denied. Therefore, the insured can file its negligence action contemporaneously or even in conjunction with its coverage dispute.

The record does not reveal the exact date when Fritz filed his claim with Hastings Mutual or when Hastings Mutual denied coverage. The record instructs that Becker died on June 7, 2008, however, and the claim must have been filed and denied on or after that date. Fritz therefore would have had until at least June 7, 2011, to file a negligent-procurement and -advice suit

against defendants. Stephens, as Fritz's assignee, filed her complaint on May 31, 2011, a full week before the earliest possible expiration of the statutory limitations period. Accordingly, her claim was timely and the circuit court erred by dismissing it pursuant to MCR 2.116(C)(7).

VI. VICARIOUS LIABILITY

Worden argues in the alternative that the circuit court should have dismissed Stephens's vicarious liability claims against it.[8] Worden does not cite a court rule provision supporting dismissal of these claims. Because some discovery had been conducted augmenting the allegations in Stephens's complaint, we will review the propriety of Worden's request under MCR 2.116(C)(10).

> A motion under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "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*, 469 Mich at 183. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013).]

[8] Worden raised this challenge below, but the circuit court did not reach this issue because it resolved the matter on statute of limitations grounds.

Worden contends that Shamaly acted outside the scope of his employment, negating any claim of vicarious liability. Specifically,

> Shamaly testified in his deposition . . . that if he had done as claimed[,] he would have violated the policy of the Worden Agency to only procure issuance of policies . . . in conformance with an insurer's underwriting guidelines, since the underwriting guidelines of Hastings Mutual . . . limited workers' compensation coverage only to work being performed in Michigan.

Stephens presented sufficient evidence to overcome summary disposition on this ground.

> The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. . . . This Court has defined "within the scope of employment" to mean " 'engaged in the service of his master, or while about his master's business.' " Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. [*Hamed v Wayne Co*, 490 Mich 1, 10-11; 803 NW2d 237 (2011) (citations omitted).]

Here, Shamaly was acting in the interest of his employer, Worden. Although his sale of insurance resulted in a commission for Shamaly, it also resulted in profit for Worden. It was Shamaly's job to secure commercial insurance policies for Worden's customers. Shamaly acted within the parameters of his job description when he procured the Hastings Mutual policy for Fritz, even if his job performance was negligent or not in conformance with his employer's instructions. Ac-

cordingly, we reject Worden's alternate ground for affirming the dismissal of Stephens's claims against it.

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

BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ., concurred.

PEOPLE V TEMELKOSKI

Docket No. 313670. Submitted April 9, 2014, at Detroit. Decided October 21, 2014, at 9:05 a.m. Leave to appeal sought.

Boban Temelkoski pleaded guilty of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a), in the Wayne Circuit Court in 1994. He was 19 years old, and the victim was 12. Defendant was assigned to youthful trainee status under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*. After he successfully completed probation, the court dismissed the case pursuant to MCL 762.14, which left defendant without a conviction on his record. The Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., which took effect after defendant pleaded guilty, however, nevertheless required him to register as a sex offender for life. In 2012, defendant moved for removal from the sex offender registry, arguing that requiring him to register as a sex offender when he did not have a conviction for a sex offense constituted cruel or unusual punishment. The court, James R. Chylinski, J., granted the motion, and the prosecution appealed by leave granted.

The Court of Appeals *held*:

1. MCL 762.12 provides that an assignment to youthful trainee status under HYTA does not constitute a conviction of a crime unless the trial court revokes the defendant's status as a youthful trainee. If the defendant successfully completes his or her HYTA assignment, MCL 762.14(1) and (4) require the court to discharge the individual and dismiss the proceedings, and all proceedings regarding the disposition of the criminal charge and the individual's assignment as a youthful trainee are closed to public inspection. However, an individual assigned to HYTA status before October 1, 2004, for a listed offense enumerated in MCL 28.722 is required under MCL 762.14(3) to comply with SORA's requirements, including registration as a sex offender and inclusion on the public sex offender registry, which is available on the Internet. Although defendant was assigned to and completed youthful trainee status, because the assignment occurred before October 1, 2004, he was considered to have been convicted of a listed offense for purposes of SORA and was required under MCL 28.722(w)(*v*), MCL 28.723(1)(b), and MCL 28.725(12) to register as a sex offender for life.

2. Deciding whether a legislative scheme imposes punishment involves a two-part inquiry. The court must determine whether the Legislature intended the statute as a criminal punishment or a civil remedy, which requires an examination of the statute's text and structure. If the statute imposes a disability for the purposes of punishment, that is, to reprimand the wrongdoer, to deter others, or the like, it has been considered penal. In contrast, a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose or evidences the intent to exercise regulatory power. If the Legislature did not intend to impose punishment, the second part of the analysis is determining whether the act is so punitive either in purpose or effect as to negate the Legislature's intent to deem it civil. Five factors were relevant to that analysis in this case: (1) whether the regulatory scheme has historically and traditionally been regarded as punishment, (2) whether SORA imposes an affirmative disability or restraint, (3) whether it promotes the traditional aims of punishment, (4) whether it has a rational connection to a nonpunitive purpose, and (5) whether it is excessive with respect to this purpose.

3. MCL 28.721a indicates that the Legislature enacted SORA pursuant to its police powers to protect the citizenry against individuals it deemed pose a danger of recidivism by providing police and the public with a means of monitoring those individuals. An analysis under the five factors was therefore necessary to determine whether SORA's requirements as applied to defendant nonetheless constituted punishment.

4. With respect to the first factor, sex offender registration and notification laws as applied to adult defendants have generally been held not to constitute a form of punishment. In addition, unlike traditional forms of public shaming such as branding and banishment, publicity and stigma are not integral parts of SORA; any attendant humiliation is a collateral consequence of a valid regulation.

5. With respect to the second factor, SORA inflicts no suffering, disability, or restraint. While defendant certainly experienced adverse effects from being listed on the public registry, they stemmed from the commission of the underlying act, not SORA's registration requirements. Punishment in the criminal justice context must be reviewed as the deliberate imposition by the state of some measure intended to chastise, deter, or discipline. Actions taken by members of the public, lawful or not, are not dispositive of whether the legislation's purpose is punishment.

6. The third factor also failed to indicate a punitive purpose because SORA does not promote the traditional aims of punishment, such as retribution and deterrence. Although SORA may deter future sexual offenses, that is not its primary purpose and does not render SORA punitive. Further, while SORA exempts certain individuals from the registration requirements for situations involving a consensual act, those mechanisms are reasonably related to the danger of recidivism, which is consistent with the regulatory objective.

7. SORA has a rational connection to the nonpunitive purpose of public safety, and therefore the fourth relevant factor weighs in favor of finding that the act does not impose punishment.

8. With respect to the fifth factor, neither the duration nor the broad dissemination of information to the public is excessive. The public registry is passive and requires individuals to seek out information on sex offenders. It warns members of the public not to use information from the public registry to injure, harass, or commit a crime against individuals listed on the registry and warns that those acts could lead to prosecution. Moreover, the duration of the registry requirements are reasonably tied to the legitimate regulatory purpose of protecting the public. SORA categorizes offenders into tiers, with the more serious offenses requiring lifetime registration. Furthermore, SORA contains exceptions for certain offenders who engaged in a consensual sexual act, limiting the effects of the registry to those individuals who the Legislature deemed posed a greater threat to the public.

9. Defendant therefore failed to show by the clearest proof that SORA is so punitive in either purpose or effect that it imposes punishment despite the Legislature's intent to deem it civil. Accordingly, as applied to defendant, SORA does not violate the Ex Post Facto Clauses of the Michigan and United States Constitutions or amount to cruel or unusual punishment under Const 1963, art 1, § 16.

Reversed.

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.

David Herskovic for defendant.

Before: BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ.

PER CURIAM. This case is before this Court for consideration as on leave granted.[1] The people contend that the trial court erred by granting defendant's motion to be removed from the sex offender registry under the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. For the reasons set forth in this opinion, we reverse.

I. FACTS AND PROCEDURAL HISTORY

In 1994, defendant, then age 19, was charged with second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (victim under 13 years of age). The charge arose from an incident in which defendant kissed and groped a 12-year-old female. The facts and circumstances of the incident are disputed.

On March 4, 1994, defendant pleaded guilty of CSC-II. Defendant was adjudicated under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq*., and sentenced to three years' probation. On April 16, 1997, upon successful completion of probation, the trial court dismissed the case and defendant did not have a conviction on his record. However, defendant was required to register as a sex offender pursuant to SORA, which took effect after defendant had pleaded guilty. See MCL 28.723(1)(b); MCL 28.722(w)(*v*). Under the current version of SORA, defendant is required to register as a sex offender for life. See MCL 28.722(w)(*v*) (designating CSC-II involving a minor under age 13 as a "Tier III offense"); MCL 28.725(12) ("Except as otherwise provided . . . , a tier III offender shall comply with this section for life.").

---

[1] *People v Temelkoski*, 495 Mich 879 (2013).

On August 9, 2012, defendant filed a motion seeking removal from the sex offender registry. Citing *People v Dipiazza*, 286 Mich App 137; 778 NW2d 264 (2009), defendant argued that requiring him to register as a sex offender when he does not have a conviction for a sex offense constitutes cruel or unusual punishment. Defendant argued that, like the defendant in *Dipiazza*, he engaged in a consensual act with the complainant. Defendant further claimed that his status as a sex offender caused him difficulty gaining employment and adversely affected his ability to be a father to his children and caused depression. Defendant attached a psychological risk assessment conducted by a licensed psychologist who opined that defendant is at a low risk for reoffending and that he does not meet the clinical classification of a pedophile or sexual predator.

In opposing the motion, the prosecution claimed that it was well-settled law that SORA's registration and reporting requirements do not constitute "punishment" in the constitutional sense and, therefore, the requirements did not violate the constitutional proscriptions against cruel or unusual punishment. The prosecution further argued that *Dipiazza* was limited by *In re TD*, 292 Mich App 678 (2011), vacated 493 Mich 873 (2012), and that the circumstances of the underlying offense were unlike the circumstances in *Dipiazza*, making the case distinguishable.

On September 21, 2012, the trial court granted defendant's motion, stating:

> One, Holmes Youthful Trainee is not a conviction, and it's not subject to S.O.R.A.
>
> That's -- it may be in the face of the law that you have, but that's my ruling.
>
> Second thing is, this is an ex post facto law.

> He was not subject to the law at the time that he was sentenced.
>
> All of a sudden, they pass a law later saying that he has to register.
>
> * * *
>
> And thirdly, I'll make a ruling, so that you have a proper record for the Court of Appeals.
>
> This is a punishment.
>
> * * *
>
> . . . I'm gonna grant the motion to remove him from the Sex Registry.

On December 4, 2012, the prosecution filed a delayed application for leave to appeal in this Court, arguing that the trial court had erred by (1) holding that registration on the sex offender registry amounted to punishment, (2) holding that the punishment was cruel or unusual, and (3) holding that SORA violated the Ex Post Facto Clause.

After this Court denied the prosecution's application for leave to appeal,[2] our Supreme Court, in lieu of granting leave to appeal, remanded the case to this Court for consideration "as on leave granted." *People v Temelkoski*, 495 Mich 879 (2013).

II. STANDARD OF REVIEW

"We review constitutional issues de novo." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). "Statutes are presumed to be constitutional, and the courts have a duty to construe a statute as constitu-

[2] *People v Temelkoski*, unpublished order of the Court of Appeals, entered July 8, 2013 (Docket No. 313670).

tional unless its unconstitutionality is clearly apparent." *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999). "The party challenging a statute has the burden of proving its invalidity." *Id*. To the extent we must interpret the applicable statutory provisions, issues involving statutory interpretation are questions of law that we review de novo. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

III. LEGAL BACKGROUND

A. RELEVANT STATUTES

Under HYTA, when a defendant between the ages of 17 and 21 pleads guilty of certain criminal offenses,[3] "the court of record having jurisdiction of the criminal offense, may, without entering a judgment of conviction . . . , consider and assign that individual to the status of youthful trainee." MCL 762.11(1). "An assignment to youthful trainee status does not constitute a conviction of a crime unless the court revokes the defendant's status as a youthful trainee." *Dipiazza*, 286 Mich App at 141-142, citing MCL 762.12. If the defendant successfully completes his or her HYTA assignment, the court "shall discharge the individual and dismiss the proceedings," MCL 762.14(1), and "all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection," MCL 762.14(4). However, an individual assigned to HYTA status "*before* October 1, 2004, for a listed offense enumerated in [MCL 28.722 of SORA][4] is required to

[3] Following a 2004 amendment, HYTA no longer applies to individuals who plead guilty of CSC-II and certain other offenses. See MCL 762.11(2), as amended by 2004 PA 239.

[4] CSC-II involving a victim less than 13 years of age is a listed Tier-III offense for purposes of SORA. MCL 28.722(k) and (w)(*v*).

comply with the requirements of that act." MCL 762.14(3) (emphasis added).

SORA was enacted in 1994 and took effect on October 1, 1995. Former MCL 28.731, as enacted by 1994 PA 295. In relevant part, subject to certain exceptions, SORA currently requires the following individuals to register as sex offenders:

> (a) An individual who is convicted of a listed offense after October 1, 1995.
>
> (b) An individual convicted of a listed offense on or before October 1, 1995 if on October 1, 1995 he or she is on probation or parole, committed to jail, committed to the jurisdiction of the department of corrections, or under the jurisdiction of the juvenile division of the probate court or the department of human services for that offense . . . . [MCL 28.723(1).]

SORA currently defines "convicted" in relevant part as follows:

> (*i*) Having a judgment of conviction or a probation order entered in any court having jurisdiction over criminal offenses . . . .
>
> (*ii*) Either of the following:
>
> (A) *Being assigned to youthful trainee status . . . before October 1, 2004*. [MCL 28.722(b) (emphasis added).]

"The SORA, as it was first enacted, was designed as a tool solely for law enforcement agencies, and registry records were kept confidential." *Doe v Mich Dep't of State Police*, 490 F3d 491, 495 (CA 6, 2007). "As of September 1, 1999, however, the SORA was amended to create the [public sex offender registry (PSOR)] which can be accessed by anyone via the internet." *Id.*; see MCL 28.728(2). Generally, offenders required to register under SORA are included on the PSOR,[5] MCL 28.728(2), and

[5] Some juvenile offenders and some Tier I offenders are exempted from the PSOR, see MCL 28.728(4); however, these exceptions are not at issue in this case.

the PSOR lists "names, aliases, addresses, physical descriptions, birth dates, photographs, and specific offenses" of registered offenders, *Dipiazza*, 286 Mich App at 143.

The United States Court of Appeals for the Sixth Circuit explained the interplay between SORA and HYTA as follows:

> When the Michigan legislature enacted the SORA, it also amended the HYTA to provide that even individuals assigned to youthful trainee status were required to register as sex offenders. This . . . provision is in effect an exception to HYTA's general provision that "[u]nless the court enters a judgment of conviction against the individual . . . , all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection."
>
> * * *
>
> Both the original and the amended versions of the SORA . . . define the term "convicted" to reach youthful trainees charged with certain sex offenses. The SORA thus creates an exception to the HYTA's provisions that "assignment of an individual to the status of youthful trainee . . . is not a conviction for a crime" and that an "individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." Notwithstanding the HYTA, the SORA thus requires youthful trainees charged with certain sex offenses to register as "convicted sex offenders" and information about their identities and "convictions" appears on the PSOR. [*Doe*, 490 F3d at 495-496 (citations omitted).]

In this case, defendant pleaded guilty of CSC-II involving a person under 13, MCL 750.520c(1)(a), a Tier-III offense for purposes of SORA, MCL 28.722(k); MCL 28.722(w)(*v*). Although defendant was assigned to

and completed youthful trainee status under HYTA, because defendant's adjudication under HYTA occurred before October 1, 2004, he is considered to have been "convicted" of a listed offense for purposes of SORA and must register as a sex offender. MCL 762.14(3). As a Tier-III offender who does not qualify under any of the exceptions, defendant is required to register as a sex offender for life. MCL 28.723(1)(b); MCL 28.722(w)(*v*).

B. CONSTITUTIONAL PRINCIPLES

"The Ex Post Facto Clauses of the United States and Michigan Constitutions bar the retroactive application of a law if the law: (1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) *increases the punishment for a crime*; or (4) allows the prosecution to convict on less evidence." *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014), citing *Calder v Bull*, 3 US (3 Dall) 386, 390; 1 L Ed 648 (1798) (emphasis added). "The Michigan Constitution prohibits cruel *or* unusual punishment, Const 1963, art 1, § 16, whereas the United States Constitution prohibits cruel *and* unusual punishment, US Const, Am VIII." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011). Thus, "[i]f a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *Id*. (quotation marks and citation omitted).

IV. ANALYSIS

Defendant argues that we should affirm the trial court's order removing him from the sex offender registry because applying SORA to him constitutes cruel or unusual punishment and violates the Ex Post Facto Clause. Necessarily, determination of whether a

law violates the Ex Post Facto Clause or amounts to cruel or unusual punishment involves a threshold inquiry into whether the law imposes punishment in the constitutional sense.

This Court has previously addressed whether SORA imposes punishment as applied to adult defendants. In *People v Pennington*, 240 Mich App 188, 193; 610 NW2d 608 (2000), this Court rejected the defendant's argument that SORA violated the Ex Post Facto Clause, holding that SORA's registration requirement did not constitute punishment. This Court relied on *Lanni v Engler*, 994 F Supp 849 (ED Mich, 1998), and *Doe v Kelley*, 961 F Supp 1105 (WD Mich, 1997), two federal cases holding that SORA did not constitute punishment and was instead aimed at protecting the public. *Pennington*, 240 Mich App at 193-197.

Similarly, in *People v Golba*, 273 Mich App 603; 729 NW2d 916 (2007), this Court rejected a constitutional challenge brought by an adult defendant. In *Golba*, the defendant argued that the trial court had violated his constitutional rights by ordering him to register as a sex offender on the basis of judicially found facts. *Id*. at 615. In rejecting the defendant's argument, this Court held that SORA did not offend the Constitution because registration did not amount to punishment. *Id*. at 619-620. Instead, this Court explained that the act "advances a legitimate government interest in protecting the community by promoting awareness of the presence of convicted sex offenders from whom certain members of the community may face a danger." *Id*. at 620 (quotation marks and citation omitted).

This Court has also addressed whether SORA imposes punishment as applied to a juvenile. In *Ayres*, 239 Mich App at 9-10, the juvenile respondent was adjudicated as delinquent in family court for CSC-II and was

required to register as a sex offender. This Court rejected the respondent's argument that applying SORA amounted to cruel or unusual punishment. *Id*. at 18-21. In doing so, this Court held that SORA's registration requirement was not a form of punishment, adopting the reasoning set forth in *Kelley*, 961 F Supp at 1108-1112, and *Lanni*, 994 F Supp at 852-854. *Ayres*, 239 Mich App at 18-19. However, the *Ayres* Court "buttressed its conclusion" that SORA did not impose punishment "with the fact that SORA at that time exempted juveniles from the provisions requiring public notification." *Golba*, 273 Mich App at 618.

Following the creation of the PSOR, in rejecting various constitutional arguments brought by another juvenile respondent, this Court questioned the continuing validity of *Ayres*. *In re Wentworth*, 251 Mich App 560, 568-569; 651 NW2d 773 (2002). Seven years later in *Dipiazza*, 286 Mich App at 146-159, a case involving an 18-year-old HYTA defendant, this Court held that *Ayres* was no longer binding and concluded that the application of SORA to the defendant in that case amounted to cruel or unusual punishment.

In *Dipiazza*, the defendant, then age 18, was involved in a consensual sexual relationship with NT, a female who was "nearly 15 years old." *Id*. at 140. NT's parents were aware of the relationship and condoned it, but one of NT's teachers reported the defendant to the prosecuting attorney. *Id*. The defendant was adjudicated under HYTA for attempted third-degree criminal sexual conduct, and he successfully completed probation. *Id*. at 140, 154. Although his case was dismissed and he eventually married NT, the defendant was still required to register as a sex offender. *Id*. at 140.

The defendant petitioned the trial court for removal from the sex offender registry, arguing that the registry

requirement amounted to cruel or unusual punishment. *Id*. at 140-141. Specifically, the defendant argued that he did not have a conviction on his record because he had successfully completed HYTA and that the registry wrongfully identified him as having been convicted of a sex offense. *Id*. at 140. The defendant argued that because of the amendments of SORA that became effective on October 1, 2004, he would not have had to register on the PSOR if he had been convicted six weeks later. *Id*. at 141. The trial court denied the defendant's request, ruling that it was bound by *Ayres*, 239 Mich App 8. *Dipiazza*, 286 Mich App at 141.

On appeal, in addressing whether the registration and notification requirements of SORA imposed "punishment" on the defendant, this Court examined *Ayres* and then noted that *Ayres* was decided under SORA as it was first enacted, when public access to registration was foreclosed, and that the continuing validity of *Ayres* had been questioned by this Court in *Wentworth*, 251 Mich App 560. *Dipiazza*, 286 Mich App at 144-147. This Court proceeded to apply anew the four factors[6] set forth in *Ayres* for determining whether governmental action constitutes punishment in the constitutional sense. *Id*. at 147-152.

With respect to the first factor (legislative intent), this Court noted that the amendments of SORA by 2004 PA 240, effective October 1, 2004, were motivated in part by concerns that the "reporting requirements are needlessly capturing individuals who do not pose a danger to the public, and who do not pose a danger of reoffending" and observed that

---

[6] These factors include (1) the legislative intent, (2) the design of the legislation, (3) the historical treatment of analogous measures, and (4) the effects of the legislation. *Dipiazza*, 286 Mich App at 147, citing *Ayres*, 239 Mich App at 14-15.

> [i]t is incongruous to find that a teen who engages in consensual sex and is assigned to youthful trainee status after October 1, 2004, is not considered dangerous enough to require registration, but that a teen who engaged in consensual sex and was assigned to youthful trainee status before October 1, 2004, is required to register. The implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship. [*Dipiazza*, 286 Mich App at 148-149 (quotation marks and citations omitted).]

With respect to the second factor (the design of the legislation), this Court noted that the federal decisions (*Lanni* and *Kelley*) concluded that the notification scheme in SORA was "purely regulatory and remedial" and did not inflict "suffering, disability or restraint." *Id.* at 149. Yet this Court went on to distinguish the federal decisions, concluding that the defendant in the matter at hand did suffer a disability and loss of privileges:

> That defendant is suffering a disability and a loss of privilege is further confirmed by the fact that there are not strict limitations on public dissemination . . . . Searches on the sex offender registry are no longer limited . . . to the searcher's zip code, but rather the registry provides a searcher with information about every person registered as a sex offender living in every zip code in the state. [*Id*. at 151.]

With respect to the third factor (historical treatment of analogous measures), this Court found that none existed, and with respect to the fourth factor (the effects of the legislation), this Court held that SORA negatively affected HYTA's purpose and the defendant, who had successfully completed his probation:

> While the government has always had the authority to warn the public about dangerous persons and such warnings have never been understood as imposing punishment, in this case,

> the warning is not about the presence of an individual who is dangerous. . . . [T]he government is effectively warning the public that defendant is dangerous, thus publicly labeling defendant as dangerous. Such warning or "branding" in the context of this case clearly constitutes punishment.
>
> Further, the basic premise of HYTA is "to give a break to first-time offenders who are likely to be successfully rehabilitated" by having the offender's act not result in a conviction of a crime and by requiring that the offender's record not be available for public inspection. However, the PSOR provides a "Conviction Date" . . . for defendant. Consequently, requiring defendant to register for 10 years forces him to retain the status of being "convicted" of an offense, thus frustrating the basic premise of HYTA. [*Id*. at 152 (citations omitted).]

This Court also set forth the "devastating" effects on the defendant caused by the requirement to register and concluded that the registration requirements under SORA, "as applied to defendant," constituted punishment. *Id*. at 152-153.

Next, this Court addressed whether the punishment imposed by SORA was cruel or unusual as applied to the defendant and concluded that, "considering the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation, . . . requiring defendant to register as a sex offender for 10 years is cruel or unusual punishment." *Id*. at 156.

Following this Court's decision in *Dipiazza*, the Legislature again amended SORA in 2011 PA 18 and added a "consent exception" for certain offenders who can prove that they engaged in a consensual sexual act. That exception is codified at MCL 28.728c(3) and (14), and provides as follows:

> (3) An individual classified as a tier I, tier II, or tier III offender who meets the requirements of subsection (14) . . .

may petition the court under that subsection for an order allowing him or her to discontinue registration under this act.

* * *

(14) The court shall grant a petition properly filed by an individual under subsection (3) if the court determines that the conviction for the listed offense *was the result of a consensual sexual act between the petitioner and the victim* and any of the following apply:

(a) All of the following:

(*i*) The victim was 13 years of age or older but less than 16 years of age at the time of the offense.

(*ii*) The petitioner is not more than 4 years older than the victim.

(b) All of the following:

(*i*) The individual was convicted of a violation of [MCL 750.158, MCL 750.338, MCL 750.338a, or MCL 750.338b].

(*ii*) The victim was 13 years of age or older but less than 16 years of age at the time of the violation.

(*iii*) The individual is not more than 4 years older than the victim.

(c) All of the following:

(*i*) The individual was convicted of a violation of [MCL 750.158, MCL 750.338, MCL 750.338a, MCL 750.338b, or MCL 750.520c].[7]

(*ii*) The victim was 16 years of age or older at the time of the violation.

(*iii*) The victim was not under the custodial authority of the individual at the time of the violation. [Emphasis added.]

---

[7] For purposes of SORA, defendant is considered to have been "convicted" of CSC-II under MCL 750.520c; because the complainant in this case was not 16 at the time of the offense (she was 12), the consent exception of MCL 28.728c(3) and (14)(c) does not apply to defendant.

In addition, in *TD*, 292 Mich App 678, a case involving a juvenile defendant convicted by jury of CSC-II, this Court rejected the defendant's argument that SORA amounted to cruel or unusual punishment. This Court differentiated *Dipiazza*, noting that "[t]he *Dipiazza* Court's analysis was limited to the specific facts in that case." *Id*. at 689. However, our Supreme Court vacated this Court's opinion and dismissed *TD* as moot because the defendant was "no longer required to register under the amended [SORA]." *TD*, 493 Mich at 873. *TD*, therefore, has no precedential value, and the prosecution's reliance on the case is misplaced.

In this case, defendant was not a juvenile at the time he was assigned to youthful trainee status under HYTA. HYTA applies to individuals between the ages of 17 and 21. Thus, assignment under HYTA is not indicative of whether an individual is a juvenile under the law. However, *Pennington*, 240 Mich App 188, and *Golba*, 273 Mich App 603, are not controlling in this case because, unlike the defendants in *Pennington* and *Golba*, defendant was assigned to youthful trainee status under HYTA.

Defendant argues that *Dipiazza* is controlling. He contends that, like the defendant in *Dipiazza*, he engaged in a consensual act with the complainant and was adjudicated under HYTA. Defendant argues that requiring him to register as a sex offender is punishment because he does not have a conviction for a sex offense.

Dipiazza is not controlling in this case. First, the facts of this case are distinguishable. Defendant was not involved in consensual relationship similar to the one at issue in *Dipiazza*, which involved an 18-year-old and a female who was "nearly" 15-years-old. *Dipiazza*, 286 Mich App at 140. In contrast, in this case, defendant was 19 when he committed the offense and the com-

plainant was only 12 years old. This was not an ongoing Romeo and Juliet relationship condoned by the complainant's parents. Second, the *Dipiazza* Court analyzed whether SORA constituted punishment *before* the Legislature amended the act in 2011 and added the consent exception discussed above. This exception addressed a primary concern the *Dipiazza* Court had with SORA—i.e., requiring a youthful trainee to register as a sex offender after he engaged in a consensual sexual relationship with a peer. Because the *Dipiazza* Court did not have the opportunity to consider if the 2011 amendment had any effect on whether SORA constitutes punishment, its constitutional analysis is outdated.

To determine whether SORA is a form of punishment as applied to defendant, we turn to *Earl*, 495 Mich 33, our Supreme Court's most recent decision addressing whether a statutory scheme imposes punishment for purposes of the Constitution.

In *Earl*, our Supreme Court explained that determining whether a legislative scheme imposes punishment involves a two-part inquiry:

> The court must begin by determining whether the Legislature intended the statute as a criminal punishment or a civil remedy. If the Legislature's intention was to impose a criminal punishment, . . . the analysis is over. However, if the Legislature intended to enact a civil remedy, the court must also ascertain whether "the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." [*Id*. at 38 (citations omitted) (alteration in original).]

The first step in this inquiry—"determining whether the Legislature intended for a statutory scheme to impose a civil remedy or a criminal punishment"—requires examining the statute's text and its structure

to determine whether the Legislature "indicated either expressly or impliedly a preference for one label or the other." *Id*. (quotation marks and citations omitted). "If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal." *Id*. at 38-39 (quotation marks and citations omitted). In contrast, "a statute is intended as a civil remedy if it imposes a disability to further a legitimate governmental purpose." *Id*. " '[W]here a legislative restriction "is an incident of the State's power to protect the health and safety of its citizens," it will be considered as "evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." ' " *Id*. at 42-43, quoting *Smith v Doe*, 538 US 84, 93-94; 123 S Ct 1140; 155 L Ed 2d 164 (2003) (citation omitted).

If the Legislature did not intend for an act to impose punishment, the second part of the analysis is to determine whether the act is " 'so punitive either in purpose or effect as to negate the State's intention to deem it civil.' " *Earl*, 495 at 43, quoting *Smith*, 538 US at 92. In determining "whether an act has the purpose or effect of being punitive, courts consider seven factors noted in *Kennedy v Mendoza-Martinez*, 372 US 144, 168-169; 83 S Ct 554; 9 L Ed 2d 644 (1963)." *Earl*, 495 Mich at 43-44. The *Mendoza-Martinez* factors are

> "[1] [w]hether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment—retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation

> to the alternative purpose assigned." [*Id*. at 44, quoting *Mendoza-Martinez*, 372 US at 168-169 (second alteration added).]

These factors are "useful guideposts" and are "neither exhaustive nor dispositive." *Earl*, 495 Mich at 44 (quotation marks and citation omitted). Moreover, "courts will 'reject the legislature's manifest intent [to impose a civil remedy] only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive either in purpose or effect [as] to negate the . . . intention to deem it civil.' " *Id*. (citation omitted) (first alteration in original).

A. LEGISLATIVE INTENT

MCL 28.721a sets forth the Legislature's intent in enacting SORA as follows:

> The legislature declares that the sex offenders registration act was enacted pursuant to the legislature's exercise of the police power of the state with the intent to better assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders. The legislature has determined that a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people, and particularly the children, of this state. The registration requirements of this act are intended to provide law enforcement and the people of this state with an appropriate, comprehensive, and effective means to monitor those persons who pose such a potential danger.

This statutory provision indicates that the Legislature was acting pursuant to its police powers to protect the citizenry against individuals it deemed pose a danger of recidivism by providing police and the public with a means of monitoring those individuals. " '[W]here a

legislative restriction "is an incident of the State's power to protect the health and safety of its citizens," it will be considered as "evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." ' " *Earl*, 495 Mich at 42-43, quoting *Smith* 538 US at 93-94 (citation omitted). The Legislature did not intend that SORA impose punishment; "[t]he Legislature's intent as set forth in express terms was not to chastise, deter, or discipline an offender, but rather to assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts by convicted sex offenders." *Dipiazza*, 286 Mich App at 148 (quotation marks and citation omitted).

The *Dipiazza* Court reasoned that the Legislature's stated intent as expressed in MCL 28.721a had been "frustrated" because "[t]he implied purpose of SORA, public safety, is not served by requiring an otherwise law-abiding adult to forever be branded as a sex offender because of a juvenile transgression involving consensual sex during a Romeo and Juliet relationship." *Id*. at 148-149. The 2011 amendment addressed the *Dipiazza* Court's concern. Specifically, the 2011 amendment added a consent exception to SORA that provides some youthful offenders relief in situations involving consensual sexual acts. See MCL 28.728c(3) and (14). While the exception does not apply in this case because the complainant was only 12 years old and defendant was 19, the Legislature could have reasonably concluded that the public should be protected and informed of individuals, including HYTA trainees, who commit sexual offenses against persons under age 13, irrespective of whether the complainant consented. Failure to extend the consent exception to include situations involving complainants under the age of 13 does not make SORA punitive in nature.

In sum, we conclude that the Legislature intended SORA as a civil remedy to protect the health and welfare of the public.

B. PURPOSE AND EFFECTS

Having determined that the Legislature intended SORA as a civil remedy, we must determine whether SORA nevertheless is " 'so punitive either in purpose or effect as to negate the State's intention to deem it civil.' " *Earl*, 495 Mich at 44, quoting *Smith*, 538 US at 92. This inquiry involves applying the relevant *Mendoza-Martinez* factors. In *Smith*, 538 US at 97, the United States Supreme Court applied these factors to Alaska's sex offender registration act (ASORA) and concluded that the purpose and effects of ASORA did not negate the state's intent to deem it civil. The *Smith* Court applied the following five factors in reaching this conclusion: "whether, in its necessary operation," ASORA (1) "has been regarded in our history and traditions as a punishment," (2) "imposes an affirmative disability or restraint," (3) "promotes the traditional aims of punishment," (4) "has a rational connection to a nonpunitive purpose," and (5) "is excessive with respect to this purpose." *Id*. These five factors are relevant in this case, and they govern our analysis.

1. HISTORICAL FORM OF PUNISHMENT

With respect to whether SORA has been regarded historically and traditionally as punishment, sex offender registration and notification laws are a relatively new form of legislation. See *Kelley*, 961 F Supp at 1106-1107. Today, all 50 states and the federal government have enacted some form of sex offender registration and notification provisions, see *id*., and a body of

law has developed on a range of issues related to the legislation, including whether the legislation constitutes punishment.

Smith, 538 US 84, is the preeminent case holding that a sex offender registration and notification law, as applied to an adult defendant, is not a form of punishment. The *Smith* Court noted that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a legitimate nonpunitive governmental objective and has been historically so regarded." *Id*. at 93 (quotation marks and citation omitted); see also *Helman v State*, 784 A2d 1058, 1078 (Del, 2001) (noting that "in their brief history most courts seem to regard notification statutes as remedial in nature"). Indeed, consistently with *Smith*, courts from various jurisdictions have held that as applied to adult defendants, sex offender registration and notification laws are nonpunitive in nature. See, e.g., *Cutshall v Sundquist*, 193 F3d 466, 477 (CA 6, 1999); *Femedeer v Haun*, 227 F3d 1244, 1253 (CA 10, 2000); *People v Malchow*, 193 Ill 2d 413, 421; 250 Ill Dec 670; 739 NE2d 433 (2000); *State v Seering*, 701 NW2d 655, 667-669 (Iowa, 2005); *State v Pentland*, 296 Conn 305, 314; 994 A2d 147 (2010) (noting that the state's sex offender legislation did not impose punishment in the constitutional sense). But see *Commonwealth v Baker*, 295 SW3d 437, 447 (Ky, 2009); *Wallace v State*, 905 NE2d 371, 384 (Ind, 2009); *Starkey v Oklahoma Dep't of Corrections*, 2013 Okla 43, ¶ 77; 305 P3d 1004 (2013) (concluding that respective states' sex offender registry and notification laws imposed punishment).

In addition, unlike traditional forms of public shaming, such as branding and banishment, publicity and stigma are not integral parts of SORA; instead, "[t]he purpose and the principal effect of notification are to

inform the public for its own safety, not to humiliate the offender," and "the attendant humiliation is but a collateral consequence of a valid regulation." *Smith*, 538 US at 99. As this Court previously noted in *Ayres*:

> "The notification provisions themselves do not touch the offender at all. While branding, shaming and banishment certainly impose punishment, providing public access to public information does not. . . . And while public notification may ultimately result in opprobrium and ostracism similar to those caused by these historical sanctions, such effects are clearly not so inevitable as to be deemed to have been imposed by the law itself. [*Ayres*, 239 Mich App at 16, quoting *Kelley*, 961 F Supp at 1110.]

In considering the "historical treatment of analogous measures," the *Dipiazza* Court concluded that "no analogous measures exists, nor is there an historical antecedent that relates to requiring a defendant to register as a sex offender when the defendant was a teenager engaged in consensual sex and . . . was assigned to youthful trainee status . . . ." *Dipiazza*, 286 Mich App at 151. The *Dipiazza* Court considered the historical treatment of SORA in the context of the unique facts of that case, so the reasoning is inapplicable in this case. Furthermore, given that the 2011 amendment added a consent exception, this reasoning is no longer applicable.

In short, we conclude that SORA is unlike traditional forms of punishment and the first *Mendoza-Martinez* factor weighs in favor of finding that SORA is nonpunitive in its purpose and effects as applied to defendant.

2. AFFIRMATIVE DISABILITY OR RESTRAINT

The second relevant factor concerns whether SORA imposes an affirmative disability or restraint. *Smith*, 538 US at 97. The *Smith* Court noted that, in applying

this factor, "we inquire how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id*. at 99-100. The Court concluded that ASORA did not impose an affirmative disability or restraint. *Id*. at 100. ASORA did not resemble imprisonment because it did not impose physical restraints, it did not limit the offender's ability to change jobs or residences, and the effects were less harsh than occupational debarment, which the Court had previously held to be nonpunitive. *Id*. The Court rejected the argument that ASORA imposed a severe restraint in that it likely would render offenders "completely unemployable," explaining that even absent ASORA, employers and landlords could obtain the same information by conducting "routine background checks." *Id*. The Court stated, "Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record." *Id*. at 101. Moreover, unlike probation or supervised release, which "entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction," under ASORA, offenders were "free to move where they wish and to live and work as other citizens, with no supervision," and any prosecution for an infraction was separate from the original offense. *Id*. at 101-102.

Defendant argues that SORA has imposed significant hardships on him and his family, including "loss of employment, loss of ability to be a father to his children, harassment, and depression." Apart from the information available under SORA, defendant argues that a criminal background check would not reveal any conviction for a sexual offense.

In addition, SORA " 'inflicts no suffering, disability or restraint.' " *Pennington*, 240 Mich App at 195, quoting *Kelley*, 961 F Supp at 1109. Although defendant certainly experiences adverse effects from being listed on the PSOR, these effects stem from the commission of the underlying act, not SORA's registration requirements. While secondary effects may flow indirectly from the PSOR, " 'punishment in the criminal justice context must be reviewed as the *deliberate imposition by the state* of some measure *intended* to chastise, deter or discipline. Actions taken by members of the public, lawful or not, can hardly be deemed dispositive of whether legislation's purpose is punishment.' " *Pennington*, 240 Mich App at 196, quoting *Kelley*, 961 F Supp at 1111. The central purpose of SORA is not intended to chastise, deter, or discipline; rather, it is a remedial measure meant to protect the health, safety, and welfare of the general public.

The *Dipiazza* Court found that the defendant in that case did suffer a disability and loss of privilege in part because SORA no longer contained "strict limitations on public dissemination as there were in *Lanni*." *Dipiazza*, 286 Mich App at 151. However, the 2011 amendment narrowed the scope of SORA by allowing certain individuals to petition the court for removal from the registry because they had engaged in a consensual sexual act. While the Legislature did not extend the exemption to individuals who commit sexual offenses against children under the age of 13, this does not serve to transform SORA into punishment. Rather, this furthers SORA's purpose of protecting the public. In short, *Dipiazza*'s reasoning with respect to this factor is inapplicable in the present case, and we conclude that the second *Mendoza-Martinez* factor weighs in favor of finding that SORA does not impose punishment as applied to defendant.

3. TRADITIONAL AIMS OF PUNISHMENT

The third relevant factor also fails to indicate a punitive purpose because SORA does not promote the traditional aims of punishment, such as retribution and deterrence. See *Earl*, 495 Mich at 46; *Smith*, 538 US at 97. The *Smith* Court reasoned that although ASORA might deter future crime, this alone was not indicative of punishment given that "[a]ny number of governmental programs might deter crime without imposing punishment." *Smith*, 538 US at 102. The Court noted, " 'To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.' " *Id*. (citations omitted). And although the length of the reporting requirement was tied to categories of offenders, the registration obligations were not retributive, but instead were "reasonably related to the danger of recidivism," which was "consistent with the regulatory objective." *Id*.

Smith's reasoning is persuasive and applies in this case. While SORA might deter future sexual offenses, that is not the primary purpose of the act and it does not render SORA punitive. Further, while SORA exempts certain individuals from the registry requirements in situations involving a consensual act and categorizes offenders into tiers depending on the severity of the underlying offense, as in *Smith* these mechanisms are "reasonably related to the danger of recidivism," which is "consistent with the regulatory objective." *Id*.

4. RATIONAL CONNECTION TO NONPUNITIVE PURPOSE

SORA has a rational connection to a nonpunitive purpose, and therefore the fourth relevant factor

weighs in favor of finding that the act does not impose punishment. *Smith*, 538 US at 97. The *Smith* Court noted that ASORA "has a legitimate nonpunitive purpose of 'public safety, which is advanced by alerting the public to the risk of sex offenders in their communit[y].' " *Id*. at 102-103 (citation omitted) (alteration in original). SORA has the same legitimate nonpunitive purpose of public safety. See *Doe*, 490 F3d at 505 (noting that "[t]his court has previously concluded that the state's interests in protecting public safety and in aiding effective law enforcement are advanced by the SORA's registration requirements").

5. EXCESSIVE WITH RESPECT TO NON-PUNITIVE PURPOSE

The fifth and final relevant factor for purposes of our analysis concerns whether SORA is excessive with respect to its nonpunitive purpose of protecting the safety and welfare of the general public. *Smith*, 538 US at 97. In weighing this factor, the *Smith* Court reasoned that neither the duration of the reporting requirements nor the broad dissemination of information to the public was excessive. *Id*. at 104-105. Alaska's public-notification scheme was passive and required individuals to search for information, and the website warned users that they would be prosecuted for committing criminal acts against offenders. *Id*. at 105. The Court stated, "Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." *Id*.

We find *Smith*'s analysis regarding this factor persuasive and equally applicable in the context of Michigan's SORA as applied to defendant. The PSOR is passive and requires individuals to seek out information

on sex offenders. The registry warns members of the public not to use information from the PSOR to "injure, harass, or commit a crime against" individuals listed on the registry and warns that those acts could lead to prosecution.[8] Moreover, the duration of the registry requirements are reasonably tied to the legitimate regulatory purpose of protecting the public. SORA categorizes offenders into tiers, with the more serious offenses requiring lifetime registration. Furthermore, SORA contains exceptions for certain offenders who engaged in a consensual sexual act, limiting the effect of the registry to those individuals who the Legislature deemed posed a greater threat to the public.

Although HYTA requires certain individuals to register under SORA on the basis of what, at first blush, appears to be an arbitrary date of adjudication (October 1, 2004), there was a rational basis underlying this provision. Notably, when the Legislature amended HYTA to require youthful trainees assigned to that status before October 1, 2004, to comply with SORA and exempted youthful trainees assigned on or after that date, the Legislature also amended HYTA to provide that, beginning in 2004, individuals who pleaded guilty of more serious sexual offenses (including first- and second-degree criminal sexual conduct) were no longer eligible for youthful trainee status under HYTA. See 2004 PA 239, amending §§ 11 and 14 of HYTA. Therefore, the class of youthful trainees assigned under HYTA before October 1, 2004, includes individuals who pleaded guilty of more serious sexual offenses, whereas the class of youthful trainees assigned on or after October 1, 2004, did not. Thus, it was reasonable for the

[8] Michigan Public Sex Offender Registry <http://communitynotification.com/ cap_main.php?office=55242/> (accessed August 1, 2014) [http://perma.cc/5WBM-222J].

Legislature to require the pre-October 2004 class of HYTA youthful trainees to comply with SORA—i.e., it could have concluded that this class contained individuals who were more likely to reoffend and posed a greater threat to the public. This statutory scheme is not overly excessive, and instead "[t]he 2004 amendments continue to advance public safety goals while simultaneously 'weeding out' those youthful trainees who have been deemed least likely to reoffend." *Doe*, 490 F3d at 505.

The *Dipiazza* Court found that the effects of SORA were "devastating" to the defendant in that case. *Dipiazza*, 286 Mich App at 152. However, unlike *Dipiazza*, this case involves different circumstances. Defendant here was not engaged in a consensual relationship with the 12-year-old complainant. Thus, the adverse effects that flow from SORA in this case are not "overly excessive" as compared to its regulatory purpose, and this factor weighs in favor of finding that SORA is nonpunitive as applied to defendant.

V. CONCLUSION

In sum, the relevant *Mendoza-Martinez* factors indicate that SORA does not impose punishment as applied to defendant. SORA has not been regarded in our history and traditions as punishment, it does not impose affirmative disabilities or restraints, it does not promote the traditional aims of punishment, and it has a rational connection to a nonpunitive purpose and is not excessive with respect to this purpose. Defendant therefore has failed to show by "the clearest proof" that SORA is "so punitive either in purpose or effect" that it negates the Legislature's intent to deem it civil. *Earl*, 495 Mich at 44 (quotation marks and citation omitted). Accordingly, as applied to defendant, SORA does not

violate the Ex Post Facto Clause or amount to cruel or unusual punishment because it does not impose punishment.

Reversed.

BORRELLO, P.J., and WHITBECK and K. F. KELLY, JJ., concurred.

In re APPLICATION OF INDIANA MICHIGAN POWER COMPANY FOR A CERTIFICATE OF NECESSITY

Docket Nos. 314829 and 314979. Submitted September 10, 2014, at Lansing. Decided October 21, 2014, at 9:10 a.m. Leave to appeal sought.

In 2005, the Nuclear Regulatory Commission granted the Indiana Michigan Power Company (Indiana Michigan) 20-year license renewals for two nuclear reactors at the Donald C. Cook Nuclear Power Plant. Indiana Michigan claimed that to take advantage of the license renewals, it had to undertake a multiyear project involving life cycle management (LCM) investment in the equipment, systems, and facilities of the plant. It explained that LCM is a process for the timely detection and mitigation of aging effects in systems, structures, and components that are important to plant safety, reliability, and economics and, for this project, included nonrecurring capital replacements required to operate for the extended license period. Indiana Michigan sought a certificate of necessity (CON) for the LCM project. The LCM project included 117 subprojects that were to be implemented from the second half of 2011 through 2018. The subprojects involved replacing various components. The cost of each subproject was separately calculated and included a risk reserve. Indiana Michigan also proposed a 20% management reserve to cover unknown contingencies for the project as a whole. It acknowledged that a power uprate of capacity was feasible (meaning power output could be increased) and that a small investment in the upsizing of certain equipment to accommodate a potential future uprate was included in the LCM project, because it would be more costly to upsize later. The Public Service Commission (PSC) entered an order approving a CON. The PSC preapproved recovery of a CON amount of $773,611,000 for projected project costs, as well as a 10% management reserve of $77,361,100, for a total of $850,972,100. The Association of Businesses Advocating Tariff Equity (ABATE) and the Michigan Attorney General appealed separately, contending that the LCM project does not qualify for a CON under MCL 460.6s or, alternatively, that the PSC erred by approving a management reserve for the LCM project. ABATE argued that eight subprojects that required an incremental expenditure for a potential future uprate

should not have been approved. The Attorney General argued that greater specification of costs allowed and disallowed was necessary. The Court of Appeals consolidated the appeals.

The Court of Appeals *held*:

The PSC did not err by construing MCL 460.6s so as to determine that the LCM project is a significant investment comprised of a group of investments being made for a singular purpose. The PSC did not err by approving the eight subprojects contested by ABATE. There was no factual basis for the PSC's determination that 10% of the estimated costs represented a reasonable management reserve. The PSC's order was not reasonable to the extent that it approved this cost. This cost should not have been preapproved. Indiana Michigan should be entitled to these costs only if it is able to establish after the fact that these costs were reasonable and prudent.

1. Because a determination of factual matters is required, the substantial evidence test applies in this matter.

2. The PSC did not err by construing MCL 460.6s(1) so as to conclude that the proposed LCM project is a "significant investment in an existing electric generation facility" and that it qualified as "a group of investments reasonably planned to be made over a multiple year period not to exceed 6 years for a singular purpose . . . ."

3. The Legislature's intent in including the phrase "singular purpose" in MCL 460.6s(1) was to include a qualifying group of investments that had a common purpose, but not to require an extraordinary purpose. The phrase "increasing the capacity of an existing electric generation plant" in the statute is meant to provide an example of a singular purpose, not to show that increasing capacity is the only singular purpose that would qualify.

4. Although some costs involved in the LCM indirectly relate to potential future uprates, there is no statutory barrier to their approval by the PSC. The language of MCL 460.6s(4)(a) does not require a separate finding of need for each individual outlay forming the group of investments that comprises a "significant investment" in an existing facility under MCL 460.6s(1).

5. The need for the power supplied by the facility was established. The evidence clearly showed that a turbine was needed. The fact that a new turbine increased capacity was incidental. Because there was a current need for the seven subprojects, whether current need existed for each aspect of the subprojects did not have to be determined under MCL 460.6s(4). Subsection(4) merely required that the costs be reasonable and prudent. Given

the testimony that the components being replaced needed replacement currently and would have to be replaced again at a much higher cost if there was an uprate, it cannot be said that the PSC acted unlawfully or unreasonably by determining that the current expense for replacements with features that would accommodate an uprate was both reasonable and prudent. Substantial evidence supported the determination that the current expenditure was warranted.

6. Even if Indiana Michigan had established that a management reserve was a reasonable cost generally, it failed to establish that the amount it sought was reasonable. There was no factual basis for the PSC's determination that 10% of the estimated costs represented a reasonable management reserve. Because the 10% management reserve was not supported by substantial evidence on the whole record, there was no showing that the cost was reasonable within the meaning of MCL 460.6s(4)(c), and, therefore, the PCS's order was not reasonable within the meaning of MCL 462.26(8) to the extent that it approved this cost. This cost should not have been preapproved.

7. The Attorney General never challenged the PSC's failure to specify costs allowed and disallowed and, therefore, failed to preserve an issue regarding the need for specification of the costs of the 117 subprojects.

Affirmed in part and reversed in part.

Clark Hill PLC (by *Robert A. W. Strong*) for the Association of Businesses Advocating Tariff Equity.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Steven D. Hughey* and *Spencer A. Sattler*, Assistant Attorneys General, for the Public Service Commission.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Donald E. Erickson*, Assistant Attorney General, for the Attorney General.

Warner Norcross & Judd LLP (by *Matthew T. Nelson*, *Richard J. Aaron*, and *David R. Whitfield*) for the Indiana Michigan Power Company.

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM. The Michigan Public Service Commission (PSC) entered an order approving a certificate of necessity (CON) for a life cycle management (LCM) project, comprised of 117 subprojects, at the Donald C. Cook Nuclear Power Plant owned by the Indiana Michigan Power Company (Indiana Michigan). The PSC preapproved recovery of a CON amount of $773,611,000 for projected project costs, as well as a 10% management reserve of $77,361,100, for a total of $850,972,100. In these consolidated appeals,[1] appellant Association of Businesses Advocating Tariff Equity (ABATE) and appellant Attorney General appeal as of right. We affirm in part and reverse in part.

This appeal requires construction of MCL 460.6s. Subsection (1) of this statute provides that an electric utility can seek a CON for "a significant investment in an existing electric generation facility," and that a "significant investment" may include "a group of investments reasonably planned to be made over a multiple year period not to exceed 6 years for a singular purpose such as increasing the capacity of an existing electric generation plant." Subsection (4) requires that the PSC specify the costs approved if it approves a CON. Subsection (9) provides that the PSC must include in rates all reasonable and prudent costs for which the CON has been granted when the facility is considered "used and useful."

Appellants maintain that Indiana Michigan's LCM project does not qualify for a CON under the statute.

[1] See *In re Application of Indiana Michigan Power Co for a Certificate of Necessity*, unpublished order of the Court of Appeals, entered March 7, 2013 (Docket Nos. 314829, 314979).

Alternatively, they argue that the PSC erred by approving a management reserve for the LCM project. ABATE argues that eight subprojects that required an incremental expenditure for a potential future uprate should not have been approved, and the Attorney General argues that greater specification of costs allowed and disallowed was necessary.

The PSC did not err by construing the statute so as to determine that the LCM project is a significant investment comprised of a group of investments being made for a singular purpose. Moreover, the PSC did not err by approving the eight subprojects contested by ABATE. However, we conclude that the management reserve was not supported by substantial evidence on the whole record. We decline to address the specification-of-costs issue because it was not properly preserved.

I. FACTS

In 1975 and 1978, the Donald C. Cook Nuclear Power Plant placed its two nuclear reactors in service. The Nuclear Regulatory Commission (NRC) had issued 40-year operating licenses for each reactor in 1974 and 1977, consistent with their expected 40-year life spans. In 2005, the NRC granted Indiana Michigan 20-year license renewals for the units, allowing them to operate until 2034 and 2037. Indiana Michigan indicated that the extension to 60 years would require "that the plant's systems, structures, and components be inspected, maintained, refurbished, and replaced on a managed basis." In fact, the NRC exacted a commitment to manage the aging of passive, long-lived components as a condition of continued operations. Indiana Michigan confirmed that continued investment was required to maintain highly reliable operations.

Specifically, Indiana Michigan claimed that to take advantage of the license renewals, it had to undertake a multiyear project involving LCM investment in the equipment, systems, and facilities of the plant. It explained that life cycle management is "a process for the timely detection and mitigation of aging effects in [systems, structures and components] that are important to plant safety, reliability and economics," and for this project included "non-recurring capital replacements required to operate for an extended license period."

Indiana Michigan sought a CON for its LCM project, which was originally projected to cost $1.169 billion. The LCM project included 117 subprojects that were to be implemented from the second half of 2011 through 2018. The subprojects involved replacing various components. The cost of each subproject was separately calculated, and included a risk reserve. Indiana Michigan also proposed a management reserve, incorporated in the $1.169 billion, to cover unknown contingencies for the project as a whole. It acknowledged that a power uprate of capacity was feasible (meaning power output could be increased) and that "a very small investment in the upsizing of certain equipment to accommodate a potential future uprate" was also included in the LCM project, as it would be less costly to upsize now.

Paul Chodak III, the president and chief operating officer of Indiana Michigan, testified that the

> investments are reasonable and necessary at the Cook Plant to allow it to comply with its NRC licenses, operate safely and reliably, and continue to provide low-cost energy to [Indiana Michigan's] customers. If the LCM Project is not performed, the availability of the generation of the Cook Plant would deteriorate, which would adversely impact the cost of generation available to [Indiana Michigan's] customers. The LCM Project is the most reasonable

> and prudent means of meeting our customers' needs through the end of this license period . . . .

Michael Carlson, the vice president of site support services at the Cook plant, added that without capital to support the LCM project, the reactors would have to be shut down before their extended license lifetimes due to equipment degradation.

ABATE and the Attorney General argued that the LCM project was akin to capital expenditures for maintenance that would simply allow for continued operations. They maintained that the project did not qualify as a "significant investment in an existing electric generation facility" because it was not a "group of investments" made "for a singular purpose such as increasing the capacity of an existing electric generation plant." Regarding this point, the PSC concluded that the requirement that a project be for a "singular purpose" did not require that the project increase capacity and that "an LCM project, for the singular purpose of assuring that safe and reliable power can continue to be produced from a nuclear generation facility until the end of its extended license, comports with the requirements of Section 6s(1) and thus is eligible for a CON." Further, it concluded that the costs should cover the six-year period of 2013 through 2018 (rather than the second half of 2011 though 2018 as had been requested), and that the costs for this abbreviated period would total $773,611,000.

Appellants also argued that a management reserve should be disallowed. The PSC agreed that Indiana Michigan had not carried its burden of proving that a proposed management reserve of $220 million, in addition to the risk reserve included in the CON amount, was reasonable. However, acknowledging that "knowledge of the future is not achievable given the complexity

of the LCM project and the tasks and resources required to achieve it," the PSC found "it appropriate to include a management reserve of 10% of the base cost of the project," which amounted to $77,361,100.

Finally ABATE argued that, to the extent eight subprojects involved upsizing some equipment to accommodate a potential future uprate, they should be disallowed. The PSC held that the cost of replacing a turbine nearing the end of its life with significant signs of wear should be allowed. With respect to the seven other projects, the PSC held that they should be permitted even though there were incremental costs associated with future uprates for which a current need could not be established.

II. STANDARD OF REVIEW

In *In re Application of Consumers Energy Co for Rate Increase*, 291 Mich App 106, 109-110; 804 NW2d 574 (2010), this Court described the scope of our review as follows:

> The standard of review for PSC orders is narrow and well defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. See also *Mich Consol Gas Co v Pub Serv Comm*, 389 Mich 624, 635-636; 209 NW2d 210 (1973). A party aggrieved by an order of the PSC has the burden of proving by clear and convincing evidence that the order is unlawful or unreasonable. MCL 462.26(8). To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a statutory requirement or abused its discretion in the exercise of its judgment. *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999). A reviewing court gives due deference to the PSC's administrative expertise,

> and should not substitute its judgment for that of the PSC. *Attorney General v Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999).
>
> A final order of the PSC must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Const 1963, art 6, § 28; *In re Application of Consumers Energy Co*, 279 Mich App 180, 188; 756 NW2d 253 (2008). Whether the PSC exceeded the scope of its authority is a question of law that is reviewed de novo. *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

The operation of the competent, material, and substantial evidence test was explained in *In re Application of Detroit Edison Co*, 483 Mich 993 (2009):

> Judicial review of administrative agency decisions must "not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 124 [223 NW2d 283] (1974); see also *In re Payne*, 444 Mich 679, 692-693 [514 NW2d 121] (1994) ("When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact, if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record.").

We reject ABATE's suggestion that the substantial evidence test does not apply on grounds that approval of the CON involved ratemaking. In *Detroit Edison Co v Pub Serv Comm*, 264 Mich App 462, 472; 691 NW2d 61 (2004), this Court held:

> [D]etermining the interest rate to be awarded as part of a utility's full recovery of [retail open access] implementation costs [under MCL 460.10a] is highly akin to ratemaking in that it does not involve determining a factual matter, but involves instead an effort to provide a fair return that

> is neither too high nor too low in a context in which no one interest rate can reasonably be characterized as the only fair rate.

MCL 460.10a(1) provides: "The commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier." In contrast, MCL 460.6s(4) requires a contested case hearing on a CON application, MCL 460.6s(1) requires various findings before a CON can be approved, and a determination regarding the amount of estimated costs that should or should not be approved requires factual input and factual findings. Since a determination of factual matters is required, the substantial evidence test applies.

ABATE further argues that the PSC's decision regarding the management reserve was arbitrary and capricious. This Court recently held in *In re Application of Detroit Edison Co to Increase Rates*, 297 Mich App 377, 383; 823 NW2d 433 (2012), aff'd 495 Mich 884 (2013), quoting *Attorney General v Pub Serv Comm*, 206 Mich App 290, 296; 520 NW2d 636 (1994), that MCL 462.26(8) " 'requires a reviewing court to determine only whether an order is unlawful or unreasonable, not whether it is arbitrary and capricious.' "

Finally, the standard of review for an agency's interpretation of a statute was set forth in *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):

> [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.
>
> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, 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. [Citations and quotation marks omitted.]

III. SIGNIFICANT INVESTMENT

In this case of first impression, we hold that the PSC did not err by construing MCL 460.6s(1) so as to conclude that the proposed LCM project is a "significant investment in an existing electric generation facility" and that it qualified as "a group of investments reasonably planned to be made over a multiple year period not to exceed 6 years for a singular purpose . . . ."

MCL 460.6s(1) provides:

> An electric utility that proposes to construct an electric generation facility, *make a significant investment in an existing electric generation facility*, purchase an existing electric generation facility, or enter into a power purchase agreement for the purchase of electric capacity for a period of 6 years or longer may submit an application to the commission seeking a certificate of necessity for that construction, investment, or purchase if that construction, investment, or purchase costs $500,000,000.00 or more and a portion of the costs would be allocable to retail customers in this state. *A significant investment in an electric generation facility includes a group of investments reasonably*

> *planned to be made over a multiple year period not to exceed 6 years for a singular purpose such as increasing the capacity of an existing electric generation plant.* The commission shall not issue a certificate of necessity under this section for any environmental upgrades to existing electric generation facilities or for a renewable energy system. [Emphasis added.]

Whether the investment at issue qualifies as a "significant investment" within the meaning of the statute depends on how the statute is construed.

> The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 212; 501 NW2d 76 (1993). The first step in that determination is to review the language of the statute itself. *House Speaker v State Administrative Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993). If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *Lorencz v Ford Motor Co*, 439 Mich 370, 376; 483 NW2d 844 (1992). Should a statute be ambiguous on its face, however, so that reasonable minds could differ with respect to its meaning, judicial construction is appropriate to determine the meaning. *Sam v Balardo*, 411 Mich 405, 418; 308 NW2d 142 (1981); *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). [*In re MCI*, 460 Mich at 411-412.]

ABATE asserts that the other qualifying projects would increase power supply and that the doctrine of *ejusdem generis* requires an interpretation that a "significant investment" must be one that will also increase power supply. The investment at issue here, ABATE urges, "is not for new capacity but is intended to keep old capacity running in the future." According to ABATE, such "preventative maintenance" does not fall within the scope of MCL 460.6s(1).

"Under the statutory construction doctrine known as ejusdem generis, where a general term follows a series of specific terms, the general term is interpreted 'to include only things of the same kind, class, character, or nature as those specifically enumerated.' " *Neal v Wilkes*, 470 Mich 661, 669; 685 NW2d 648 (2004), quoting *Huggett v Dep't of Natural Resources*, 464 Mich 711, 718-719; 629 NW2d 915 (2001). In *Huggett*, 464 Mich at 718, quoting *Belanger v Warren Consol Sch Dist, Bd of Ed*, 432 Mich 575, 583; 443 NW2d 372 (1989), quoting 2A Sands, Sutherland Statutory Construction (4th ed), § 47.17, p 166, the Court stated:

> This canon gives effect to both the general and specific terms by "treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words."

The series of terms at issue is "construct an electric generation facility, make a significant investment in an existing electric generation facility, purchase an existing electric generation facility, or enter into a power purchase agreement for the purchase of electric capacity." While three possibilities in the series could increase the capacity of a plant, this shared characteristic does not transform "mak[ing] a significant investment in an existing electric generation facility" into a general term. It is specific in its own right. Moreover, it does not *follow* the terms that appellees would identify as "specific" so that it might be viewed as an extension of those terms. Accordingly, the *ejusdem generis* doctrine does not guide our construction.

"Significant investment" is expressly defined in the statute to include "a group of investments reasonably planned to be made over a multiple year

period not to exceed 6 years for a singular purpose such as increasing the capacity of an existing electric generation plant." Appellants argue, in essence, that "singular" should be construed to mean unique or extraordinary. *Black's Law Dictionary* (10th ed), defines "singular," when used as an adjective, as "[i]ndividual; each." In *The American Heritage Dictionary, Second College Edition* (1991), "singular" is defined, when used as an adjective, as "[b]eing only one; individual" or alternatively as "[d]eviating strongly from a norm; rare." The two lead definitions in *Webster's New Twentieth Century Dictionary Unabridged* (1979), are "individual; separate or of or having to do with an individual or peculiar to one; private" and "remarkable; eminent; extraordinary." The dictionaries suggest that "singular" is generally thought to mean "individual," "one," *or* "extraordinary." Since the term is subject to two interpretations, it is ambiguous and judicial construction is required to effectuate legislative intent. We note the juxtaposition of "*group* of investments" with "*singular* purpose." This context indicates that the Legislature's intent was to include a qualifying group of investments that had a common purpose, but not to require an extraordinary purpose.

Appellants note that the phrase "such as increasing the capacity of an existing electric generation plant" describes "singular purpose," and argue that the singular purpose therefore must be to increase capacity. However, had the Legislature intended that result, it would have said that a significant investment would include "a group of investments . . . for *the* singular purpose *of* increasing the capacity of an existing electric generation plant." The phrase "such as" connotes that "increasing the capacity of an existing electric generation plant" was meant to be an

example of a singular purpose, not the only singular purpose that would qualify.[2]

Appellants indicate that the 117 subprojects at issue in essence involve replacing old equipment and qualify as legally insignificant capital expenditures. However, it appears that the project more closely amounts to a full-scale renovation of the Cook Nuclear Power Plant. The PSC found that it was "for the singular purpose of assuring that safe and reliable power can continue to be produced from a nuclear generation facility until the end of its extended license." This finding was supported by the testimony of Chodak and Carlson. Thus, the LCM project, comprised of 117 subprojects, appears to be the type of significant investment that the Legislature contemplated would qualify for a CON and concomitant preapproval of costs. We find no reason to disagree with the PSC's interpretation of MCL 460.6s(1).

IV. EIGHT SUBPROJECTS

As part of a 2010 feasibility study to define work associated with a power uprate, Indiana Michigan solicited an evaluation of "the existing plant systems and components in regard to Life Cycle Management considering the recent operating license extension." The power uprate was abandoned but the study was used in designing the LCM project. In the interest of cost efficiency, some LCM components were sized for uprated capacity to accommodate future demand. Specifi-

[2] ABATE argues that "such" must be defined in accordance with the definition recognized in *People v Alexander*, 234 Mich App 665, 676-677; 599 NW2d 749 (1999). There, the Court was construing the phrase "such an institution" and considered dictionary definitions of "such." The Court was not construing the phrase "such as," which is generally followed by an example.

cally, the testimony indicated that "costs associated with upsizing are included in 7 of the 117 LCM subprojects. By including the cost of upsizing in the LCM Project, we will avoid having to replace this equipment at a large expense should our customers require the power uprate." Evidence demonstrated that an eighth project involved the Unit 2 low-pressure and high-pressure steam turbines, which needed extensive repairs due to erosion and were nearing the end of their service lives. The testimony supported that the turbines in place were no longer commercially available and would be replaced with a technologically improved turbine that would incidentally add capacity. Further testimony supported the prudence of proactively replacing aging and obsolete equipment before failure or unreliability, which would serve to avert unscheduled downtime and the need for expedited repairs and replacement, and would allow the safety of the units to be maintained at their current levels. Moreover, there was testimony that the projects were "necessary to allow the Cook Plant to safely and reliably reach the end of the extended operating licenses."

The PSC determined that these subprojects should be covered as part of the CON. It found it reasonable to replace the Unit 2 turbine "as part of the LCM rather than wait for a catastrophic failure that could result in an extended and costly outage." Also, the PSC "agree[d] . . . that the modest incremental cost associated with upsizing certain components is justified in light of the possibility that the plant may be uprated in the not-too-distant future. The Commission also agrees that the other contested subprojects meet the LCM screening criteria."

MCL 460.6s(4) provides, in pertinent part:

> The commission shall grant the request [for a CON] if it determines all of the following:
>
> (a) That the electric utility has demonstrated *a need for the power that would be supplied* by the existing or proposed electric generation facility . . . through its approved integrated resource plan that complies with subsection (11).
>
> (b) The information supplied indicates that the existing or proposed electric generation facility will comply with all applicable state and federal environmental standards, laws, and rules.
>
> (c) The *estimated cost of power* from the existing or proposed electric generation facility or the price of power specified in the proposed power purchase agreement *is reasonable*. . . .
>
> (d) The *existing or proposed electric generation facility* or proposed power purchase agreement *represents the most reasonable and prudent means of meeting the power need* relative to other resource options for meeting power demand, including energy efficiency programs and electric transmission efficiencies.
>
> (e) To the extent practicable, the construction or investment in a new or existing facility in this state is completed using a workforce composed of residents of this state as determined by the commission. This subdivision does not apply to a facility that is located in a county that lies on the border with another state. [Emphasis added.]

Although some costs involved in the LCM indirectly relate to potential future uprates, we find no statutory barrier to their PSC approval. MCL 460.6s(4)(a) requires a determination regarding whether there is a "need for the power that would be supplied by the existing or proposed electric generation facility . . . ." The statutory language does not require a separate finding of need for each individual outlay forming the group of investments that comprises a "significant investment" in an existing facil-

ity under MCL 460.6s(1). If the need for power is established, the facility must be "the most reasonable and prudent means of meeting the power need" under MCL 460.6s(4)(d). MCL 460.6s(4)(c) requires an additional determination that the "estimated cost of power from the existing or proposed electric generation facility . . . is reasonable." If an investment or part of an investment was not needed to accomplish the singular purpose for which a significant investment was being made, it and its cost would arguably fail the "reasonable and prudent" test.

Here, the evidence established that the LCM project and 117 subprojects would allow for continued operation of the facility for the duration of the extended licenses; the facility would continue to serve the need already being served. Thus, the need for the power supplied by the facility was established. The evidence also established that the turbine was both an uprate and an LCM project, that the seven other subprojects would be of a quality that would allow for future uprates, and that there was an incremental cost, at least for some of the seven, for this allowance. However, the evidence clearly supported that the turbine was needed. That it increased capacity was incidental; it was being replaced because of need rather than a current desire to uprate capacity. Moreover, because there was a current need for the seven subprojects, whether current need existed for each aspect of the subprojects did not have to be determined under MCL 460.6s(4). Rather, Subsection (4) merely required that the costs be reasonable and prudent. Given testimony that the components being replaced needed replacement currently and would have to be replaced again at a much higher cost if there was an uprate, it cannot be said that the PSC acted unlawfully or unreasonably by determining that the current expense for replacements with features that

would accommodate an uprate was both reasonable and prudent. Although there was a risk involved that the uprates might never occur, substantial evidence supported the determination that, on balance, the current expenditure was warranted.

V. MANAGEMENT RESERVE

Indiana Michigan offered testimony establishing that individual cost estimates were calculated for each subproject and the estimates included individual risk reserves. However, Indiana Michigan claimed that while there was a high level of confidence in the cost estimating, it was "unrealistic to assume that all anomalies have been both recognized and accounted for in the estimates" and accordingly, Indiana Michigan chose "to apply a 20% [management] reserve to overall cost estimate." It distinguished "risk reserve" from "management reserve" as follows:

> Risk reserve is included in the funding of each project as it progresses to address discrete potential defined issues or "known unknowns" [such as deviations from the projected inflation rate, abnormal seasonal weather and attendant construction delays, and variances in commodities prices]. This amount of this reserve is based on the occurrence probability and consequences of the risk and where possible is based on data from similar projects that have been benchmarked. . . . If the given risk is not realized, then the funding reserved for its mitigation will not be expended.

In contrast, Indiana Michigan explained that management reserve

> is allocated for "unknown unknowns," [e.g. upgrading security in response to the 9/11 terrorist attacks, and price volatility of materials due to unforeseen world events, natural disasters, or other unexpected issues discovered during project implementation,] and its amount is based on

> guidance established by organizations such as the American Association of Cost Engineers, which provides clear guidance based on the level of project definition.

Indiana Michigan claimed that the amount it was requesting for management reserve was

> based on accepted industry practices and is a necessary and prudent project management tool for forecasting total project costs. Management reserve is a real project cost that is routinely forecast in construction projects and ultimately held for necessary cost growth due to unknown unknowns within the project (or sub-projects for the LCM). Unknown unknowns occur when internal or external factors impact the project that a project manager[, who assesses risk reserve,] cannot reasonably predict or estimate.
>
> Both risk reserve and management reserve have been included in the project cost estimate because their purposes are significantly different. . . .
>
> * * *
>
> . . . [M]anagement reserve is an accepted and recommended practice to include in a project cost estimate in addition to risk reserve contingency as stated by Project Management Institute (PMI) in their guidebook labeled A Guide to the Project Management Body of Knowledge (PMBOK), the Institute of Nuclear Power Operations (INPO) as stated in their document labeled 09-002, Excellence in Nuclear Project Management, the American Association of Cost Engineers (AACE) in their document labeled AACE International Recommended Practice No. 41R-08, and the American National Standards Institute (ANSI) in their document labeled ANSI/EIA Standard 748A — Standard for Earned Value Management.
>
> Disagreement with the use of management reserve assumes that the Cook project team knows exactly what will happen in the future, and has already accounted for each outcome in the project cost estimate. While that level

> of knowledge is desirable, it is simply not achievable due to the complexity of the project and the tasks and resources required to complete it.

The PSC staff originally opposed the management reserve, maintaining that the costs were purely speculative and that risk reserve of 15% to 25% had already been built into the subprojects. The staff believed that

> it is appropriate and necessary to allow the Commission to review these costs if and when they are incurred, and customers deserve some assurance that costs are being reasonably and prudently controlled on the LCM project. Furthermore, MCL 460.6s(9) already has an allowance for costs to be increased up to 110% of the amount that the Commission approves in this case if the Commission finds that the excess costs are reasonable and prudent.[3] If [Indiana Michigan's] approximate 20% management reserve is approved, combined with the 10% allowance permitted in MCL 460.6s(9), this could increase the amount an additional 30% above the individual subproject forecasted costs. It is important to note that this "30% contingency" is over and above the "15-25% risk reserve" contingency that is already built into the individual subprojects described above.

Indiana Michigan responded by claiming that 32 subprojects specified in a certain report had a cost and a contingency, but that to develop the cost for the LCM project, "we removed all the contingency" "so we had a raw cost" "and then we added the indirect costs[, a straight 10%,] and those were the individual sub-project costs."[4] Further, there was testimony that "management reserve is the only source of contingency in the LCM project" and

---

[3] Subsection (9) provides for this allowance after completion of the project; it is not pre-approved as a cost of the project, which is what Indiana Michigan is seeking.

[4] There was no explanation of what comprised "indirect costs" and it is not clear whether there is a basis for distinguishing them from contingency costs.

> that contingency costs are an appropriate and necessary component of a cost estimate of any major capital project. It is a standard practice, not just in the utility industry, but throughout the construction industry to include contingency costs in capital project estimates to account for real costs that will be incurred but cannot be known at the start of a project. . . . Management reserve is a different area of contingency not covered by risk reserves.

Indiana Michigan maintained that if "management reserve margins are not included in the approved cost estimate as typically done, then the total cost estimate will be understated and not reflect the foreseeable cost of the project."

The administrative law judge recommended that the management reserve be denied, concluding, in pertinent part, that Indiana Michigan had not met its burden of proof:

> Although [Indiana Michigan] argues that the record is clear that the only contingency in the LCM project is the management reserve, . . . Staff correctly points out that the evidence regarding removal of all other contingencies . . . came late in the proceeding during cross-examination and was not supported by documentary evidence. . . .
>
> Further, the record is not clear that there are not multiple layers of contingencies as Staff suggests.

The PSC concluded that Indiana Michigan had "failed to carry its burden of proof to show that its proposed management reserve, over and above what appears to be a risk reserve added to at least some projects, is reasonable. The portion of the record in this case dedicated to [Indiana Michigan's] testimony is rife with contradictions and late attempts to correct misstatements made in the course of the proceeding." The PSC therefore removed the proposed management reserve from the costs approved but, professing to understand "that knowledge of the future is not achievable

given the complexity of the LCM project and the tasks and resources required to achieve it, the Commission finds it appropriate to include a management reserve of 10% of the base cost of the project."

Preliminarily, MCL 460.6s does not expressly address whether a management reserve can be included as an approved cost. Regarding approval of costs, the statute simply says:

> In a certificate of necessity under this section, the commission shall specify the costs approved for the construction of or significant investment in the electric generation facility, the price approved for the purchase of the existing electric generation facility, or the price approved for the purchase of power pursuant to the terms of the power purchase agreement. [MCL 460.6s(6).]

MCL 460.6s(9) then provides:

> Once the electric generation facility or power purchase agreement is considered used and useful or as otherwise provided in subsection (12), the commission shall include in an electric utility's retail rates all reasonable and prudent costs for an electric generation facility or power purchase agreement for which a certificate of necessity has been granted. *The commission shall not disallow recovery of costs an electric utility incurs in constructing, investing in, or purchasing an electric generation facility or in purchasing power pursuant to a power purchase agreement for which a certificate of necessity has been granted, if the costs do not exceed the costs approved by the commission in the certificate. Once the electric generation facility or power purchase agreement is considered used and useful or as otherwise provided in subsection (12), the commission shall include in the electric utility's retail rates costs actually incurred by the electric utility that exceed the costs approved by the commission only if the commission finds that the additional costs are reasonable and prudent*. If the actual costs incurred by the electric utility exceed the costs approved by the commission, the electric utility has the

> burden of proving by a preponderance of the evidence that the costs are reasonable and prudent. The portion of the cost of a plant, facility, or power purchase agreement which exceeds 110% of the cost approved by the commission is presumed to have been incurred due to a lack of prudence. The commission may include any or all of the portion of the cost in excess of 110% of the cost approved by the commission if the commission finds by a preponderance of the evidence that the costs were prudently incurred. [Emphasis added.]

Thus, Subsection (9) provides that approved costs can be recovered in rates when a facility becomes used and useful. If the costs are not preapproved but are nonetheless incurred, Subsection (9) provides that they may be recovered if reasonable and prudent. Thus, the question is not whether the utility will be able to recover the costs, but whether they will be preapproved.

Appellants argue that the provision in Subsection (9) for recovery of actual costs implies that a management reserve was not contemplated as part of the costs preapproved with issuance of a CON. However, nothing in Subsection (6) or Subsection (9) would preclude preapproval of a management reserve cost. If testimony established that a management reserve was a legitimate cost associated with a qualifying project, Subsection (6) would merely require that it be specified. Subsection (9) provides that all reasonable and prudent costs for a facility covered by a CON be included in rates, whether preapproved or not. If preapproved, there is no concern that the utility would get a windfall if ultimately the costs were not incurred; although Subsection (9) states that preapproved "costs" cannot be disallowed, if they are not incurred they would not qualify as a "cost." Thus, if preapproved, there is an assurance of recovery in rates if incurred. If not preapproved, the utility does not absorb the cost but simply loses the benefit of preapproval.

Here, ample testimony supported the inclusion of a cost for contingencies in the estimated costs of the LCM project. However, the testimony was confusing regarding whether contingencies were covered in part by risk reserve built into the individual subprojects. Indiana Michigan first presented testimony indicating that some contingencies were covered by risk reserve and then presented undocumented testimony indicating that all contingencies had been stripped out of at least some subprojects. Given the questions that remained regarding management reserve, the PSC did not err when it found that Indiana Michigan did not establish that management reserve was a reasonable cost by substantial evidence on the whole record.

Indiana Michigan had proposed a management reserve of 20% of estimated costs. There was no evidence explaining the origin of this figure or its reasonableness. Thus, even if Indiana Michigan had established that a management reserve was a reasonable cost generally, it failed to establish that the amount of the cost was reasonable. Coextensively, there was no factual basis for the PSC's determination that 10% of estimated costs represented a reasonable management reserve. Citing *Consumers Power Co v Pub Serv Comm*, 189 Mich App 151, 187; 472 NW2d 77 (1991), it is suggested by appellees that the PSC's provision for 10% as a management reserve was within a range of values presented and was therefore supported by substantial evidence. However, the PSC expressly found that the reasonableness of a 20% management reserve was not supported by the record.[5] It then included a 10% man-

[5] In arguing that projects with uprate modifications should be excluded from the LCM project, a witness for the Attorney General argued that those projects should be removed along with the proposed management reserve, and that an adjusted 20% management reserve should then be added back in. Again, there was no evidence addressing where this figure

agement reserve, not because record evidence supported this cost, but "because the Commission understands that knowledge of the future is not achievable given the complexity of the LCM project and the tasks and resources required to achieve it." It remains unclear why the PSC chose 10% as opposed to 1% or 15%. Since the amount of this cost was not supported by substantial evidence on the whole record, there was no showing that the cost was reasonable within the meaning of MCL 460.6s(4)(c), and, therefore, the PSC's order was not reasonable within the meaning of MCL 462.26(8) to the extent that it approved this cost. Accordingly, this cost should not have been preapproved and Indiana Michigan should be entitled to these costs only if it is able to establish after the fact that the costs were reasonable and prudent.

VI. NEED FOR SPECIFICATION OF COSTS OF THE 117 SUBPROJECTS

The Attorney General argues that the PSC did not specify the costs it allowed and those it disallowed as required by MCL 460.6s(6), which provides:

> In a certificate of necessity under this section, the commission shall specify the costs approved for the construction of or significant investment in the electric generation facility, the price approved for the purchase of the existing electric generation facility, or the price approved for the purchase of power pursuant to the terms of the power purchase agreement.

The Attorney General asserts that a remand is necessary for such specification. Further, the Attorney General insists that this issue was preserved by several citations to MCL 460.6s(6) in exceptions to the proposal

---

came from or why it should be regarded as reasonable. Moreover, it did not establish a range of values that would have supported the 10% range chosen by the PSC.

for decision. The Attorney General mentioned that MCL 460.6s(6) requires the specification of costs in the context of its argument that the PSC had to approve or reject, but could not amend or modify, Indiana Michigan's application for a CON, an argument that the Attorney General has not pursued on appeal. Moreover, the Attorney General noted that MCL 460.6s(6) relates to the nature and reasonableness of costs, and discussed this provision in the context of discussing whether contingent costs can be approved as a specific cost. The Attorney General never challenged the failure to specify costs allowed and disallowed. "Failure to file exceptions to a proposal for decision in a timely manner constitutes a waiver of the objection." *Attorney General v Pub Serv Comm*, 174 Mich App 161, 164; 435 NW2d 752 (1988). This issue is not preserved.

The record indicates that the costs for each subproject were broken down and that these were the costs approved by the PSC. However, it is not clear from the record on appeal to what extent costs were itemized. The statute speaks of "*costs* approved" but does not indicate the level of specificity required. (Emphasis added.) It could mean the total cost of each composite project or require itemization of each project. If itemization is called for, what degree of itemization should be required? With a project of this complexity, itemization down to nuts and bolts would presumably be too cumbersome to be useful. Had the Attorney General argued below that the statute contemplated more specificity, the pros and cons of more specificity and the degree of appropriate specificity would have been developed and addressed by the PSC. Moreover, in considering this question it would be helpful to understand how the PSC will assess cost overruns so that it can be determined what is an overrun and what was a preapproved cost. Since we have neither this information nor

the benefit of the PSC's determination regarding this issue, we decline to consider it.

We affirm in part and reverse in part.

FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ., concurred.

RUSHA v DEPARTMENT OF CORRECTIONS

Docket No. 317693. Submitted October 7, 2014, at Lansing. Decided October 21, 2014, at 9:15 a.m. Leave to appeal sought.

Roy Rusha brought an action in the Court of Claims against the Department of Corrections (the DOC), alleging that the DOC violated the constitutional ban on cruel or unusual punishment by failing to treat his multiple sclerosis during his incarceration. The DOC moved for summary disposition on the basis that plaintiff failed to file the action or notice of intent to file the action within six months following the happening of the event giving rise to the cause of action, as required by MCL 600.6431(3). Plaintiff alleged that the statutory filing requirement was inapplicable to his action alleging a constitutional tort and that, because the DOC denied him treatment until his release from prison, the constitutional violation was of a "continuing nature" and his complaint was therefore timely filed. The court, William E. Collette, J., agreed with plaintiff and entered an order denying the DOC's motion for summary disposition. The DOC appealed.

The Court of Appeals *held*:

The statutory notice requirement of MCL 600.6431(3) applies to constitutional torts. Plaintiff's failure to comply with the six-month statutory notice period bars his claim alleging a constitutional tort. It is well established that the Legislature may impose reasonable procedural requirements on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations. This ability to set reasonable procedural requirements is broadly construed and encompasses legislation supplemental to constitutional provisions that are self-executing. The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon. The constitutional provision at issue, Const 1963, art 1, § 16, is self-executing. Application of the notice provision of § 6431(3) did not effectively divest plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogate a constitutional right. The statutory notice requirement of § 6431(3) is reasonable and did not otherwise deprive plaintiff of any substantive, constitutional

right. The order denying the DOC's motion for summary disposition is reversed and the matter is remanded to the Court of Claims for entry of an order granting the DOC's motion for summary disposition.

Reversed and remanded.

CONSTITUTIONAL LAW — CONSTITUTIONAL TORTS — NOTICE OF INTENTION TO FILE CLAIM.

The statutory notice requirement of MCL 600.6431(3) applies to actions based on constitutional torts.

Bendure & Thomas (by *Mark R. Bendure*) and *McKeen & Associates, PC* (by *Euel W. Kinsey*), for plaintiff.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *James T. Farrell*, Assistant Attorney General, for defendant.

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

MURRAY, J. Defendant, Department of Corrections (DOC), appeals as of right the Court of Claims order denying its motion for summary disposition of plaintiff's allegation of cruel or unusual punishment in violation of the Michigan Constitution. On appeal, the DOC contends that plaintiff's failure to file the statutorily required notice of intent to file a claim within six months of the alleged injury bars this lawsuit where the complaint was not filed until nearly 28 months after the alleged injury first occurred. Because we hold that the statutory notice requirement of MCL 600.6431 applies to constitutional torts, we reverse the Court of Claims' decision to the contrary and remand this case for entry of an order granting the DOC's motion for summary disposition.

I. BACKGROUND

This case arises out of plaintiff's claim that the DOC violated the Michigan Constitution's ban on cruel or

unusual punishment by failing to treat his multiple sclerosis during his incarceration. See Const 1963, art 1, § 16. As alleged in the complaint, plaintiff was incarcerated on October 20, 2010, having violated his probation. Five months earlier, plaintiff's doctor had diagnosed him with multiple sclerosis, and as of October 20, had prescribed certain medication for plaintiff. Prison doctors apparently disagreed. Instead, they concluded plaintiff did not satisfy the DOC's criteria for a multiple sclerosis diagnosis and refused treatment on this ground. Plaintiff's symptoms allegedly worsened. He experienced multiple hospitalizations during which independent physicians diagnosed him with acute relapsing multiple sclerosis. Despite plaintiff's persistent symptoms and weekly grievances, the DOC continued to refuse the alleged necessary medications. Plaintiff was eventually transferred to a different correctional facility and confined to a wheelchair. On August 28, 2012, plaintiff was released from prison. His condition has allegedly deteriorated since that time.

II. PROCEEDINGS

Less than a year after his release from prison, plaintiff filed a single-count complaint in the Court of Claims alleging cruel or unusual punishment. Plaintiff did not, however, file a notice of intention to file a claim against the state for personal injuries. See MCL 600.6431(3).

The complaint alleged that the DOC's "capitated basis" compensation method gave an incentive to its independent medical contractors to provide substandard care to prisoners by rendering the contractors responsible for costs exceeding a predetermined rate of compensation set by the DOC's per-prison-per-month (PPPM) formula. Plaintiff claims that this policy ac-

counted for the prison doctors' refusal to diagnose and treat his multiple sclerosis under the DOC's criteria despite numerous diagnoses to the contrary by independent physicians, and that, consequently, the DOC's enactment and enforcement of this policy and criteria constituted cruel or unusual punishment in violation of the Michigan Constitution.

The DOC moved for summary disposition on multiple grounds. Relevant to this appeal is the DOC's contention that plaintiff's failure to comply with the six-month statutory notice period of MCL 600.6431(3) precluded this action.[1] Plaintiff responded that MCL 600.6431(3)'s filing requirement was inapplicable since the gravamen of his claim was the constitutional tort and his personal injury, as a mere consequence of the alleged constitutional violation, could not trigger that subsection. Alternatively, plaintiff claimed that because the DOC denied him treatment until his release date from prison, the constitutional violation was of a "continuing nature" and his complaint was therefore timely filed.

After hearing arguments, the court ultimately agreed with plaintiff, ruling that constitutional torts are exempt from the requirements of MCL 600.6431(3). As the court explained during the motion hearing:

> [M]y opinion is that constitutional torts do not have to conform with the requirements of notice under the act because the constitution—you know, I am not a big constitutional tort fan personally, but the constitution trumps

[1] The DOC also argued that plaintiff's failure to verify the complaint and failure to comply with the disclosure requirements of MCL 600.5507(2) as set forth in the prison litigation reform act, MCL 600.5501 *et seq*., each independently warranted dismissal. The court ultimately rejected the former argument, while the DOC voluntarily withdrew the latter.

> statutes. . . . But my opinion is, he can file it willy-nilly, apparently, as long as he is suffering from the injury.

An order denying the DOC's motion was entered on July 23, 2013. This appeal followed.[2]

III. ANALYSIS

The sole issue for decision is whether plaintiff's failure to comply with the six-month statutory notice period of MCL 600.6431(3) bars his claim alleging a constitutional tort. We hold that it does. The Court of Claims ruled on this issue pursuant to MCR 2.116(C)(7). We review de novo a trial court's ruling under that subrule. *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

In interpreting both constitutional and statutory provisions, the primary duty of the judiciary is to ascertain the purpose and intent of the provision at issue. *White v City of Ann Arbor*, 406 Mich 554, 562; 281 NW2d 283 (1979). The starting point—and usually the ending point—for this inquiry is the plain language of the provision. *Co Rd Ass'n of Mich v Governor*, 474 Mich 11, 15; 705 NW2d 680 (2005); *UAW v Green*, 302 Mich App 246, 264-265; 839 NW2d 1 (2013); *Rinke v Potrzebowski*, 254 Mich App 411, 414; 657 NW2d 169 (2002). "When a constitutional or statutory provision contains clear and unambiguous language it is not open to judicial construction and effect is given to the plain meaning of the words used." *Oppenhuizen v Zeeland*, 101 Mich App 40, 49; 300 NW2d 445 (1980).

As noted, plaintiff's complaint consists of one count alleging a violation of Article 1, § 16 of the Michigan

---

[2] This Court previously dismissed plaintiff's jurisdictional challenge. *Rusha v Dep't of Corrections*, unpublished order of the Court of Appeals, entered May 29, 2014 (Docket No. 317693).

Constitution on the basis that the DOC policy precluded plaintiff's treatment for multiple sclerosis and worsened his condition, and therefore its enforcement subjected him to cruel or unusual punishment that caused him damage. Our Supreme Court has held that a claim for damages premised on a constitutional provision standing alone *may be* actionable under circumstances such as those presented here, i.e., where the claimant alleges a violation of the Michigan Constitution by virtue of a governmental custom or policy. *Smith v Dep't of Pub Health*, 428 Mich 540, 545; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989). This type of claim has been referred to as a "constitutional tort." *77th Dist Judge v Michigan*, 175 Mich App 681, 692-693; 438 NW2d 333 (1989), disavowed on other grounds by *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 774 n 8; 664 NW2d 185 (2003); see also *Smith*, 428 Mich at 610 n 21 (opinion by BRICKLEY, J.), 642-643 (BOYLE, J., concurring in part and dissenting in part).

Assuming plaintiff has properly alleged a constitutional tort, the Court of Claims has exclusive jurisdiction. Pertinent to this case, the Court of Claims Act (the "Act"), MCL 600.6401 *et seq*., expressly vests that court with exclusive jurisdiction "[t]o hear and determine any claim or demand, statutory or constitutional, . . . ex contractu or ex delicto, or any demand for monetary, equitable, or declaratory relief . . . against the state or any of its departments . . . notwithstanding another law that confers jurisdiction of the case in the circuit court." MCL 600.6419(1)(a). Although plaintiff brought this action in the Court of Claims, he argues that he was not required to comply with the Act's applicable provisions and procedures.

In particular, one procedure he asserts does not apply to this case is the Act's notice provision, which requires a claimant either to file a claim or to provide notice of his intention to file a claim against the state within one year of its accrual, MCL 600.6431(1), unless the claim is for personal injuries or property damage, in which case the deadline is six months, MCL 600.6431(3). Plaintiff's complaint outlines numerous alleged physical injuries and conditions that he suffers from as a result of the allegedly unconstitutional policies of the DOC, including more symptomatic and debilitating multiple sclerosis, being wheelchair bound, and having a port permanently inserted into his chest. To remedy these conditions and injuries, plaintiff specifically seeks only monetary damages, and not injunctive relief, because he is no longer in prison. Hence, plaintiff's constitutional tort claim clearly seeks redress for his personal injuries. See *Palmer v Bd of Comm'rs for Payne Co Oklahoma*, 765 F Supp 2d 1289, 1294-1295 (WD Okla, 2011), (court applied personal injury statute of limitations to plaintiff's Eight Amendment claim of denial of medical care), aff'd 441 Fed Appx 582 (CA 10, 2011), and citing *Wilson v Garcia*, 471 US 261, 276-280; 105 S Ct 1938; 85 L Ed 2d 254 (1985). Accordingly, plaintiff's claim falls under the six-month statutory notice provision of MCL 600.6431(3).

Application of MCL 600.6431(3) is straightforward. The statutory language unambiguously sets forth the six-month window within which to file a claim or notice of intent to file a claim after an alleged personal injury:

> In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action. [MCL 600.6431(3).]

Section 6431(3) is an unambiguous "condition precedent to sue the state," *McCahan v Brennan*, 291 Mich App 430, 433; 804 NW2d 906 (2011), aff'd 492 Mich 730 (2012), and a claimant's failure to comply strictly with this notice provision warrants dismissal of the claim, even if no prejudice resulted, *McCahan v Brennan*, 492 Mich 730, 746-747; 822 NW2d 747 (2012).

Plaintiff does not, and indeed cannot, contest his failure to comply with the condition precedent of § 6431(3). Instead, plaintiff argues that the Court of Claims properly denied the DOC's motion for summary disposition because the Act's statutory notice requirement cannot interfere with his constitutional tort claim since the Constitution trumps statutes.[3] Plaintiff's argument ignores a long line of *published* cases recognizing the Legislature's constitutional authority to enact procedural rules governing constitutional claims.

Indeed, it is well established that the Legislature may impose reasonable procedural requirements, such as a limitations period, on a plaintiff's available remedies even when those remedies pertain to alleged constitutional violations. *Taxpayers Allied for Constitutional Taxation v Wayne Co*, 450 Mich 119, 126; 537 NW2d 596

[3] Plaintiff relies almost exclusively on an unpublished decision of this Court for the proposition that statutory notice requirements are inapplicable where constitutional torts are at issue. See *Rodwell v Forrest*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 2010 (Docket No. 289038). Setting aside that *Rodwell* has no precedential value, MCR 7.215(C)(1), central to *Rodwell*'s holding was that governmental immunity cannot provide a shield from constitutional tort liability. *Rodwell*, unpub op at 5. No doubt that is the case. See *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 121; 782 NW2d 784 (2010). But that proposition is not at issue here, as the statutory notice requirement of § 6431 does not preclude plaintiff from suing for a violation of Article 1, § 16, it just contains a procedural mechanism for bringing such a claim.

(1995). This ability to set reasonable procedural requirements is broadly construed and encompasses legislation supplemental to constitutional provisions that are self-executing. *Durant v Dep't of Ed (On Second Remand)*, 186 Mich App 83, 98; 463 NW2d 461 (1990). " 'The only limitation, unless otherwise expressly indicated, on legislation supplementary to self-executing constitutional provisions is that the right guaranteed shall not be curtailed or any undue burdens placed thereon.' " *Id*. at 98, quoting *Hamilton v Secretary of State*, 227 Mich 111, 125; 198 NW 843 (1924) (opinion by BIRD, J.), quoting *State ex rel Caldwell v Hooker*, 22 Okla 712; 98 P 964 (1908).

Whether a constitutional provision is self-executing depends upon whether subsequent legislation is a necessary prerequisite for its operation. *Durant*, 186 Mich App at 97. On this score, our Supreme Court has elaborated:

> "A constitutional provision may be said to be self-executing, if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." [*Thompson v Secretary of State*, 192 Mich 512, 520; 159 NW 65 (1916), quoting Cooley, Constitutional Limitations (7th ed), p 121.]

The constitutional provision at issue provides, in relevant part, that "cruel or unusual punishment shall not be inflicted . . . ." Const 1963, art 1, § 16. This prohibition clearly proscribes a specific evil: the state's inflicting cruel or unusual punishment on a person. Article 1, § 16 is not merely a statement of abstract principle or a dormant aspiration pending subsequent legislation, such as a municipality's ability to own and

operate a utility,[4] the power to exercise eminent domain,[5] or the federal prohibition on state taxation of imports.[6] Instead, this unambiguous proscription renders " 'a sufficient rule by means of which the right which it grants may be enjoyed and protected . . . .' " *Detroit v Oakland Circuit Judge*, 237 Mich 446, 450; 212 NW 207 (1927) (citation omitted). No further legislation is required to effectuate the ban, so the provision is self-executing. See 16 CJS, Constitutional Law, § 93, p 120 ("The cruel and unusual punishment provision of a state constitution is a self-executing provision that prohibits specific evils that can be remedied without implementing legislation."); *State v Lafferty*, 2001 Utah 19, ¶ 73; 20 P3d 342 (2001) ("Article I, section 9 [of the Utah Constitution providing that 'cruel and unusual punishment [shall not be] inflicted'] is also a self-executing provision that prohibits specific evils that can be remedied without implementing legislation."); *De La Rosa v State*, 173 Misc 2d 1007, 1010; 662 NYS2d 921 (Ct of Claims, 1997) (explaining that New York State's constitutional provision prohibiting cruel and unusual punishments is self-executing); *Ex parte Berman*, 86 Ohio App 411, 417; 87 NE2d 716 (1949)

---

[4] See *Sault Ste Marie City Comm v Sault Ste Marie City Attorney*, 313 Mich 644, 654, 659; 21 NW2d 906 (1946) (holding that Article 8, § 24 of the 1908 Constitution authorizing a city or village to issue bonds under certain conditions to acquire or operate a public utility is not self-executing).

[5] See *Detroit v Oakland Circuit Judge*, 237 Mich 446, 451; 212 NW 207 (1927) (holding that to the extent the constitutional provision permitting cities to "acquire" parks without their corporate limits comprehends the right of acquisition by eminent domain (see 1908 Const, art 8, § 22), the provision is not self-executing "as it 'merely lays down a general principle' ") (citation omitted).

[6] See *Price Paper Corp v Detroit*, 42 Mich App 488, 491; 202 NW2d 523 (1972) ("The provision of the Federal Constitution prohibiting state taxation of imports is not self-executing.").

("The provisions contained in the Bill of Rights respectively of the Federal and Ohio Constitutions defining . . . the guarantees against cruel and unusual punishment . . . *are self-executing and require no legislative or statutory authority* to support or implement them.").

Because the ban on cruel or unusual punishment is self-executing, the question becomes whether the six-month statutory notice of § 6431(3) curtails or places an undue burden on the right to be free from its infliction. *Durant*, 186 Mich App at 98. It does not. The only burden § 6431(3) places on the assertion of a personal injury claim against the state—constitutional or otherwise—is a six-month filing deadline. This is a minimal imposition, especially considering that § 6431 allows the filing of statutory notice in lieu of filing an entire claim.[7] The statutory notice requirement does not abrogate a substantive right, but rather provides the framework within which a claimant may assert that right. Notice provisions like this one generally give the state "time to investigate and to appropriate funds for settlement purposes," *Davis v Farmers Ins Group*, 86 Mich App 45, 47; 272 NW2d 334 (1978), while simultaneously allowing the claimant to retain the full benefit of the applicable limitations period.[8] See, also, *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212; 731 NW2d 41 (2007). In other words, statutory notice, like a

[7] Regarding the content of a written notice of intent to file a claim, MCL 600.6431(1) requires the claimant to file

> a written notice of intention to file a claim against the state or any of its departments . . . stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which . . . notice shall be signed and verified by the claimant before an officer authorized to administer oaths.

[8] The period of limitations for personal injury actions is three years. MCL 600.5805(10).

statute of limitations, is a procedural rather than substantive rule. *American States Ins Co v Dep't of Treasury*, 220 Mich App 586, 590; 560 NW2d 644 (1996) (statutory notice provisions are " 'procedural protections' ") (citation omitted); *Gleason v Dep't of Transp*, 256 Mich App 1, 2; 662 NW2d 822 (2003) ("A statute of limitations is a procedural, not substantive, rule.").

On this point, it bears emphasis that Michigan courts routinely enforce statutes of limitations where constitutional claims are at issue. See, e.g., *Taxpayers Allied*, 450 Mich at 125-126 (applying the one-year limitation period to bar a Headlee Amendment claim); *Gleason*, 256 Mich App at 2-3 ("plaintiffs' substantive right to compensation when private property is taken for public use is wholly unaffected by the procedural requirement that the action be brought within three years of its accrual"); *Durant*, 186 Mich App at 98 ("A one-year period of limitation does not curtail or place undue burdens on a taxpayer's exercise of rights granted by the Headlee Amendment."); *Price Paper Corp v Detroit*, 42 Mich App 488, 491; 202 NW2d 523 (1972) ("Plaintiff's failure to exercise the existing statutory remedy within the prescribed time limit does not deny the constitutional tax exemption on imports. It does, however, foreclose further assertion of the exemption in the courts."). The exception to enforcement lies where " 'it can be demonstrated that [statutes of limitations] are so harsh and unreasonable in their consequences that they effectively divest plaintiffs of the access to the courts intended by the grant of the substantive right.' " *Curtin v Dep't of State Hwys*, 127 Mich App 160, 163; 339 NW2d 7 (1983) (citation omitted).

We see no reason—and plaintiff has provided none—to treat statutory notice requirements differently. Indeed, although statutory notice requirements

and statutes of limitations do not serve identical objectives, *Davis*, 86 Mich App at 47, both are *procedural* requirements that ultimately restrict a plaintiff's remedy, but not the substantive right. See *American States Ins Co*, 220 Mich App at 599 (statutory notice periods are " 'devices . . . which have the effect of shortening the period of time set forth in' statutes of limitation") (omission in *American States*), quoting *Carver v McKernan*, 390 Mich 96, 99; 211 NW2d 24 (1973), overruled on other grounds by *Rowland*, 477 Mich at 213, 222-223; see also *Brown v United States*, 239 US App DC 345, 362; 742 F2d 1498 (1984) (en banc) (Bork, J., dissenting) ("Like statutes of limitations, notice-of-claims provisions go primarily to the remedy.") (citation omitted).

Here, it can hardly be said that application of the six-month notice provision of § 6431(3) effectively divested plaintiff of the ability to vindicate the alleged constitutional violation or otherwise functionally abrogated a constitutional right. Again, plaintiff waited nearly 28 months to file his claim. But § 6431(3) would have permitted him to file a claim on this very timeline had he only provided notice of his intent to do so within six months of the claim's accrual. Providing such notice would have imposed only a minimal procedural burden, which in any event would be significantly less than the "minor 'practical difficulties' facing those who need only make, sign and file a complaint within six months." *Brown*, 239 US App DC at 365 (Bork, J., dissenting), quoting *Burnett v Grattan*, 468 US 42, 51; 104 S Ct 2924; 82 L Ed 2d 36 (1984). To be sure, providing statutory notice " 'requires only ordinary knowledge and diligence on the part of the injured and his counsel, and there is no reason for relieving them from the requirements of this [statutory notice provision] that would not be applicable to any other statute

of limitation.' " *Rowland*, 477 Mich at 211, quoting *Ridgeway v Escanaba*, 154 Mich 68, 73; 117 NW 550 (1908).

The fact that plaintiff's claim is constitutional in nature changes nothing, then, when § 6431(3) in no way abrogates the substantive constitutional protection he asserts. See *Taxpayers Allied*, 450 Mich at 126 ("The plaintiff has not provided us with any reason why this state constitutional right should be treated differently [than a federal constitutional right otherwise limited by a statute of limitations]."); *Hart v Detroit*, 416 Mich 488, 496; 331 NW2d 438 (1982) (rejecting the claim that statutes of limitations may not be applied to suits seeking remedies for violations of federal constitutional rights); accord *Luy v Baltimore Police Dep't*, 326 F Supp 2d 682, 693 (D Md, 2004), aff'd 120 Fed Appx 465 (CA 4, 2005) ("the notice requirements of the [Local Government Tort Claims Act] apply to intentional and constitutional torts"). Rather, § 6431(3) merely supplements the constitutional protection at issue by placing a reasonable, albeit minimal, burden on a plaintiff to advise the state of potential claims. For these reasons, the statutory notice requirement of § 6431(3) is reasonable and did not otherwise deprive plaintiff of any substantive, constitutional right. Plaintiff's failure to comply is dispositive.[9]

---

[9] Plaintiff has cited no authority in support of his alternative argument that his claim survives under the so-called "continuing violations" doctrine. He has therefore abandoned that argument. *Mudge v Macomb Co*, 458 Mich 87, 104-105; 580 NW2d 845 (1998). In any event, the doctrine is no longer viable in this state—even if it applied to notice provisions. *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 517; 739 NW2d 402 (2007) ("the continuing-wrongful-acts doctrine is no longer viable with respect to claims arising beyond the period of limitations"), citing *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 290; 696 NW2d 646 (2005) ("the [continuing violations] doctrine has no continued place in the jurisprudence of this state"), amended 473 Mich 1205 (2005).

We reverse the court order denying the DOC's motion for summary disposition and remand for entry of an order granting the DOC's motion for summary disposition. We do not retain jurisdiction.

No costs, this case involving a public question. MCR 7.219(A).

SAAD, P.J., and O'CONNELL, J., concurred with MURRAY, J.

AGUIRRE v DEPARTMENT OF CORRECTIONS

Docket No. 316918. Submitted October 14, 2014, at Lansing. Decided October 21, 2014, at 9:20 a.m.

Governor Rick Snyder entered Executive Reorganization Order No. 2011-3, effective April 15, 2011, that abolished the 15-member Parole and Commutation Board established under Executive Reorganization Order 2009-3, effective April 19, 2009, and created a new 10-member Parole Board. ERO 2011-3 granted the director of the Department of Corrections the power to appoint Parole Board members. The director did not appoint any of the members of the Parole and Commutation Board to serve as members on the new Parole Board. Robert Aguirre and five other members of the Parole and Commutation Board whose positions with the board were eliminated when ERO 2011-3 became effective brought an action in the Court of Claims against the Department of Corrections and the state of Michigan, seeking damages for breach of contract and promissory estoppel. Plaintiffs alleged that their employment contracts were breached when their employment was terminated without just cause. The Court of Claims, Clinton Canady III, J., denied defendants' motion for summary disposition and granted summary disposition in favor of plaintiffs. The trial court concluded that plaintiffs' letters of appointment to the Parole and Commutation Board continued to be effective after ERO 2011-3 was entered and that ERO 2011-3 transferred plaintiffs' contracts from the Parole and Commutation Board to the Parole Board. The court agreed that the Governor had the authority to eliminate plaintiffs' positions, but concluded that plaintiffs' contracts remained valid and the termination had breached the contracts. Defendants appealed.

The Court of Appeals *held*:

1. The Governor did not transfer plaintiffs to the Parole Board when the Governor transferred the "personnel" of the Parole and Commutation Board to the Parole Board. ERO 2011-3 transferred secretaries and other assistants from the Parole and Commutation Board to the Parole Board; it did not transfer plaintiffs, members of the Parole and Commutations Board, to the Parole Board.

2. Section V(B) of ERO 2011-3, which provides that all rules, orders, contracts, and agreements relating to the transfers under the order lawfully adopted before the effective date of the order shall continue to be effective until revised, amended, repealed, or rescinded, did not apply to plaintiffs because plaintiffs did not have a contract or agreement that related to the transfers under the order.

3. Const 1963, art 5, § 10 is not violated when the Governor eliminates positions from a department of the executive branch as part of a reorganization. Article 5, § 10 applies in cases of removal, which contemplates the firing of one person and the hiring of another to fill the same position. Article 5, § 10 is not implicated in this case where the Governor completely abolished plaintiffs' positions.

4. The trial court erred when it determined that ERO 2011-3 transferred plaintiffs' contracts from the Parole and Commutation Board to the Parole Board and concluded that the elimination of plaintiffs' positions breached their contracts. The order granting plaintiffs' motion for summary disposition and denying defendants' motion for summary disposition is reversed and the matter is remanded to the Court of Claims for further proceedings.

Reversed and remanded.

1. CONSTITUTIONAL LAW — SEPARATION OF POWERS — EXECUTIVE REORGANIZATION ORDERS.

Executive Reorganization Order No. 2011-3, effective April 15, 2011, transferred secretaries and other assistants from the Parole and Commutation Board to the Parole Board, it did not transfer the members of the Parole and Commutation Board to the Parole Board (MCL 791.305).

2. CONSTITUTIONAL LAW — GOVERNOR'S REMOVAL OF STATE OFFICERS.

Const 1963, art 5, § 10 is not violated when the Governor, as part of a reorganization, eliminates positions from a department of the executive branch; the section applies in cases of removal, which contemplates the firing of one person and the hiring of another to fill the same position.

Deborah Gordon Law (by *Sarah S. Prescott*) for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal

Counsel, and *Jeanmarie Miller*, Assistant Attorney General, for the defendants.

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

PER CURIAM. Defendants, the Department of Corrections (the Department) and the state of Michigan (collectively, "the State"), appeal as of right the trial court's order granting summary disposition in favor of plaintiffs, Robert Aguirre, James Atterberry, Sr., Ted Hammon, Artina Hardman, John Sullivan, and Laurin Thomas (collectively, "the members"), whose positions with the Michigan Parole and Commutation Board were eliminated when the Governor entered Executive Reorganization Order No. 2011-3. The members contend that this elimination violated the just-cause termination provisions of their employment contracts. Because ERO 2011-3 did not transfer the members' contracts and the Governor does not violate Article 5, § 10 of the Michigan Constitution when reorganizing a department under Article 5, § 2 of the Michigan Constitution in a way that eliminates positions, we reverse and remand.

I. FACTS

A. BACKGROUND FACTS

In 1992, the Michigan Legislature established "a parole board consisting of 10 members" within the Department.[1] In 2009, Governor Jennifer Granholm reorganized the Department,[2] abolished the parole board, and created the 15-member Parole and Commutation Board.[3]

---

[1] MCL 791.231a(1).

[2] Executive Reorganization Order No. 2009-3; MCL 791.304.

[3] ERO 2009-3; MCL 791.304.

The members were members of the Parole and Commutation Board. The members each received a letter of appointment from the Governor's office. Hardman's term was from April 19, 2009, to November 20, 2012, Sullivan, Aguirre, and Hammon's terms were from December 1, 2009, to November 30, 2013, and Thomas and Atterberry's terms were from December 1, 2010, to November 30, 2014.

B. ERO 2011-3

In 2011, by ERO 2011-3, Governor Rick Snyder abolished the Parole and Commutation Board and created a new Parole Board. ERO 2011-3 provided in § III (A) that the new Parole Board "shall consist of 10 members appointed by the Director of the Department of Corrections." Section II(A) of ERO 2011-3 transferred to the new Parole Board

> [a]ll of the authority, powers, duties, functions, responsibilities, records, personnel, property, and unexpended balances of appropriations, allocations, or other funds of the Michigan Parole and Commutation Board[.]

Section V(B)[4] provided that

> [a]ll rules, orders, contracts, and agreements relating to the transfers under this Order lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended, repealed, or rescinded.

ERO 2011-3 granted the director of the Department of Corrections the power to appoint Parole Board members. The director did not appoint any of the members to serve as members on the new Parole Board.

C. PROCEDURAL HISTORY

The members filed suit on January 5, 2012, seeking

[4] ERO 2011-3 contains three sections designated as § V.

damages for breach of contract and promissory estoppel. They claimed that the State breached their employment contracts by terminating their employment without just cause on April 15, 2011. On June 3, 2013, the State moved for summary disposition. The State contended that the Governor had permissibly reorganized the executive branch under Article 5, § 2 of the Michigan Constitution.

In their response, the members also moved for summary disposition. The members asserted that ERO 2011-3 had transferred their employment contracts from the Parole and Commutation Board to the Parole Board. The members contended that Article 5, § 2 does not authorize the Governor to breach existing employment contracts. And the members also asserted that their termination violated the Michigan Constitution's prohibition against the impairment of contracts.

D. THE TRIAL COURT'S RULING

Following a hearing on June 21, 2013, the trial court denied the State's motion for summary disposition and granted the members' motion for summary disposition. The trial court concluded that the members' letters of appointment continued to be effective after ERO 2011-3. The trial court also concluded that ERO 2011-3 transferred the members' contracts from the Parole and Commutation Board to the Parole Board. The trial court agreed that the Governor had authority to eliminate the members' positions, but concluded that their contracts remained valid and the termination breached their contracts. It thus granted the members' motion for summary disposition on liability and denied the State's motion for summary disposition.

II. INTERPRETING ERO 2011-3

A. STANDARD OF REVIEW

We review de novo the trial court's ruling on a motion for summary disposition.[5] This Court reviews de novo issues of law, including issues of constitutional construction[6] and the constitutionality and interpretation of an executive order.[7]

B. LEGAL STANDARDS

1. GENERAL STANDARDS OF INTERPRETATION

When interpreting constitutional provisions, this Court gives constitutional language the meaning that "reasonable minds, the great mass of people themselves, would give it."[8] We must also consider "the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished . . . ."[9] We must avoid interpretations that create constitutional invalidity.[10] We consider the administrating agency's interpretation "persuasive as to the meaning of the order unless it is plainly erroneous or inconsistent with the order."[11]

---

[5] *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999).

[6] *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558; 737 NW2d 476 (2007).

[7] See *Straus*, 459 Mich at 534 (we construe executive orders similar to statutes); *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002) (we review de novo the constitutionality of statutes).

[8] *House Speaker v Governor*, 443 Mich 560, 577; 506 NW2d 190 (1993) (quotation marks and citations omitted).

[9] *Id*. at 580 (quotation marks and citations omitted).

[10] *Id*. at 585.

[11] *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 757; 330 NW2d 346 (1982) (quotation marks omitted).

The purpose of interpretation is to determine the intent of the document's drafter.[12] When interpreting executive orders, this Court gives unambiguous orders the meanings that they clearly express.[13] If possible, we must give effect to every word, sentence, and section.[14] We construe executive orders as constitutional unless an order is clearly unconstitutional.[15]

2. ARTICLE 5, § 2 OF THE MICHIGAN CONSTITUTION

Article 5, § 2 of the Michigan Constitution provides that

> the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration.

"[T]his provision is clear and unambiguous."[16] It gives the Governor express authority to alter the executive branch in broad or limited fashions.[17] Transferring the authority, duties, functions, and responsibilities of one department to another department changes the organization of the executive branch.[18] The constitutional convention and the ratifying public intended Article 5, § 2 to "bestow upon the Governor considerable authority to reorganize the executive branch."[19] Thus, the Governor's power under this section is nearly plenary.[20]

---

[12] See *United States Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

[13] *Soap & Detergent Ass'n*, 415 Mich at 757.

[14] *Id*.

[15] *Straus*, 459 Mich at 534.

[16] *House Speaker*, 443 Mich at 577.

[17] *Id*.

[18] *Id*. at 578.

[19] *Id*. at 585.

[20] *Straus*, 459 Mich at 534.

3. ARTICLE 5, § 10 OF THE MICHIGAN CONSTITUTION

Article 5, § 10 of the Michigan Constitution provides that

> [t]he governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature.

Article 5, § 10 "essentially provides that the Governor may only remove a public officer for good cause."[21]

4. ARTICLE 1, § 10 OF THE MICHIGAN CONSTITUTION

Article 1, § 10 of the Michigan Constitution provides that "[n]o . . . law impairing the obligation of contract shall be enacted."

C. APPLYING THE STANDARDS

1. OVERVIEW

The State contends that ERO 2011-3 voided the members' agreements with the State. The members contend that ERO 2011-3 transferred their contracts to the Parole Board and, therefore, did not abolish their contracts. We conclude that ERO 2011-3 did not transfer the members' employment agreements to the Parole Board and that ERO 2011-3 permissibly eliminated the members' positions.

---

[21] *Morris v Governor (On Remand, After Remand)*, 214 Mich App 604, 611; 543 NW2d 363 (1995).

2. CONTRACTUAL RELATIONSHIP

As an initial matter, we note that the State has not contended that the members did not have a contractual relationship with the State.[22] Instead, the State contends that the Governor's removal of the members' positions did not violate the just-cause provision of the members' employment agreements. Therefore, we presume for the purposes of this appeal that a just-cause provision applied to the members' relationship with the State.

3. ABOLITION OF THE MEMBERS' POSITIONS

The State contends that the trial court erred when it determined that the State breached the members' contracts because ERO 2011-3 abolished the members' positions. We agree and conclude that the trial court erroneously determined that ERO 2011-3 transferred the members' employment to the Parole Board.

Section V(B) of ERO 2011-3 states that

> [a]ll rules, orders, contracts, and agreements relating to the transfers under this Order lawfully adopted prior to the effective date of this Order shall continue to be effective until revised, amended, repealed, or rescinded.

Therefore, the question is whether the members had an order, contract, or agreement "relating to the transfers under this Order[.]" We conclude that the members did not have such a contract.

Among other things, ERO 2011-3 transferred "personnel" to the Parole Board.[23] The word "personnel"

[22] See *Attorney General, ex rel Rich v Jochim*, 99 Mich 358, 367-368; 58 NW 611 (1894) (a public office is not the subject to a contract, and appointment does not establish a contractual relationship).

[23] ERO 2011-3, § II(A).

means "the body of persons employed in an organization."[24] For the following reasons, we conclude that the Governor did not transfer the members when the Governor transferred "personnel."

When an executive order uses language in one part of an order that it omits in another, we presume that the omission was intentional.[25] ERO 2011-3 repeatedly refers to the appointed members of the Parole Board as "members of the Board" in Section III, Subsections (A), (B), (C), and (E). ERO 2009-3 similarly referred to the members of the Parole and Commutation Board as "members."

In contrast, Section III(D) of ERO 2011-3 allows the board's chairperson to select "secretaries and other assistants[.]" This section replaced Section II(D) of ERO 2009-3, which provided that the chairperson could appoint "secretaries, assistants, clerks, and other employees[.]" The Governor's inclusion of "personnel" in the transfer, rather than "members of the Board"—a term that the Governor used repeatedly elsewhere in the order—indicates that the Governor did not intend to transfer the members to the new Parole Board.

This interpretation is consistent with the Parole Board's subsequent interpretation of the order. The Department required all members of the Parole and Commutation Board who wished to serve on the Parole Board, including the chairperson, to submit letters of interest, applications, and have an interview for the position before receiving an appointment. The Parole Board's interpretation is persuasive and the Governor's use of "personnel" rather than "members of the Board"

---

[24] *Random House Webster's College Dictionary* (1997).

[25] See *People v Peltola*, 489 Mich 174, 185; 803 NW2d 140 (2011).

does not contradict its interpretation.[26]

We conclude that when the Governor transferred the "personnel" of the Parole and Commutation Board to the Parole Board, the Governor intended to, and did, transfer "secretaries and other assistants" rather than the members. Therefore, we conclude that ERO 2011-3 did not transfer the members' contracts from the Parole and Commutation Board to the Parole Board.

In short, the members were not transfers under the order because they were not personnel. Rather, they were members, a different class of persons. Accordingly, Section V(B) of ERO 2011-3 did not apply to the members because they did not have a contract or agreement that related to the transfers under the order.

4. VIOLATION OF ARTICLE 5, § 10

As an alternative ground for affirmance, the members contend that if the Governor abolished their positions, he violated Article 5, § 10 of the Michigan Constitution. We disagree.

In *Morris v Governor*, this Court considered whether the Governor violates Article 5, § 10 when the Governor removes positions from a department of the executive branch under Article 5, § 2.[27] We concluded that the Governor does not violate Article 5, § 10 of the Michigan Constitution when the Governor eliminates positions as part of a reorganization.[28] We held that Article 5, § 10 applies in cases of removal, "which contemplates the firing of one person and the hiring of another to fill the same position."[29] This provision is not implicated

---

[26] See *Soap & Detergent Ass'n*, 415 Mich at 757.

[27] *Morris*, 214 Mich App at 610-611.

[28] *Id*. at 611.

[29] *Id*.

when the Governor completely abolishes the position.[30]

Here, the Governor created the Parole Board with 10 members, a five-member reduction when compared to the Parole and Communication Board, which had 15 members. This is not a case in which the Governor fired one person and hired another to fill the same position. The positions were on a different board and the new board was clearly smaller in size. Because this case concerns a reorganization, we conclude that Article 5, § 10 does not apply.

5. UNCONSTITUTIONAL IMPAIRMENT OF CONTRACT

As a second alternative ground for affirmance, the members contend that the Governor's reorganization of the Parole Board violated the Contracts Clause of the Michigan Constitution. The trial court did not decide this issue and the State did not raise or argue the issue in their brief on appeal. We need not address an issue that was not the basis of the trial court's decision.[31] And, though we might exercise our discretion to review the issue as a question of law for which the necessary facts have been presented, this Court should decline to do so when it would require us to construct and evaluate our own arguments.[32] Our analysis of this issue would benefit from a decision of the trial court and full argument. Therefore, we decline to affirm on this basis. Our decision does not prevent the members from raising this issue on remand.

---

[30] *Id*.

[31] *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 534; 660 NW2d 384 (2003); *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 83; 600 NW2d 348 (1999).

[32] *Candelaria*, 236 Mich App at 83.

III. CONCLUSION

We conclude that the trial court erred when it determined that ERO 2011-3 transferred the members' contracts from the Parole and Commutation Board to the Parole Board and when it concluded that the elimination of the members' positions breached their contracts. However, we do not opine regarding whether this action violated the Contracts Clause of the Michigan Constitution. Accordingly, we reverse the trial court's order granting the members' motion for summary disposition and denying the State's motion for summary disposition and remand for further proceedings consistent with this opinion.

We reverse and remand. We do not retain jurisdiction.

METER, P.J., and WHITBECK and RIORDAN, JJ., concurred.

PEW v MICHIGAN STATE UNIVERSITY

Docket No. 317727. Submitted September 4, 2014, at Detroit. Decided October 14, 2014, at 9:00 a.m. Leave to appeal sought.

Alexandra Pew brought a negligence action in the Court of Claims against Michigan State University (MSU) for injuries she suffered after falling out a sixth-story window of Case Hall, a dormitory on MSU's campus, alleging that MSU had breached its duty to repair and maintain the building. The court, James S. Jamo, J., granted MSU's motion for summary disposition under MCR 2.116(C)(7) on the ground that the public-building exception to governmental agencies' general immunity from tort liability, MCL 601.1406, did not apply because Case Hall was not open to the public at 3:00 a.m., when Pew was injured. Pew appealed.

The Court of Appeals *held*:

The trial court did not err by granting summary disposition to MSU on the basis of governmental immunity. Although the vestibule of Case Hall was open 24 hours a day, the sole purpose of the vestibule between 12:00 a.m. and 6:00 a.m. was to allow a receptionist to restrict public access to the remainder of the building and to admit only residents and their guests. Under these circumstances, Case Hall was not open to the public for purposes of the public-building exception to governmental immunity at the time Pew was injured. *Tellin v Forsyth Twp*, 291 Mich App 692 (2011), was distinguishable.

Affirmed.

GOVERNMENTAL IMMUNITY — PUBLIC-BUILDING EXCEPTION — BUILDING OPEN TO THE PUBLIC — UNIVERSITY RESIDENCE HALLS.

A dormitory at a public university that restricts entry to residents and their guests during certain hours is not a public building during those hours for purposes of the public-building exception to governmental immunity, even if the public may enter the vestibule of the dormitory to seek entrance into the building 24 hours a day (MCL 691.1406; 691.1407(1)).

Johnson Law, PLC (by *Ven R. Johnson* and *Christopher P. Desmond*), for Alexandra Pew.

Michael J. Kiley for Michigan State University.

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

PER CURIAM. Plaintiff, Alexandra Pew, appeals as of right the trial court's order granting summary disposition on governmental immunity grounds in favor of defendant, Michigan State University (the University), under MCR 2.116(C)(7). Pew fell through a sixth-story window at Case Hall on the University's campus. The trial court held that the public-building exception to governmental immunity did not apply because Case Hall was not a public building when Pew was injured. We affirm.

I. FACTS

A. BACKGROUND FACTS

At around 3:00 a.m. on March 25, 2012, Pew, who was then a high school student, and her friends Kevin Watroba and Kasey Gardiner visited their friend Jason Matney at the University. In a written statement, Watroba indicated that Gardiner drove the group to the University, where they met Matney at a fraternity house. From the fraternity house, the group went to Matney's residence at Case Hall.

Watroba indicated that Pew and Gardiner were "goofing around" and "acting silly." In her statement, Gardiner indicated that she and Pew were hiding behind a pillar. Gardiner was between the pillar and the wall, and Pew was between the pillar and the window. Gardiner saw the glass shatter and Pew fall through the window. Watroba indicated that Pew had been sitting on "the ledge thing," got up, and had her back against the window. Watroba indicated that Pew "suddenly . . . just fell backwards out the window."

In an affidavit, Sharon Potter, the assistant facilities manager for Case Hall, indicated that students and guests could only access the residential areas of the hall by swiping a key card. At her deposition, Potter testified that the lower three floors of Case Hall contain administrative offices, a cafeteria, and classrooms, and are open until 12:00 a.m. According to Potter, Case Hall is closed from 12:00 a.m. to 6:00 a.m. and students must use their key card to enter the building.

Sean Addley, the night receptionist coordinator, testified that Case Hall has two sets of doors and that there is a short distance between Case Hall's outer doors and inner doors. According to Addley, between 12:00 a.m. and 6:00 a.m., a night receptionist sits behind the inner doors. A student resident must pass his or her key card to the receptionist through a slot. The receptionist verifies that the student is a resident before opening the inner door. If the student resident has a guest, the resident must fill out a visitor verification card and give it to the receptionist. The receptionist then takes the guest's identification and places it in a box. The receptionist will allow up to three guests to enter with the student resident. Matney testified at his deposition that the night receptionist followed this procedure on the night that Pew was injured.

B. PROCEDURAL HISTORY

On December 19, 2012, Pew filed a complaint against the University, alleging that it had breached its duty to repair and maintain the building. Pew contended that the public-building exception to governmental immunity applied and, therefore, the University was not entitled to governmental immunity. On February 5, 2013, the University moved for summary disposition on the basis that the public-building exception did not apply because Case Hall was not open to the public. In

response, Pew contended that portions of Case Hall are open to the public without restriction and that, therefore, Case Hall is a public building. Pew also contended that the vestibule was open all night, also rendering Case Hall a public building.

At the July 10, 2013 hearing on the motion, the University contended that the vestibule in this case was similar to the courtesy phone area in *Maskery v Univ of Mich Bd of Regents*,[1] in which the Michigan Supreme Court held that a dormitory building was not a public building because it was not open to the public. The University contended that Case Hall was closed when Pew was injured. Pew contended that *Maskery* did not apply because Case Hall was not entirely closed to the public. Pew contended that this Court's decision in *Tellin v Forsyth Twp*[2] held that if any portion of a building is open to the public, the entire building is open to the public. On that basis, Pew contended that she was injured in a public building because Case Hall's vestibule was open to the public when she was injured.

The trial court reasoned that *Tellin* was distinguishable and concluded that *Maskery* applied because the public did not have access to Case Hall at the time that Pew was injured. The trial court therefore granted the University's motion for summary disposition.

II. PUBLIC-BUILDING EXCEPTION TO GOVERNMENTAL IMMUNITY

A. STANDARD OF REVIEW

This Court reviews de novo the trial court's decision on a motion for summary disposition.[3] A defendant is

---

[1] *Maskery v Univ of Mich Bd of Regents*, 468 Mich 609; 664 NW2d 165 (2003).

[2] *Tellin v Forsyth Twp*, 291 Mich App 692; 806 NW2d 359 (2011).

[3] *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008).

entitled to summary disposition under MCR 2.116(C)(7) if the plaintiff's claims are barred because of immunity granted by law.[4] The moving party may support its motion with affidavits, depositions, admissions, or other documentary evidence that would be admissible at trial.[5] We must consider this evidence and determine whether it indicates that the defendant is entitled to immunity.[6] We consider the contents of the plaintiff's complaint to be true, unless contradicted by the documentary evidence.[7] If reasonable minds could not differ on the legal effects of the facts, whether governmental immunity bars a plaintiff's claim is a question of law.[8]

B. LEGAL STANDARDS

Generally, the governmental immunity act provides broad immunity from tort liability to governmental agencies, officials, or employees who exercise or discharge a governmental function.[9] However, MCL 691.1406 provides that "[g]overnmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public." The public-building exception to governmental immunity applies if the plaintiff proves five elements:

> (1) a governmental agency is involved, (2) the public building in question was open for use by members of the

---

[4] *Odom*, 482 Mich at 466.

[5] *Id.*; MCR 2.116(G)(5), (6).

[6] *Snead v John Carlo, Inc*, 294 Mich App 343, 354; 813 NW2d 294 (2011).

[7] *Odom*, 482 Mich at 466.

[8] *Snead*, 294 Mich App at 354.

[9] MCL 691.1401 *et seq.*; *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984); *Jones v Bitner*, 300 Mich App 65, 74-75; 832 NW2d 426 (2013).

> public, (3) a dangerous or defective condition of the public building itself exists, (4) the governmental agency had actual or constructive knowledge of the alleged defect, and (5) the governmental agency failed to remedy the alleged defective condition after a reasonable period or failed to take action reasonably necessary to protect the public against the condition after a reasonable period.[10]

"When determining the public's access, we analyze the building itself, *not* the specific accident site within the building."[11]

C. APPLYING THE STANDARDS

The parties dispute only the second element of the public-building exception: whether Case Hall was "open for use by members of the public." Relying on *Tellin*, Pew contends that the building was open for use by members of the public because (1) the time of the day the accident occurred was irrelevant, or (2) even if the time of day were to be relevant, Case Hall's vestibule was open for use by members of the public when Pew was injured. We disagree with both of Pew's arguments.

1. TIMING OF THE INJURY

Pew asserts that the time of day was irrelevant for the purposes of determining whether Case Hall was a public building. Pew contends that the *Maskery* Court's statement that courts should consider the timing of a plaintiff's injury to determine whether a building was open to the public was dictum. We conclude that principles of stare decisis require us to consider the timing of Pew's injury.

---

[10] *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998) (emphasis omitted).

[11] *Brown v Genesee Co Bd of Comm (After Remand)*, 464 Mich 430, 435; 628 NW2d 471 (2001).

Principles of stare decisis require us to reach the same result in a case that presents the same or substantially similar issues as a case that another panel of this Court has decided.[12] However, dictum does not constitute binding authority.[13] Dictum is a judicial comment that is not necessary to the decision in the case.[14] But if a court intentionally addresses and decides an issue that is germane to the controversy in the case, the statement is not dictum even if the issue was not decisive.[15]

MCL 691.1406 provides that governmental agencies owe a duty to repair and maintain public buildings "*when open for use* by members of the public."[16] The Michigan Supreme Court in *Maskery* noted that buildings that are open during some periods of the day, such as courthouses and athletic facilities, may be closed to the public during other periods of the day.[17] The *Maskery* Court opined that an accident occurring when a building that is periodically open to the public was closed would fall outside the public-building exception.[18] The Michigan Supreme Court's statement was not necessary to the decision in that case because the residence hall at issue in *Maskery* was always closed to the public.[19] In *Tellin*, this Court recognized that the

---

[12] MCR 7.215(C)(2); *W A Foote Hosp v City of Jackson*, 262 Mich App 333, 341; 686 NW2d 9 (2004).

[13] *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 216; 625 NW2d 93 (2000).

[14] *Carr v City of Lansing*, 259 Mich App 376, 383-384; 674 NW2d 168 (2003).

[15] *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 563; 741 NW2d 549 (2007).

[16] Emphasis added.

[17] *Maskery*, 468 Mich at 619.

[18] *Id*.

[19] See *id*. at 620.

Maskery court addressed this point "arguably in dictum[.]"[20] However, the *Tellin* court then adopted the Michigan Supreme Court's statement and applied it in that case.[21]

We conclude that, regardless of whether the Michigan Supreme Court's statement in *Maskery* was dictum, principles of stare decisis require us to follow this Court's decision in *Tellin*. In *Tellin*, this Court considered the time that the plaintiff was injured in order to determine whether the building was open to the public. This Court's discussion of the timing of the incident was certainly germane to the issue in *Tellin*, even if it was not determinative of whether the building was a public building. Accordingly, we conclude that we must consider whether Case Hall was open to the public *at the time* that Pew was injured.

2. CASE HALL WAS NOT A PUBLIC BUILDING WHEN PEW WAS INJURED

Pew contends that even if this Court considers the timing of Pew's injury, the trial court erred because Case Hall's vestibule was open to the public when Pew was injured and, therefore, Case Hall was a public building for purposes of the public-building exception. We conclude that Case Hall was not open to the public, despite the fact that persons could enter the vestibule.

In *Maskery*, the Michigan Supreme Court held that a residence hall at the University of Michigan was not subject to the public-building exception because it was continuously locked and not "open for use by members

---

[20] *Tellin*, 291 Mich App at 709.

[21] See *id*. at 710 ("At any time of the day the public was freely permitted to access the area under the roof overhang where the I-beam configuration was located to use the drop box.").

of the public."[22] The plaintiff slipped and fell while walking away from a courtesy phone after requesting that her daughter, a college student, let her into the Betsy Barbour Residence Hall on the University of Michigan's Ann Arbor campus.[23] Visitors could access the residence "only by using the courtesy phone to contact a resident, who then could unlock the door to allow entry."[24]

The Court reasoned that, "[t]o determine whether a building is open for use by members of the public, the nature of the building and its use must be evaluated."[25] The Court held that a building is not open to the public if the government "has restricted entry to the building to those persons who are qualified on the basis of some individualized, limiting criteria of the government's creation[.]"[26]

In *Tellin*, this Court held that Forsyth Township was not entitled to governmental immunity when an I-beam dislodged from the K.I. Sawyer Learning Center and fell on the plaintiffs.[27] The Learning Center included a library and had a one-unit living area and a single main entrance.[28] The Learning Center had a 24-hour drop box for library books located under the roof overhang near the main entrance.[29] At around 8:00 p.m., the 13-year-old plaintiff went to the Learning Center to stand under the roof overhang near the entrance to

---

[22] *Maskery*, 468 Mich at 610-611 (quotation marks omitted).

[23] *Id*. at 611.

[24] *Id*. at 611-612.

[25] *Id*. at 618.

[26] *Id*.

[27] *Tellin*, 291 Mich App at 693-694.

[28] *Id*. at 694

[29] *Id*. at 696.

wait for her mother to pick her up.[30] The plaintiffs' friend swung around a steel pole supporting an I-beam, which dislodged and fell on the plaintiffs, injuring them.[31]

We concluded that the public-building exception to governmental immunity applied because "the exterior area where the incident occurred was open to the public, even though the interior of the Learning Center itself was closed when the incident occurred."[32] We reasoned that the test provided in *Maskery* focused on the intended use of the building, not the building's hours of operation.[33] We concluded that the Learning Center was intended as an area for the public to access to drop off books 24 hours a day.[34]

Pew contends that, under *Tellin*, Case Hall was open to the public because members of the public could access the vestibule 24 hours a day. However, the relevant question under *Maskery* is whether the University restricted access to the building to persons qualified to enter: or, in other words, whether there was a "general right of entry" into the building.[35] Simply because the public may access the building for some limited purpose—such as to deliver mail and food or to seek entry deeper into the building—does not render a building open to the public.[36]

We conclude that this case is distinguishable from *Tellin*. In *Tellin*, this Court opined that the hours that the building was open were not determinative of

---

[30] *Id*.

[31] *Id*.

[32] *Id*. at 709.

[33] *Id*. at 710.

[34] *Id*.

[35] See *Maskery*, 468 Mich at 618 n 9.

[36] See *id*. at 620 n 10.

whether the building was open to the public. Rather, this Court applied the test in *Maskery* and concluded that the Learning Center was open to members of the public because the Learning Center invited members of the public to drop their books in the building's entrance location 24 hours a day. Accordingly, the public had an unlimited, and in fact an invited, general right of entry to the building 24 hours a day.

In this case, though people may enter the vestibule—the small space between Case Hall's inner and outer doors—24 hours a day, the sole purpose of the vestibule between the hours of 12:00 a.m. and 6:00 a.m. is to restrict access to the remainder of the building. That the public could enter the area between Case Hall's outer and inner doors between the hours of midnight and 6:00 a.m. did not give the public a general right of entry to Case Hall. To the contrary, the evidence in this case indicates that public access to Case Hall was available only to residents and guests between those hours.

In other words, the University restricted entrance into Case Hall "to those persons who were qualified on the basis of individualized, limiting criteria—in this case, permission from a tenant."[37] Case Hall was no more a public building between the hours of 12:00 a.m. and 6:00 a.m. than was the residence hall in *Maskery*. In this case, the residents' guests entered the vestibule to gain access to the building; in *Maskery*, the residents' guests entered the area of the courtesy phone to gain access to the building. In both cases, the building was restricted to those persons who had a qualified right to enter, despite the fact that people could enter the vestibule to seek entrance into the building.

---

[37] See *id*. at 620.

We conclude that Case Hall was not a public building for the purposes of the public-building exception to governmental immunity. At the time that Pew entered the building, entrance into the building was restricted to residents and their guests. The public did not have a general right of entry to Case Hall when Pew was injured. Because the public-building exception applies to public buildings "*when open for use* by members of the public," we conclude that the trial court properly granted summary disposition in this case.

III. CONCLUSION

We conclude that Case Hall was not a public building for the purposes of the public-building exception to governmental immunity because, at the time Pew was injured, Case Hall was not open to the public.

We affirm.

METER, P.J., and WHITBECK and RIORDAN, JJ., concurred.

BRASKA v CHALLENGE MANUFACTURING CO
KEMP v HAYES GREEN BEACH MEMORIAL HOSPITAL
KUDZIA v AVASI SERVICES, INC

Docket Nos. 313932, 315441, and 318344. Submitted October 7, 2014, at Grand Rapids. Decided October 23, 2014, at 9:00 a.m. Leave to appeal sought.

Rick Braska, Jenine Kemp, and Stephen Kudzia applied for unemployment benefits from the Unemployment Insurance Agency (UIA), a unit of the Department of Licensing and Regulatory Affairs (DLRA), after being fired by their respective employers—Challenge Manufacturing Company, Hayes Green Beach Memorial Hospital, and Avasi Services, Inc.—on the basis of drug tests indicating that they had used marijuana. Claimants asserted that the provision of the Michigan Employment Security Act (MESA) that disqualifies those who were fired on this basis from receiving unemployment benefits, MCL 421.29(1)(m), was inapplicable because their marijuana use was in compliance with the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*., which protected them against being subject to penalty or denied any right or privilege for that use.

In Docket No. 313932, the UIA granted Braska's application for benefits, ruling that because he had a valid registration identification card entitling him to use marijuana for medical purposes, MCL 421.29(1)(m) did not bar his claim. Challenge Manufacturing appealed, and an administrative law judge (ALJ) affirmed after ruling that the evidence of Braska's positive drug test was inadmissible because of problems in the chain of custody. Challenge appealed before the Michigan Compensation Appellate Commission (MCAC), which reversed the ALJ's decision after concluding that the drug test results were admissible and that they disqualified Braska from benefits under MCL 421.29(1)(m). Braska appealed in the Kent Circuit Court, Mark A. Trusock, J., which reversed the MCAC's decision on the ground that it was not supported by competent, material, and substantial evidence.

In Docket No. 315441, the UIA granted Kemp's application for benefits after she provided documentation that she was entitled to use marijuana medically, and an ALJ affirmed the UIA's decision

under the MMMA. Hayes Green Beach appealed, and the MCAC reversed on the ground that the MMMA did not regulate private employment or offer employment protection. The Ingham Circuit Court, William E. Collette, J., reversed the MCAC's decision, ruling that because Kemp's claim involved state action rather than private employment, the MMMA prohibited the UIA from denying her benefits.

In Docket No. 318344, the UIA denied Kudzia's application for benefits and an ALJ affirmed the denial. Kudzia appealed before the MCAC, which also affirmed. The Macomb Circuit Court, John C. Foster, J., reversed, ruling that to the extent the MMMA and MESA conflicted, the MMMA controlled and applied to the state's action of denying him benefits.

The Court of Appeals granted the DLRA's applications for leave to appeal these three circuit court orders and consolidated the cases.

The Court of Appeals *held*:

Employees who were discharged for failing a drug test as a result of using marijuana for medical purposes in accordance with the MMMA were not disqualified from receiving unemployment benefits on this basis by MCL 421.29(1)(m). The provision of the MMMA that protects medical marijuana users from being subject to penalty or denied any right or privilege, MCL 333.26424(a), applied to prevent those fired for using marijuana in accordance with the MMMA from being disqualified from receiving unemployment compensation benefits, and it superseded conflicting provisions of MESA under MCL 333.26427(e). MCL 421.29(1)(b), which disqualifies those who were fired for general misconduct, did not apply to those who were fired for positive drug tests and, even if it had, would also have been superseded by the MMMA to the extent it conflicted. Because there was no evidence to suggest that claimants' positive drug tests were caused by anything other than their use of marijuana in accordance with the MMMA, the circuit courts did not err by reversing the MCAC's rulings.

Affirmed.

UNEMPLOYMENT COMPENSATION — DISCHARGE FOR FAILING DRUG TEST — DISQUALIFICATION FROM BENEFITS — MICHIGAN MEDICAL MARIHUANA ACT.

An employee discharged for failing a drug test as a result of having used marijuana in accordance with the Michigan Medical Marihuana Act, MCL 333.26421 *et seq*., is not disqualified from receiving unemployment benefits on this basis by MCL 421.29(1)(m) (MCL 333.26424(a), 333.26427(e)).

Legal Aid of Western Michigan (by *D. Scott Stuart*) for Rick Braska.

Revision Legal, PLLC (by *Eric W. Misterovich*), and *Newburg Law, PLLC* (by *Matthew R. Newburg*), for Jenine Kemp.

Schwartz Law Firm, PC (by *Mary A. Mahoney*), for Stephen Kudzia.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Susan Przekop-Shaw*, *Bradley A. Fowler*, *Peter Kotula*, and *Michael O. King, Jr.*, Assistant Attorneys General, for the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency.

Amici Curiae:

Richard W. McHugh for the National Employment Law Project.

Steven M. Gray for the Michigan Unemployment Insurance Project.

Daniel S. Korobkin, *Michael J. Steinberg*, and *Kary L. Moss* for the American Civil Liberties Union Fund of Michigan.

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

PER CURIAM. In these consolidated appeals, the Department of Licensing and Regulatory Affairs, Unemployment Insurance Agency (Department), appeals by leave granted circuit court orders holding that claimants were entitled to unemployment benefits. In Docket No. 313932, the Department appeals a November 9, 2012 Kent Circuit Court order reversing a decision of

the Michigan Compensation Appellate Commission (MCAC) that claimant Rick Braska was disqualified from receiving unemployment benefits. In Docket No. 315441, the Department appeals a March 5, 2013 Ingham Circuit Court order reversing the decision of the MCAC that claimant Jenine Kemp was disqualified from receiving unemployment benefits. In Docket No. 318344, the Department appeals a September 5, 2013 Macomb Circuit Court order reversing the decision of the MCAC that claimant Stephen Kudzia was disqualified from receiving unemployment benefits. The common issue presented in the three cases is whether an employee who possesses a registration identification card under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, is disqualified from receiving unemployment benefits under the Michigan Employment Security Act (MESA), MCL 421.1 *et seq.*, after the employee has been fired for failing to pass a drug test as a result of marijuana use.[1] For the reasons set forth in this opinion, we affirm the circuit court rulings that claimants were entitled to unemployment benefits.

I. BACKGROUND

A. *BRASKA v CHALLENGE MANUFACTURING CO* (DOCKET No. 313932)

Braska began working for Challenge Manufacturing Company (Challenge) as a material handler and hi-lo operator in September 2009. On June 11, 2010, Braska injured his ankle and was sent to a medical center where he was required to take a drug test. Braska

[1] Although the MMMA uses the spelling "marihuana," we use the more common spelling "marijuana" throughout this opinion. In addition, we will use the phrase "medical marijuana card" to refer to a "registration identification card."

tested positive for marijuana and disclosed for the first time that he had obtained a medical marijuana card in May 2010 and regularly used medical marijuana for his chronic back pain. Challenge terminated Braska's employment for violation of the company's drug-free-workplace policy as set forth in the employee handbook.

Dr. Richard Rasmussen, certified as a medical review officer for drug tests, reviewed the "results verification record," which was a printout of the laboratory results that was given to him. He signed the record on June 15, 2010. The results verification record showed that Braska tested positive for marijuana. There were 225 nanograms per milliliter of blood, which, according to Rasmussen, was "higher than the average." According to Rasmussen and Dr. David Crocker, there are no objective standards to determine when someone is under the influence of marijuana.

Following his termination, Braska applied for unemployment benefits. On July 6, 2010, the Unemployment Insurance Agency (UIA) found that Braska was not fired for a deliberate disregard of his employer's interest. It concluded that Braska was not disqualified for unemployment benefits under MCL 421.29(1)(b) for engaging in misconduct. Challenge protested the determination, and the UIA modified its decision, finding that Braska was discharged for testing positive for marijuana. Although failing a drug test would ordinarily have disqualified Braska from receiving benefits under MCL 421.29(1)(m), the UIA determined that because Braska had a valid medical marijuana card, he was not disqualified for unemployment benefits under that provision.

Challenge appealed the redetermination, and a hearing was held before an administrative law judge (ALJ). At the hearing, the ALJ excluded from evidence the

results verification record, as well as a "specimen result certification" that Rasmussen sent to Challenge, because of problems in the chain of custody of Braska's urine sample. At the conclusion of the hearing, the ALJ found that Braska was fired for testing positive for marijuana, not general misconduct. The ALJ noted that an employer is required to establish, as a foundational element to the admission of the results of a drug test, that the sample analyzed was the sample collected from the employee. In this case, Challenge failed to produce any witness to establish how the drug test was conducted and how the sample test was handled. According to the ALJ, in the absence of this foundational testimony, the test results were inadmissible hearsay, and disqualification from unemployment benefits could not be established without them.

Recognizing that there might be disagreement on the adequacy of the evidence presented by Challenge, the ALJ addressed the effect of Braska's possession of a medical marijuana card. The ALJ noted that it surpassed credulity to believe that Braska had the card but did not use medical marijuana and that Braska specifically did not ask for a retest when one was offered by Rasmussen. The ALJ found that there was no evidence that Braska had operated a hi-lo under the influence of marijuana. Therefore, the ALJ concluded that Braska was not disqualified from receiving unemployment benefits under § 29(1)(m).

Challenge appealed the ALJ's decision to the MCAC, and the MCAC reversed. The MCAC concluded that the only question governing the admission of a document in an administrative hearing is whether reasonable people would rely on the document. It found that all the documents offered by Challenge were reliable. The MCAC noted that the ALJ allowed Braska to collect

unemployment benefits because he possessed a medical marijuana card. The MCAC concluded that this amounted to error, given that Challenge only needed to present evidence that Braska had tested positive on a drug test that was administered in a nondiscriminatory manner to disqualify Braska from receiving benefits. It ruled that the preponderance of the evidence established that Braska was disqualified from receiving benefits under § 29(1)(m).

Braska appealed the MCAC's decision in the circuit court, and the circuit court reversed on the ground that the MCAC's decision was not supported by competent, material, and substantial evidence. The court noted that the MCAC had failed to address the ALJ's interpretation and application of the MMMA and MESA, but the court declined to address those issues. This Court granted the Department's application for leave to appeal the circuit court's order.

B. *KEMP v HAYES GREEN BEACH MEMORIAL HOSPITAL*
(DOCKET No. 315441)

Kemp worked for Hayes Green Beach Memorial Hospital (HGB) as a CT technician. HGB had a zero-tolerance drug policy. Employees were tested for drugs upon hire and then upon reasonable suspicion. In May 2011, a patient complained about Kemp, claiming that Kemp had inserted an IV line in the patient without using gloves, discussed the patient's insurance coverage in a crowded area, and told the patient about her family's drug use, including that she ate "special brownies."

On June 2, 2011, following an investigation into the complaint, Jennifer Myers, the human resource manager for HGB, told Kemp that she needed to take a drug test. Kemp consented, and she wrote on the consent form that she used marijuana for medical reasons. At

the meeting, Kemp showed no objective signs of intoxication. Kemp tested positive for marijuana and delta–9–tetrahydrocannabinol (THC). A second test confirmed the results. On June 8, 2011, Myers informed Kemp that she was terminated. The reason for the termination was the failed drug test.

Kemp suffered from lupus, neuropathy, and chronic pain in her hand. She obtained a medical marijuana card in December 2010 and it remained valid in May 2011, when she was terminated. According to Kemp, she was never under the influence of marijuana at work. She used marijuana between 6:00 p.m. and 7:00 p.m., and the effects were usually gone within two hours. Her shift at HGB was from 6:30 a.m. to 3:00 p.m.

Following her termination, Kemp applied for unemployment benefits. The UIA initially determined that, because Kemp was terminated for testing positive for an illegal substance, she was disqualified from receiving benefits under § 29(1)(m). The UIA reversed its decision after Kemp provided documentation that she possessed a medical marijuana card. HGB protested, and a hearing was held before an ALJ. The ALJ affirmed the UIA's redetermination that Kemp was not disqualified from receiving unemployment benefits. The ALJ explained that because marijuana was legally available to use for medical purposes, the issue whether Kemp's use of marijuana constituted misconduct or was illegal must include consideration of the MMMA. Because Kemp used marijuana for medical purposes, her use was lawful and, therefore, could not bar her receipt of benefits.

HGB appealed, and the MCAC reversed the ALJ's decision. The MCAC concluded that Kemp was disqualified from receiving unemployment benefits under § 29(1)(m). It reasoned that the MMMA only allows

possession and consumption of marijuana; it does not regulate private employment or offer employment protection.

Kemp appealed in the Ingham Circuit Court, and the circuit court reversed the MCAC's decision. The circuit court noted that, although a federal court held that the MMMA did not prohibit a private employer from firing an employee who used medical marijuana, the present case involved state action. MESA, and specifically § 29, is enforced and interpreted by a state agency. Because there was state action, the MMMA was applicable and needed to be considered in determining whether Kemp was disqualified from receiving unemployment benefits. According to the circuit court, an employee who uses medical marijuana but is not intoxicated at work is not disqualified from receiving benefits under § 29(1)(m). It noted that the benefit interpretation by the UIA provided that an employee who uses medical marijuana should not be disqualified from benefits unless the employee is in possession of marijuana at work, is under the influence at work, or uses it at work. Specifically, regarding Kemp, the circuit court stated that Kemp did not fall under any of the three categories and that there was no evidence that she used medical marijuana other than as allowed by the MMMA. According to the circuit court, any disqualification from unemployment benefits would amount to a forfeiture of benefits that Kemp was otherwise qualified to receive, which constituted an impermissible penalty under the MMMA.

In reaching its conclusion, the circuit court rejected the Department's argument that Kemp tested positive for marijuana at work and that her discharge was akin to testing positive for any other intoxicating or illegal substance, such as Vicodin. It noted that the record did

not show that Kemp tested positive for active marijuana. Rather, she tested positive for a metabolite of marijuana known as 11-carboxy-THC, which is not a Schedule 1 controlled substance and has no pharmacological effect on the body. Thus, according to the circuit court, the drug test simply demonstrated what Kemp had informed HGB of before the test—she used medical marijuana. This Court granted the Department's application for leave to appeal the circuit court's order.

C. *KUDZIA v AVASI SERVICES INC* (DOCKET No. 318344)

Kudzia worked as an in-home service technician for Avasi Services, a corporate subsidiary of Art Van Furniture, Inc., whose employees repaired furniture for Art Van customers. Art Van required its employees to be drug-free, and it subjected the employees who drove an Art Van vehicle to random drug tests. On June 21, 2012, Daryl Smith, the service manager for Avasi Services, advised Kudzia that he had to report for a random drug test. Kudzia, who showed no signs of intoxication, said nothing in response. According to Dr. Stuart Hoffman, a medical review officer, Kudzia tested positive for "metabolized marijuana." On June 27, 2012, Smith met with Kudzia and informed him that he was discharged because of the failed test. Kudzia did not dispute the test results, and he informed Smith that he had a medical marijuana card.

In the past, Kudzia had undergone two surgeries on his knees. In July 2010, he received a medical marijuana card, which was valid through July 2012. After he received the card, Kudzia used a marijuana-infused cream on his knees.

The UIA found that Kudzia was discharged for testing positive on a drug test. It determined that he was not disqualified from receiving benefits under

§ 29(1)(m). Avasi Services appealed, and a hearing was held before an ALJ. The ALJ ruled that Kudzia was disqualified from receiving benefits under § 29(1)(b) (misconduct). The ALJ explained that no law prohibited an employer from having a policy that prohibited the use or possession of controlled substances. Kudzia acted in direct contravention of his employer's policy, as he did not request an exemption to use medical marijuana. However, the hearing referee also concluded that Kudzia was not disqualified from receiving benefits under § 29(1)(m). There was no evidence that Kudzia used medical marijuana in contravention of the MMMA.

Kudzia appealed, and the MCAC affirmed the ALJ's decision on different grounds. It reasoned that an employee who tests positive for a controlled substance is disqualified from receiving benefits under § 29(1)(m). Kudzia appealed the MCAC's decision in the Macomb Circuit Court, and the circuit court reversed. First, the circuit court ruled that, to the extent that provisions of the MMMA and MESA conflicted, the MMMA controlled. Second, it held that, although the MMMA does not impose restrictions on private employers, the MMMA applies to state action and the MCAC's decision to deny Kudzia benefits was an action by the state. The circuit court then held that Kudzia's use of medical marijuana implicated § 29(1)(m) because the MMMA did not legalize the use of marijuana. Nonetheless, the circuit court determined that the disqualification from benefits was contrary to the MMMA because it was a penalty or the denial of a right or privilege for the medical use of marijuana. The circuit court rejected the Department's argument that Kudzia's behavior was impermissible under the MMMA. It explained that Kudzia tested positive for marijuana metabolites and that it did not follow, from the presence of the metabolites, that Kudzia had ingested marijuana in the workplace or that he was under the influence of mari-

juana during work hours. This Court granted the Department's application for leave to appeal the circuit court's order.

II. STANDARD OF REVIEW

The issue whether unemployment benefits may be denied to an individual who, after using marijuana in accordance with the MMMA, is discharged after testing positive on a drug test was raised before the circuit courts in all three cases. The issue was decided by the circuit courts in the Kemp case and the Kudzia case and is therefore is preserved in those two cases. *King v Oakland Co Prosecutor*, 303 Mich App 222, 239; 842 NW2d 403 (2013). Although the issue was not decided by the circuit court in the Braska case, the issue involves an issue of statutory interpretation, the facts necessary for its resolution are present, and it is dispositive of the appeal; therefore we will address the issue in all three cases. See *State Treasurer v Snyder*, 294 Mich App 641, 644; 823 NW2d 284 (2011).

A decision by the MCAC is subject to review by a circuit court under MCL 421.38, which provides in relevant part as follows:

> The circuit court . . . may review questions of fact and law on the record made before the administrative law judge and the [MCAC] involved in a final order or decision of the [MCAC], and may make further orders in respect to that order or decision as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record.

"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 clear-error standard of review. *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 585; 701 NW2d 214 (2005). In other words, the circuit court's legal conclusions are reviewed de novo and its factual findings are reviewed for clear error. *Mericka v Dep't of Community Health*, 283 Mich App 29, 36; 770 NW2d 24 (2009).

These appeals involve issues of statutory interpretation, which are questions of law that we review de novo. *Id*. "The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent as expressed by the language of the statute." *Id*. at 38. If the statutory language is clear and unambiguous, judicial construction is neither required nor permitted; the statute must be enforced as written. *Michigan v McQueen*, 493 Mich 135, 147; 828 NW2d 644 (2013). Regarding voter-initiated statutes such as the MMMA, the intent of the electors governs the interpretation of the statute. *Id*. The statute's plain language is the most reliable evidence of the electors' intent. *Id*.

III. ANALYSIS

A. MESA

When it enacted MESA, the Legislature declared that "[e]conomic insecurity due to unemployment is a serious menace" and that "[t]he systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment by the setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own . . . is for the public good, and the general welfare of the people of this state." MCL 421.2(1).

An individual must be eligible to receive unemployment benefits under MESA. Initially, an individual must meet

certain threshold requirements set forth in MCL 421.28 such as, among other things, filing a claim for benefits and seeking employment. See MCL 421.28(1)(a), (b), and (c). In the event an individual meets the threshold requirements of § 28, he or she may nevertheless be disqualified from receiving benefits under MCL 421.29, which provides in pertinent part as follows:

> (1) Except as provided in subsection (5), an individual is disqualified from receiving benefits if he or she:
>
> * * *
>
> (b) Was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work.
>
> * * *
>
> (m) Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner. . . .
>
> (*i*) "Controlled substance" means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.[2]
>
> (*ii*) "Drug test" means a test designed to detect the illegal use of a controlled substance. [Emphasis added.]

B. THE MMMA

The MMMA was approved by the state electors in November 2008. *People v Kolanek*, 491 Mich 382, 393; 817

[2] A "controlled substance" is defined in MCL 333.7104(2) as "a drug, substance, or immediate precursor included in schedules 1 to 5 of part 72 [MCL 333.7201 *et seq*.]."

NW2d 528 (2012). In approving the MMMA, the state electors found that, according to modern medical research, there were beneficial uses for marijuana in treating or alleviating the effects of a variety of debilitating medical conditions. MCL 333.26422(a). "The purpose of the MMMA is to allow a limited class of individuals the medical use of marijuana . . . ." *Kolanek*, 491 Mich at 393. However, the MMMA did not legalize the use or possession of marijuana in all contexts. *People v Koon*, 494 Mich 1, 5; 832 NW2d 724 (2013). Marijuana remains a Schedule 1 controlled substance. *Id*.[3] "The MMMA does *not* create a general right for individuals to use and possess marijuana in Michigan. Possession, manufacture, and delivery of marijuana remain punishable offenses under Michigan law." *Kolanek*, 491 Mich at 394. See also *Ter Beek v Wyoming*, 495 Mich 1, 15; 846 NW2d 531 (2014) ("[I]ts possession, manufacture, and delivery remain punishable offenses under Michigan law.").

The MMMA functions by granting immunity from arrest, prosecution, or penalty. *Koon*, 494 Mich at 5. Section 4 of the MMMA provides, in pertinent part:

> A qualifying patient who has been issued and possesses a registry identification card *shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right*

[3] Marijuana is listed as a Schedule 1 controlled substance under the Public Health Code, MCL 333.1101 *et seq*. MCL 333.7212(1)(c). In 2013, the Legislature amended MCL 333.7212, adding § 2, which reclassified marijuana as a Schedule 2 controlled substance "if it is manufactured, obtained, stored, dispensed, possessed, grown, or disposed of in compliance with this act and as authorized by federal authority." 2013 PA 268. MCL 333.7214, the list of Schedule 2 controlled substances was also amended by 2013 PA 268, and it now provides that marijuana is a Schedule 2 controlled substance "but only for the purpose of treating a debilitating medical condition as that term is defined in [the MMMA], and as authorized under this act." MCL 333.7214(e). Marijuana remains listed as a Schedule 1 controlled substance under federal law. 21 USC 812(c), Schedule I(c)(10).

> *or privilege*, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . . [MCL 333.26424(a) (emphasis added).][4]

The MMMA's immunity applies only if marijuana is used in accordance with the provisions of the MMMA. MCL 333.26427(a). The MMMA does not permit any person to "[u]ndertake any task under the influence of marihuana, when doing so would constitute negligence or professional malpractice" or to "[o]perate, navigate, or be in actual physical control of any motor vehicle, aircraft, or motorboat while under the influence of marihuana." MCL 333.26427(b)(1), (4). In addition, nothing in the MMMA may be construed to require an "employer to accommodate the ingestion of marihuana in any workplace or any employee working while under the influence of marihuana." MCL 333.26427(c)(2).

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

C. APPLICATION

The central issue presented in these three appeals is whether an employee who has a medical marijuana card

[4] The MMMA also grants a "patient" an affirmative defense, under certain circumstances, to any prosecution involving marijuana. MCL 333.26428.

and is discharged after failing a drug test may be denied unemployment benefits. To resolve this issue, we must examine the interplay between MESA and the MMMA. Specifically, we must first determine (1) whether claimants met the threshold requirements for unemployment compensation under MESA, (2) whether claimants were nevertheless disqualified from receiving benefits under one of MESA's disqualification provisions, and (3), to the extent claimants were disqualified for testing positive for marijuana, whether the MMMA nevertheless provides immunity and supersedes MESA in this respect.

With respect to MESA, none of the parties disputes that claimants met the threshold requirements for unemployment benefits under MCL 421.28. The MCAC found claimants disqualified for benefits under § 29(1)(m). As set forth earlier, that statutory provision disqualifies an individual who was discharged for the following conduct: (1) "illegally ingesting, injecting, inhaling or possessing a controlled substance on the premises of the employer," (2) refusing to submit to a fairly administered drug test, and (3) for "testing positive on a drug test, if the test was administered in a nondiscriminatory manner." MCL 421.29(1)(m). There is no evidence in the record that any of the three claimants ingested, injected, inhaled, or possessed marijuana on the premises of their respective employers. Furthermore, claimants' employers did not allege that claimants were under the influence of marijuana at any time during work hours. Similarly, claimants did not refuse to submit to a drug test. Thus, the first two disqualifiers under § 29(1)(m) are inapplicable in the present cases.

With respect to the third disqualifier, the MCAC determined that claimants were disqualified under that

provision because they failed a drug test. However, although claimants failed their respective drug tests and ordinarily would have been disqualified for unemployment benefits under § 29(1)(m), we must determine whether claimants were nevertheless entitled to unemployment benefits under the MMMA provisions that grant immunity and supersede contrary laws.[5]

As noted, the MMMA's immunity clause provides in relevant part as follows:

> A qualifying patient who has been issued and possesses a registry identification card *shall not be subject to* arrest, prosecution, or *penalty in any manner, or denied any right or privilege*, including but not limited to *civil penalty or disciplinary action* by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act . . . . [MCL 333.26424(a) (emphasis added).]

The immunity provided under this section is broad. It prohibits the imposition of certain consequences on individuals who use medical marijuana in accordance with the MMMA. See *1031 Lapeer LLC v Rice*, 290 Mich

[5] Claimants present several arguments concerning the results of the drug tests. Braska argues that the MCAC erred by admitting the results verification record and the specimen result certificate. Braska and Kemp argue that individuals are not disqualified under § 29(1)(m) simply for testing positive on a drug test. According to them, based on the definition of a "drug test," an individual is only disqualified if the positive drug test was the result of the "illegal use" of a drug. Finally, Kudzia argues that he only tested positive for marijuana "metabolites," and the circuit court stated that Kemp tested positive for 11-carboxy-THC without explaining the import of that statement. We need not address the merits of these arguments. Even assuming that claimants tested positive for marijuana and results of those tests were properly admitted during the administrative proceedings, because there was no evidence that the positive drug tests were a result of anything other than the medical use of marijuana in accordance with the terms of the MMMA, denial of the unemployment benefits constituted a penalty that ran afoul of the MMMA's immunity clause. Therefore, claimants' arguments are moot.

App 225, 231; 810 NW2d 293 (2010) (use of the phrase "shall not" designates a mandatory prohibition). Specifically, the statute provides that qualifying patients "shall not" (1) "be subject to arrest, prosecution, or penalty in any manner" or (2) be denied any "right" or "privilege," "*including but not limited to* civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau . . . ." (Emphasis added).

In this case, none of the parties contends that claimants used medical marijuana in a manner that did not comply with the terms of the MMMA. Therefore, we must determine whether denial of unemployment benefits constitutes either imposition of a penalty or denial of a right or privilege.

The MMMA does not define the term "penalty." In *Ter Beek*, 495 Mich at 20, in the context of the MMMA, our Supreme Court referred to a dictionary to define the term to mean "a 'punishment imposed or incurred for a violation of law or rule . . . something forfeited.' " *Id*., quoting *Random House Webster's College Dictionary* (2000). Further, because the term "penalty" in MCL 333.26424(a) is modified by the phrase "in any manner," the immunity granted by the MMMA from penalties "is to be given the broadest application" and applies to both civil and criminal penalties. *Ter Beek v Wyoming*, 297 Mich App 446, 455; 823 NW2d 864 (2012), aff'd 495 Mich 1 (2014).

Applying this definition to the present case, we conclude that denial of unemployment benefits under § 29(1)(m) constitutes a "penalty" under the MMMA that was imposed upon claimants for their medical use of marijuana. As discussed earlier, none of the parties disputes that claimants met the threshold requirements for unemployment benefits under MCL 421.28. The only reason claimants were disqualified by the MCAC

from receiving benefits was because they tested positive for marijuana. In other words, absent their medical use of marijuana—and there was no evidence that claimants, all of whom possessed a medical marijuana card, failed to abide by the MMMA's provisions in their use—claimants would not have been disqualified under § 29(1)(m). Thus, because claimants used medical marijuana, they were required to forfeit their unemployment benefits. For this reason, the decision by the MCAC to deny claimants unemployment benefits amounted to a penalty imposed for the medical use of marijuana contrary to MCL 333.26424(a). Accordingly, because the MMMA supersedes MESA in this respect, the MCAC erred by denying claimants unemployment benefits. See MCL 333.26427(e) ("All other acts and parts of acts inconsistent with [the MMMA] do not apply to the medical use of marihuana as provided for by this act.").

The Department argues that disqualification under § 29(1)(m) is not a "penalty." According to the Department, something cannot be forfeited unless one was entitled to it, and claimants were not entitled to unemployment benefits because MESA conditions the payment of benefits upon an individual's eligibility and qualification. We reject the Department's argument that, because claimants were disqualified under § 29(1)(m), they were not penalized. This argument ignores the salient fact that claimants met the threshold requirements for unemployment benefits and were disqualified only because of their use of medical marijuana.

In addition, the Department claims that, to the extent the denial of unemployment benefits constituted a penalty, the penalty was imposed not for the medical use of marijuana, but rather for failing a drug test.

Essentially, the Department contends that we should distinguish the act of failing a drug test from claimants' medical use of marijuana. We decline the Department's invitation to ignore the basis for the positive drug tests and engage in linguistic gymnastics in an attempt to avoid the plain language of the MMMA. Claimants' use of medical marijuana and their subsequent positive drug tests are inextricably intertwined. Each claimant tested positive for marijuana. There was no dispute that each claimant possessed a medical marijuana card. No evidence was presented to suggest that the marijuana discovered in the drug tests was not from the medical use of marijuana or that claimants failed to use medical marijuana in accordance with the provisions of the MMMA. Stated simply, claimants would not have failed the drug test had they not used medical marijuana. The plain language of the MMMA's immunity clause states that claimants "*shall not*" suffer a penalty for their medical use of marijuana. In construing unambiguous language such as this, we will give the statutory words their plain meaning. See *Scalise v Boy Scouts of America*, 265 Mich App 1, 26; 692 NW2d 858 (2005) ("When construing a statute, where the language is unambiguous, this Court gives the words their plain meaning."). But for claimants' use of medical marijuana, the MCAC would not have disqualified them for unemployment benefits. The disqualification clearly amounted to a penalty imposed on claimants for their medical use of marijuana that ran afoul of the MMMA's immunity clause. Because the MMMA supersedes conflicting provisions of MESA, the MCAC erred by concluding that claimants were disqualified for unemployment benefits.[6]

[6] Because we conclude that the denial of unemployment benefits constituted a "penalty," we need not address whether unemployment

The Department also argues that if we were to hold that the MMMA protects against the denial of unemployment benefits, we would disregard the MMMA's provision that employers are not required to accommodate the use of medical marijuana in the workplace. However, the Department reads the relevant provision of the MMMA, MCL 333.26427(c)(2), too broadly. The provision does not state that an employer is not required to accommodate the *medical use* of marijuana, which includes internal possession, MCL 333.26423(f). Rather, it states that nothing in the MMMA shall be construed to require "[a]n employer to accommodate the *ingestion* of marihuana *in any workplace* or any employee *working while under the influence* of marihuana." MCL 333.26427(c)(2) (emphasis added). There was no evidence that claimants ingested marijuana in the workplace or that they worked under the influence of marijuana. Thus, the Department's argument with respect to MCL 333.26427(c)(2) is misplaced.

In a related argument, the Department contends that awarding unemployment benefits in this case amounts to a penalty imposed on the employers because the employers ultimately will be required to pay increased contributions to the unemployment compensation fund. However, to the extent that applying the plain language of the MMMA results in employers being responsible for paying unemployment benefits, that is a matter of public policy. Our authority does not extend to setting public policy for the state. *Houston v Governor*, 491 Mich 876, 877 (2012). Rather, our concern is the plain language of the statute, which is the best indicator of the intent of the electorate in approving the medical marijuana initiative. *McQueen*, 493 Mich at 147. Here,

benefits constitute a "right" or a "privilege" for purposes of the MMMA.

as discussed earlier, the denial of unemployment benefits conflicts with the plain language of the MMMA's immunity clause.

The Department cites *Casias v Wal-Mart Stores, Inc*, 695 F3d 428 (CA 6, 2012), and *Beinor v Indus Claim Appeals Office of Colorado*, 262 P3d 970 (Colo App, 2011), to further support its argument that the MMMA does not apply to private employers. The Department's reliance on these cases is unpersuasive.

In *Casias*, the Sixth Circuit Court of Appeals held that the MMMA's immunity clause did not apply to a private employer's decision to fire an employee for using medical marijuana, reasoning that the MMMA does not impose restrictions on private employers. *Id.* at 435. The *Casias* decision is not binding precedent on this Court. See *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221 n 6; 761 NW2d 293 (2008) (noting that, "[o]n questions of state law, Michigan courts are not bound by foreign authority"). Moreover, unlike in *Casias*, we are not presented with the issue of whether the MMMA's immunity clause applies in cases involving action solely by private employers.[7] The issue

[7] In addressing whether the MMMA's immunity clause applied to private employers, the Sixth Circuit interpreted the phrase "*including but not limited to* civil penalty or disciplinary action *by a business or occupational or professional licensing board or bureau*" to be limited in scope to state actors—i.e., business, occupational, or professional licensing boards or bureaus. See *Casias*, 695 F3d at 436. Notably, the Sixth Circuit did not discuss in any detail the significance of the phrase "*included but not limited to*" in determining that the MMMA was limited to business, occupational, or professional licensing boards or bureaus. See *id*. at 435-437. However, as noted, we are not tasked with deciding whether the MMMA applies in situations involving solely a private actor when denial of unemployment benefits involves action by the MCAC, a state actor. See *Vander Laan v Mulder*, 178 Mich App 172, 176; 443 NW2d 491 (1989) (noting that when an individual is denied unemployment benefits, the employer's conduct is not at issue).

raised in these cases is not whether the employers violated the MMMA because they terminated claimants. The issue is whether, by denying unemployment benefits, the MCAC—a state actor—imposed a penalty on claimants that ran afoul of the MMMA's broad immunity clause. When an individual is denied unemployment benefits, the employer's conduct is not at issue; rather, the denial involves state action. See *Vander Laan v Mulder*, 178 Mich App 172, 176; 443 NW2d 491 (1989).

Similarly, *Beinor*, 262 P3d at 975, is neither binding on this Court, *Mettler Walloon*, 281 Mich App at 221 n 6, nor is it persuasive. In *Beinor*, the Colorado Court of Appeals held that the plaintiff, a medical marijuana user, was not entitled to unemployment benefits after he was terminated for failing a drug test. The court reasoned that the plaintiff was not entitled to immunity under the provision of Colorado's constitution allowing the medical use of marijuana. *Id*. at 975-976. The reasoning in *Beinor* is not persuasive for purposes of these cases. The constitutional provision at issue in that case only protected medical marijuana users from the state's criminal laws, *id*. at 975, whereas the MMMA's immunity clause is much broader, extending to both criminal and civil penalties. See *Ter Beek*, 495 Mich at 20-21. Therefore, we do not find *Beinor* helpful to our analysis in these cases.

Finally, the Department argues that even if the MMMA prevents claimants from being disqualified from receiving unemployment benefits under § 29(1)(m), they are still disqualified from receiving benefits under § 29(1)(b) of MESA. Under that provision, an individual is disqualified from receiving benefits if he or she was discharged for misconduct connected with the individual's work. MCL 421.29(1)(b).

According to the Department, all three claimants engaged in misconduct because they acted in direct and knowing contravention of their employers' zero-tolerance drug policies.

Contrary to the Department's argument, § 29(1)(b) is not applicable in the present cases. "[I]t is a settled rule of statutory construction that where a statute contains a specific statutory provision and a related, but more general, provision, the specific one controls." *In re Haley*, 476 Mich 180, 198; 720 NW2d 246 (2006). In these cases, the MCAC found that each claimant was discharged for testing positive on a drug test. Other than testing positive for marijuana, there was no misconduct that led to any claimant being discharged. MCL 421.29 contains a specific provision regarding disqualification when an individual tests positive on a drug test. Accordingly, under the settled rule of statutory interpretation set forth in *In re Haley*, claimants' disqualification from receiving unemployment benefits is governed by § 29(1)(m), the specific provision concerning testing positive on a drug test, rather than § 29(1)(b), a related, but more general, provision regarding misconduct.

In addition, even if § 29(1)(b) were applicable and the MCAC disqualified claimants from receiving unemployment benefits because they were discharged for misconduct, this would not affect our analysis with respect to the plain language of the MMMA's immunity clause. Claimants' misconduct involved testing positive for marijuana on a drug test, which violated their employers' zero-tolerance drug policies. However, the only reason that claimants tested positive on the drug tests was that they used medical marijuana. Absent their use of medical marijuana, claimants would not have been disqualified from receiving unemployment benefits.

Thus, the denial of benefits as a result of disqualification under § 29(1)(b), like disqualification under § 29(1)(m), results in a "penalty in any manner" for the medical use of marijuana contrary to MCL 333.26424(a).

IV. CONCLUSION

Claimants tested positive for marijuana and would ordinarily have been disqualified for unemployment benefits under MESA, MCL 421.29(1)(m); however, because there was no evidence to suggest that the positive drug tests were caused by anything other than claimants' use of medical marijuana in accordance with the terms of the MMMA, the denial of the benefits constituted an improper penalty for the medical use of marijuana under the MMMA, MCL 333.26424(a). Because the MMMA supersedes conflicting provisions of MESA, the circuit courts did not err by reversing the MCAC's rulings that claimants were not entitled to unemployment compensation benefits.[8]

Affirmed. A public question being involved, no costs awarded. MCR 7.219(A). We do not retain jurisdiction.

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

---

[8] To the extent the circuit court in Docket No. 313932 erred by applying the incorrect standard of review, we affirm because the court reached the right result. See *Gleason v Dep't of Transportation*, 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.").

DIEZ v DAVEY

Docket No. 318910. Submitted September 4, 2014, at Detroit. Decided October 23, 2014, at 9:05 a.m.

Robert A. Diez brought an action in the Macomb Circuit Court against Marie-Jesusa C. Davey, seeking sole legal and physical custody of the parties' three minor children. The court, Kathryn A. George, J., awarded the parties joint legal and physical custody. The court ordered plaintiff to pay defendant $7,062 per month for child support and also ordered plaintiff to pay $118,000 for defendant's attorney fees. Plaintiff appealed.

The Court of Appeals *held*:

1. Unless application of the Michigan Child Support Formula would be unjust or inappropriate, a parent's child support obligation is determined by application of the formula. Under the formula, the first step in calculating each parent's support obligation involves determining the parents' individual incomes, including earnings generated from a business. With regard to corporate income, the formula, 2013 MCSF 2.01(E)(4)(a), requires inclusion of distributed profits as income to a parent. And, under 2013 MCSF 2.01(E)(4)(d)(i), the formula requires consideration of undistributed profits when there has been a substantial reduction in the percentage of profits distributed to a parent as compared to historical distribution patterns. In this case, plaintiff was the president and sole shareholder of an S corporation, Supreme Gear Company (SGC). The trial court relied on the opinion of an expert, who asserted that 60 to 65% of SGC's undistributed earnings constituted excess working capital that could have been distributed, and that those undistributed corporate earnings were, therefore, available as income to plaintiff for child support purposes. The formula, however, does not mandate the pursuit of one reasonable business model over another, and it does not necessitate the revamping of a parent's reasonable and historical business practices in favor of alternative methods in which a corporation could theoretically be run in order to make additional funds available. Generally, the management of a corporation involves some exercise of business judgment. Nothing in the formula can be read to limit a parent's freedom to make business decisions or to

require the attribution of greater income to a parent who makes relatively conservative business decisions. Provided that the operation of a parent's business is in keeping with historical practices, that those practices can be described as the reasonable exercise of business judgment, and that there is no evidence of an improper effort to make funds unavailable for child support, nothing in the formula mandates that the reality of how a parent operates a business, and has historically operated a business, should be dismissed in favor of an alternative method in which the business could be conducted. The trial court erred by adopting the opinion of an expert who evaluated plaintiff's income not on the basis of how plaintiff historically ran the business but on the basis of the substitution of the expert's business judgment for that of plaintiff's business judgment.

2. When a corporation elects S-corporation status, income taxes are paid by the shareholders, but the corporation owns the profits on which the taxes are paid and the corporation is not required to distribute that income. The corporation may, however, choose to distribute funds to shareholders for the payment of the tax liability arising from the corporation's earnings. Funds distributed for payment of taxes on earnings retained by the corporation are not an indication of what the parent has, or should have, available for child support. The formula acknowledges the unique taxation rules involved with business ownership and recognizes, under 2013 MCSF 2.01(C)(2)(a), that money may be passed to a parent not as income but as a tax strategy. It is apparent that funds distributed for the payment of taxes arising from earnings retained by an S corporation are not available to the parent for payment of child support. Rather, those funds are applied to pay a necessary business expense and are properly excluded from the parent's net income. On remand, the trial court must determine what corporate distributions to plaintiff, if any, were used by plaintiff to pay taxes on corporate earnings retained by SGC. Any distributions used to offset plaintiff's tax liability attributable to SGC shall not be included in the determination of plaintiff's income.

3. It is the best interests of the children that control the determination of a parenting-time schedule. An award of joint custody does not necessitate a 50/50 split of the children's time between each parent. Under MCL 722.26a(7)(a), "joint custody," in terms of physical custody, is defined as an order of the court in which it is specified that the child shall reside alternately for specific periods with each of the parents. Under MCL 722.27a, parenting time must generally be granted in a frequency, duration,

and type reasonably calculated to promote a strong relationship between the child and the parent granted parenting time. In this case, the parenting-time schedule, under which the children reside alternatively for specific periods with each of the parents, plainly constituted an award of joint custody of the type contemplated by the Legislature and provided ample time for plaintiff to promote a strong relationship with his children. The trial court was not required to provide a perfect division of parenting time, and the trial court did not abuse its discretion in adopting the schedule at issue. To the extent plaintiff challenged the trial court's assessment of the best-interest factors under MCL 722.23, he failed to show that the court's findings were against the great weight of the evidence.

4. Under MCR 3.206(C)(1), a party to a domestic relations action 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 postjudgment proceeding. A party who requests attorney fees and expenses must allege facts sufficient to show that (1) the party is unable to bear the expense of the action and the other party is able to pay, or (2) 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. The rule has been interpreted to require an award of attorney fees to the extent necessary to enable a party to prosecute or defend a suit. A party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees. In this case, defendant had an annual income of less than $8,000 per year and incurred legal fees in excess of $118,000. Therefore, the trial court did not clearly err by finding that defendant could not afford her attorney fees. Plaintiff, in contrast, was the sole shareholder of a profitable corporation, earning, by his own admission, a salary of $183,000 a year; he also had funds in savings; and he could have withdrawn funds from SGC. Although plaintiff's father had loaned defendant the money to pay her attorney fees, the evidence showed that defendant had agreed to repay the loan. The trial court did not abuse its discretion by awarding defendant attorney fees. And, insofar as plaintiff challenged the necessity of some of the expenses, plaintiff failed to show that the trial court abused its discretion in determining the amount of fees awarded.

Affirmed in part, vacated in part, and remanded for reconsideration of plaintiff's income for the purpose of determining plaintiff's child support obligation.

FORT HOOD, J., concurring in part and dissenting in part, agreed with the majority regarding the child custody and parenting-time issues, but dissented from the majority's opinion with regard to child support and would have affirmed the trial court decision in its entirety. The purpose of the formula is to determine the amount of income available for child support. A case-by-case, factual inquiry—one that is not limited to situations in which there is evidence of a reduction in distributions compared to historical practices—is required to determine what portion of an S corporation's profits are necessary to fund the corporation and what portion may be considered income under the formula. This inquiry is necessary to balance the needs of the corporation against the concern that the corporation might be used to shield income in a child support dispute. The trial court in this case undertook the appropriate analysis. With regard to the funds distributed to plaintiff for the payment of taxes arising from SGC's earnings, plaintiff stipulated the inclusion of those funds in his income calculation and, therefore, he should have been precluded on appeal from disputing the inclusion of those funds in his income.

1. PARENT AND CHILD — CHILD SUPPORT FORMULA — DETERMINATION OF INCOME — INCOME FROM A BUSINESS — HISTORICAL PRACTICE.

Unless application of the Michigan Child Support Formula would be unjust or inappropriate, a parent's child support obligation is determined by application of the formula; provided that the operation of a parent's business is in keeping with historical practices, that those practices can be described as the reasonable exercise of business judgment, and that there is no evidence of an improper effort to make funds unavailable for child support, nothing in the formula mandates that the reality of how a parent operates a business, and has historically operated a business, should be dismissed in favor of an alternative method in which the business could be conducted in order to make more income available for child support.

2. PARENT AND CHILD — CHILD SUPPORT FORMULA — INCOME — S CORPORATIONS — DISTRIBUTIONS FOR THE PAYMENT OF TAXES.

Funds distributed by an S corporation for the payment of taxes on earnings retained by the corporation are not an indication of what the parent has, or should have, available for child support, and any distributions used to offset a parent's tax liability attributable to an S corporation shall not be included in the determination of the party's income.

3. PARENT AND CHILD — PHYSICAL CUSTODY — PARENTING-TIME.

It is the best interests of the children that control the determination of a parenting-time schedule; an award of joint custody does not necessitate a 50/50 split of the children's time between each parent.

Judith A. Curtis for plaintiff.

Plunkett Cooney (by *Hilary A. Ballentine* and *Karen E. Beach*) for defendant.

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

HOEKSTRA, P.J. In this child custody dispute, plaintiff/counter-defendant, Robert A. Diez (plaintiff), appeals as of right a trial court order that resolved issues involving child custody and parenting time, child support, and attorney fees. Because the trial court's award of custody and parenting time was not an abuse of discretion and the trial court did not abuse its discretion in awarding attorney fees to defendant/counter-plaintiff, Maria-Jesusa Cloma Davey (defendant), we affirm those portions of the trial court's judgment. However, for the reasons explained in this opinion, we vacate the trial court's award of child support and remand for reconsideration of plaintiff's income under the Michigan Child Support Formula (MCSF).

I. BACKGROUND

Plaintiff is the president and sole shareholder of Supreme Gear Company (SGC), a manufacturer of precision gears used in the aerospace industry. SGC is organized as a corporation and it has elected to be an S corporation for tax purposes under 26 USC 1362(a)(1). The parties in this case met in 1994 and became

romantically involved. They never married, but, over the course of a 16-year relationship, they had three children together.

After their relationship ended, plaintiff filed the present lawsuit in April 2010, seeking sole legal and physical custody of the three minor children. Following more than three years of litigation, on July 2, 2013, the trial court issued an opinion and order addressing the issues of (1) custody and parenting time, (2) child support, and (3) defendant's request for attorney fees. First, regarding custody and parenting time, the trial court awarded the parties joint legal and joint physical custody. The parenting-time schedule provided plaintiff with approximately 122 overnights per year, consisting of alternate weekends from Friday to Monday morning, alternate weeks in the summer, parenting time during spring break, and holiday parenting time in accordance with the "16th Judicial Circuit Reasonable Parenting Time Schedule."

On the issue of child support, the trial court credited the testimony of an expert, Certified Public Accountant Justin Cherfoli, who opined that plaintiff had an average income of $723,000 over the course of three years, from 2009 through 2011. Included within this calculation of income were plaintiff's wages, distributions from SGC, "perks" such as car expenses paid by SGC, and a portion of "excess working capital" retained in SCG, meaning those amounts that, in Cherfoli's judgment, plaintiff could withdraw from the S corporation while maintaining a viable business. In light of this evidence, and accounting for defendant's income and plaintiff's award of 122 overnights, the trial court set plaintiff's monthly child support at $7,062.

Lastly, in regard to attorney fees, the trial court found that defendant was unable to bear her legal

expenses, and that plaintiff should pay all defendant's attorney fees. After defendant submitted a bill of costs, the trial court awarded defendant $118,000 in attorney fees. In October 2013, a judgment reflecting the trial court's opinion and order regarding custody and child support as well as the award of attorney fees was entered. Plaintiff now appeals as of right.

II. CHILD SUPPORT

On appeal, plaintiff challenges the child support order entered by the trial court. In particular, plaintiff disputes whether the trial court erred by relying on an expert's determination of excess working capital in the S corporation when attributing income to plaintiff. He also contends that the trial court erred by including within its calculation of plaintiff's income funds distributed to plaintiff by SGC for purposes of paying the tax burden attributable to SGC's corporate income.

Relevant to plaintiff's arguments, the Friend of the Court referee held an evidentiary hearing on the topic of child support. The hearing took place over the course of three days, and it involved testimony from both parties and three certified public accountants who testified as experts. The experts reached various conclusions regarding plaintiff's actual income available for the payment of child support in the years 2008 through 2011, but, ultimately, the referee and trial court both relied on the opinion of Justin Cherfoli when determining plaintiff's income.

According to his testimony, Cherfoli estimated plaintiff's income as follows: $1,145,000 in 2011, $637,000 in 2010, $391,000 in 2009, and $2,116,000 in 2008. As a result, he offered a three-year average of $723,000 and a four-year average of $1,071,000. He arrived at his determinations of plaintiff's income by considering

plaintiff's W-2 income, interest and dividends, actual distributions, perks, and "additional monies available for income, or for payment of child support that aren't in any of the other four categories . . . ." Cherfoli included in his calculations for 2008 the amount distributed for the purchase of a house and, for all years, those sums from the company distributed to plaintiff for what plaintiff and his accountant testified was payment of SGC's taxes. In the final category, that is, additional monies, Cherfoli placed a portion of what he characterized as "excess working capital." Specifically, he defined "working capital" as current assets—including cash, accounts receivable, and inventory—less current liabilities. He then considered what money was required to pay for the operations of the manufacturing side of the company and any amount beyond this, he considered excess working capital, or, in other words, funds in excess of what Cherfoli deemed required to meet SGC's ongoing operating expenses. Using calculations known as the "Bardahl analysis," Cherfoli calculated excess working capital of $300,000 in 2010 and $797,000 in 2011. On the basis of his own judgment, he then concluded that 60 to 65% of SGC's excess working capital was available for distribution in a given year. Therefore, in his opinion, an additional $200,000 could have been distributed in 2010 and an additional $460,000 could have been distributed in 2011. He did not discern any excess working capital that could have been distributed in 2009.

By his own admission, Cherfoli had no study to support the percentages he chose as appropriate distributions of excess working capital. He based the numbers on his own opinion of what he viewed as "reasonable" when compared with the business's requirements. In doing so, he compared SGC with other corporations, noting that SGC operated under a more "conservative"

business model insofar as it had "more cash and less debt than" other companies in the same industry. Compared to other companies, SGC had 22% of its total assets in cash and a zero debt-to-capital ratio, while others had 6% of total assets in cash and an average debt-to-capital ratio of 20%. Cherfoli further opined that distribution of additional capital would not hinder SGC's operations because many of SGC's purchases of needed equipment could be financed by acquiring new debt, rather than adhering to SGC's historical practice of purchasing equipment with cash.[1]

Following the hearing, the referee recommended that plaintiff be ordered to pay $8,806 a month in child support. In arriving at this figure, the referee accepted Cherfoli's opinions and determined that plaintiff had an average monthly gross income, for 2010 and 2011, of $74,117.13, or $889,405.56 per year. Included in these figures were amounts paid to plaintiff for the purpose of satisfying SGC's tax liability. The referee concluded that taxes owed by SGC were plaintiff's liability.[2]

---

[1] Regarding the purchase of equipment, plaintiff testified that the aerospace industry, for which SGC manufactures gears, is "majorly capital intensive" and requires the regular purchase of new machinery to stay current in order to continue receiving contracts. According to plaintiff, these equipment purchases, which occur almost every year, can range anywhere from a few hundred thousand dollars to upwards of $2,000,000 per machine. Therefore, in plaintiff's view, to stay competitive, particularly against larger manufacturing companies with more assets, the corporation needs cash on hand to purchase the necessary new equipment.

[2] The referee indicated that plaintiff's attorney stipulated that the amounts paid in taxes for SGC should be included in plaintiff's gross income. While counsel did so stipulate, in context, it is abundantly clear from the record that counsel in no way intended to stipulate inclusion of the funds for purposes of determining plaintiff's child support obligations. Plaintiff's counsel argued repeatedly, and presented expert testimony to the effect, that taxes paid for income attributable to SGC should not be considered income to plaintiff for purposes of calculating child support.

Plaintiff objected to the referee's recommendation, and the matter was considered by the trial court. The trial court acknowledged that it must conduct a de novo review, but framed the matter as whether the referee "erred in crediting Cherfoli's expert testimony" and ultimately found no error in the referee's reliance on Cherfoli's testimony. Specifically, the trial court concluded that "Michigan law treats the income of an S corporation as the income of the S corporation's shareholders" and, for this reason, "Cherfoli properly treated the income of plaintiff's S corporation as plaintiff's income." Indeed, the trial court concluded that Cherfoli's analysis "worked to plaintiff's advantage" because Cherfoli considered only "excess working capital" rather than all of SGC's income as income available for distribution. Agreeing with the referee that Cherfoli was the most credible expert, the trial court accepted Cherfoli's excess-working-capital calculation and Cherfoli's conclusion that 60 to 65% of the excess working capital was available for distribution. In accepting Cherfoli's figures, the trial court made no findings regarding whether these figures included amounts disbursed for payment of SGC's taxes. The trial court used the average of three years, rather than the two-year average used by the referee, resulting in a gross average annual income of $723,000, and ultimately, a net monthly average income of $35,712. On the basis of these findings, and accounting for defendant's income and plaintiff's award of 122 overnights, the trial court set plaintiff's child support at $7,062 per month.

A. STANDARD OF REVIEW

This Court reviews child support orders for an abuse of discretion. *Malone v Malone*, 279 Mich App 280, 284; 761 NW2d 102 (2008). In contrast, we review the trial

court's factual findings for clear error. *Borowsky v Borowsky*, 273 Mich App 666, 672; 733 NW2d 71 (2007). Issues involving statutory interpretation or the proper interpretation of the MCSF pose questions of law which we review de novo. *Id*. As when interpreting statutes, this Court must ensure compliance with the plain language of the MCSF and may not read anything into the MCSF that is not present. *Peterson v Peterson*, 272 Mich App 511, 518; 727 NW2d 393 (2006). Whether the trial court properly applied the MCSF to the facts of the case also presents a question of law that we review de novo. *Clarke v Clarke*, 297 Mich App 172, 179; 823 NW2d 318 (2012).

B. THE MCSF AND CORPORATE INCOME

Parents of a minor child have a well-recognized obligation to support that child. *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 225; 663 NW2d 481 (2003), citing MCL 722.3. By statute, excepting those factual instances in which application of the MCSF would be unjust or inappropriate, a parent's child support contribution is determined by use of the MCSF. MCL 552.605(2). See also *Clarke*, 297 Mich App at 179. That is, the MCSF has the force of law insofar as, by statute, a trial court is presumptively required to order child support in an amount determined by application of the MCSF. MCL 552.605(2); *Stallworth v Stallworth*, 275 Mich App 282, 284; 738 NW2d 264 (2007). See also 2013 MCSF 1.01(B) ("Unless rebutted by facts in a specific case, the law presumes that [the MCSF] sets appropriate levels of support.").

The MCSF was designed "based upon the needs of the child and the actual resources of each parent." MCL 552.519(3)(a)(*vi*). Under the MCSF, the first step in calculating each parent's support obligation involves

determination of both parents' individual incomes. 2013 MCSF 2. "The objective of determining net income is to establish, as accurately as possible, how much money a parent *should* have available for support." 2013 MCSF 2.01(B) (emphasis added). The MCSF directs that "[a]ll relevant aspects of a parent's financial status are open for consideration when determining support," 2013 MCSF 2.01(B), and a parent's income calculated under the MCSF "will not be the same as that person's take home pay, net taxable income, or similar terms that describe income for other purposes," MCSF 2.01(A).

Specifically included within "income" for purposes of child support calculations are numerous itemized sources of compensation and financial gain. See 2013 MCSF 2.01(C). Most relevant to the present dispute, income includes: "Earnings generated from a business, partnership, contract, self-employment, or other similar arrangement, or from rentals." 2013 MCSF 2.01(C)(2). More particularly, the MCSF includes a list identifying forms of compensation to which courts should pay particular attention when endeavoring to calculate the income of a business owner, executive, or self-employed individual. 2013 MCSF 2.01(E)(4). These forms of compensation include:

> (a) Distributed profits, profit sharing, officers' fees and other compensation, management or consulting fees, commissions, and bonuses.
>
> * * *
>
> (d) Reduced or deferred income. Because a parent's compensation can be rearranged to hide income, determine whether unnecessary reductions in salaries, fees, or distributed profits have occurred by comparing amounts and rates to historical patterns.

> (i) Unless the business can demonstrate legitimate reasons for a substantial reduction in the percentage of distributed profits, use a three-year average to determine the amount to include as a parent's income.
>
> (ii) Unless a business can demonstrate legitimate reasons for reductions (as a percentage of gross business income) in salaries, bonuses, management fees, or other amounts paid to a parent, use a three-year average to determine the amount to include as a parent's income. [2013 MCSF 2.01(E)(4).]

In considering the various sources of income a business owner or self-employed individual may possess, the MCSF expressly recognizes, and discusses, the inherent difficulty in ascertaining income for these individuals. 2013 MCSF 2.01(E)(1). This difficulty arises because:

> (a) These individuals often have types of income and expenses not frequently encountered when determining income for most people.
>
> (b) Taxation rules, business records, and forms associated with business ownership and self-employment differ from those that apply to individuals employed by others. Common business documents reflect policies unrelated to an obligation to support one's child.
>
> (c) Due to the control thatbusiness [sic] owners or executives exercise over the form and manner of their compensation, a parent, or a parent with the cooperation of a business owner or executive, may be able to arrange compensation to reduce the amount visible to others looking for common forms of income. [2013 MCSF 2.01(E)(1).]

Given the potential for manipulation, and the close connection between a parent's finances and that of a parent's business, "[i]n order to determine the monies that a parent has available for support, it may be necessary to examine business tax returns, balance sheets, accounting or banking records, and other business documents to identify any additional monies a

parent has available for support that were not included as personal income." 2013 MCSF 2.01(E)(2).

When undertaking this analysis, which must necessarily be undertaken on a case-by-case basis, it is apparent from the MCSF that a parent's historical business practices should be given considerable weight in assessing the parent's income from a business. For example, the MCSF places significant emphasis on the parent's historical receipt of income and distributions from business earnings as a percentage of gross profits, instructing courts to consider "historical patterns" when considering whether reduced or deferred income and distributions are available as "income." 2013 MCSF 2.01(E)(4)(d). Similarly, the MCSF states that, in determining what business earnings may be attributed to a parent, "[i]ncome (or losses) from a corporation should be carefully examined to determine the extent to which they were *historically* passed on to the parent or used merely as a tax strategy." 2013 MCSF 2.01(C)(2)(a) (emphasis added). A historical analysis may reveal whether a parent has used a business in an effort to shield money from the court's consideration, thereby enabling the court to determine the actual income available to the parent. See 2013 MCSF 2.01(E)(1)(c).

While providing general directives regarding the consideration of business earnings, the MCSF does not expressly refer to S corporations or provide explicit directions on how earnings generated by an S corporation, and retained by the corporation or distributed for payment of taxes, should be considered. Relevant to this analysis, an S corporation is a small business which has elected, under 26 USC 1362(a)(1), to be an S corporation for tax purposes. The effect of that election is that the corporation's income and losses "pass through to the individual shareholders as if the income and losses

belonged to the members of a partnership." *Ross v Auto Club Group*, 481 Mich 1, 9; 748 NW2d 552 (2008). See also 26 USC 1366(b) and (c). The benefit of S-corporation election from a tax perspective is that the corporation may avoid federal taxation at the corporate level. See *Chocola v Dep't of Treasury*, 422 Mich 229, 236; 369 NW2d 843 (1985).

Although the income of an S corporation is treated, for tax purposes, as belonging to the shareholders, see 26 USC 1366, it does not follow that the S corporation must actually distribute its earnings to the shareholders. See *JS v CC*, 454 Mass 652, 660 n 10; 912 NE2d 933 (2009); *In re Marriage of Brand*, 273 Kan 346, 351; 44 P3d 321 (2002). In practice, an S corporation may retain earnings, but distribute some funds to the individual shareholders to enable them to meet those tax liabilities attributable to the S corporation's earnings. See, e.g., *Tebbe v Tebbe*, 815 NE2d 180, 183 (Ind Ct App, 2004). While an S corporation is not required to disburse income to shareholders, it is notable that a sole shareholder of an S corporation is, in particular, uniquely situated insofar as he or she possesses a power over corporate funds not enjoyed by an average employee and may, given this power, be especially able to manipulate the distribution of income, or lack thereof, from the corporation. See *JS*, 454 Mass at 663; *Taylor v Fezell*, 158 SW3d 352, 358 (Tenn, 2005).

C. ANALYSIS

Considering the plain language of the MCSF and the manner in which S corporations function, the question presented in the determination of plaintiff's income in this case is twofold. First, we must decide to what extent, if any, undistributed earnings retained by an S corporation may be included as income to shareholders

for purposes of calculating the individual's income under the MCSF. To resolve this issue in this case, we specifically consider whether the trial court erred by relying on Cherfoli's determination, regarding how much excess working capital in the S corporation was available for distribution, as a basis for attributing additional income to plaintiff. Second, we must also decide whether money distributed by the S corporation to individual shareholders to meet the tax burden arising from the S corporation's income can be attributed to the individual as income for child support purposes.

1. RETAINED EARNINGS

We begin our consideration of earnings retained by the corporation by turning to the MCSF. Reviewing the list of the various types of income that are specified in the MCSF for inclusion in a parent's income, we see no mention of earnings retrained by an S corporation as a type of earning that must, in all cases, be included when calculating a parent's income. For instance, generally, the MCSF includes within income those "earnings generated from a business . . . ." 2013 MCSF 2.01(C)(2). However, when earnings generated by a corporation are at issue, it is apparent that not all such earnings can categorically be included as income to a parent because such earnings are not always attributable, or available, to a parent. Corporations, even when owned by a sole shareholder, are separate entities under the law, see *Lakeview Commons Ltd Partnership v Empower Yourself, LLC*, 290 Mich App 503, 509; 802 NW2d 712 (2010), and undistributed profits are said to "belong to the corporation," see *Dodge v Ford Motor Co*, 204 Mich 459, 497; 170 NW 668 (1919); *In re Marriage of Brand*, 273 Kan at 351. Accordingly, with regard to corporate

income, the MCSF cautions that "income . . . from a corporation should be carefully examined to determine the extent to which [it was] *historically passed on to the parent* . . . ." 2013 MCSF 2.01(C)(2)(a) (emphasis added). This directive makes plain that all corporate earnings cannot be unconditionally attributed to a parent; rather, there must be some consideration of whether a parent receives, or has historically received, those funds. In particular, the MCSF clearly requires inclusion of *distributed* profits as income to a parent, 2013 MCSF 2.01(E)(4)(a), and it plainly requires consideration of undistributed profits when there has been a substantial *reduction* in the percentage of profits distributed to a parent as compared to historical distribution patterns, 2013 MCSF 2.01(E)(4)(d)(i). Nowhere, however, does the MCSF identify undistributed corporate profits as income to a parent when there is no evidence of a reduction in distributions compared to historical practices. Given that the MCSF does not expressly include this class of corporate earnings within a parent's income when there is no evidence of a reduction in distributions compared to historical practices, it would be inappropriate to adopt a brightline rule including undistributed earnings retained by an S corporation within the calculation of a parent's income under the MCSF in all circumstances.

Cherfoli's opinion, on which the trial court relied, appeared to recognize that not all earnings retained by an S corporation may be attributed to shareholders as income in every circumstance. Cherfoli instead focused his analysis on a subclass of these retained earnings, which he characterized as "excess working capital." He judged that, in this case, 60 to 65% of this excess working capital could be distributed and he, therefore, deemed these amounts available as income to plaintiff for child support purposes. The broader question pre-

sented thus becomes whether the MCSF requires calculation of a parent's income as though he or she operates a business in a particular manner and distributes some specific percentage of "excess" profits. We see no such requirement in the MCSF.

Quite simply, nothing in the plain language of the MCSF indicates a parent should be imputed with income as though he or she runs his or her business in line with industry averages, or that he or she should be charged with income as though some set percentage of excess working capital had been distributed. Rather, the focus in the MCSF regarding the analysis of undistributed profits as income centers on the manipulation of income as discerned through analysis of the historical conduct of the corporation and the parent regarding the distribution of profits. See 2013 MCSF 2.01(C)(2)(a); 2013 MCSF 2.01(E)(4)(d). Stated differently, while the MCSF ultimately seeks to discover what monies a parent "has available" and *should* have available as income, 2013 MCSF 2.01(B) and (E)(2), it does not mandate the pursuit of one reasonable business model over another, and it does not necessitate the revamping of a parent's reasonable and historical business practices in favor of alternative methods in which a corporation *could* theoretically be run in order to make additional funds available.

Instead, as a general proposition, the management of a corporation, or any business, obviously involves some exercise of business judgment, see *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 270; 671 NW2d 125 (2003), and there is no indication in the MCSF that its drafters intended to interfere with this business judgment. A corporation is, as noted, a separate entity under the law, *Lakeview Commons*, 290 Mich App at 509, and its continued viability depends on both its

compliance with corporate law and its maintenance of capitalization sufficient to meet ordinary expenses and further its business purposes, *Taylor*, 158 SW3d at 358. A corporate business owner, and in particular a sole shareholder, while able to distribute profits to himself or herself, nonetheless faces business expenses and concerns, including a financial responsibility to creditors and employees, not encountered by most parents. See 2013 MCSF 2.01(E)(1)(a) (recognizing the unique expenses encountered by business owners); *Zold v Zold*, 880 So 2d 779, 781 (Fla Dist Ct App, 2004), aff'd in part 911 So 2d 1222 (Fla, 2005). In this role, a business owner must exercise judgment in the determination of what funds are required to maintain the business over time and what funds are available for distribution to shareholders; and, as a general matter, funds retained for necessary and legitimate business reasons are not available to the parent and need not be included as income under the MCSF. See 2013 MCSF 2.01(E)(4)(d) (requiring consideration of whether reductions in corporate distributions, i.e., increased retention of profits, were "unnecessary" or unsupported by a "legitimate reason[]"). See also, e.g., *Ewald v Ewald*, 292 Mich App 706, 722; 810 NW2d 396 (2011) (concluding that the plaintiff's debt expense to continue his farming operation had to be deducted from his gross income to determine his "net income" from his farming operation). Indeed, nothing in the MCSF can be read to categorically limit a parent's freedom to make these business decisions or to require the attribution of greater income to a parent who has historically made relatively conservative business decisions. In short, provided that the operation of a parent's business is in keeping with historical practices, that those practices can be described as the reasonable exercise of business judgment, and that there is no evidence of an improper

effort to make funds unavailable for child support, nothing in the MCSF mandates that the reality of how a parent operates a business, and has historically operated a business, should be dismissed in favor of an alternative method in which the business could be conducted.

Turning to the particular facts of the present case, problematic in Cherfoli's opinion is his substitution of his own judgment for that of plaintiff's in terms of how SGC could be appropriately managed and, as a related matter, Cherfoli's general disregard of the corporation's historical practices. That is, rather than focus on SGC's historical business practices and its historical distribution of profits to plaintiff, which would afford plaintiff continued control in the management of the corporation while at the same time ascertaining what monies should be available for child support under the MCSF, Cherfoli focused on how the business *could* be run by comparing its practices to that of an industry standard and offering his own personal opinion regarding what percentage of profit could be distributed under his alternative model. Central to our decision is the fact that Cherfoli did *not* opine that plaintiff's management of his corporation or his retention of profits in the corporate coffers was outside the range of how business owners could reasonably be expected to conduct their business.[3] Cherfoli did not focus his analysis on whether the profits retained by SGC were used or intended for unnecessary or illegitimate business expenses, whether the retention of funds was at odds with plaintiff's

[3] Rather than fault plaintiff for making questionable or unprincipled business decisions, Cherfoli ultimately charged plaintiff with nothing more than the operation of a "conservative" business model insofar as plaintiff preferred to operate debt free as opposed to pursuing loans to finance his operations.

historical practices,[4] or whether plaintiff retained those funds in the corporation in order to avoid child support. Instead, in substituting his own judgment for that of plaintiff, Cherfoli freely acknowledged that his estimation was his own "personal" opinion, and, beyond his own personal feelings on the subject, he offered no basis to conclude that 60 to 65% of the purported excess working capital was actually available to plaintiff or *should* be distributed by SGC to plaintiff. See 2013 MCSF 2.01(B) and (E)(2). Accordingly, we conclude that the trial court erred by adopting the opinion of an expert who evaluated plaintiff, not on the basis of how plaintiff historically ran the business, but on the basis of, in essence, the substitution of his own business judgment for that of plaintiff's in terms of how much income the business could relinquish.[5]

2. DISTRIBUTIONS FOR PAYMENT OF TAXES

As a related matter, we consider plaintiff's assertion that the trial court erred by including within the calculation of his income funds distributed to plaintiff for payment of taxes arising from SGC's corporate

[4] The record in fact suggests that plaintiff historically purchased equipment for cash and, for several years, maintained roughly the same amount of cash on hand in the corporation.

[5] The dissent finds no fault in the trial court's adherence to Cherfoli's opinion because, rather than evaluate a parent's available income based on an S corporation's actual distributions and historical conduct, the dissent proposes the use of a nonexhaustive list of factors described in *JS*, 454 Mass at 662-663. To adopt these judicially created factors would, however, improperly supplant the MCSF, which controls the determination of a parent's income for child support purposes in Michigan. Rather than follow the approach outlined in *JS*, we are persuaded that a court evaluating a parent's income—including cases involving income generated by an S corporation—is presumptively required to apply the relevant provisions of the MCSF to the facts of the case. See *Stallworth*, 275 Mich App at 284.

earnings. As noted, when a corporation elects S-corporation status, income taxes are paid by the shareholders, rather than the corporation; but, the corporation owns the profits on which the taxes are paid and the corporation is not required to actually distribute this income to the shareholders. See *Ross*, 481 Mich at 9; *In re Marriage of Brand*, 273 Kan at 351. In many cases, however, the corporation may choose to distribute funds to shareholders for the payment of the tax liability arising from the corporation's earnings. See, e.g., *Tebbe*, 815 NE2d at 183.

In such circumstances, it is clear that funds distributed for payment of taxes on earnings retained by the corporation are not an indication of what the parent has, or should have, available for child support. See 2013 MCSF 2.01(B). That is, the MCSF acknowledges the unique taxation rules involved with business ownership, 2013 MCSF 2.01(E)(1)(b), and specifically recognizes that money may be passed on to the parent, not as income, but "as a tax strategy," see 2013 MCSF 2.01(C)(2)(a). The election of S-corporation status is plainly one such tax strategy and, given the manner in which an S corporation functions, it is readily apparent that funds distributed under this model for payment of taxes arising from earnings retained by the corporation are not available to the parent for the payment of child support. See 2013 MCSF 2.01(E)(2). Instead, those funds are applied to a necessary business expense, and are properly excluded from the parent's net income. See, e.g., *Ewald*, 292 Mich App at 722. See also 2013 MCSF 2.07(B) (including actual taxes paid as items to be deducted from a parent's income under the MCSF). Consequently, while money passed as a tax strategy must be carefully examined to ensure it is, in truth, a tax strategy, see 2013 MCSF 2.01(C)(2)(a), we hold that funds distributed by an S corporation to shareholders to

actually offset payment of taxes on earnings retained by the corporation should not be included as income to the shareholder-parent under the MCSF.[6]

In this case, Cherfoli conceded in his testimony that some of the funds identified by plaintiff as funds used for the payment of taxes were included within his calculations of income, and the referee determined that those funds were properly included as income. The trial court did not, however, expressly address the matter. Consequently, on remand, the trial court shall, when assessing plaintiff's income, determine what corporate distributions to plaintiff, if any, were used by plaintiff to pay taxes on corporate earnings retained by SGC. Any such distributions, used merely to offset plaintiff's tax liability attributable to SGC, shall not be included in the determination of plaintiff's income.

III. CUSTODY

On appeal, plaintiff also challenges the trial court's custody and parenting-time determinations. In particular, plaintiff argues that the trial court erred by ostensibly awarding joint custody, but then only providing plaintiff with parenting time comparable to that of a noncustodial parent. Plaintiff maintains that 122 days of parenting time is insufficient to allow him to foster a relationship with the children, and he asserts that this case "cries out for true joint custody." He also expresses concern that defendant, who is not a United States

[6] Our holding in this regard is consistent with that of other jurisdictions recognizing that distributions from an S corporation to offset a shareholder's tax liability should not be considered income to the parent because such funds do not actually increase the shareholder's ability to pay child support. See, e.g., *In re Marriage of Matthews*, 40 Kan App 2d 422, 431; 193 P3d 466 (2008); *Walker v Grow*, 170 Md App 255, 280; 907 A2d 255 (2006); *Tebbe*, 815 NE2d at 184; *McHugh v McHugh*, 702 So 2d 639, 642 (Fla App, 1997).

citizen, may remove the children to the Philippines. In plaintiff's view, the trial court also should not have relied on defendant's testimony when deciding the issue of custody because she was not a credible witness. Apart from these more general criticisms of the trial court's rulings, plaintiff challenges the trial court's findings regarding several best interests factors, specifically, Factors (b), (d), (f), (h), and (*l*).

On appeal, under MCL 722.28, in child custody disputes, "all orders and judgments of the circuit court shall be affirmed . . . 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." See also *Dailey v Kloenhamer*, 291 Mich App 660, 664; 811 NW2d 501 (2011). Accordingly, we review the trial court's findings of fact, including its findings related to the best-interest factors, under the great weight of the evidence standard. *Fletcher v Fletcher*, 447 Mich 871, 877-879; 526 NW2d 889 (1994). Discretionary rulings, including the ultimate award of custody and the award of parenting time, are reviewed for an abuse of discretion. *Id*. at 879; *Shade v Wright*, 291 Mich App 17, 20-21; 805 NW2d 1 (2010). An abuse of discretion occurs when a court's decision "results in an outcome that falls outside the range of reasonable and principled outcomes." *Ewald*, 292 Mich App at 725. In comparison, "clear legal error" occurs when the trial court chooses, interprets, or applies the law incorrectly. *Fletcher*, 447 Mich at 881.

Plaintiff primarily argues on appeal that the trial court abused its discretion by failing to award the parents equal parenting time.[7] In awarding parenting

[7] Early in the litigation, plaintiff sought sole physical and legal custody of the children. However, at the time the trial court made the final custody determination in this case, plaintiff sought and received joint

time, it is the best interests of the children that control the determination of a parenting-time schedule. *Berger v Berger*, 277 Mich App 700, 716; 747 NW2d 336 (2008). See also *Harvey v Harvey*, 470 Mich 186, 187 n 2; 680 NW2d 835 (2004) ("[T]he statutory 'best interests' factors control whenever a court enters an order affecting child custody."). "Both the statutory best interest factors in the Child Custody Act, MCL 722.23, and the factors listed in the parenting time statute, MCL 722.27a(6), are relevant to parenting time decisions." *Shade*, 291 Mich App at 31. While custody decisions require findings under all the best-interest factors, when parenting time is at issue, the trial court need only make findings on contested issues. *Id*. at 31-32.

To the extent plaintiff challenges the trial court's award of parenting time as a deviation from what it means to have "joint custody," he is mistaken in his understanding of joint custody. Joint custody does not necessitate a 50/50 split of the children's time between each parent. Rather, pursuant to MCL 722.26a(7)(a), "joint custody," in terms of physical custody, is defined as an order of the court in which it is specified that "the child shall reside alternately for specific periods with each of the parents." No specific schedule is required; instead, the focus is on the best interests of the children, and generally parenting time must be granted "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and the

---

custody. On appeal, he similarly claims that joint custody was appropriate. At points, however, plaintiff asserts that the trial court should have granted him sole custody. This unpreserved claim lacks merit given that plaintiff concedes that an established custodial environment exists with both parents and he did not present clear and convincing evidence that a change in custody was in the best interests of the children. MCL 722.27(1)(c); *Thompson v Thompson*, 261 Mich App 353, 362; 683 NW2d 250 (2004). Consequently, we discern no abuse of discretion in the trial court's award of joint custody.

parent granted parenting time." MCL 722.27a(1). The Michigan Parenting Time Guideline recognizes that there are myriad parenting-time arrangements available depending on what will serve the best interests of the children. See SCAO, *Michigan Parenting Time Guideline*, pp 7-9, 12.

In this case, the parenting-time schedule, pursuant to which the children reside alternatively for specific periods with each of the parents, plainly constituted an award of joint custody of the type contemplated by our Legislature. See MCL 722.26a(7)(a). Contrary to plaintiff's arguments, the schedule—which afforded him 122 days, or roughly a third of each year—provided ample time for him to "promote a strong relationship" with his children, see MCL 722.27a(1), and it was in fact not a significant deviation from the 140 days of parenting time to which he had previously agreed, cf. *Shade*, 291 Mich App at 32. The schedule affords defendant the bulk of the school year and plaintiff time when the children are not in school, a schedule that was not an abuse of discretion given evidence that defendant has historically been responsible for the children's day-to-day care and educational needs and that plaintiff's home in Holly, Michigan, is a 45-minute drive from the children's school. In short, the trial court was not required to provide a perfect division of parenting time, and the trial court did not abuse its discretion by adopting the schedule at issue.

Insofar as plaintiff specifically challenges the trial court's assessment of the children's best interests as described in the best-interest factors, MCL 722.23, he has not shown the trial court's findings were against the great weight of the evidence. First, to the extent plaintiff challenges the trial court's consideration of Factor (b), this factor involves the capacity and dispo-

sition 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. MCL 722.23(b). The trial court determined that this factor favored defendant because she was the children's stay-at-home caretaker, and in this role she was responsible for the children's daily care, medical decisions, discipline in the form of "time outs," and school-related matters such as attendance at parent-teacher conferences. These findings were supported by defendant's testimony[8] regarding her role with the children, testimony from a Friend of the Court investigator who interviewed the parties, and by testimony from defendant's adult daughter, who had lived with the family when the children were younger.[9] While plaintiff argues on appeal that he has been long involved in the children's upbringing and more "proactive" than defendant in the children's development, these arguments are merely an attack on the trial court's credibility determinations and not an indication that the trial court's findings were against the great weight of the evidence. *Berger*, 277 Mich App at 711. On the whole, the trial court's conclusion that Factor (b) favored defendant was supported by the evidence.

Regarding Factor (d), "[t]he length of time the child has lived in a stable, satisfactory environment, and the desirability of maintaining continuity," MCL 722.23(d), the trial courts findings were similarly not against the

[8] In general, plaintiff urges this Court to disregard many of the trial court's findings of fact because they relied on defendant's testimony, which plaintiff describes as not credible. However, plaintiff's attacks on defendant's credibility ignore the deference given to the trial court in making such determinations, and plaintiff's arguments do not demonstrate that the trial court's findings were against the great weight of the evidence. See *Berger*, 277 Mich App at 708, 711.

[9] This adult daughter is defendant's child from another relationship.

great weight of the evidence. The trial court concluded that this factor was neutral because both parties shared joint physical custody and there existed a shared custodial environment—facts that plaintiff concedes on appeal. Contrary to plaintiff's contention that defendant disturbed the continuity of the children's environment by removing the children from their Shelby Township home in contravention of a court order, the trial court found no evidence or testimony to support this assertion, and nothing in the record establishes that the trial court's determinations regarding Factor (d) were against the great weight of the evidence.

The trial court also reasonably concluded that Factor (f), the moral fitness of the parties involved, MCL 722.23(f), was a neutral factor based on evidence to suggest that both parents had moral failings which, in essence, offset each other. Although plaintiff contests on appeal whether he abuses alcohol, and whether this may be equated with defendant's gambling and financial wrongdoings, we cannot conclude that the trial court's findings were against the great weight of the evidence. To the extent plaintiff casts additional slurs on defendant's character, those issues were presented to the trial court and the trial court was not required to specifically comment on every piece of evidence or argument.[10] *McIntosh v McIntosh*, 282 Mich App 471,

[10] One of plaintiff's specific accusations raised in relation to defendant's character is that she may take the children to the Philippines as she did her children from a previous relationship. These fears appear unfounded as there is no indication that defendant has any interest in returning to the Philippines with the children or that she has threatened to do so without plaintiff's permission. See MCL 722.27a(6)(h). In any event, contrary to plaintiff's representations on appeal, the trial court addressed plaintiff's concerns, specifically ordering that neither party shall take the children to a country which is not a party to the *Hague Convention on the Civil Aspects of International Child Abduction* without signed consent from the other party. Hague Conference on Private

474-475; 768 NW2d 325 (2009). Given the evidence demonstrating that both parties have moral failings, the trial court's finding that Factor (f) was neutral was not against the great weight of the evidence.

Relating to Factor (h), the home, school, and community record of the child, MCL 722.23(h), the trial court reasonably concluded that this factor favored defendant given that she has the primary responsibility for the children's education. While plaintiff disagrees with this assertion on appeal and endeavors to establish he was "proactive" in the children's development, by his own admissions in the trial court he was not as "active" in the children's preschool and he did not frequently attend parent-teacher conferences. On the evidence presented, the trial court's finding that Factor (h) weighed in defendant's favor was not against the great weight of the evidence.

Under Factor (*l*), which involves "[a]ny other factor considered by the court to be relevant to a particular child custody dispute," MCL 722.23(*l*), the trial court considered plaintiff's attempts to financially manipulate defendant over the course of the proceedings. Specifically, defendant testified that plaintiff forced her out of the Shelby Township home on multiple occasions, and plaintiff's father testified that plaintiff took defendant's credit cards and stopped paying her when she was an SGC employee. Plaintiff's treatment of defendant was a relevant factor for the trial court to consider when evaluating the children's best interests, and, on the record presented, the court's findings relating to Factor (*l*) were not against the great weight of the evidence.

International Law, *Hague Convention on the Civil Aspects of International Child Abduction* (Oct 25, 1980). See TIAS No. 11670 (1988).

On the whole, after reviewing the record, we find the trial court's findings were not against the great weight of the evidence, the court did not commit clear legal error on a major issue, and the trial court did not abuse its discretion in awarding joint custody and adopting a parenting schedule affording plaintiff 122 overnights per year. Consequently, we affirm the trial court's custody and parenting-time determinations. See MCL 722.28.

IV. ATTORNEY FEES

Lastly, plaintiff also challenges the trial court's award of attorney fees to defendant. Specifically, plaintiff argues that defendant can afford to pay her fees, in large part because plaintiff's father has paid defendant's legal fees and that such payment was, contrary to defendant's representations to the trial court, not a loan. Further, plaintiff challenges his own ability to pay the fees and contests the necessity of some of the fees, arguing that defendant's counsel conducted "unnecessary, improper duplications of discussions" with defendant and plaintiff's father and stepmother.

As noted, the trial court awarded defendant $118,000 in fees, finding she was unable to pay these expenses while plaintiff could afford the cost of her attorney fees. We review a trial court's decision whether to award attorney fees for an abuse of discretion. *Loutts v Loutts*, 298 Mich App 21, 24; 826 NW2d 152 (2012). We review the trial court's findings of fact for clear error, and any questions of law de novo. *Id*.

Requests for attorney fees in child custody disputes are governed by MCR 3.206(C). Under 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." 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. [MCR 3.206(C)(2).]

Typically, this rule has been interpreted to require an award of attorney fees to the extent "necessary to enable a party to prosecute or defend a suit." *Myland v Myland*, 290 Mich App 691, 702; 804 NW2d 124 (2010) (citation and quotation marks omitted). " '[A] party sufficiently demonstrates an inability to pay attorney fees when that party's yearly income is less than the amount owed in attorney fees.' " *Loutts*, 298 Mich App at 24 (citation omitted; alteration in original).

In this case, plaintiff argues that defendant did not have an inability to pay her attorney fees. This argument has no basis in the evidence given that defendant had an annual income of less than $8,000 per year while she incurred legal fees in excess of $118,000 during the course of the litigation. In light of this evidence, the trial court did not clearly err by finding defendant could not afford her attorney fees. See *id*. In comparison, contrary to plaintiff's claim that he cannot afford to meet defendant's attorney fees, the evidence shows that he is the sole shareholder of a profitable corporation. Even if his actual annual income is not as substantial as that calculated by the trial court, plaintiff earns, by his own admission, a salary of $183,000 per year, he has funds in savings, and he could, as he did to purchase the Holly home, withdraw funds from SGC. On the facts of

this case, the trial court did not abuse its discretion by awarding defendant attorney fees under MCR 3.206(C).

Nevertheless, on appeal, despite defendant's low salary in comparison to her extensive bills, plaintiff maintains that defendant could pay her fees because plaintiff's father had provided her the money. Contrary to plaintiff's arguments, the evidence presented shows that defendant had agreed to repay plaintiff's father for those fees he paid on her behalf. If anything, the fact that defendant had to borrow money to pay her fees only underscores her inability to pay the expenses, further justifying an award under MCR 3.206(C)(2)(a). Lastly, insofar as plaintiff challenges the necessity of some of the expenses, there is no evidence to support his allegations regarding the duplicative nature of the conversations he challenges, and we see nothing improper in defendant's attorney meeting with plaintiff's father and stepmother, both of whom lived with defendant and were relevant witnesses, or potential witnesses, in this child custody dispute. Plaintiff has not shown the trial court's award of attorney fees was an abuse of discretion.

V. CONCLUSION

In sum, the trial court did not abuse its discretion, either in awarding custody and parenting time, or in awarding defendant attorney fees. However, the trial court's calculation of plaintiff's income was an error of law insofar as it focused on an expert's business judgment of how SGC could be run, rather than the historical practices of the business and plaintiff's efforts, if any, to shield income in the corporation. We hold also that funds, if any, that were distributed to plaintiff for the payment of SGC's taxes should not have been used in the calculation of his income. Consequently, we

vacate the trial court's award of child support and remand for a recalculation of plaintiff's income.

Affirmed in part, vacated in part, and remanded for reconsideration of plaintiff's income for purposes of child support under the MCSF consistent with this opinion. We do not retain jurisdiction. No costs, because neither party prevailed in full. MCR 7.219.

WILDER, J., concurred with HOEKSTRA, P.J.

FORT HOOD, J. (*concurring in part and dissenting in part*). I respectfully dissent from the majority's opinion regarding child support. I concur in regard to the child custody and parenting-time issues. Accordingly, I would affirm the trial court decision in its entirety.

The majority decides two issues relating to child support. The first issue relates to undistributed income from an S corporation. The majority holds that undistributed earnings retained by an S corporation cannot be included within the calculation of a parent's income under the Michigan Child Support Formula (MCSF) unless there is evidence of a reduction in distributions compared to historical practices. In so holding, the majority overlooks other relevant factors that should be examined when considering undistributed income in an S corporation. As a result, the majority's decision limits the reach of the MCSF, the purpose of which is not to protect business owners, but to determine the amount of income *available* for child support. 2013 MCSF 2.01(B).

With regard to undistributed S-corporation profits, I would adopt a case-by-case, fact-specific inquiry that is not limited to situations in which there is evidence of reduction in distributions compared to historical practices. Other jurisdictions have adopted similar ap-

proaches. Recently, the Connecticut Supreme Court held that, when determining the income of an S corporation's shareholder for child support purposes, a case-by-case, fact-specific inquiry must be undertaken to determine how much of an S corporation's retained earnings should be imputed to the shareholder. *Tuckman v Tuckman*, 308 Conn 194, 210; 61 A3d 449 (2013).[1] The *Tuckman* court found that this was necessary to balance the needs of the corporation to retain earnings for its ongoing operations against the concern that the corporation could be used to shield income in a child support dispute. *Id*. at 210-211.

The *Tuckman* court relied heavily on the Massachusetts Supreme Judicial Court's analysis in *JS v CC*, 454 Mass 652; 912 NE2d 933 (2009). *Tuckman*, 308 Conn at 210-212. In *JS*, the court first noted that the Massachusetts Child Support Guidelines applicable to the case included "income derived from business/partnerships." *JS*, 454 Mass at 661 (quotation marks and citation omitted).[2] The court concluded that a case-by-case, fact-specific inquiry was necessary. *Id*. at 662-663. To provide guidance, the court provided a nonexhaustive list of considerations. *Id*. at 663. First, the court directed lower courts to consider the amount of control the parent had over the corporation, noting that minority shareholders were less likely to have access to retained earnings, while majority shareholders, and to an even greater extent, sole shareholders, had the ability to access funds and manipulate income.

---

[1] "Legal authority from other jurisdictions is not binding in Michigan, but [this Court] may review and rely on it if we find its reasoning persuasive." *In re Estate of Herbert Trust*, 303 Mich App 456, 464; 844 NW2d 163 (2013).

[2] While not identical, this definition closely resembles the MCSF's definition of income, which includes "[e]arnings generated from a business . . . ." 2013 MCSF 2.01(C)(2).

Id. Second, the court directed lower courts to look at the legitimate business interests justifying the retention of earnings, but noting that "the business judgment rule cannot shield the shareholder from the factual inquiry" described. *Id*. at 663-664. Third, the court directed lower courts to "weigh affirmative evidence of an attempt to shield income by means of retained earnings." *Id*. at 664. Finally, the court considered the allocation of the burden of proof. *Id*.[3]

I agree with the analysis in *Tuckman* and *JS*. The MCSF requires that "[e]arnings generated from a business" be included when determining a parent's gross income. 2013 MCSF 2.01(C)(2). The MCSF also directs courts to closely examine income from a corporation "to determine the extent to which [it was] historically passed on to the parent or used merely as a tax strategy," indicating that not all of a corporation's earnings are to be considered income. 2013 MCSF 2.01(C)(2)(a). Accordingly, it would seem that the MCSF would not require that all of a corporation's earnings be imputed to a parent. However, I do not agree, as the majority holds, that an S corporation should be treated the same as any other corporation under the MCSF. Because of the unique tax treatment of S corporations, all of an S corporation's earnings are reported by the corporation's shareholders, even though some of these earnings are never actually disbursed. It is clear that, particularly when a parent is the sole owner of an S corporation, the parent has complete control to determine his or her own salary, when to take distributions, and how much money to leave in the corporation. To

[3] Other jurisdictions have reached similar conclusions regarding the treatment of the undistributed income of an S corporation. See, e.g., *Hubbard Co Health & Human Servs v Zacher*, 742 NW2d 223, 227 (Minn App, 2007); *Walker v Grow*, 170 Md App 255, 281; 907 A2d 255 (2006); *Taylor v Fezell*, 158 SW3d 352 (Tenn, 2005).

ignore this fact would allow a sole shareholder, such as plaintiff, to determine his or her own income for child support purposes and entirely avoid the MCSF's inclusion of "[e]arnings generated from a business." 2013 MCSF 2.01(C)(2). Thus, a case-by-case, factual inquiry is required to determine what portion of an S corporation's profits are necessary to fund the corporation, and what portion may be considered income under the MCSF. See *Tuckman*, 308 Conn at 210; *JS*, 454 Mass at 662-663. This analysis would also comport with the MCSF's direction to trial courts "to identify any additional monies a parent has available for support that were not included as personal income." 2013 MCSF 2.01(E)(2). Further, I would place the burden of demonstrating that earnings are necessarily retained in the corporation on plaintiff in this case.

It is my opinion that, in this case, the trial court undertook the type of analysis discussed in *Tuckman* and *JS*, and I would affirm. The second issue addressed by the majority is whether the trial court erred by including within the calculation of plaintiff's income funds distributed to plaintiff for payment of taxes arising from SGC's corporate earnings. Plaintiff stipulated the inclusion of these funds in the calculation of his income, and, thus, I would hold that plaintiff is precluded from raising this argument. See *Holmes v Holmes*, 281 Mich App 575, 587-588; 760 NW2d 300 (2008).

For the reasons stated, I would affirm the trial court's orders in full.

HOGG v FOUR LAKES ASSOCIATION, INC

Docket No. 316898. Submitted October 8, 2014, at Lansing. Decided October 23, 2014, at 9:10 a.m.

Robert Hogg brought an action in the Livingston Circuit Court against Four Lakes Association, Inc. (Four Lakes), and several individuals who served, at various times, as officers and directors of Four Lakes. Four Lakes was incorporated in 1968 under the summer resort owners act, MCL 455.201 *et seq*., and functioned in a similar manner to a homeowners association, providing services including road maintenance and water-quality testing within the association's boundaries. Plaintiff and the individual defendants all owned property within Four Lakes' area of operation. Plaintiff brought suit, asserting that Four Lakes was no longer a valid organization and should cease operations. The court, Michael P. Hatty, J., rejected plaintiff's argument that Four Lakes' term of corporate existence had expired and granted summary disposition in favor of defendants. Plaintiff appealed.

The Court of Appeals *held*:

1. MCL 455.202 of the summer resort owners act states that the term of existence of a corporation incorporated under the act shall not exceed 30 years. However, the later enacted MCL 450.371 states that notwithstanding any other provision of law, the term of existence of every domestic corporation incorporated under any law of this state may be perpetual or may be for a limited period as fixed by its articles. Four Lakes' articles of incorporation state that its term of corporate existence is perpetual. By its plain language, the mandate in MCL 450.371 applies to corporations incorporated under the summer resort owners act and supersedes the 30-year limit on corporate existence set forth in the summer resort owners act. Four Lakes is a domestic corporation incorporated under a law of this state and, therefore, may exist in perpetuity as specified in its articles of incorporation. The trial court properly granted summary disposition in favor of defendants.

2. Under Const 1963, art 4, § 24, no law shall embrace more than one object, which shall be expressed in its title. The title of the summer resort owners act states that the purpose of the act is to authorize the formation of corporations by summer resort owners; to

authorize the purchase, improvement, sale, and lease of lands; to authorize the exercise of certain police powers over the lands owned by said corporation and within its jurisdiction; to impose certain duties on the department of commerce; and to provide penalties for the violation of by-laws established under police powers. Contrary to plaintiff's argument on appeal, plaintiff's personal belief that Four Lakes' area of operation was not a summer resort and the failure of the summer resort owners act to define the term "summer resort" do not render the act unconstitutional under the Title-Object Clause of Michigan's 1963 Constitution.

Affirmed.

CORPORATIONS — SUMMER RESORT ASSOCIATIONS — TERMS OF EXISTENCE.

Notwithstanding any other provision of law, under MCL 450.371, the term of existence of every domestic corporation incorporated under any law of this state may be perpetual or may be for a limited period as fixed by its articles; the mandate in MCL 450.371 applies to corporations incorporated under the summer resort owners act, MCL 455.201 *et seq*., and supersedes the 30-year limit on corporate existence set forth in the summer resort owners act.

Laurie S. Longo for plaintiff.

Secrest Wardle (by *John L. Weston* and *Sidney A. Klingler*) for defendants.

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

SAAD, P.J. Plaintiff appeals the trial court's order that denied his motion for summary disposition and granted summary disposition to defendants. For the reasons stated in this opinion, we affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant Four Lakes Association, Inc. (Four Lakes), was established on April 30, 1968,[1] and is incorporated

[1] The articles of association for Four Lakes state that its "term of . . . corporate existence is perpetual."

under the summer resort owners act (the SRO),[2] which permits individuals who own homes in a resort area to "form a summer resort owners corporation for the better welfare of said community and for the purchase and improvement of lands to be occupied for summer homes and summer resort purposes . . . ."[3] The entities incorporated under the SRO essentially function in a similar manner to homeowners associations, with special powers granted by statute.[4] Four Lakes accordingly provides basic infrastructure services, including road maintenance, snow removal, and water-quality testing, for properties located in a forested lake area near Brighton. It also owns small parcels of common property. To fund its operations, Four Lakes collects dues from its members, and the individual parties to this suit, including plaintiff, have all served as officers and directors of Four Lakes at various times. Both plaintiff and the individual defendants own property within the area of operation of Four Lakes.

For reasons that are not entirely clear, plaintiff brought this suit in the Livingston Circuit Court, and alleged that Four Lakes was no longer a valid organization and should cease operations, because MCL 455.202 prohibited SRO corporations from existing for more than 30 years. He also asked the court to force Four Lakes to return any corporate funds to its members, and moved for summary disposition.[5] Defendants admitted that the term of corporate existence for Four

---

[2] MCL 455.201 *et seq*.

[3] MCL 455.201.

[4] See, for example, MCL 455.204.

[5] It is unclear under what subrule plaintiff moved for summary disposition, but because the trial court considered matters outside the pleadings in its adjudication of the case, we review this matter under MCR 2.116(C)(10). See *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 457; 750 NW2d 615 (2008).

Lakes had not been renewed, but emphasized that the members were discussing new forms of association for the entity, and asserted that they would lose essential infrastructure services if the court held that Four Lakes no longer existed.

At a hearing, the trial court stated the 30-year limit in MCL 455.202 on SRO corporate existence was superseded by MCL 450.371, which allowed the term of existence of *any* Michigan corporation to be perpetual. After it heard additional arguments from both parties on the applicability of MCL 450.371, the trial court denied plaintiff's motion for summary disposition, and instead granted summary disposition to defendants. It noted that the 1963 Michigan Constitution essentially abrogated the SRO's 30-year limit on SRO corporate existence when it eliminated the 1908 Constitution's reference to temporal limits on corporate existence. Furthermore, the court stated that the Legislature intended MCL 450.371 to effect this change in public policy. Accordingly, the trial court held that MCL 450.371 superseded MCL 455.202 and allowed Four Lakes to operate in perpetuity, as specified in its articles of association.

Plaintiff appealed, and argues that the trial court erred when it held that Four Lakes was permitted by the SRO to declare that its existence was "perpetual" at the time of its incorporation and that MCL 450.371 does not apply to the term of existence for SRO corporations. He also claims that the SRO is unconstitutional because the alleged vagueness of its terms violates the Title-Object Clause, Const 1963, art 4, § 24.[6] Plaintiff did not make this constitutional argument in the trial court.

---

[6] We note that plaintiff's entire appeal is puzzling—on one hand, he demands that the mandates of the SRO be strictly enforced; on the other, he claims that the SRO is unconstitutional. Plaintiff does not seem to grasp the dissonance that is inherent in his arguments, but his lack of understanding is ultimately inconsequential, because both of his claims are without merit.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition is reviewed de novo, and we view the evidence in the light most favorable to the nonmoving party. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). Matters of statutory interpretation are reviewed de novo. *In re McEvoy*, 267 Mich App 55, 59; 704 NW2d 78 (2005). "The first step when interpreting a statute is to examine its plain language, which provides the most reliable evidence of [legislative] intent." *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). When the language of a statute 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." *Huron Mountain Club v Marquette Co Rd Comm*, 303 Mich App 312, 324; 845 NW2d 523 (2013) (quotation marks and citation omitted).

As noted, plaintiff did not raise his constitutional arguments at trial. "Issues raised for the first time on appeal are not ordinarily subject to review." *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). We may elect to review such issues when they involve questions of law, and the facts necessary for their resolution have been presented. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Our review of these unpreserved issues is limited to plain error. *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006).

III. ANALYSIS

A. THE SRO AND MCL 450.371

MCL 450.371 provides:

> Notwithstanding any other provision of law, the term of existence of *every domestic corporation* heretofore incorporated or hereafter incorporating *under any law of this state* may be perpetual or may be for a limited period of time, as fixed by its articles, or amendment thereto made before the expiration of its corporate term, or by a certificate of extension of its corporate term, or by a certificate of renewal of its corporate term. [Emphasis added.]

Accordingly, any Michigan entity that is incorporated under any Michigan law may exist perpetually or may exist "for a limited period of time, as fixed by its articles . . . ." *Id*. By its plain language, then, the mandate in MCL 450.371: (1) applies to corporations incorporated under the SRO, and (2) supersedes the provision of the SRO (namely, MCL 455.202) that imposed a 30-year limit on the existence of any entity incorporated under the SRO.[7]

Four Lakes, which is located in Michigan, was incorporated in 1968 under the SRO. Accordingly, it is a "domestic corporation" incorporated "under [a] law of

---

[7] The rules of statutory construction provide that a more recently enacted law has precedence over an older statute. *Parise v Detroit Entertainment, LLC*, 295 Mich App 25, 28; 811 NW2d 98 (2011). The Legislature enacted the SRO in 1929 and enacted MCL 450.371 in 1963. MCL 450.371 therefore governs the term of existence of any SRO corporation. The fact that the Legislature made minor clerical amendments to MCL 455.251, which concerns the continuance of corporate existence for summer resort associations, in 1982 is irrelevant to the supremacy of MCL 450.371 in the area of corporate terms of existence, because "[w]hen a statute continues a former . . . law, that law common to both acts dates from its first adoption, and only such provisions of the old act as are left out of the new one are gone, and only new provisions are new laws." *Wade v Farrell*, 270 Mich 562, 567; 259 NW 326 (1935) (citation and quotation marks omitted). The trial court's and defendant's observation that the Legislature enacted MCL 450.371 in the same year as Michigan's 1963 Constitution, which eliminated the 1908 Constitution's 30-year limit on corporate terms of existence, supports our interpretation. See Const 1908, art 12, § 3 ("No corporation shall be created for a longer period than 30 years . . . .").

this state," and it thus may exist in perpetuity or for a limited period of time "as fixed by its articles." MCL 450.371. Four Lakes' articles specify that its "term of . . . corporate existence is perpetual." Four Lakes is therefore in existence and may carry out the functions specified in its articles.

Plaintiff's arguments to the contrary are completely unavailing. They ignore the plain language of MCL 450.371 and instead include inapposite citations of the Business Corporation Act,[8] a separate act that has no relation to the operation of MCL 450.371.[9] As noted, MCL 450.371 applies to "every domestic corporation heretofore incorporated or hereafter incorporating under any law of this state"—which, of course, includes domestic corporations incorporated under the SRO.[10]

---

[8] MCL 450.1101 *et seq*.

[9] Specifically, plaintiff cites MCL 450.1123(1), which states:

> Unless otherwise provided in, or inconsistent with, the act under which a corporation is or has been formed, this act applies to . . . summer resort associations . . . . The entities specified in this subsection shall not be incorporated under this act.

As defendants correctly note, the reference in MCL 450.1123(1) to "this act" is a reference to the *Business Corporation Act*—not MCL 450.371, which is contained in a separate act to provide for the term of existence of domestic corporations. 1963 (2d Ex Sess) PA 26, title. See also *Miller v Allstate Ins Co (On Remand)*, 275 Mich App 649, 654; 739 NW2d 675 (2007) (implying that "this act" as used in MCL 450.1123(1) refers to the Business Corporation Act), aff'd on other grounds 481 Mich 601 (2008). The actual function of MCL 450.1123 is merely to allow SRO corporations, and additional corporations formed under other acts, to take advantage of the procedures specified in the Business Corporation Act, so long as the act under which the corporation was formed does not provide otherwise.

[10] Our ruling conflicts with an unpublished decision of this Court, which held that an entity incorporated under the SRO was "not permitted to have a perpetual term." *American Family Homes, Inc v Glennbrook Beach Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued May 28, 2013 (Docket Nos. 301489, 302331, 302780, 301490, and 301496), p 7. This decision, however, only analyzed SRO

Plaintiff's claims regarding the term of corporate existence for Four Lakes are, therefore, incorrect as a matter of law, and the trial court properly granted defendants summary disposition under MCR 2.116(C)(10).

B. THE TITLE-OBJECT CLAUSE

As noted, plaintiff did not make his constitutional argument at trial, and we are therefore not required to entertain this claim. *Booth Newspapers*, 444 Mich at 234. However, we choose to do so because his argument involves questions of law and the facts necessary to resolve his claim have been presented. *Smith*, 269 Mich App at 427.

The Title-Object Clause of the Michigan Constitution states, "No law shall embrace more than one object, which shall be expressed in its title." Const 1963, art 4, § 24. "When assessing a title-object challenge to the constitutionality of a statute, all possible presumptions should be afforded to find constitutionality." *Lawnichak v Dep't of Treasury*, 214 Mich App 618, 620; 543 NW2d 359 (1995). The purpose of the clause is to "prevent the Legislature from passing laws not fully understood, and to ensure that both the legislators and the public have proper notice of legislative content and to prevent deceit and subterfuge." *Id*. at 621. The clause is "only violated where the subjects [of the legislation] are so diverse in nature that they have no necessary connection." *Id*. at 620.

The title of the SRO states that the purpose of the act is

---

corporations within the context of the SRO, and did not mention, cite, or analyze the impact of MCL 450.371 on the SRO. Accordingly, we think it is wrongly decided on this issue. In any event, it is not binding authority, because it is unpublished. *Neville v Neville*, 295 Mich App 460, 468; 812 NW2d 816 (2012).

> to authorize the formation of corporations by summer resort owners; to authorize the purchase, improvement, sale, and lease of lands; to authorize the exercise of certain police powers over the lands owned by said corporation and within its jurisdiction; to impose certain duties on the department of commerce; and to provide penalties for the violation of by-laws established under police powers. [1929 PA 137, title.]

Plaintiff unconvincingly asserts that the title of the SRO does not put affected parties on notice of its contents, and that it cannot apply to Four Lakes, because he does not consider the area within Four Lakes' area of operation a summer resort. Plaintiff's personal beliefs and the fact that the SRO does not define the term "summer resort" do not render it unconstitutional under the Title-Object Clause. Furthermore, plaintiff has completely failed to show that the subjects of the SRO mentioned in the title are "so diverse in nature that they have no necessary connection." [11] *Lawnichak*, 214 Mich App at 620. Accordingly, his claim under the Title-Object Clause is without merit.[12]

Affirmed.

O'CONNELL and MURRAY, JJ., concurred with SAAD, P.J.

---

[11] We note that Michigan courts have repeatedly refused to find the SRO unconstitutional in its entirety. See *Whitman v Lake Diane Corp*, 267 Mich App 176, 180-181, 183; 704 NW2d 468 (2005), *Baldwin v North Shore Estates Ass'n*, 384 Mich 42, 49-50; 179 NW2d 398 (1970), and *American Family Homes*, unpub op at 5.

[12] Plaintiff makes the equally frivolous (and unpreserved) assertion that the SRO impermissibly delegates legislative authority to organizations formed under its mandates. The SRO grants SRO corporations the same powers and privileges as municipal corporations, which are administrative in nature, and designates them as the "local governing body" in the area under their authority. MCL 455.204. Because the Legislature may delegate administrative powers, and because the duties of a summer resort organization, as defined by the SRO, are administrative in nature, MCL 455.204 does not constitute an unconstitutional delegation of authority.

SPRENGER v BICKLE

Docket No. 317822. Submitted October 9, 2014, at Petoskey. Decided October 23, 2014, at 9:15 a.m.

John C. Sprenger filed an action under the Paternity Act, MCL 722.711 *et seq*., in the Benzie Circuit Court against Emily R. Bickle, alleging that he was the biological father of a child born to her while she was lawfully married to Adam Bickle. Defendant and Bickle had divorced in April 2011, after which plaintiff and defendant were briefly engaged. There was a dispute regarding whether defendant was pregnant before her divorce, but the engagement ended in August 2011 and defendant remarried Bickle, giving birth three months later. Plaintiff requested that the court determine the issues of legal and physical custody, parenting time, and child support. Defendant moved to dismiss, asserting that plaintiff lacked standing. The court, Nancy Ann Kida, J., determined that plaintiff did not have standing and granted defendant's motion. The Court of Appeals, RONAYNE KRAUSE, P.J., and GLEICHER, J. (GLEICHER, J., additionally concurring separately and BOONSTRA, J., dissenting), affirmed, ruling that the trial court had correctly determined that plaintiff lacked standing under the Paternity Act. 302 Mich App 400 (2013). During the appeal, however, plaintiff filed a separate lawsuit under the recently enacted Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., which had become effective shortly after the trial court dismissed his first action. Defendant moved to dismiss the RPA action and for sanctions under MCR 2.114. The trial court, John D. Mead, J., dismissed the action, concluding that plaintiff once again lacked standing, but denied defendant's motion for sanctions. Plaintiff appealed, and defendant cross-appealed.

The Court of Appeals *held*:

1. Under MCL 722.1443(2)(c) and (d), a court has authority to determine that a child was born out of wedlock and make a determination of paternity and enter an order of filiation. Plaintiff was the "alleged father" for purposes of an RPA action, defined by MCL 722.1433(3) as a man who by his actions could have fathered the child. Bickle was the "presumed father" in this case, defined by MCL 722.1433(4) as a man who is presumed to be the child's

father by virtue of his marriage to the child's mother at the time of the child's birth. MCL 722.1441 governs an action such as plaintiff's to determine that the presumed father is not the child's father. MCL 722.1441(3)(a) provides that if a child has a presumed father, the court may determine that the child was born out of wedlock for purposes of establishing the child's paternity if the alleged father files an action and several circumstances apply, including that the alleged father did not know or have reason to know that the mother was married at the time of conception. MCL 722.1441(3)(c) similarly provides for such a determination if another set of circumstances apply, including that the mother was not married at the time of conception. Accordingly, MCL 722.1441(3)(a) concerns situations in which the child was conceived during wedlock, while MCL 722.1441(3)(c) concerns situations in which the child was not conceived during the marriage, negating any need to prove the additional circumstances required under MCL 722.1441(3)(a). Plaintiff brought this action under both provisions, however, because of questions concerning the timing of conception in relationship to entry of the divorce judgment.

2. Because conception during wedlock is necessary for a proceeding under MCL 722.1441(3)(a), the panel initially and necessarily assumed that the child was conceived during defendant's first marriage to Bickle. Plaintiff testified that he knew defendant was married up to the time her divorce from Bickle was finalized, and both parties conceded that plaintiff and defendant had engaged in sexual relations before entry of the divorce judgment. Therefore, plaintiff necessarily failed to establish that he did not know that defendant was married at the time of conception, as required by MCL 722.1441(3)(a)(*i*).

3. With respect to the requirement of MCL 722.1441(3)(c)(*i*) that the mother not be married at the time of conception, the trial court did not clearly err by finding that plaintiff had failed to demonstrate that the child's conception occurred outside the marriage. The evidence, including testimony by both defendant's obstetrician and plaintiff's expert witness, overwhelmingly supported the conclusion that conception occurred during defendant's first marriage to Bickle.

4. The trial court did not err by refusing to award defendant attorney fees and costs as sanctions. MCR 2.114 concerns the execution of court documents and applies to all pleadings, motions, affidavits, and other papers mandated by the court rules. MCR 2.114(D) provides that the signature of an attorney or a party constitutes a certification by the signer that (1) he or she has read

the document, (2) to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) the document was not interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation. MCR 2.114(E) provides that if a document is signed in violation of the rule, the court must impose an appropriate sanction on the person who signed it, which may include an order to pay to the other party the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. When plaintiff filed this action, however, the RPA was newer legislation that had not yet been subjected to much construction by the appellate courts, and as a matter of first impression, the opinion in this case set forth an interpretation of the RPA as applied to unique facts in which conception fell extremely close to the date of divorce. Although the panel rejected plaintiff's legal position, it was not prepared to conclude that the complaint was unwarranted by existing law or that the complaint was interposed for an improper purpose. Not every error in legal analysis constitutes a frivolous position, and merely because an appellate court concludes that a legal position asserted by a party should be rejected does not mean that the party acted frivolously in advocating its position, particularly in regard to legal issues that are complex and not easily resolved. Rather than filing his complaint for an improper purpose, plaintiff appeared to have been solely motivated by a desire to attain the rights of a parent.

Affirmed.

Phelps Legal Group, PLC (by *Eric W. Phelps*), for plaintiff.

Law Offices of Paul T. Jarboe (by *Paul T. Jarboe*) for defendant.

Before: MURPHY, C.J., and SAWYER and M. J. KELLY, JJ.

MURPHY, C.J. Plaintiff appeals as of right the trial court's order granting defendant's motion to dismiss plaintiff's complaint regarding paternity and denying plaintiff's motion for genetic testing. Defendant cross-

appeals that same order with respect to the trial court's denial of her request for an award of attorney fees and costs as sanctions under MCR 2.114. We affirm.

The paternity dispute between the parties, and more specifically the issue regarding plaintiff's standing to pursue a paternity complaint, was previously before this Court, resulting in a published opinion in *Sprenger v Bickle*, 302 Mich App 400; 839 NW2d 59 (2013). The basic factual premise of the litigation was previously set forth by this Court as follows:

> Plaintiff alleges that he is the biological father of a minor child born to defendant in November 2011, while she was lawfully married to someone else. Plaintiff and defendant were briefly engaged after defendant's divorce from Adam Bickle in April 2011. Although the parties dispute whether defendant was pregnant before her divorce, mutual friends of the couple and members of both their families assert that within days of the divorce, defendant and plaintiff were sharing the news that they were expecting a child. The engagement between plaintiff and defendant ended; in August 2011, defendant remarried Adam and they were still married when she gave birth three months later.
>
> In December 2011, plaintiff filed a paternity action under the Paternity Act [MCL 722.711 *et seq*.], alleging himself to be the biological father of the child and requesting the court to determine issues of legal and physical custody, parenting time, and child support. In response, defendant filed a motion to dismiss, asserting lack of standing, MCR 2.116(C)(5), and failure to state a claim on which relief could be granted, MCR 2.116(C)(8). In an April 6, 2012 ruling, the circuit court determined that plaintiff did not have standing and granted defendant's motion to dismiss . . . . [*Id*. at 402-403.]

This Court affirmed, ruling that the trial court had correctly determined that plaintiff lacked standing un-

der the Paternity Act. *Id*. at 404-405. The panel observed that "[u]nless and until defendant and her husband ask a court to declare that the child was born out of wedlock, plaintiff lacks standing to claim paternity under the Paternity Act." *Id*. at 404. The Court concluded its opinion by stating:

> [T]he lower court dismissed plaintiff's case for lack of standing just weeks before the Revocation of Paternity Act became effective. Plaintiff filed a separate lawsuit under this new act, and that case is still pending. We have not been called upon to decide whether plaintiff has standing under the Revocation of Paternity Act. Rather, this case concerns whether plaintiff has standing under the Paternity Act. The majority holds the trial court correctly determined that he does not. [*Id*. at 409.]

We are now confronted with plaintiff's new action regarding paternity brought under the Revocation of Paternity Act (RPA), MCL 722.1431 *et seq*., which was dismissed on the basis that plaintiff once again lacked standing. The RPA generally provides a court with authority to "[d]etermine that a child was born out of wedlock" and to "[m]ake a determination of paternity and enter an order of filiation[.]" MCL 722.1443(2)(c) and (d). MCL 722.1441 "governs an action to determine that a presumed father is not a child's father," MCL 722.1435(3), and this is the nature of plaintiff's action in this case. Plaintiff's new suit was predicated and relied on MCL 722.1441(3)(a) and (c), which provide in pertinent part:

> (3) If a child has a presumed father, a court may determine that the child is born out of wedlock for the purpose of establishing the child's paternity if an action is filed by an alleged father and any of the following applies:
>
> (a) All of the following apply:

(*i*) The alleged father did not know or have reason to know that the mother was married at the time of conception.

(*ii*) The presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child.

(*iii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.

(*iv*) Either the court determines the child's paternity or the child's paternity will be established under the law of this state or another jurisdiction if the child is determined to be born out of wedlock.

* * *

(c) Both of the following apply:

(*i*) The mother was not married at the time of conception.

(*ii*) The action is filed within 3 years after the child's birth. The requirement that an action be filed within 3 years after the child's birth does not apply to an action filed on or before 1 year after the effective date of this act.[1]

As is clearly evident when examining these provisions, MCL 722.1441(3)(a) concerns situations in which the child at issue was conceived during wedlock, while MCL 722.1441(3)(c) concerns situations wherein the

[1] Plaintiff, as "a man who by his actions could have fathered the child," is the "alleged father." MCL 722.1433(3). And Adam Bickle, as "a man who is presumed to be the child's father by virtue of his marriage to the child's mother at the time of the child's . . . birth," is the "presumed father." MCL 722.1433(4). We also note that plaintiff additionally cited MCL 722.1437(2) in his complaint in support of his assertion that he had standing. However, MCL 722.1437 addresses revocation of an acknowledgment of parentage, and plaintiff eventually stipulated the withdrawal of the claim, considering that no such document ever existed.

child was not conceived during the marriage, negating the need to supply the extra proofs required under Subsection (3)(a). Because of questions concerning the timing of conception here in relationship to entry of the divorce judgment, plaintiff chose to cover both possibilities encompassed by the two subsections. The trial court, following an evidentiary hearing, dismissed the new paternity action and denied plaintiff's motion for genetic testing. The court found that plaintiff had not demonstrated that conception occurred after the divorce judgment was entered for purposes of MCL 722.1441(3)(c) and that plaintiff knew defendant was married at the time of conception for purposes of MCL 722.1441(3)(a) if conception had actually occurred during the marriage. The trial court expressed that "the medical testimony demonstrated that it was highly likely that the defendant was married at the time of conception." The trial court declined to award defendant any costs or attorney fees, given that the RPA was new and plaintiff had made a "legitimate run" under the RPA.

On appeal, plaintiff challenges the trial court's findings under MCL 722.1441(3)(a) and (c). We initially note that plaintiff repeatedly speaks of the court's alleged failure to draw all inferences in a light most favorable to plaintiff; however, summary-disposition principles are not applicable here, as the court conducted an evidentiary hearing and made factual findings based on the evidence presented. Under the RPA, a trial court is permitted to conduct an evidentiary hearing "at its discretion when there are contested factual issues and a hearing would assist the trial court in making an informed decision on the issue[s]." *Parks v Parks*, 304 Mich App 232, 239-240; 850 NW2d 595 (2014). "When reviewing a decision related to the [RPA], this Court reviews the trial court's factual

findings, if any, for clear error," which occurs when this Court is firmly and definitely convinced that a mistake was made. *Glaubius v Glaubius*, 306 Mich App 157, 164; 855 NW2d 221 (2014), citing *Parks*, 304 Mich App at 237. Our review is de novo with respect to construction of the RPA. *Glaubius*, 306 Mich App at 164.

With respect to the requirement in MCL 722.1441(3)(a)(*i*) ("alleged father did not know or have reason to know that the mother was married at the time of conception"), we shall begin with the assumption that the child was conceived during defendant's first marriage to Adam Bickle, considering that conception during wedlock is a necessary attribute of proceeding under Subsection (3)(a). Plaintiff specifically testified that he knew defendant was married up until April 8, 2011, when defendant's divorce from Bickle was finalized. And plaintiff also conceded, as did defendant, that plaintiff and defendant engaged in sexual relations before entry of the divorce judgment. Therefore, keeping in mind for now our conception-timing assumption, plaintiff necessarily failed to establish that he did not know that defendant was married at the time of conception as required by MCL 722.1441(3)(a)(*i*). Indeed, the evidence conclusively established the contrary.

Plaintiff argues that because the date of conception could conceivably have been either before or after the divorce was finalized, it could not be concluded that he knew or had reason to know that defendant was married at the time of conception. This argument fails to appreciate the structure of MCL 722.1441 and the relationship between and functions of Subsections (3)(a) and (c). Again, if conception occurred during wedlock, Subsection (3)(a) needs to be further examined and Subsection (3)(c) is rendered irrelevant or unsupportable, whereas if conception occurred out of wedlock,

Subsection (3)(c) is triggered and Subsection (3)(a) is rendered irrelevant or unsupportable. In analyzing MCL 722.1441(3)(a), there needs to be a finding or an assumption that conception occurred during the marriage. Under plaintiff's faulty theory, any time an uncertainty exists regarding whether conception occurred during or out of wedlock, Subsection (3)(a)(*i*) would be satisfied, which clearly was not the intent of the Legislature. If the child here was conceived during the marriage, plaintiff was fully aware that defendant was still married given his testimony. MCL 722.1441(3)(a) clearly envisions and applies to circumstances in which a male has sexual intercourse with a married female, not knowing her to be a married woman at the time and without adequate information such that he should have known about her marital status. When there is uncertainty about whether conception occurred before or after entry of a divorce judgment, the better-framed question for purposes of analyzing MCL 722.1441(3)(a)(*i*) might involve asking whether the alleged father knew or had reason to know that the child's mother was married before her divorce was finalized. Plaintiff did not and cannot establish standing under MCL 722.1441(3)(a) in light of his testimony that he knew defendant was married before April 8, 2011, when the divorce was finalized.[2]

---

[2] Working together, Subsections (3)(a) and (c) can give an alleged father standing even if it is impossible to determine whether conception occurred before or after the finalization of a divorce. In that circumstance, if the alleged father did not know or have reason to know before entry of a divorce judgment that a child's mother was married, and if the other requirements in Subsections (3)(a)(*ii*) through (*iv*) were satisfied, the alleged father could proceed because either Subsection (3)(a) or (c) would have been definitively established, despite being unable to pinpoint the specific subsection that was established.

With respect to the requirement in MCL 722.1441(3)(c)(*i*) ("mother was not married at the time of conception"), we hold that the trial court did not clearly err by finding that plaintiff had failed to demonstrate that conception occurred outside the marriage. The evidence overwhelmingly pointed to conception taking place during defendant's marriage to Bickle. In support of his argument regarding the applicability of MCL 722.1441(3)(c), plaintiff asserted that a possibility existed, albeit a small one, that defendant conceived the child following the granting of her divorce on April 8, 2011. The proffered evidence, however, made the likelihood of this possibility extremely remote. Both defendant's obstetrician and plaintiff's expert, a physician and fertility specialist, concurred that the most likely time of conception was between March 27, 2011, and April 3, 2011. Indeed, plaintiff's own expert indicated that there was a "95 to 97 percent" probability that conception occurred during that pre-divorce-judgment time frame. Defendant's obstetrician opined that the probability of conception having occurred after April 8, 2011, was in the range of "less than 1 percent." Plaintiff's expert expressed that the probability that defendant conceived on or after April 8, 2011, was "1 to 2 percent."[3]

Additionally, there was testimony indicating that defendant used an over-the-counter pregnancy test on either April 11 or April 13, 2011, which revealed a positive result. And both defendant's obstetrician and plaintiff's expert stated that those tests, while useful and accurate, would not register, on either date identified for the test, a conception that had occurred between April 8 and April 10, 2011.

---

[3] We note that there is no dispute that the child was born premature.

On this issue, defendant also presents a judicial estoppel argument. In the first appeal, plaintiff emphatically took the position that defendant was pregnant and that the child had been conceived before the finalization of the divorce.[4] And plaintiff conceded at the evidentiary hearing in the present case that he had taken that position in the first action. An argument could be made that plaintiff is judicially estopped from taking a position here that is wholly inconsistent with his unequivocal position in the prior case that defendant was pregnant before the divorce was finalized. See *Wells Fargo Bank, NA v Null*, 304 Mich App 508, 537; 847 NW2d 657 (2014) (discussing the features of judicial estoppel). Then again, defendant's own position in the present case on the conception-timing issue is at odds with her stance in the previous case. We decline to take into consideration the doctrine of judicial estoppel.

On the basis of the testimony alone, plaintiff's argument under MCL 722.1441(3)(c) fails, as there was effectively no supporting evidence. The trial court did not commit error by rejecting plaintiff's claim under Subsection (3)(c).[5]

---

[4] The first panel, while not specifically deciding the issue, apparently leaned toward agreeing with plaintiff's view that conception had occurred during the marriage given its comment, after acknowledging a factual dispute on the matter, that "mutual friends of the couple and members of both their families assert[ed] that within days of the divorce, defendant and plaintiff were sharing the news that they were expecting a child." *Sprenger*, 302 Mich App at 402.

[5] We note that the trial court concluded that plaintiff had not presented clear and convincing evidence in support of his positions, which standard defendant maintains reflects the proper burden of proof. Defendant, and evidently the trial court, relied on MCL 722.1445, which provides that "[i]f an action is brought by an alleged father who proves by clear and convincing evidence that he is the child's father, the court may make a determination of paternity and enter an order of filiation . . . ." However, this burden of proof appears to only concern the actual establishment of paternity, without addressing the underlying prerequisite of standing as

Plaintiff next contends that the trial court erred by sustaining an objection by defendant with respect to plaintiff's attempt to elicit a response from defendant about whether Adam Bickle was the child's biological father. Plaintiff contends that the question was relevant in regards to establishing, as required by MCL 722.1441(3)(a)(*ii*), that "[t]he presumed father, the alleged father, and the child's mother at some time mutually and openly acknowledged a biological relationship between the alleged father and the child." Given our holding that plaintiff failed to establish under MCL 722.1441(3)(a)(*i*) knowledge of whether defendant was married at the time of conception, and considering that the requirements of Subsections (3)(a)(*i*) through (*iv*) all had to be established for standing to exist, any error in excluding the testimony was entirely harmless. MCR 2.613(A).

Finally, we disagree with defendant on her cross-appeal that the trial court erred by failing to award her attorney fees and costs as sanctions under MCR 2.114. With respect to a request for sanctions under MCR 2.114, we review for an abuse of discretion the trial

---

governed by MCL 722.1441. MCL 722.1441 does not set forth any standard regarding the burden of proof. In *Parks*, 304 Mich App at 239-240, this Court, in determining whether the RPA mandated an evidentiary hearing or whether it was discretionary because the RPA did not even mention the word "hearing," made an analogy to the process involved in addressing a motion to change custody and the threshold issue of proper cause or change of circumstances, wherein an evidentiary hearing is only necessary when contested factual issues exist that must be resolved to make an informed decision. In the child custody context relative to the threshold issue, a preponderance-of-the-evidence standard applies. *Vodvarka v Grasmeyer*, 259 Mich App 499, 509; 675 NW2d 847 (2003). Ultimately, we need not decide the proper burden of proof for purposes of MCL 722.1441, given that plaintiff's claims under MCL 722.1441(3)(a) and (c) were not supported by clear and convincing evidence or a preponderance of the evidence. Rather, the evidence overwhelmingly supported defendant's positions.

court's ruling on the request. *Edge v Edge*, 299 Mich App 121, 127; 829 NW2d 276 (2012). However, the court's underlying factual findings, including a finding of frivolousness, are reviewed for clear error. *Kitchen v Kitchen*, 465 Mich 654, 661; 641 NW2d 245 (2002); *Edge*, 299 Mich App at 127. Issues regarding the interpretation of MCR 2.114 are reviewed de novo on appeal. *Edge*, 299 Mich App at 127.

MCR 2.114 concerns the execution of court documents and applies to all pleadings, motions, affidavits, and other papers mandated by the court rules. MCR 2.114(A). The court rule provides in pertinent part:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
>
> (1) he or she has read the document;
>
> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.[6]

---

[6] The question whether a claim is frivolous is evaluated at the time the claim was raised. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). The objective of sanctions "is to deter parties and

We decline to reverse the trial court's ruling that denied defendant's request for sanctions. The RPA is newer legislation that has not yet been subjected to much construction by the appellate courts, and, as a matter of first impression, our published opinion today sets forth an interpretation of the RPA as applied to unique facts in which conception fell extremely close to the date of divorce. Although we reject plaintiff's legal position, we are not prepared to conclude that the complaint was unwarranted by *existing* law or that the complaint was interposed for an improper purpose, such as to harass defendant, cause unnecessary delay, or needlessly increase litigation costs. MCR 2.114(D); *Kitchen*, 465 Mich at 663 (stating that "[n]ot every error in legal analysis constitutes a frivolous position" and that "merely because this Court concludes that a legal position asserted by a party should be rejected does not mean that the party was acting frivolously in advocating its position," especially in regard to legal issues that are complex and not easily resolved). Rather than filing the complaint for an improper purpose, plaintiff appears to have been motivated solely by a desire to attain the rights of a parent, as alleged. Accordingly, we affirm the trial court's denial of sanctions.

Affirmed. Neither party having fully prevailed on appeal, we decline to award taxable costs under MCR 7.219.

SAWYER and M. J. KELLY, JJ., concurred with MURPHY, C.J.

---

attorneys from filing documents or asserting claims and defenses that have not been sufficiently investigated and researched or that are intended to serve an improper purpose." *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 723; 591 NW2d 676 (1998). Sanction provisions should not be construed in a manner that has a chilling effect on advocacy, that prevents a party from bringing a difficult case, or that penalizes a party whose claim initially appears viable but later becomes unpersuasive. *Louya v William Beaumont Hosp*, 190 Mich App 151, 163; 475 NW2d 434 (1991).

PEOPLE v WHITE

Docket No. 315579. Submitted October 14, 2014, at Detroit. Decided October 23, 2014, at 9:20 a.m. Leave to appeal sought.

Rickey White pleaded guilty in the Oakland Circuit Court to two counts of obtaining money by false pretenses with intent to defraud, MCL 750.218(4), and one count of conducting a criminal enterprise, MCL 750.159i, for charging an upfront fee to help struggling homeowners modify their mortgages using attorneys that he falsely claimed to have on staff, then failing to complete or submit the loan modification proposals to a bank. Under a sentence evaluation conducted in accordance with *People v Cobbs*, 443 Mich 276 (1993), the court, Michael D. Warren, Jr., J., stated that if defendant met the court's conditions, which included an initial restitution payment of $20,000 within 60 days, it would delay defendant's sentencing and impose a minimum sentence that would not exceed the bottom third of the sentencing guidelines' recommendation. When defendant failed to make the $20,000 payment on time, the court declined to sentence defendant according to the *Cobbs* evaluation and, instead, sentenced him as a fourth-offense habitual offender to concurrent prison terms of 280 months to 40 years for the criminal-enterprise conviction and 3 months to 30 years for each of the false-pretenses convictions. Defendant was also ordered to pay restitution of $283,245. The court denied defendant's motion to withdraw his plea, as well as his request for an evidentiary hearing. The Court of Appeals denied defendant's motion to remand the matter under MCR 7.211(C)(1) but granted his delayed application for leave to appeal.

The Court of Appeals *held*:

1. The law of the case barred defendant from obtaining relief on his claim that the trial court had abused its discretion by denying his motion for an evidentiary hearing because his motion to remand under MCR 7.211(C)(1) raised the same issues and was denied. Had the merits been reached, the conclusion would have been that the trial court did not abuse its discretion in this regard because the offer of proof supporting the motion was inconsistent with defendant's own testimony during the plea hearing.

2. Defendant should not have been allowed to withdraw his guilty plea on the ground that he was denied the effective assistance of counsel. Defendant testified at the plea hearing that he fully understood the plea and the sentencing evaluation, that he was satisfied with his legal advice, and that he was not under any pressure to tender the guilty plea. His affidavit to the contrary was insufficient to contradict his sworn testimony in open court, and he did not establish that there was a viable defense of which his counsel failed to advise him.

3. Defendant was not entitled to withdraw his guilty plea on the ground that the sentence imposed exceeded the *Cobbs* evaluation. Although *Cobbs* held that a defendant who pleads guilty in reliance on a preliminary sentence evaluation has an absolute right to withdraw the plea if the court later determines that the sentence must exceed the evaluation, because defendant did not fulfill a precondition of his plea agreement by making a $20,000 payment, the sentencing court was not bound by the *Cobbs* evaluation and defendant was not entitled to an opportunity to withdraw the plea.

Affirmed.

CRIMINAL LAW — PLEA AGREEMENTS — *COBBS* EVALUATIONS — FAILURE TO MEET PLEA CONDITIONS — WITHDRAWAL OF PLEAS.

A defendant who fails to satisfy the conditions of a plea agreement is not entitled to withdraw the plea after being sentenced to a term that exceeds a preliminary evaluation conducted under *People v Cobbs*, 443 Mich 276 (1993).

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Matthew K. Payok*, Assistant Attorney General, for the people.

Maynard Law Associates, PLLC (by *Jeffery D. Maynard*), and *Stuart G. Friedman* for defendant.

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

BOONSTRA, P.J. Defendant, Rickey White, appeals by delayed leave granted his convictions based on guilty pleas to two counts of obtaining money by false pre-

tenses with intent to defraud involving $1,000 or more but less than $20,000, MCL 750.218(4), and one count of conducting a criminal enterprise, MCL 750.159i(1). The trial court sentenced defendant as a habitual offender (fourth offense), MCL 769.12, to concurrent prison terms of 280 months to 40 years for the criminal-enterprise conviction, and 3 months to 30 years each for the false-pretenses convictions. Defendant was also ordered to pay restitution in the amount of $283,245. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Between 2009 and 2011, defendant, through a company identified as Braunstein & Associates, represented that he could assist struggling homeowners with mortgage modification. Defendant charged an upfront fee and promised a full money-back guarantee. Defendant allegedly represented that there were attorneys on staff to review and assist in preparing loan modification proposals to banks. Apparently, defendant employed no attorneys, and modification proposals were either incomplete or never submitted to the banks.

The Attorney General initiated an investigation of defendant's activities and negotiated with defendant for nearly a year. Before charges were formally filed, defendant and the Attorney General's office reached an agreement whereby defendant would pay $2,000 a week in restitution. Pursuant to this agreement, defendant paid approximately $10,000 in restitution, but then stopped making the required payments. As a result, defendant was formally charged with one count of operating a criminal enterprise and two counts of false pretenses involving $1,000 or more but less than $20,000.

Defendant pleaded guilty to the charged offenses and received a sentence evaluation from the trial court pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). The trial court agreed to delay sentencing for 60 days; if defendant paid partial restitution in the amount of $20,000, the trial court would further delay sentencing for an additional 90 days; if defendant paid an additional $20,000 in restitution during that period, the trial court would continue to delay the sentence up to the statutory maximum of 11 months; and, if defendant met all criteria imposed by the court, it would sentence defendant to a minimum sentence that would not exceed the bottom third of the recommended guidelines range.

Defendant failed to make the first $20,000 payment. At the time of sentencing, the trial court declined to sentence defendant in accordance with the *Cobbs* evaluation and imposed a higher sentence. The court concluded that it was not bound by the preliminary sentence evaluation in light of defendant's failure to make the agreed-upon restitution payment. The court further rejected defendant's claim that he should be permitted to withdraw his plea because he was denied the effective assistance of counsel and his plea was not voluntarily made. The trial court also denied defendant's request for an evidentiary hearing. We find no errors requiring reversal.

II. DENIAL OF REQUEST FOR EVIDENTIARY HEARING

For his first claim of error, defendant argues that the trial court abused its discretion when it denied his request for an evidentiary hearing regarding the voluntariness of his plea and the effectiveness of his trial counsel. We are precluded from granting defendant any relief in this regard. In an order dated May 14, 2014, a

panel of this Court, considering the same issues, denied defendant's motion to remand.[1] That decision is now the law of the case. *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984). If defendant disagreed with the motion panel's decision, he should have filed a motion for rehearing before that panel or an application for leave to appeal that decision to the Supreme Court. *People v Douglas*, 122 Mich App 526, 530; 332 NW2d 521 (1983).

Even if we were to consider this issue, however, we would conclude that the trial court did not abuse its discretion when it denied defendant's request for an evidentiary hearing. A trial court's denial of a request for an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when a court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

In support of his request for an evidentiary hearing, defendant provided his own affidavit and affidavits from his aunt and uncle. The affidavits essentially state that defendant's counsel pressured defendant into entering a plea, that counsel was unprepared, and that counsel did not advise defendant of the charges against him or any possible defenses. At the time of the plea, however, defendant was sworn and testified that he was satisfied with the advice given by his counsel. The court also specifically explained the charges and the possible sentences. Defendant stated that it was his own choice to plead guilty and that there were no promises, threats, or inducements compelling him to tender the plea. Moreover, the fact that defendant had been repre-

[1] *People v White*, unpublished order of the Court of Appeals, entered May 14, 2014 (Docket No. 315579).

sented for nearly a year by prior counsel during pre-charge negotiations with the Attorney General's office, and that he had at one time begun restitution payments, belies any assertion that he did not know the nature of the charges against him or any possible defenses. The statements made in defendant's affidavit directly contradict his testimony at the plea hearing. The trial court denied defendant's request for an evidentiary hearing because it found that, under the circumstances, granting an evidentiary hearing at which defendant presumably would provide testimony inconsistent with his prior testimony would be against public policy. The trial court noted: "After all, the Defendant swore under oath to this Court to a certain state of affairs, and to now allow him to attack his own sworn testimony would allow him to benefit from perjury (either at the plea or in his affidavit) as well as to countenance a fraud upon the Court."

In reaching its conclusion, the trial court relied on this Court's decision in *People v Serr*, 73 Mich App 19, 25-26, 28; 250 NW2d 535 (1976). In that case, the defendant sought to withdraw his guilty plea as not knowing and voluntary. This Court held that when a plea is entered in accordance with the applicable court rules, a trial court is barred from considering testimony or affidavits inconsistent with statements made during the plea hearing. This Court held:

> It is the opinion of this court that where a defendant has been found guilty by reason of his own statements as to all of the elements required to be inquired into by GCR 1963, 785.7, and his attorney has also confirmed the agreement and the defendant has been sentenced, neither he nor his attorney will be permitted thereafter to offer their own testimony to deny the truth of their statements made to induce the court to act. To do so would be to permit the use of its own process to create what amounts to a fraud upon

> the court. This is based on public policy designed to protect the judicial process. [*Id*. at 28.]

We conclude that because defendant's offer of proof, i.e., his own affidavit, is inconsistent with defendant's own testimony during the plea hearing, the trial court did not abuse its discretion when it denied defendant's request for an evidentiary hearing.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he should have been permitted to withdraw his guilty plea because he was denied the effective assistance of counsel. Defendant argues that his trial counsel failed to explain the nature of the charges and possible defenses, and that he pressured defendant into accepting the plea. We disagree that defendant was denied the effective assistance of counsel.

When ineffective assistance of counsel is claimed in the context of a guilty plea, the relevant inquiry is whether the defendant tendered the plea voluntarily and understandingly. *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011). Guilty pleas have been deemed involuntary or unknowing when defense counsel failed to explain adequately the nature of the charges. *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995). Guilty pleas have also been found to be involuntary when counsel failed to explain possible defenses to the charges. *People v Fonville*, 291 Mich App 363, 394; 804 NW2d 878 (2011). Under those circumstances, the effective assistance of counsel has been denied because the defendant has been deprived of the ability to make an intelligent and informed decision regarding the available options. *Corteway*, 212 Mich App at 445.

Defendant testified at the plea proceeding that he fully understood the plea and the sentencing evaluation, that he was satisfied with his legal advice, and that he was not under any pressure to tender the guilty plea. Defendant's contradictory affidavit is insufficient to contradict his sworn testimony in open court. *Armisted*, 295 Mich App at 49. The record below indicates that defendant knowingly and voluntarily accepted the plea agreement.

Further, defendant has not established that he had a viable defense of which his counsel failed to advise him. Defendant devotes a great deal of his brief on appeal to explaining that he operated a legitimate business that processed loan modification applications under the Home Affordable Modification Program. Defendant represents that the banks and other lenders as a whole did not live up to their obligations under the program. Thus, apparently, the defense that defendant was deprived of asserting was that struggling homeowners suffered financial losses simply because the financial institutions set up roadblocks for individuals seeking relief under the program. We conclude that defendant has not articulated a viable defense. The defense he sets forth does not even address the charges that defendant misrepresented to his customers that he had attorneys on staff to prepare and present modification proposals. This defense further does not address the charge that the applications were incomplete or, indeed, never even submitted to the program. Considering this, defendant has not established that his plea was unknowing and involuntary because his counsel failed to advise him of a viable defense.

IV. SENTENCE IN EXCESS OF *COBBS* EVALUATION

Finally, defendant argues that he was entitled to withdraw his plea because the sentence imposed exceeded the court's preliminary evaluation under *Cobbs*. We disagree.

A decision on a motion to withdraw a plea after sentencing is reviewed for an abuse of discretion. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012).

Before the entry of his plea, the trial court provided a preliminary sentencing evaluation pursuant to *Cobbs*. In *Cobbs*, the Supreme Court held that a trial court may participate in sentencing discussions at the request of a party but not on the judge's own initiative. Within these parameters, "a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense." *Cobbs*, 443 Mich at 283 (emphasis omitted). Defendant relies on the following language from *Cobbs* in support of his assertion that he was entitled to withdraw his plea when the court sentenced defendant inconsistently with the preliminary evaluation:

> However, a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. [*Id*.]

Defendant's reliance on this language is misplaced.

In *People v Kean*, 204 Mich App 533; 516 NW2d 128 (1994), this Court held that the defendant was not entitled to the benefit of a plea bargain that included a prosecutor's sentencing recommendation, and the trial court was not required to afford the defendant an opportunity to withdraw his plea, because the defendant had violated a specific condition of the plea agreement. *Id*. at 535-536. See also *People v Abrams*, 204 Mich App 667, 672-673; 516 NW2d 80 (1994), and *People v Garvin*, 159 Mich App 38, 43-44; 406 NW2d 469 (1987). This Court reasoned that when the defendant left a treatment program before his sentencing and failed to turn himself in, he had violated the plea

agreement and was not entitled to the benefit of the bargain. *Kean*, 204 Mich App 535-536. Although *Kean* involved a sentencing recommendation, not a *Cobbs* evaluation, the rationale is equally applicable to cases involving a *Cobbs* plea.

In this case, defendant violated a precondition of the plea agreement: he failed to timely make the agreed-upon $20,000 restitution payment. Therefore, defendant is not entitled to the benefit of his bargain. Further, the trial court was not bound by the preliminary sentencing evaluation, and it was not required to afford defendant an opportunity to withdraw his plea. *Kean*, 204 Mich App at 535-536.

Perhaps in anticipation of this conclusion, defendant argues that making the restitution payment was not a specific precondition of the sentencing evaluation. Defendant argues that the only preconditions identified by the court were related to his compliance with the terms of his bond. He further submits that his failure to make the restitution payment was, therefore, not a violation of the sentencing agreement. Defendant then concludes that because the trial court failed to sentence him in accordance with the sentencing evaluation, he had an absolute right to withdraw his plea. However, defendant has selectively quoted from the court's colloquy and has taken statements out of context. Defendant relies on the following statements made by the court:

> *The Court*: . . . [D]o you understand that I'm making the Cobbs representation with regard to you subject to the pre-conditions that you abide by all the conditions and terms of your bond, that you timely appear for your presentence interview and your sentencing and your delay of sentencings [sic], and you do not test positive for drugs and you do not engage in criminal behavior prior to sentencing?
>
> *Mr. White*: Yes, your Honor.

> *The Court*: And do you agree that if any of those preconditions to the Cobbs representation are violated that you waive the right to withdraw your plea and that I will not be bound by the Cobbs representation?

Only seconds before the trial court made these statements, it made perfectly clear that making the $20,000 restitution payment was a precondition of sentencing defendant in accordance with the *Cobbs* evaluation. The court stated:

> Okay. With regard to you as an individual, I have made a representation to you that pursuant to *People v Cobbs* that if you were to plead guilty today that I would agree to the following: that we would wait 60 days, approximately 60 days for your sentence in this case, and if you pay $20,000.00 of restitution at the time of sentencing I would then further delay the sentence for an additional 90 days. If you paid an additional $20,000.00 at that time I would continue the delayed sentence up to the statutory maximum of approximately 11 months, at which time I would sentence you. *And if you meet those criteria up to the time of the delayed sentence and follow all the other conditions I impose on you in connection with the delay of sentence*, that any sentence that you would receive would not exceed the bottom one-third of the guideline range . . . .

Reading the court's statements in their entirety, it is clear that the timely making of the initial $20,000 restitution payment was a specific precondition of being sentenced in accordance with the *Cobbs* evaluation. Because defendant failed to comply with a precondition, the trial court was not bound by the preliminary sentence evaluation, and defendant was not entitled to an opportunity to withdraw his plea. *Kean*, 204 Mich App at 535-536.

Affirmed.

MARKEY and K. F. KELLY, JJ., concurred with BOONSTRA, P.J.

In re MCCARRICK/LAMOREAUX

Docket Nos. 315510, 317403, and 318475. Submitted September 4, 2014, at Grand Rapids. Decided October 23, 2014, at 9:25 a.m.

The Department of Human Services petitioned the Chippewa Circuit Court, Family Division, to remove three minor children from the home of their mother, M. McCarrick. The court, James P. Lambros, J., issued an interim ex parte order authorizing the removal. The children were of Indian heritage and members of the Sault Ste. Marie Tribe of Chippewa Indians. At the subsequent removal hearing, the court found that probable cause existed to assume jurisdiction over the children, that the department had proved by clear and convincing evidence that it had made active efforts to prevent the breakup of the family, and that continued placement with McCarrick would subject the children to serious emotional or physical damage. In Docket No. 315510, McCarrick appealed as of right the removal order that was issued after the removal hearing. In Docket No. 317403, McCarrick appealed as of right the trial court's subsequent order removing the oldest daughter from the care of the child's father after he was incarcerated for assault. The Court of Appeals dismissed both appeals, reasoning that nondispositional removal orders were not appealable as of right. McCarrick sought leave to appeal the dismissals in the Michigan Supreme Court. In Docket No. 318475, McCarrick sought delayed leave to appeal the trial court's orders removing the children from her care in the Court of Appeals. The Court of Appeals granted the application. The Supreme Court then vacated the dismissal orders in Docket Nos. 315510 and 317403, and remanded those appeals to the Court of Appeals for reconsideration of the jurisdictional issue. 495 Mich 986 (2014). The Court of Appeals consolidated the three appeals.

The Court of Appeals *held*:

1. Under MCR 7.203(a)(2), the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a judgment or order of a court or tribunal from which an appeal of right to the Court of Appeals has been established by law or court rule. MCR 3.993(A)(1) states that a party may appeal by right an order of disposition placing a minor under the supervision of the

court or removing the minor from the home. Under the language of the court rule, a respondent parent may appeal by right (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home. In context, the word "of" as used in the court rule converts the word "disposition" into an adjectival phrase, modifying the noun "order" to specify that the type or kind of order at issue must be a dispositional order. A respondent parent may not appeal by right any order that removes a minor child from the home, but only an order of disposition that removes a minor child from the home. Therefore, McCarrick was not entitled to appeal by right the removal orders at issue in Docket Nos. 315510 and 317403. Although the Court could have nonetheless treated the claims of appeal in those dockets as applications for leave, it was not necessary to do so because those dockets raised the same issues as those presented in Docket No. 318475, in which the Court of Appeals had already granted leave.

2. Under the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*., a foster care placement may not be ordered in a child protective proceeding in the absence of a determination, supported by clear and convincing evidence, including the testimony of a qualified expert witness, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. The Indian Family Preservation Act (IFPA), MCL 712B.1 *et seq*., states that an Indian child may not be removed, placed in foster care, or remain removed unless an expert witness testifies regarding the active efforts provided to prevent the breakup of the family and the likelihood of damage to the child if he or she is not removed. In this case, the trial court found that the children were likely to suffer harm if McCarrick were to maintain custody. The terms "harm" and "damage" are synonymous for the purposes of the acts at issue. Therefore, the trial court's finding of harm was sufficient to satisfy both ICWA and the IFPA. Nor did the trial court clearly err when it found that the department had made active efforts to prevent the breakup of the family in light of the evidence presented concerning the services offered to McCarrick and the relevance of those services to her situation. Under 25 USC 1912(e) and MCL 712B.15(2), however, ICWA and the IFPA require expert testimony with regard to whether continued custody with the respondent parent is likely to result in serious emotional or physical damage to the child. In this case, although there was testimony indicating that McCarrick was aware that the children were using marijuana and that one child was injecting drugs, there was no testimony concerning potential damage to the children if McCarrick retained custody. Therefore,

the trial court failed to comply with ICWA and the IFPA when it ordered the children removed from McCarrick's care because there was no expert testimony indicating that continued custody by McCarrick was likely to result in serious emotional or physical damage to the children. Remand was necessary for the trial court to determine whether McCarrick's continued custody would result in serious emotional or physical damage to the children. If the trial court could not support its finding with testimony from a qualified expert witness at a hearing on remand, it had to return the children to McCarrick's home. But if a qualified expert witness were to testify that McCarrick's continued custody would result in serious emotional or physical damage to the children, the trial court could continue the children in their placements.

Conditionally reversed and remanded for further proceedings.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — REMOVAL — APPEALS BY RIGHT.

Under MCR 7.203(a)(2), the Court of Appeals has jurisdiction of an appeal of right filed by an aggrieved party from a judgment or order of a court or tribunal from which an appeal of right to the Court of Appeals has been established by law or court rule; with regard to proceedings involving juveniles, MCR 3.993(A)(1) states that a party may appeal by right an order of disposition placing a minor under the supervision of the court or removing the minor from the home; under MCR 3.993(A)(1), a respondent parent in a child protection proceeding may not appeal by right any order that removes a minor child from the home, but only an order of disposition that removes a minor child from the home.

University of Michigan Law School Child Advocacy Law Clinic (by *Joshua B. Kay* and *Vivek S. Sankaran*) and Michigan Indian Legal Services (by *Cameron Ann Fraser*, *Elaine Margaret Barr*, and *James Keedy*) for M. McCarrick.

Brian A. Peppler, Prosecuting Attorney, and *Elizabeth C. Chambers*, Chief Assistant Prosecuting Attorney, for the Department of Human Services.

Elizabeth A. Eggert for the Sault Ste. Marie Tribe of Chippewa Indians.

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

PER CURIAM. This consolidated child welfare dispute involves three dockets. In Docket No. 315510, respondent-mother, M. McCarrick, appeals of right the trial court's March 13, 2013 order removing her three minor children from her home. In Docket No. 317403, McCarrick appeals of right the trial court's June 28, 2013 order removing her minor daughter from her father's care and custody. The child's father is not participating in these appeals. In Docket No. 318475, McCarrick appeals by delayed leave granted[1] the trial court's orders removing the children from her care.

Because the trial court failed to comply with the federal Indian Child Welfare Act (ICWA)[2] and the Michigan Indian Family Preservation Act (the Family Preservation Act),[3] we conditionally reverse and remand for further proceedings.

I. FACTS

A. BACKGROUND FACTS

The children in this case are of Indian heritage and are enrolled members of the Sault Ste. Marie Tribe of Chippewa Indians. On February 26, 2012, the Department of Human Services (the Department) petitioned the trial court to remove the children from McCarrick's care. The Department contended that since 2005, McCarrick had been involved in four abuse or neglect proceedings in which she had physically abused, neglected, improperly supervised, and contributed to the

[1] *In re McCarrick*, unpublished order of the Court of Appeals, entered March 28, 2014 (Docket No. 318475).

[2] 25 USC 1901 *et seq*.

[3] MCL 712B.1 *et seq*.

delinquency of her children. The Department alleged that McCarrick and the children were abusing alcohol, marijuana, cocaine, and heroin in McCarrick's home. The Department detailed the services that it had previously provided to McCarrick.

On February 26, 2013, the trial court issued an interim ex parte order authorizing the Department to remove the children from the home pending a preliminary hearing. The trial court found that leaving the children in the home would be contrary to their welfare. It also found that the Department had made active efforts to prevent the breakup of McCarrick's family, as ICWA and the Family Preservation Act required it to do before the trial court could authorize the children's removal. On February 27, 2013, the trial court adjourned the preliminary hearing to allow the parties to secure counsel and to allow a tribal representative to appear at the removal hearing.

At the March 8, 2013 removal hearing, Jennifer Sheppard, a services specialist for the Department, testified that McCarrick provided the children with inadequate parental supervision because she allowed them to abuse drugs. According to Sheppard, the Department received a complaint that McCarrick allowed her older daughter to smoke marijuana in a car that McCarrick was driving and that the daughter tested positive for marijuana. Sheppard testified that McCarrick's son also smoked marijuana in the home and was on probation for marijuana use. She also stated that McCarrick's son indicated that McCarrick's older daughter was "shooting up." The children told Sheppard that McCarrick was unaware of or ignored their substance abuse in the home.

Sheppard testified that the son disclosed that McCarrick's friend, J. Vincent, also used drugs in the home

and that he had observed Vincent's toddler holding a syringe. Sheppard believed that McCarrick's younger daughter was obtaining drugs from Vincent. According to Sheppard, the Department had investigated McCarrick 10 times in the past 4 years and had substantiated neglect allegations in 2010. McCarrick tested negative for drugs and Sheppard did not believe that McCarrick was supplying the children with drugs. Gary McLeod, the older children's probation officer, testified that the children were on probation for retail fraud, illegal entry, truancy, and violating probation. McLeod testified that McCarrick cooperated with the children's probation.

B. CHILD-REARING PRACTICES WITHIN THE TRIBE

The parties stipulated that Stacey O'Neil was an expert on child-rearing practices within the tribe. O'Neil testified that she works for the Sault Tribe and she provided McCarrick with in-home care services from September to December 2011. O'Neil detailed the services that she provided to McCarrick, including: (1) behavioral health and psychological assessments, (2) random drug screens, (3) assistance with obtaining a personal protection order against her previous partner, (4) financial assistance to obtain housing, (5) services to pay for her utilities, (6) gas vouchers for work transportation, (7) ongoing services through the Department, and (8) parenting services. O'Neil opined that these services qualified as active efforts to prevent the breakup of McCarrick's family. O'Neil testified that she successfully closed McCarrick's case in December 2011 and that she had no further contact with McCarrick.

C. THE TRIAL COURT'S FINDINGS AND CONCLUSIONS

On March 8, 2013, the trial court found that probable cause existed to assume jurisdiction over the children.

The trial court found that the Department proved by clear and convincing evidence that it had made active efforts to prevent the breakup of McCarrick's family, and that continued placement with McCarrick would subject the children to serious emotional or physical damage. The trial court found that O'Neil provided McCarrick with active efforts in December 2011, and that the efforts were not successful because McCarrick actively or passively permitted the children to use drugs.

The trial court found that McCarrick's continued custody of the children was likely to result in serious emotional or physical damage to the children, and that it was dangerous to the children to remain in her care. It placed the children with the Department for care and supervision.

D. THE SUPPLEMENTAL PETITIONS AND SECOND REMOVAL HEARING

On May 2, 2013, the Department filed a supplemental petition against McCarrick. According to the Department, McCarrick maintained contact with the older daughter despite the trial court's order restricting their contact to supervised visitation. According to the Department, the younger daughter told McCarrick that she was suicidal and wanted to run away from her placement, but McCarrick did not report this to anyone. The Department alleged that the younger daughter later ran away and attempted suicide. The Department also alleged that in April 2013, Children's Protective Services workers found McCarrick's home in a "deplorable" condition and McCarrick acknowledged that drug users were living in her home.

On June 7, 2013, the Department petitioned to remove the older daughter from her father's care. The

Department asserted that the child's father was incarcerated for assault and was unable to care for the child. On June 26, 2013, the trial court held a hearing on whether to remove the older daughter from her father's care. O'Neil testified about the services that she provided to the father. The trial court noted that the child was removed from McCarrick's care by a previous court order, and found that its previous determinations regarding active efforts and the potential harm to the children supported continuing their removal.

E. PROCEDURAL HISTORY

As previously discussed, McCarrick filed her initial appeals in Docket Nos. 315510 and 317403 as of right. This Court dismissed both appeals, reasoning that nondispositional removal orders are not appealable in this Court as of right.[4] McCarrick sought leave to appeal this Court's dismissals in the Michigan Supreme Court.

In Docket No. 318475, McCarrick applied in this Court for delayed leave to appeal the trial court's removal orders. On March 28, 2014, in Docket No. 318475, this Court granted McCarrick's application for leave to appeal.

On April 11, 2014, the Michigan Supreme Court vacated this Court's judgment in Docket No. 315510 and directed us to reconsider our dismissal in light of unpublished decisions from this Court:

> [W]e vacate the February 18, 2014 judgment of the Court of Appeals, and we remand this case to the Court of Appeals for its reconsideration of the respondent's jurisdictional issue, in light of *In re White*, unpublished opinion per

[4] *In re McCarrick/Lamoreaux*, unpublished opinion per curiam of the Court of Appeals, issued February 18, 2014 (Docket No. 315510); *In re McCarrick*, unpublished order of the Court of Appeals, entered September 16, 2013 (Docket No. 317403).

> curiam of the Court of Appeals, issued December 19, 2013 (Docket No. 313770); *In re McClain/Waters/Skinner*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 302460); and *In re Klemkow*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2010 (Docket No. 295488).[5]

The Michigan Supreme Court also vacated this Court's dismissal order in Docket No. 317403 and remanded the case for consideration of the same issue.[6]

On remand, McCarrick describes the jurisdictional question at issue here as follows:

> MCR 3.993(A)(1) permits an appeal by right to the Court of Appeals of "an order of disposition placing a minor under the supervision of the court or removing the minor from the home." This Court previously dismissed Ms. McCarrick's appeals by right of removal orders issued after preliminary hearings because the appealed orders were not orders of disposition issued under MCR 3.973. Yet in other recent cases, this Court has decided such cases on the merits. Does MCR 3.993(A)(1) afford appeals by right of removal orders issued after preliminary hearings?[7]

II. INTERPRETATION OF MCR 3.993(A)(1)

A. OVERVIEW

MCR 7.203(A)(2) provides that this Court may hear appeals of right from "[a] judgment or order of a court or tribunal from which appeal of right to the Court of Appeals has been established by law or court rule." MCR 3.993(A)(1) provides that a party may appeal by right "an order of disposition placing a minor under the supervision of the court or removing the minor from the home[.]"

---

[5] *In re McCarrick/Lamoreaux*, 495 Mich 986 (2014).

[6] *In re McCarrick*, 495 Mich 986 (2014).

[7] Emphasis omitted.

To answer the question presented on appeal, this Court must decide the meaning of the phrase "an order of disposition placing a minor under the supervision of the court or removing the minor from the home[.]" MCR 3.993(A)(1). McCarrick contends that that this phrase means that a respondent parent may appeal *as of right* "an order . . . removing the minor from the home." In other words, McCarrick contends that the clause "of disposition" modifies the clause "placing a minor under the supervision of the court" rather than the previous clause "an order." Therefore, under McCarrick's reading, a parent could appeal by right *either* (1) *an order of disposition* that places a minor under the supervision of the court, or (2) *an order* removing the minor from the home.

For the reasons set forth in this opinion, we disagree. We conclude that MCR 3.993(A)(1) provides that a respondent parent may appeal by right (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home. Thus, we conclude that the order involved must be an *order of disposition*. Accordingly, we conclude that McCarrick is not entitled to an appeal of right in Docket Nos. 315510 and 317403 because neither order was an order of disposition.

B. STANDARD OF REVIEW

This Court reviews de novo the scope of this Court's jurisdiction.[8] This Court reviews de novo questions of law, including the interpretation and application of our court rules.[9]

---

[8] *Chen v Wayne State Univ*, 284 Mich App 172, 191; 771 NW2d 820 (2009).

[9] *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

C. RULES OF INTERPRETATION

This Court interprets court rules using the "same principles that govern the interpretation of statutes."[10] Our purpose when interpreting court rules is to give effect to the intent of the Michigan Supreme Court.[11] The language of the court rule itself is the best indicator of intent.[12] If the plain and ordinary meaning of a court rule's language is clear, judicial construction is not necessary.[13]

When interpreting a court rule, we must read the rule's provisions "reasonably and in context."[14] We should not read court rules in isolation.[15] Generally, this Court affords every word and phrase in a court rule its plain and ordinary meaning.[16] But when the Michigan Supreme Court chooses a word that has acquired "a peculiar and appropriate meaning in the law," we must construe that term according to its legal meaning.[17] We construe identical language in various provisions of the same rule identically.[18] And we read different rules that share the same subject or share a common purpose together as one law.[19]

---

[10] *Ligons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

[11] *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 528-529; 672 NW2d 181 (2003).

[12] See *US Fidelity & Guaranty Co v Mich Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

[13] See *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

[14] See *McCahan v Brennan*, 492 Mich 730, 739; 822 NW2d 747 (2012).

[15] See *id*. at 740.

[16] See *United States Fidelity & Guaranty Co*, 484 Mich at 13.

[17] See *Feyz v Mercy Mem Hosp*, 475 Mich 663, 673; 719 NW2d 1 (2006).

[18] See *Robinson v Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010).

[19] See *Sinicropi v Mazurek*, 273 Mich App 149, 157; 729 NW2d 256 (2006).

When interpreting a court rule, we must presume that every word has some meaning.[20] Therefore, we must avoid any interpretation that renders any part of the court rule surplusage or nugatory.[21] This Court must give effect to every sentence, phrase, clause, and word in a court rule.[22] If at all possible, this Court should interpret a court rule to avoid inconsistencies.[23]

D. BACKGROUND LAW

1. CHILD PROTECTIVE PROCEEDINGS

Child protection law is procedurally complex. The family division of the circuit court has jurisdiction over minors whose parents or persons responsible for their care neglect or fail to support them or whose homes are unfit places to live.[24] A child protective proceeding typically commences with the child's emergency removal from the home, or a petition filed with the family division of the circuit court to remove the child from the home.[25] When the child is removed from the home on an emergency basis, the Department must contact a judge or referee "immediately" to seek an ex parte placement order.[26] Generally, if the child is taken into protective custody, the trial court must hold a hearing within 24 hours.[27] But the trial court may adjourn the hearing for the purpose of securing an attorney, parent, or legal

---

[20] See *Hoste v Shanty Creek Mgt, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999).

[21] See *id*.

[22] See *US Fidelity*, 484 Mich at 13.

[23] See *Nowell v Titan Ins Co*, 466 Mich 478, 482-483; 648 NW2d 157 (2002).

[24] MCL 712A.2(b).

[25] MCR 3.963.

[26] MCR 3.963(A)(3).

[27] MCR 3.965(A)(1); MCL 712A.13a(2).

guardian, for up to 14 days to obtain a witness, or for up to 21 days to provide notice to the child's tribe if the child is an Indian child.[28]

2. INDIAN CHILDREN

If the child is an Indian child, MCR 3.967(A) provides that a removal hearing must be held within 14 days of the child's removal from the home unless the child's parent or Indian custodian has requested an additional 20 days.[29] The trial court may remove an Indian child from the child's parent or Indian custodian, or the child may remain removed,

> only upon clear and convincing evidence, including the testimony of at least one qualified expert witness . . . who has knowledge about the child-rearing practices of the Indian child's tribe, that active efforts as defined in MCR 3.002 have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that these efforts have proved unsuccessful, and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[30]

3. PRELIMINARY HEARINGS

The trial court may combine the removal hearing with the preliminary hearing.[31] At the preliminary hearing, "the court must decide whether to authorize the filing of the petition and, if authorized, whether the child should remain in the home, be returned home, or be placed in foster care pending trial."[32] If the trial court

---

[28] MCR 3.965(B)(1) and (10).

[29] MCR 3.967(A).

[30] MCR 3.967(D).

[31] See MCR 3.967(E).

[32] MCR 3.965(B)(11).

authorizes the petition at the preliminary hearing, the trial court may release the child to a parent, guardian, or legal custodian, or "may order placement of the child . . . ."[33]

The trial court "may order placement of the child into foster care if the court finds all of the following:"

> (a) Custody of the child with the parent presents a substantial risk of harm to the child's life, physical health, or mental well-being.
>
> (b) No provision of service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from the risk as described in subrule (a).
>
> (c) Continuing the child's residence in the home is contrary to the child's welfare.
>
> (d) Consistent with the circumstances, reasonable efforts were made to prevent or eliminate the need for removal of the child.
>
> (e) Conditions of child custody away from the parent are adequate to safeguard the child's health and welfare.[34]

If the trial court orders placement of the child in foster care, it must make (1) an explicit finding that placement in the child's home is contrary to the child's welfare and (2) the reasonable efforts findings outlined earlier in this opinion.[35]

4. DISPOSITIONAL HEARINGS

After the preliminary hearing, the case progresses either by the parent's plea of admission or no contest to the allegations in the petition[36] or by a trial on the

---

[33] MCR 3.965(B)(12).

[34] MCR 3.965(C)(2). See also MCL 712A.13a(9).

[35] MCR 3.965(C)(3) and (4).

[36] MCR 3.971.

allegations in the petition.[37] Following a plea or trial, the trial court conducts a dispositional hearing to determine what actions to take with respect to the child or any adult.[38] "When the child is in placement, the interval [to the dispositional hearing] may not be more than 28 days, except for good cause."[39] The trial court must find whether the Department made reasonable efforts to prevent the child's removal or return the child to the home.[40] Following the hearing, "[t]he court shall enter an order of disposition . . . ."[41]

If the trial court does not terminate its jurisdiction over the child at the dispositional hearing, the trial court must "follow the review procedures of MCR 3.975 for a child in placement[.]"[42] MCR 3.975 provides dispositional review procedures that the trial court must follow if a child is in foster care. Under MCR 3.975(F)(1), the trial court must evaluate the case service plan and the parent's progress with services. The trial court must also consider "any likely harm to the child if the child continues to be separated from his or her parent, guardian or custodian," "any likely harm to the child if the child is returned to the parent, guardian, or legal custodian," and "if the child is an Indian child, whether the child's placement remains appropriate . . . ."[43] Following dispositional review, the trial court may return the child home, change the child's placement, modify the case service plan, or modify, continue, or replace the dispositional order.[44]

---

[37] MCR 3.972.

[38] MCR 3.973(A).

[39] MCR 3.973(C).

[40] MCR 3.973(F)(3).

[41] MCR 3.973(F)(1).

[42] MCR 3.973(G).

[43] MCR 3.975(F)(1)(e), (f), and (g).

[44] MCR 3.973(G).

E. UNPUBLISHED OPINIONS

1. *KLEMKOW*

The Michigan Supreme Court has instructed this Court to consider McCarrick's jurisdictional issue in light of three unpublished opinions of this Court. In the first opinion, *Klemkow*, the respondent-mother appealed as of right the trial court's order terminating her parental rights to her minor children.[45] The mother attempted to challenge the Department's alleged failure to comply with its obligation to notify the court of what efforts it made to prevent the child's removal.[46] The *Klemkow* Court concluded that the issue was not properly before the Court because it was an improper collateral attack:

> Respondent could have directly appealed the September 2007 order removing the child. MCR 3.993(A)(1). She did not do so and cannot now collaterally challenge that decision in this appeal from the October 2009 termination order.[47]

The remainder of the *Klemkow* decision did not concern the Court's jurisdiction under MCR 3.993.

2. *McCLAIN/WATERS/SKINNER*

In the second opinion, *McClain/Waters/Skinner*, a panel of this Court considered two consolidated appeals, one in which the respondent "appeal[ed] as of right . . . the trial court's January 25, 2011, order denying her objections to the court's preliminary hearing decision . . . continuing the children's placement outside respondent's home pending a trial on the petition," and

---

[45] *Klemkow*, unpub op at 1.

[46] *Id*.

[47] *Id*.

one in which the respondent "appeal[ed] as of right from the trial court's February 24, 2011, initial dispositional order in which the court determined that it had jurisdiction over the children . . . ."[48] The *McClain*/*Waters*/*Skinner* Court did not address the respondent-mother's arguments regarding the trial court's probable cause finding at the preliminary hearing because it determined that the trial court subsequently acquired jurisdiction over the children, rendering the probable cause issue moot.[49]

However, the Court did consider the trial court's order removing the children from the home at the preliminary hearing. The trial court reasoned that

> [t]he trial court's exercise of jurisdiction over the children pursuant to the fathers' pleas did not render the removal decision moot. Indeed, it was the removal of the children from the home that enabled respondent to file an appeal as of right in Docket No. 302460. See MCR 3.993(A).[50]

The *McClain*/*Waters*/*Skinner* Court did not otherwise consider MCR 3.993(A).

3. *WHITE*

In the third opinion, *White*, a panel of this Court considered two consolidated appeals, one in which the respondent "appeal[ed] as of right the trial court's removal order and the preliminary order authorizing a petition for temporary jurisdiction over the minor child[,]" and the other in which the respondent "directly appeal[ed] as of right the trial court's initial dispositional order in which the court determined that

---

[48] *McClain*/*Waters*/*Skinner*, unpub op at 1.

[49] *Id*. at 2.

[50] *Id*.

it had jurisdiction over the child."[51] The *White* Court determined that the trial court applied the correct legal standard and satisfied the statutory requirements when it removed the minor child from the respondent-mother's care.[52]

The *White* Court appears to have assumed that this Court had jurisdiction to hear an appeal from an order removing the child as an appeal of right. There is no indication that either party raised the issue, and the *White* Court at no point in its analysis considered its jurisdiction under MCR 3.993.

4. CONCLUSION REGARDING UNPUBLISHED OPINIONS

We conclude that the three unpublished opinions are neither helpful nor instructive in determining the meaning of MCR 3.993(A)(1). In each of these opinions, prior panels of this Court have assumed—without deciding—that this Court has jurisdiction to hear an appeal from an order removing a child from the home as an appeal of right. There is no indication in any of these cases that the parties raised, or that this Court considered sua sponte, the issue of the extent of this Court's jurisdiction under MCR 3.993(A)(1).

Further, each of these appeals concerned, or was consolidated with, an order from which a respondent parent unquestionably had an appeal of right: in *Klemkow*, the order terminating parental rights,[53] and in *McClain*/*Waters*/*Skinner* and *White*, the first dispositional order after the trial court removed the child from

[51] *White*, unpub op at 1.

[52] *Id*. at 4.

[53] MCR 3.993(A)(2).

the home.[54] Accordingly, even if this Court did not have jurisdiction to hear the parents' appeals of the initial order removing the children from their home as of right, the Court certainly had the authority to hear and address the parties' issues with the prior removal proceedings in the first appeal as of right. We are unable to find a case in which this Court considered an appeal from the order removing the children *alone*, on its own merits, as compared to those circumstances in which the respondent parent also had an appeal of right.

F. INTERPRETING MCR 3.993(A)(1)

1. OVERVIEW

MCR 3.993(A)(1) allows an appeal of right of "an order of disposition placing a minor under the supervision of the court or removing the minor from the home[.]" This phrase has several constituent clauses. On the basis of the interaction of these clauses, McCarrick contends that MCR 3.993(A)(1) allows a respondent parent to appeal as of right "an order . . . removing the minor from the home." McCarrick asserts that the clause "of disposition" must modify the clause "placing a minor under the supervision of the court" rather than the clause "an order." McCarrick asserts that any other interpretation will render the phrase "placing a minor under the supervision of the court" surplusage because the trial court *never* places a minor under the court's supervision without also removing the child from the home.

---

[54] *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008); *In re Gazella*, 264 Mich App 668, 680; 692 NW2d 708 (2005) (stating that the initial dispositional order contains a finding that the adjudication was held, that the children come within the jurisdiction in the court, and places the children out of the home, that order is appealable as of right).

2. ORDER OF DISPOSITION

In order to resolve this question, we must consider the meaning and interaction of each clause in MCR 3.993(A)(1). One of the primary questions on appeal is whether the first clause is simply "an order" or "an order of disposition." We conclude that the more natural reading of the first clause of MCR 3.993(A)(1) is that the order appealed must be an "order of disposition."

First, our reading is consistent with the grammar of the clause. Generally, an order is "[a] command, direction or instruction," or "[a] written direction or command delivered by a court or judge."[55] The word "of" typically indicates possession or association.[56] The word "of" is also used as a preposition to "indicate inclusion in a number, class or whole," such as in the phrase "one of us," or to "indicate qualities or attributes," such as in the phrase "a woman of courage."[57]

It is not grammatically correct to split the clauses of MCR 3.993(A)(1) into two sections between the word "order" and the word "of." This split would make the clause "of disposition placing a minor under the supervision of the court" start with a preposition and read awkwardly. Further, as we have explained, the placement of the word "of" between the noun "order" and the noun "disposition" typically indicates either that the second noun is included in a class of, or is a quality of, the first noun. In context, the word "of" converts the word "disposition" into an adjectival phrase, modifying the noun "order" to specify that the type or kind of order is a *dispositional* order.

---

[55] *Black's Law Dictionary* (9th ed).

[56] *Farmers Ins Exch v Farm Bureau Gen Ins Co of Mich*, 272 Mich App 106, 113; 724 NW2d 485 (2006).

[57] *Random House Webster's College Dictionary* (1997) (emphasis omitted).

Second, this reading is consistent with the context of the rule. The words "order of disposition" appear as a single phrase in another portion of the court rules concerning child protective proceedings. Specifically, the court rules provide that, at the dispositional hearing, "[t]he court shall enter an order of disposition . . . ."[58] There is no question in that rule, the phrase "order of disposition" means that the type of order is a *dispositional* order.

Finally, this reading is consistent with this Court's prior interpretation of the meaning of this clause. In *SLH*, this Court noted that "an initial order of disposition is the first order appealable as of right . . . ."[59] While this statement was not crucial to the holding of the case and was thus dictum,[60] the Court's reading in *SLH* illustrates that this Court has previously interpreted MCR 3.993(A)(1) to require a *dispositional order* for an appeal of right.

Therefore, this clause, examined on its own, indicates that a parent may only appeal as of right "an order of disposition," not merely an order. However, we cannot consider this clause in isolation. We must consider the other clauses in the phrase to determine whether this interpretation renders portions of MCR 3.993(A)(1) surplusage.

3. TYPES OF CASES TO WHICH MCR 3.993 APPLIES

We first note that MCR 3.993 does not apply *solely* to child protective proceedings. Chapter 3 of the Michigan Court Rules concerns several types of spe-

[58] MCR 3.973(F)(1).

[59] *In re SLH*, 277 Mich App at 669 n 13.

[60] See *Griswold Props, LLC v Lexington Ins Co*, 276 Mich App 551, 557-558; 741 NW2d 549 (2007).

cial proceedings, and Subchapter 3.900 more specifically concerns a variety of special proceedings involving juveniles. Subjects included in Subchapter 3.900 are not only child protective proceedings, but also juvenile delinquency proceedings,[61] juvenile waiver proceedings and other designated proceedings in which a juvenile is tried as an adult for a crime,[62] juvenile guardianships,[63] and personal protection orders against minors.[64] MCR 3.993 *specifically* applies to *both* delinquency and child protective proceedings.[65] Accordingly, we will discuss both types of proceedings in this opinion.

4. PLACING A MINOR UNDER THE SUPERVISION OF THE COURT

a. OVERVIEW

At oral argument, counsel for McCarrick indicated that the standard interpretation of the phrase "placing a minor under the supervision of the court" is that the trial court places the child under court supervision when the trial court exercises jurisdiction over the child. However, we conclude that this is not the plain meaning of this phrase.

b. CHILD PROTECTIVE PROCEEDINGS

As can be seen in the background law section of this opinion, the trial court does not place a minor "under the supervision of the court" in child protection law. Rather, it places the child in the parent's home, out of

---

[61] See MCR 3.931.

[62] See MCR 3.950 and MCR 3.951.

[63] See MCR 3.979.

[64] See MCR 3.981.

[65] MCR 3.901(B)(1).

the home, or in foster care.[66] MCR 3.921 states that the trial court shall notify "the *agency* responsible for the care and supervision of the child" regarding dispositional review hearings.[67] Other court rules indicate that the agency is "responsible for the care and supervision of the child" as well.[68]

c. JUVENILE DELINQUENCY PROCEEDINGS

In juvenile delinquency proceedings, the trial court issues orders of disposition.[69] It may place the minor "under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile," and it may "order the terms and conditions of probation or supervision . . . ."[70] The trial court may also "place the juvenile in a suitable foster care home subject to the court's supervision."[71] Finally, the trial court may place the juvenile in a private or public agency, institution, or facility.[72]

Accordingly, we conclude that we need not determine the common usage of the phrase "under the supervision of the court." Instead, on the basis of the context in which the phrase is used in MCR 3.993(A)(1) and its placement in the general scheme of the court rules, we conclude that it means exactly what it says: a trial court places a minor under the supervision of the court when the trial court *orders* the minor placed under the supervision of the court. The trial court may place a

---

[66] See MCR 3.965(B)(11); MCR 3.973(G).

[67] MCR 3.921(B)(2)(a) (emphasis added).

[68] MCR 3.973(E)(2) and (F)(3). See also MCR 3.975(C)(2).

[69] MCL 712A.18(1).

[70] MCL 712A.18(1)(b). See also MCL 712A.18(2).

[71] MCL 712A.18(1)(c).

[72] MCL 712A.18(1)(d) and (e).

minor under the supervision of the court in juvenile delinquency proceedings, and it does so by issuing an order of disposition.

5. REMOVING A MINOR FROM THE HOME

a. CHILD PROTECTIVE PROCEEDINGS

The trial court may remove a minor from the home in both child protection and juvenile delinquency proceedings. In child protective proceedings, the trial court may remove the minor from the home through the use of an order before or after an emergency removal,[73] at the preliminary hearing,[74] or at a dispositional review hearing.[75] If the trial court removes the child before the initial dispositional hearing and does not terminate its jurisdiction in its dispositional order, it must review its placement decision under MCR 3.975.[76]

b. JUVENILE DELINQUENCY PROCEEDINGS

In juvenile delinquency proceedings, the trial court may also issue an order of disposition removing the minor from the home,[77] and it may "place the juvenile in a suitable foster care home subject to the court's supervision"[78] or in a public or private institution, agency, or facility.[79]

Accordingly, there is no conflict regarding the meaning of the phrase "removing the child from the home."

---

[73] MCR 3.963.

[74] MCR 3.965(B)(11).

[75] MCR 3.975(G).

[76] MCR 3.966(2) and MCR 3.973(G)(1).

[77] MCL 712A.18(1)(c), (d), and (e).

[78] MCL 712A.18(1)(c).

[79] MCL 712A.18(1)(c), (d), and (e).

The trial court removes the child from the home when the trial court places the child in a location outside the parent's home.

6. INTERACTION OF THE COMPONENT CLAUSES

McCarrick contends that requiring a parent to appeal from a dispositional order renders portions of MCR 3.993(A)(1) surplusage because every order of disposition removing the minor from the home is also an order of disposition that places the minor under the supervision of the court. We disagree.

McCarrick's assertion rests on the asserted common understanding of the phrase "placing a minor under the supervision of the court." McCarrick asserted at oral arguments that attorneys commonly understand this phrase to mean that the trial court places a minor under the supervision of the court when it exercises its jurisdiction over the child. But for the reasons previously stated, we conclude that the Michigan Supreme Court did not refer to this common understanding when it used this phrase. Reading MCR 3.993 in context with the statutes that govern the types of actions to which it applies, we conclude that the Michigan Supreme Court used the phrase "placing a minor under the supervision of the court" to refer to the specific action the trial court may take in a juvenile delinquency proceeding.

Accordingly, we reject McCarrick's assertion that our more natural reading of MCR 3.993(A)(1)—requiring the order appealed by right to be a dispositional order—renders portions of MCR 3.993(A)(1) surplusage. MCR 3.993 applies to both juvenile delinquency and child protective proceedings. In juvenile delinquency proceedings, the trial court may issue an order of disposition that (1) places a minor under the supervision of the court, (2) places the minor outside the home, or (3) does

both. The more natural reading of MCR 3.993(A)(1)—that a parent may appeal as of right (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home—does not render any portion of MCR 3.993 surplusage.

7. PRACTICAL CONCERNS

McCarrick asserts that it is imperative that this Court interpret MCR 3.993 in a fashion that allows a parent to appeal the child's removal as of right because it will lead to speedy review of removal issues. We do not disagree with the importance of the trial court's removal decision and the impact that such a decision can have on the child's well-being and the progress of the case. However, as *McClain*/*Waters*/*Skinner* and *White* illustrate, claiming an appeal of right from the order removing the child from the home is not likely to result in a faster resolution than claiming an appeal of right from the first dispositional order. Further, a respondent parent may file an application for leave to appeal the trial court's removal decision,[80] and may file the application on an emergency basis in appropriate cases.[81]

8. CONCLUSION

We conclude that MCR 3.993(A)(1) requires the order appealed to be an order of disposition. Therefore, a respondent parent may appeal (1) an order of disposition that places a minor under the supervision of the court, or (2) an order of disposition that removes the minor from the home. But a respondent parent may not

[80] See MCR 3.993(B).

[81] See MCR 7.205(F).

appeal by right *any* order that removes the minor from the home. The order must be an order *of disposition*.

Accordingly, we conclude that McCarrick was not entitled to appeal by right the trial court's removal orders following the preliminary hearings in Docket Nos. 315510 and 317403. While this Court could, at its discretion, grant leave in these dockets to address McCarrick's substantive issues, we conclude that it is not necessary to do so because those dockets raise the same issues that McCarrick raises in Docket No. 318475, in which this Court has already granted leave.

III. ORDER REMOVING THE INDIAN CHILDREN

In Docket No. 318475, this Court granted McCarrick's delayed application for leave to appeal the substantive issues she raised in Docket Nos. 315510 and 317403 regarding the sufficiency of the trial court's order removing the children from her home under ICWA and the Family Preservation Act. This Court granted McCarrick's application limited to the issues raised in the application and supporting brief. McCarrick's application challenged both the sufficiency and substance of the trial court's findings at both the March 8, 2013 and the June 26, 2013 removal hearings. We conclude that the trial court erred when it removed McCarrick's children from the home without any testimony from a qualified expert witness regarding the potential damage to the children.

A. STANDARD OF REVIEW

This Court reviews de novo issues of law, including the interpretation and application of ICWA and the

Family Preservation Act.[82] We review for clear error the trial court's findings of fact underlying the legal issues.[83] A finding is clearly erroneous if, after reviewing the entire record, we are definitely and firmly convinced that the trial court made a mistake.[84]

B. LEGAL STANDARDS

Congress enacted ICWA in 1978 to respond to abusive child welfare practices that separated large numbers of Indian children from their families and harmed the children, their parents, and the Indian tribes.[85] "ICWA establishes various substantive and procedural protections intended to govern child custody proceedings involving Indian children."[86] ICWA requires the trial court to consider the testimony of a qualified expert witness to determine whether the Indian child is likely to be seriously damaged if he or she remains in the parent's care:

> No foster care placement may be ordered in such proceeding in the absence of a determination, supported by clear and convincing evidence, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[87]

On January 2, 2013, the Family Preservation Act became effective.[88] The Family Preservation Act pro-

---

[82] *In re JL*, 483 Mich 300, 318; 770 NW2d 853 (2009); *In re Morris*, 491 Mich 81, 97; 815 NW2d 62 (2012).

[83] *Morris*, 491 Mich at 97.

[84] *In re Mason*, 486 Mich 142, 152; 782 NW2d 747 (2010).

[85] *Morris*, 491 Mich at 97-98.

[86] *Id*. at 99.

[87] 25 USC 1912(e).

[88] 2012 PA 565.

vides that an Indian child may not be removed, placed in foster care, or remain removed unless an expert witness testifies regarding the active efforts provided to prevent the breakup of the family and the likelihood of damage to the child if he or she is not removed:

> An Indian child may be removed from a parent or Indian custodian . . . only upon clear and convincing evidence, that includes testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe, that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family, that the active efforts were unsuccessful, and that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.[89]

C. SERIOUS EMOTIONAL OR PHYSICAL DAMAGE

First, McCarrick contends that the trial court's findings were not sufficient because it only found that the children were likely to suffer harm, not that the children were likely to suffer damage. We conclude that the trial court's finding complied with both ICWA and the Family Preservation Act. McCarrick provides no authority from which this Court could conclude that "harm" and "damage" are different things. As commonly defined, the word "harm" means "injury or damage," the word "injury" means "harm or damage done or sustained," and the word "damage" means "injury or harm that reduces value, usefulness, etc."[90] Given that each of these words refers to the other in its definition, we conclude that these words are synonymous for the purposes of these acts. Therefore, we

---

[89] MCL 712B.15(2).

[90] *Random House Webster's College Dictionary* (1997).

conclude that the trial court's finding of harm was sufficient to satisfy both ICWA and the Family Preservation Act.

Next, McCarrick contends that the trial court failed to comply with ICWA and the Family Preservation Act when it ordered the children removed from McCarrick's care because O'Neil did not opine about whether McCarrick's continued custody was likely to result in serious emotional or physical damage to the children. We agree.

Both ICWA and the Family Preservation Act provide that the trial court may not place an Indian child in foster care without a determination in that regard supported by the testimony of a qualified expert witness. ICWA provides that "[n]o foster care placement may be ordered in such proceeding in the absence of a determination, . . . *including testimony of qualified expert witnesses*, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[91] Similarly, MCL 712B.15(2) provides that the trial court may remove an Indian child "only upon clear and convincing evidence, *that includes* the testimony of at least 1 expert witness who has knowledge of child rearing practices of the Indian child's tribe, that . . . the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." (Emphasis added.)

We note that, according to the Bureau of Indian Affairs, one of the major purposes of the qualified expert witness is to "speak specifically to the issue of whether continued custody . . . is likely to result in

[91] 25 USC 1912(e) (emphasis added).

serious physical or emotional damage to the child."[92] While agency interpretations are not binding and cannot conflict with the plain language of the statute, such interpretations are entitled to respectful consideration.[93] Further, this Court and other courts have recognized that one of the purposes of the expert witness is to diminish the risk of cultural bias in the proceedings.[94]

In this case, O'Neil testified at the hearing regarding the efforts provided to McCarrick and the success of those efforts. However, O'Neil did not testify about the possible damage to the children. Sheppard, who was not an expert on the child-rearing practices in the children's tribe, testified that one of the children indicated that one of the other children was "shooting up drugs." Sheppard also testified that one of the children told her that McCarrick was aware that the children were using marijuana and only asked them not to smoke in the house. But Sheppard, like O'Neil, failed to testify regarding the possibility of emotional or physical damage to the children if McCarrick retained custody.

While it may appear obvious that drug use has the potential to damage children, ICWA and the Family Preservation Act require the trial court's determination of damage to include the testimony of a qualified expert witness. *Here, there was simply no testimony in that regard, much less testimony by O'Neil, the qualified expert witness.* We conclude that the trial court's deter-

---

[92] Bureau of Indian Affairs, *Guidelines for State Courts*; *Indian Child Custody Proceedings*, 44 Fed Reg 67584, 67593, § D.4(a) (November 26, 1979).

[93] See *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103; 754 NW2d 259 (2008).

[94] See *In re Elliott*, 218 Mich App 196, 207; 554 NW2d 32 (1996). See also, e.g., *In re NL*, 754 P2d 863, 867-868 (Okla, 1988); *State ex rel Lane Co Juvenile Dep't v Tucker*, 765 Or App 673, 682-683; 710 P2d 793 (1985).

mination regarding the damage to the children did not comply with ICWA or the Family Preservation Act because the trial court's determination of damage did not include the testimony of a qualified expert witness.

D. ADDITIONAL ISSUES

McCarrick contends that the trial court erred by continuing the children's removal with the June 26, 2013 order without considering whether the children were at a continued risk of damage. Given our conclusion regarding the trial court's March 8, 2013 removal order, we need not address this issue.

McCarrick also contends that the trial court's "active efforts" findings[95] were insufficient under the Family Preservation Act. We disagree.

"The timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation."[96] McCarrick contends that there was no evidence (1) that the Department made active efforts to address substance abuse, and (2) of the timing of the services. However, O'Neil testified that she provided the services from September 2011 to December 2011. And the Department never alleged that McCarrick abused substances. The Department alleged that McCarrick improperly supervised the children, who were abusing substances. O'Neil testified about the extensive services McCarrick received in 2011, including behavioral health and parenting services. These types of services target a parent's parenting ability, which is directly relevant to whether the Department made active efforts to assist McCarrick to properly supervise the children. The ser-

[95] See MCR 3.002.

[96] *JL*, 483 Mich at 325.

vices occurred a little more than a year before the inception of the current case.

Accordingly, we conclude that the trial court did not clearly err when it found that the Department made active efforts to prevent the breakup of McCarrick's family. O'Neil's testimony provided evidence about the timing of the services and the relevance of the services to McCarrick's situation.

Finally, McCarrick contends that the evidence was insufficient to support the trial court's active-efforts finding because no one testified regarding each element of the active-efforts definition as set forth in MCL 712B.3(a). That statute defines active efforts through a list of twelve elements, which identify things the Department must do or address in order to engage in active efforts. McCarrick contends that there was no evidence that the Department complied with several elements, such as using culturally appropriate services or having the child's tribe evaluate McCarrick's family. O'Neil, however, testified that she works for the Sault Tribe of Chippewa Indians and had provided McCarrick with referrals to Sault Tribe Behavioral Health and other extensive services. Having reviewed O'Neil's testimony, we conclude that the trial court had sufficient evidence from which to conclude that the Department had complied with MCL 712B.3(a).

E. REMEDY

McCarrick contends that the trial court's failure to comply with ICWA and the Family Preservation Act renders the trial court's removal invalid. We conclude that conditional reversal is an appropriate remedy in this case.

ICWA provides that "[a]ny Indian child who is the subject of any action for foster care placement . . . [and]

any parent or Indian custodian . . . may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of [25 USC 1912]."[97] The Family Preservation Act provides the same remedy for a violation of MCL 712B.15.[98] In cases in which the trial court has violated ICWA by failing to provide the child's tribe with notice, this Court conditionally reverses.[99]

McCarrick does not provide any argument to support her contention that this Court should automatically reverse in this case. We note that the provisions of ICWA and the Family Preservation Act at issue in this case are not jurisdictional requirements.[100] Automatic reversal is also not consistent with this Court's disfavor of automatic reversals.[101] And when the trial court improperly removes an Indian child, the trial court need not return the child if doing so would subject the child to a risk of immediate danger.[102] Given that the record evidence includes that one child was injecting drugs and attempted suicide, we decline to automatically reverse the trial court's order in this case because doing so could place the child in danger and this Court is not in a position to determine whether the danger would be immediate.

We conditionally reverse and remand for the trial court to determine whether McCarrick's continued custody would result in serious emotional or physical damage to the children. If the trial court cannot support

---

[97] 25 USC 1914.

[98] MCL 712B.39.

[99] *Morris*, 491 Mich at 122; *In re Johnson*, 305 Mich App 328, 333-334; 852 NW2d 224 (2014).

[100] See *Morris*, 491 Mich at 118-119.

[101] *Id*. at 120.

[102] 25 USC 1920; *Morris*, 491 Mich at 118.

its finding with testimony from a qualified expert witness at a hearing, it must return the children to McCarrick's home. But if a qualified expert witness testifies that McCarrick's continued custody would result in serious emotional or physical damage to the children, the trial court may continue the children in their current placements.

IV. COURT RULE CHANGE

We also suggest that the Supreme Court consider modifying MCR 3.993 in order to permit a parental appeal of right, at least under some circumstances, from a removal order when a child is removed from his or her parents at a stage prior to adjudication.

When a parent's action or neglect sufficiently threatens a child's safety to justify removal at the outset of a child protective proceeding, it is neither surprising nor objectionable that such removal would correlate with a higher likelihood of termination. However, as several recent cases have shown, the decision to remove a child can substantially affect the balance of the child protective proceedings even when the initial concerns are eventually determined to have been overstated.[103] In such cases, the parent may find his or her parental rights terminated not because of neglect or abuse, but because of (1) a failure to adequately comply with the Department's directives and programs and (2) a loss of bonding because of a lack of parental visitation.

Permitting a parent to appeal a removal order as a matter of right may be one way to minimize the likelihood of this unfortunate occurrence. But this

[103] See *In re Sanders*, 495 Mich 394; 852 NW2d 524 (2014); *In re Farris*, unpublished opinion per curiam of the Court of Appeals, issued August 8, 2013 (Docket No. 311967), lv gtd 497 Mich 864 (2014); *In re LaFrance*, 306 Mich App 713; 858 NW2d 143 (2014).

Court does not have rulemaking authority; that authority lies solely with the Michigan Supreme Court.[104] That Court has the power to issue proposed rules, obtain comment from the bench, bar, and broader community, and then determine as a matter of judicial policy whether and how to modify the relevant procedure. Whether or not the Supreme Court ultimately decides that a rule change is wise, we have little doubt that an inquiry into the question will be of benefit to the children and parents of Michigan.

V. CONCLUSION

In Docket Nos. 315510 and 317403, we conclude that McCarrick is not entitled to appeal as of right the trial court's order removing the child from the home because the order is not a *dispositional order*. In Docket No. 318475, we conclude that the trial court erred when it removed the children from McCarrick's home without testimony from a qualified expert concerning the potential damage to the children.

We conditionally reverse and remand for further proceedings. We do not retain jurisdiction.

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

---

[104] See MCR 1.201.

DECKER v TRUX R US, INC

Docket No. 316479. Submitted September 9, 2014, at Detroit. Decided October 28, 2014, at 9:00 a.m.

James and Kay Decker brought an action in the Oakland Circuit Court against Trux R Us, Inc., seeking damages for injuries sustained by James Decker when he was run over by a bulldozer at a construction site. Auto Owners Insurance Company, the insurer for Trux R Us, sought a declaratory judgment that it had no duty to defend or indemnify Trux R Us. The Deckers were not named as parties in the declaratory judgment action. A default judgment was entered in favor of Auto Owners after Trux R Us failed to respond to the declaratory judgment action. A motion by Trux R Us to set aside the default judgment was denied. The Deckers and Trux R Us then entered into a consent judgment for over $2 million. The consent judgment was subject to an agreement that the Deckers would not execute on the judgment against assets of Trux R Us, but would seek insurance proceeds from the policy issued by Auto Owners to Trux R Us. The Deckers then requested a writ for nonperiodic garnishment in the amount of the consent judgment, naming Auto Owners as the garnishee of Trux R Us. Auto Owners filed a garnishee disclosure on February 21, 2013, indicating that it was not indebted to Trux R Us for any amount and did not possess or control any of its property. On April 4, 2013, Auto Owners filed a motion for summary disposition of the garnishment proceeding, noting the Deckers' failure to contest its garnishee disclosure by filing discovery requests under MCR 3.101(L)(1) within 14 days after service of the disclosure. Auto Owners argued that summary disposition should be granted in its favor and the writ of garnishment should be dismissed with prejudice because the facts stated in its disclosure must be accepted as true as a result of the Deckers' failure to contest the garnishee disclosure. The Deckers responded to Auto Owners' motion and thereafter filed a motion to extend the time to serve written interrogatories on Auto Owners. Auto Owners responded, arguing that the court did not have discretion to extend the time in which discovery could be initiated because the Deckers had failed to contest the garnishee disclosure by filing discovery requests within 14 days after service of the disclosure as required

by MCR 3.101(L)(1). The court, Denise Langford Morris, J., held that the facts stated in the disclosure must be accepted as true and that the Deckers had failed to show good cause to set aside the disclosure. The court entered an order denying the motion to extend the time to serve interrogatories on Auto Owners. The trial court subsequently granted Auto Owners' motion for summary disposition. The Deckers appealed.

The Court of Appeals *held*:

1. The plain language of MCR 3.101(L) and (M) requires that the statements in the garnishee disclosure must be accepted as true when a plaintiff fails to request discovery.

2. While MCR 3.101(L) and (M) provide a deadline for when a plaintiff must serve the interrogatories or notice a deposition, MCR 3.101(T) deals with extending the time for the actual filing of written interrogatories and a demand for oral examination of the garnishee. The rules can be read harmoniously to provide that the trial court can exercise its discretion to extend discovery as long as the plaintiff has compiled with MCR 3.101 (M)(2).

3. The garnishee disclosure provided factual statements, not erroneous legal conclusions. The trial court properly granted summary disposition to Auto Owners.

Affirmed.

CAVANAGH, J., dissenting, stated that the trial court and the majority interpret MCR 3.101(L)(1), (M)(1), and (T) in a manner that impermissibly renders Subrule (T) nugatory. The trial court's denial of the Deckers' motion to extend the time in which to conduct discovery was premised on an erroneous interpretation of the law and constituted an abuse of discretion. The order granting Auto Owners' motion for summary disposition should be reversed and the matter should be remanded for further proceedings, including the Deckers' service of written interrogatories on Auto Owners.

Sachs Waldman, PC (by *George T. Fishback*), for James and Kay Decker.

Kallas & Henk PC (by *Constantine N. Kallas* and *Courtney A. Jones*) for Auto Owners Insurance Company.

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

RIORDAN, P.J. In this garnishment action, plaintiffs, James and Kay Decker, appeal as of right orders denying their motion to extend discovery and granting summary disposition in favor of garnishee defendant, Auto Owners Insurance Company. We affirm.

I. FACTUAL BACKGROUND

In October 2007, plaintiffs filed a lawsuit against defendant, Trux R Us, Inc., arising out of injuries plaintiff James Decker sustained at a construction site when he was run over by a bulldozer.

In May 2008, Auto Owners, the insurer for Trux R Us, brought a declaratory judgment action seeking a judgment that it had no duty to defend or indemnify Trux R Us with regard to the Deckers' claims. The Deckers were not named as parties in the declaratory judgment action. On August 27, 2008, a default judgment was entered in favor of Auto Owners after Trux R Us failed to respond to the lawsuit. On September 18, 2008, plaintiffs' counsel was advised about this declaratory judgment action and was provided a copy of the default judgment. In December 2008, a motion by Trux R Us to set aside the default judgment was denied and, because the claim of appeal was untimely, on April 8, 2009, this Court granted Auto Owners' motion to dismiss the claim of appeal filed by Trux R Us. *Auto Owners Ins Co v Trux R Us Inc*, unpublished order of the Court of Appeals, entered April 8, 2009 (Docket No. 290421).

In September 2009, plaintiffs and Trux R Us entered into a consent judgment in the amount of $2.25 million. At the June 2009 hearing in that regard, plaintiffs' counsel advised the trial court that the consent judgment was subject to an agreement that provided that plaintiffs would not execute on the judgment against

assets of Trux R Us, but would seek insurance proceeds from a policy issued by Auto Owners to Trux R Us.

On February 13, 2013, plaintiffs filed a request and writ for nonperiodic garnishment in the amount of the consent judgment, naming Auto Owners as the garnishee of Trux R Us.

On February 21, 2013, Auto Owners filed its garnishee disclosure that indicated that it was not indebted to Trux R Us for any amount and did not possess or control any of its property. The reasons provided by Auto Owners in support of its denial included that: (1) the insurance policy excluded coverage because James Decker was an employee of Trux R Us and was injured in the course of his employment, (2) Trux R Us violated a condition of the policy by entering into a consent judgment with plaintiffs, (3) the question of insurance coverage had been previously litigated and resulted in a judgment in favor of Auto Owners, and (4) the doctrine of laches prevented plaintiffs from proceeding.

On April 4, 2013, Auto Owners filed a motion for summary disposition of the garnishment proceeding. Auto Owners argued that plaintiffs' failure to contest its garnishee disclosure by filing discovery requests under MCR 3.101(L)(1) caused the facts stated in the disclosure to be accepted as true, as provided by MCR 3.101(M)(2); therefore, Auto Owners argued that the motion for summary disposition should be granted and the writ of garnishment dismissed with prejudice.

Plaintiffs responded to Auto Owners' motion, arguing that the motion for summary disposition should be denied because the garnishee disclosure provided only erroneous legal conclusions and not factual statements in support of its denial of liability to Trux R Us. In particular, plaintiffs argued that whether res judicata applied presented a legal issue and, in this case, it did

not apply. Further, they contended, interpretation of an insurance policy is a legal issue and, under the policy terms, James Decker was an employee of Bell Site Services, not Trux R Us. Moreover, because Auto Owners obtained a default judgment against Trux R Us before the consent judgment was entered, any "consent" condition in Auto Owners' policy was not operative at the time the consent judgment was entered. Accordingly, plaintiffs argued, Auto Owners was not entitled to summary disposition of this garnishment proceeding.

Auto Owners filed a reply to plaintiffs' response, arguing that plaintiffs' failure to initiate discovery within 14 days after receiving the garnishment disclosure resulted in Auto Owners' statement of nonliability being deemed admitted; thus, "everything else is irrelevant." But in any case, Auto Owners argued, plaintiffs' challenges to the reasons set forth in the disclosure are without merit.

On April 10, 2013, plaintiffs filed a motion under MCR 3.101(T) to extend the time to serve written interrogatories on Auto Owners. Plaintiffs argued that the trial court had discretion to allow the requested extension of the discovery deadline set forth in MCR 3.101(L)(1). Plaintiffs explained that discovery was not sought in this matter because they viewed Auto Owners' disclosures as legal conclusions and were preparing a motion for summary disposition in this matter. Plaintiffs noted that, in cases involving discovery admissions under MCR 2.312, parties may be allowed to amend or withdraw an admission when the severity of the sanction outweighs the equities involved in the matter. Further, MCR 1.105 provides that the Michigan Court Rules should be construed "to avoid the consequences of error that does not affect the substantial rights of the

parties." Plaintiffs attached a set of proposed interrogatories that they would serve on Auto Owners if the court granted their motion.

Auto Owners responded to plaintiffs' motion, arguing that the trial court did not have discretion to extend the time in which discovery could be initiated after the 14 days provided in MCR 3.101(L)(1) expired. That is, MCR 3.101(M)(2) provides: "The facts stated in the disclosure must be accepted as true unless the plaintiff has served interrogatories or noticed a deposition within the time allowed by subrule (L)(1) . . . ." Accordingly, plaintiffs were impermissibly requesting the court to set aside the admissions made by plaintiffs as a consequence of their failure to request discovery.

The trial court first issued a decision on plaintiffs' motion to extend discovery and agreed with Auto Owners, holding that because plaintiffs failed to initiate discovery within 14 days after service of the garnishee disclosure as required by MCR 3.101(L)(1), the facts set forth in the disclosure were accepted as true. The court noted that plaintiffs waited over three years to attempt to collect the debt and, to the extent plaintiffs were attempting to set aside the garnishee disclosure, no good cause was shown. Accordingly, the trial court entered an order denying plaintiffs' motion to extend the time to serve interrogatories on Auto Owners.

Subsequently, the court issued its decision on Auto Owners' motion for summary disposition, holding that, because the facts stated by Auto Owners in its disclosure must be accepted as true and Auto Owners stated that it was not indebted to Trux R Us for any amount, summary disposition was appropriate under MCR 2.116(C)(6), (7), (8), and (10). Plaintiffs now appeal.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We review de novo a trial court's decision granting a motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). We review for an abuse of discretion a trial court's decision regarding a motion to extend discovery. *Shinkle v Shinkle (On Rehearing)*, 255 Mich App 221, 224; 663 NW2d 481 (2003). "An abuse of discretion occurs when the decision results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

B. ANALYSIS

At issue in this case is the interplay between the different subrules of MCR 3.101, which provide:

> (L) Steps After Disclosure; Third Parties; Interpleader; Discovery.
>
> (1) Within 14 days after service of the disclosure, the plaintiff may serve the garnishee with written interrogatories or notice the deposition of the garnishee. The answers to the interrogatories or the deposition testimony becomes part of the disclosure.
>
> * * *
>
> (M) Determination of Garnishee's Liability.
>
> * * *
>
> (2) . . . The facts stated in the disclosure must be accepted as true unless the plaintiff has served interrogatories or noticed a deposition within the time allowed by subrule (L)(1) or another party has filed a pleading or motion denying the accuracy of the disclosure. Except as the facts stated in the verified statement are admitted by

the disclosure, they are denied. Admissions have the effect of admissions in responsive pleadings. . . .

* * *

(T) Judicial Discretion. On motion the court may by order extend the time for:

(1) the garnishee's disclosure;

(2) the plaintiff's filing of written interrogatories;

(3) the plaintiff's filing of a demand for oral examination of the garnishee;

(4) the garnishee's answer to written interrogatories;

(5) the garnishee's appearance for oral examination; and

(6) the demand for jury trial.

The principles of statutory construction apply to the interpretation of the Michigan Court Rules. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Thus, we look to "the plain language of the court rule in order to ascertain its meaning" and 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." *Id*. (quotation marks and citation omitted). "If the rule's language is plain and unambiguous, then judicial construction is not permitted and the rule must be applied as written." *Jenson v Puste*, 290 Mich App 338, 342; 801 NW2d 639 (2010). Moreover, "[i]f we can construct two rules so that they do not conflict, that construction should control." *Costa v Community Emergency Med Servs, Inc*, 263 Mich App 572, 584; 689 NW2d 712 (2004) (quotation marks and citation omitted).

As noted, on February 21, 2013, Auto Owners filed its garnishee disclosure. Plaintiffs then had the option of how to proceed. They could have pursued discovery, but

did not. Under MCR 3.101(L)(1), "the plaintiff may serve the garnishee with written interrogatories or notice the deposition of the garnishee." Here, plaintiffs failed to serve Auto Owners with written interrogatories or notice of depositions. Thus, under MCR 3.101(M)(2), "[t]he facts stated in the disclosure must be accepted as true unless the plaintiff has served interrogatories or noticed a deposition within the time allowed by subrule (L)(1) . . . ."

Consistent with canons of statutory construction, we apply the plain meaning of court rules. *Henry*, 484 Mich at 495. The plain language of MCR 3.101(L) and (M) commands that when a plaintiff fails to request discovery, the statements in the garnishee disclosure "*must be*" accepted as true. (Emphasis added.) The language of the court rule is mandatory and plainly requires the trial court to accept the statements in the garnishee disclosures as true. To read the court rule otherwise ignores this plain language, thereby violating the maxim of avoiding "construing a court rule in a manner that results in a part of the rule becoming nugatory or surplusage." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 484; 633 NW2d 440 (2001).

Further, even if there is a conflict between a general provision in a statute and a specific provision, the latter controls. *Duffy v Dep't of Natural Resources*, 490 Mich 198, 208; 805 NW2d 399 (2011); *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994) ("where a statute contains a general provision and a specific provision, the specific provision controls"). MCR 3.101(M)(2) specifically states that when a plaintiff fails to serve interrogatories or notices a deposition within the 14 days allowed by Subrule (L)(1), the statements in the garnishee's disclosure must be accepted as true. Plaintiffs' proposed reasoning somehow extrapolates from (L)(1)'s spe-

cific 14-day time period an extension of almost 50 days, or as long as a motion is filed at some point. This interpretation improperly disregards the requirements of MCR 3.101 and cuts against the dictate that we are required to apply the more specific terms of (L)(1) over the more general provision of Subrule (T)(2).

We also find that any conflict between MCR 3.101(L) and (T) is not irreconcilable. While Subrules (L) and (M) provide a deadline for when a plaintiff must "serve" the interrogatories or notice a deposition, Subrule (T) deals with extending the time for the actual "filing" of written interrogatories and a demand for oral examination of the garnishee. A harmonious reading of this subrule is that the trial court can exercise its discretion to extend discovery as long as the plaintiff has complied with MCR 3.101(M)(2). See *Henry*, 484 Mich at 495 (court rules are read as a harmonious whole). Because this interpretation avoids a conflict between the provisions, it controls. See *Costa*, 263 Mich App at 584 ("[i]f we can construct two rules so that they do not conflict, that construction should control") (quotation marks and citation omitted). With this interpretation, both statutory provisions are left with independent operations and neither is rendered nugatory.

Also relevant is the fact that the trial court *did* exercise its discretion in this case and declined to extend discovery under MCR 3.101(T). Almost 50 days after the garnishee disclosure, plaintiffs filed a motion to extend discovery. The trial court denied the motion, stating that while plaintiffs sought to extend discovery, that did not erase the fact that the admissions were accepted as true, and there was no good cause to set them aside. While the trial court used the term "good cause," there is no indication that it was under some type of misunderstanding or misreading of the court

rule. Rather, the trial court was doing just what MCR 3.101(T) instructed, namely using its "Judicial Discretion." Moreover, MCR 3.101(M)(2) provides that admissions in the garnishee disclosure have the same effect as admissions in responsive pleadings. Admissions do not simply disappear with the passage of time or the filing of a motion to extend discovery.

Plaintiffs' argument that the garnishee disclosure provided only erroneous legal conclusions, rather than factual statements, simply is not true. In the garnishee disclosure, Auto Owners alleged the following:

> Garnishee is not indebted to the Defendant for any amount and does not possess or control Defendant's property for the reasons that: (1) the insurance policy issued to Trux R Us excludes coverage for injuries to Decker because he was an employee and injured in the course of his employment; (2) the insurance policy provides no coverage because Trux R Us violated the conditions section of the policy which prohibits settlement (consent judgment) without the written agreement of the insurer; (3) the question of coverage was previously litigated between Trux R Us and Auto-Owners and judgment was entered in favor of Auto-Owners with a finding of no coverage and, because Plaintiffs stand in the shoes of Trux R Us for purposes of the garnishment, Plaintiffs are also precluded from proceeding under doctrines of res judicata and collateral estoppel; and (garnishee and or debtor are precluded from proceeding under the doctrine of laches[)].

As evident from this paragraph, Auto Owners did offer factual allegations, namely, that under the facts of this case, the insurance policy excluded coverage and that the prior litigation foreclosed garnishment.

III. CONCLUSION

Accordingly, the trial court properly granted summary disposition to Auto Owners. We affirm.

TALBOT, J., concurred with RIORDAN, P.J.

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

The issue in this case is whether MCR 3.101(L)(1) or MCR 3.101(M)(2) prohibit a plaintiff from conducting discovery if not initiated within 14 days after service of the garnishee disclosure although MCR 3.101(T) allows for motions to extend the time for conducting discovery.

Here, the trial court denied plaintiffs' motion to extend the time in which to submit written interrogatories to Auto Owners, noting that Subrule (M)(2) mandates that the facts stated in the disclosure be accepted as true unless discovery was served "within the time allowed by subrule (L)(1)," i.e., within 14 days after service of the disclosure. However, Subrule (T) grants the trial court discretion to extend the time for conducting discovery in garnishment actions, as in other civil actions. See MCR 3.101(T)(2) and (3). But neither Subrule (L)(1) nor Subrule (M)(2) refers to or incorporate the circumstances that result by operation of Subrule (T).

The trial court's interpretation of Subrules (L)(1) and (M)(2), affirmed by the majority, impermissibly renders nugatory subrule (T). See *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). According to this interpretation, even if a motion to extend time to conduct discovery was granted under Subrule (T), the information obtained would not become part of the garnishee disclosure and could not be used by a plaintiff to contest the facts stated in the disclosure. That is, the discovery requests would always be served *after* the time allowed by Subrule (L)(1), in violation of MCR 3.101(M)(2), when a motion under Subrule (T) is granted.

Accordingly, I would hold that the trial court's denial of plaintiffs' motion to extend the time in which to conduct discovery was premised on an erroneous interpretation of law and, thus, constituted an abuse of discretion. See *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). Further, I would reverse the trial court's order granting Auto Owners' motion for summary disposition that was based on the erroneous ruling, and I would remand for further proceedings, including plaintiff's service of written interrogatories on Auto Owners.

PEOPLE v WOOD

Docket No. 315379. Submitted October 14, 2014, at Detroit. Decided October 28, 2014, at 9:05 a.m. Leave to appeal sought.

Alan C. Wood was convicted in the Oakland Circuit Court, Colleen A. O'Brien, J., of first-degree murder, MCL 750.316(1); larceny in a building, MCL 750.360; and two counts of possessing, retaining, secreting, or using a financial transaction device, MCL 750.157n(1). The convictions stemmed from the killing of an 80-year-old woman for whom he had done yard work with a codefendant, Tonia M. Watson, and the theft of credit cards from her home. Watson pleaded guilty of second-degree murder, MCL 750.317; larceny in a building; and unlawfully taking a financial transaction device and testified against defendant at trial. Defendant appealed.

The Court of Appeals *held*:

1. The trial court did not err by admitting under MRE 404(b)(1) evidence of other acts, including (1) defendant's theft of a purse from his 77-year-old landlady, (2) defendant's acts of theft from the shared home of two disabled women who had hired him to work around their house, and (3) his theft from a Berkley home where he was working. MRE 404(b)(1) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with that character, but it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act or knowledge, identity, or the absence of mistake or accident. The other-acts evidence must satisfy the definition of logical relevance under MRE 401. Under MRE 403, any unfair prejudice arising from the admission of the evidence must not substantially outweigh its probative value. The trial court acted within its discretion by admitting the evidence for several relevant purposes not related to defendant's character, in particular, to show the existence of a common plan, scheme, or system. The bulk of the other acts shared several common features with the offenses in this case. Even without resorting to an analysis under MRE 404(b), however, a court may admit evidence of other criminal acts when it explains the circumstances of the

crime. The evidence of defendant's theft from one of the homes at which he worked helped explain where he acquired the knife he used against the victim.

2. The trial court acted within its discretion when it denied defendant's motion for a mistrial predicated on the prosecutor's allegedly engaging in misconduct in her opening statement by vouching for Watson's credibility. The prosecutor's reference to Watson's plea agreement did not embody an inappropriate suggestion that the prosecutor had some special knowledge, not known to the jury, that the witness was testifying truthfully. Moreover, even if the prosecutor's statements were improper, the trial court's instructions, which emphasized that the prosecutor's opening statement was not evidence and that the jury alone had the responsibility to determine witness credibility, cured any potential prejudice.

3. The trial court did not err by admitting the testimony of the prosecution's expert witnesses concerning a type of DNA testing known as Y-STR DNA testing, which involves testing only DNA on the Y chromosome, a sex chromosome found only in human males. Y-STR DNA testing cannot uniquely identify an individual because a given male will have the same Y-STR DNA profile as his male ancestors, but it is considered useful when analyzing samples that have a mixture of male and female DNA, allowing the analyst to target the male DNA without interference from the female DNA. If the trial court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, MRE 702 provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about the matter 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. A trial court may admit the evidence only if it determines that the expert testimony meets that rule's standard for reliability. When evaluating the reliability of a scientific theory or technique, the court must consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, its error rate if known, and the existence and maintenance of standards controlling the technique's operation. The prosecution carried its burden of demonstrating the admissibility of Y-STR DNA evidence. Furthermore, given the trial testimony of the experts concerning the limited significance of a Y-STR DNA match, specifically that a match

cannot uniquely identify a male DNA donor and can only include a male as a potential DNA donor to the sample, there was no danger of confusion or other unfair prejudice that under MRE 403 would substantially outweigh the probative value inherent in the Y-STR DNA testing evidence.

4. The trial court did not violate MRE 804(b)(1) or defendant's right to confront the witnesses against him by allowing the admission of an expert witness's preliminary examination testimony after properly determining that the witness was unavailable to testify at trial because of her medical condition. As required by the rule, defendant had ample opportunity to cross-examine the witness during his and Watson's joint preliminary examination.

5. The trial court did not bolster Watson's credibility with an improper jury instruction. A criminal defendant has the right to have a properly instructed jury consider the evidence, but the jury instructions must be reviewed as a whole to determine whether error requiring reversal occurred. The trial court gave an instruction that closely mirrored the standard accomplice instructions of former CJI2d 5.4 and CJI2d 5.6. The instructions did not state or suggest that Watson had offered truthful testimony, but only that the prosecution had agreed to pursue a lesser charge against her if she offered truthful testimony and that the prosecution remained free to alter the plea agreement if it obtained additional evidence against Watson. The entirety of the instructions plainly cautioned the jury about accepting Watson's testimony for several reasons. Moreover, the trial court informed the jury on three occasions that it had the sole responsibility to assess credibility. In light of Watson's testimony about her longtime use of cocaine and heroin, the trial court additionally gave an addict-informer instruction, former CJI2d 5.7, which provided additional cautions regarding judging Watson's credibility. Finally, the trial court instructed the jury that it should consider her agreement to testify in exchange for the prosecution's dismissal of a charge as it might relate to her bias or self-interest.

6. The trial court did not plainly err by denying a mistrial after the officer who only described where the police found a knife introduced into evidence further identified it as the murder weapon. The court struck the answer, and other officers properly identified the knife.

7. Defendant failed to support his claim that the prosecution suppressed exculpatory evidence relating to the DNA tests.

8. Defendant also failed to substantiate his claims that the police and forensic scientists mishandled or allowed contamination of the DNA samples or otherwise failed to maintain a proper chain of custody.

9. While defendant argued that the admission of Watson's statements to the police violated his constitutional rights, he had no standing to challenge a violation of Watson's Fourth Amendment rights. He also argued that his trial counsel should have obtained Watson's medical records. They would only have been relevant to the voluntariness of Watson's statements, however, which defendant lacked standing to challenge.

Affirmed.

EVIDENCE — EXPERT WITNESSES — DNA EVIDENCE — Y-STR DNA TESTING — ADMISSIBILITY.

MRE 702 provides that if a trial court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about the matter 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; the court may admit the expert testimony only after it determines that the evidence meets that rule's standard for reliability; when evaluating the reliability of a scientific theory or technique, the court must consider certain factors including, but not limited to, whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, its error rate if known, and the existence and maintenance of standards controlling the technique's operation; the type of DNA testing known as Y-STR DNA testing—which involves testing only DNA on the Y chromosome, a sex chromosome found only in human males, and may be useful when analyzing samples that have mixtures of male and female DNA—is based on reliable principles and methods.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Jessica R. Cooper*, Prosecuting Attorney, *Thomas R. Grden*, Chief, Appellate Division, and *Matthew A. Fillmore*, Assistant Prosecuting Attorney, for the people.

Michael A. Faraone, PC (by *Michael A. Faraone*), *Jonathan B.D. Simon*, and Alan C. Wood, *in propria persona*, for defendant.

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

BOONSTRA, P.J. Defendant appeals by right his convictions on alternative counts of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b); one count of larceny in a building, MCL 750.360; and two counts of possessing, retaining, secreting, or using a financial transaction device, MCL 750.157n(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent terms of life in prison without parole for one count of first-degree murder supported by two theories, 46 months to 15 years for the larceny conviction, and 34 months to 15 years for each financial-transaction-device conviction.[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant was convicted of killing 80-year-old Nancy Dailey and stealing her credit cards from her home on November 20, 2011. The prosecution had charged Tonia Michelle Watson as a codefendant with first-degree felony murder, larceny in a building, and stealing a financial transaction device. On December 21, 2012, Watson pleaded guilty of second-degree murder, MCL 750.317, larceny in a building, and unlawfully taking a financial transaction device. Watson testified against defendant at trial.

On November 20, 2011, Dailey's cousin—Leah Storto—and a neighbor—whom Storto identified as Steve—discovered Dailey's lifeless body and called 911. Police officers who arrived at Dailey's home described

[1] The trial court ordered that defendant serve the sentences consecutively to the remainder of a sentence for which he had received parole from prison.

finding different areas of the home ransacked and her body bound and bloody in her bedroom. The autopsy revealed bruising on Dailey's face, neck, chest, and upper right back, the back of her left hand, her left wrist, and one of her ears; bruising and linear scrapes near her neck; "multiple sharp force injuries . . . consist[ing] of a [7- to 8-inch] stab wound on the right side of the neck" that severed Dailey's carotid artery and jugular vein and a 5-inch "slashing wound in front of the neck"; "a small nick on [Dailey's] left thumb"; and "some petechiae [pinpoint hemorrhages] on [her] cheeks, forehead and in the lower [eye]lids," which often appear in instances of ligature or manual strangulation. Her death was ruled a homicide.

Another of Dailey's neighbors, Lois Hillebrand, identified defendant at trial as the man who had approached her on a Saturday in early November 2011 about raking her leaves and whom Hillebrand saw raking Dailey's leaves the next day. Another neighbor, Marie Heshczuk, testified that a couple of weeks before Dailey's death, she saw a white man and a white woman raking leaves in Dailey's front yard and the man "highly resemble[d]" defendant. She also testified that while outside raking the leaves of her neighbor directly across the street from Dailey's house on November 20, 2011, she saw Dailey through her front window between 5:00 and 5:30 p.m., and also noticed an unfamiliar man walking past Dailey's house wearing a dark hooded sweatshirt and dark pants. Another witness, Michael Wilson, identified defendant as a man he saw in an alley near Dailey's house at 5:30 p.m. on November 20, 2011.

A. WATSON'S TESTIMONY CONCERNING DAILEY'S MURDER

Watson testified about her participation with defendant in Dailey's killing. Watson identified defendant in

court as her boyfriend since November 2010. Watson also testified that she had regularly used cocaine and heroin for 25 years and that during her relationship with defendant, he regularly used marijuana and cocaine. Watson recalled that she and defendant met Dailey in early November 2011, when Dailey paid them $40 for raking leaves in her yard.

According to Watson, she and defendant were homeless in November 2011, struggling to pay for drugs and food, and living in different hotels or motels, primarily the Seville Motel on Woodward Avenue in Royal Oak south of Twelve Mile Road, but also at other lodging on Woodward Avenue, including the De Lido Motel south of Eight Mile Road. Watson testified that on November 20, 2011, she and defendant had checked out of their hotel because they "didn't have any money" and spent the day at a McDonald's restaurant located at Woodward Avenue and Thirteen Mile Road.[2] According to Watson, defendant raised the idea of robbing Dailey, and she concurred in this idea because of their dire financial straits. Watson testified that they left the restaurant, waited until dark, walked toward Dailey's house, "walked around the block a couple of times," noticed Dailey inside, and ascertained that a door was unlocked. Defendant then entered a side door and told Watson to go inside.

Watson testified that defendant told Dailey "that this was a robbery." Defendant took from Dailey's living room a passport and a cellular phone; Watson took Dailey's purse and removed some money. After Dailey

[2] The prosecutor introduced still photos and surveillance video depicting the Royal Oak McDonald's as of approximately 1:30 p.m. on November 20, 2011, and two police officers testified that defendant appeared in the images wearing clothing similar to the clothes he was wearing at the time of his arrest.

voiced a desire to use the bathroom, defendant instructed Watson to stand outside the open bathroom door, and Watson asked Dailey to give defendant "the ATM numbers to the credit cards"; defendant then searched Dailey's bedroom for valuables. When Dailey tried closing the bathroom door, defendant grabbed Dailey's hair, threw her to the ground, and dragged her into her bedroom by her hair. Defendant repeatedly punched Dailey's face, repeatedly stomped on Dailey's neck, twisted Dailey's neck with his hands, and then bound Dailey's hands with a scarf. Defendant showed Watson a knife before returning to Dailey's bedroom. Watson looked through Dailey's bedroom for jewelry. She observed Dailey lying by her closet and observed that she was not making any noise; Watson did not touch her. Watson left the house with Dailey's purse, containing an identification card and a wallet holding a Visa debit card and other credit or debit cards, while defendant left with jewelry and the cell phone and passport. A short time later, Watson observed that, in an area near the Seville Motel and a bus stop, defendant stomped into the ground in the Woodward Avenue median the knife he had used to cut and stab Dailey's throat.[3]

Watson testified that after 7:30 p.m. on November 20, 2011, she checked into the Seville Motel and that defendant discarded Dailey's cell phone on the motel roof and discarded other personal items from Dailey's purse elsewhere at the motel. Watson recalled that she found inside Dailey's purse a Visa debit card and what was apparently a personal identification number for it, that she asked defendant to try using the card, and that defendant left at about 7:45 p.m. and returned with

[3] Multiple officers testified that they recovered a knife from the Woodward Avenue median near a bus stop across from the Seville Motel.

$200 in cash that he had withdrawn using Dailey's card. Watson recounted that she then unsuccessfully tried withdrawing money at a bank near the hotel while wearing a bandana over her face and in defendant's company and that following a bus ride to Pontiac, defendant unsuccessfully tried using the card at a Mobil gas station. In Pontiac, defendant and Watson bought cocaine and heroin, and they then returned to the Seville Motel. Defendant walked past Dailey's house again that evening and noticed it "lit up like a Christmas tree," which prompted Watson and defendant's relocation to the De Lido Motel.

Watson testified that on November 21, 2011, defendant put Dailey's passport, debit card, and other cards in a bag and left them under some trees near the De Lido Motel, that she and defendant left the motel[4] and bought drugs in the Cass Corridor, and that Watson then checked them into a Westland lodging called the Paradise Hotel. Watson recalled that she and defendant walked toward a Meijer store in Canton, and along the way defendant discarded behind a Wal-Mart store a suitcase and a backpack that contained some of their clothing and a knife that defendant had stolen from the house where he had worked in September 2011.[5] Wat-

[4] Royal Oak Police Lieutenant Mike Frazier testified that with Watson's assistance, he found a red rag and a clear plastic bag between some trees and under some leaves near the De Lido Motel. The bag contained a wallet with Dailey's Visa debit card, Dailey's state identification card and passport, and other cards. Frazier testified that he also recovered paperwork bearing the name Christina Duchamp, one of defendant's prior theft victims, in the same location.

[5] Canton Township Officer James Marinelli testified that, at the request of the Royal Oak Police Department on December 1, 2011, he assisted in searching for a suitcase in "a wooded area behind" a Wal-Mart store on Ford Road. Marinelli observed 25 feet into the woods "a black suitcase leaned up against a tree with sticks and some large pieces of bark laying on top of it." Canton Police also located "a gray and black shoulder

son testified that she and defendant had intended to find another elderly woman to rob, but police officers arrested them at the store. According to Watson, when she and defendant were arrested, defendant had injuries on his hand that she first noticed after they left Dailey's house on November 20, 2011.[6] Watson testified that on November 23, 2011, she voluntarily provided lengthy statements to two detectives in which she revealed her and defendant's involvement in Dailey's death, the locations where "certain items could be located," including the knife defendant used and some of Dailey's belongings, and that she accompanied the police to assist them in finding several items.

B. DNA TESTING

Amy Altesleben, an expert in DNA analysis, testified at defendant's preliminary examination[7] that she received for analysis samples from a blue scarf, Dailey's nail clippings, a bloody washcloth found in Dailey's house, a sample of Dailey's blood, defendant's jeans and sweatshirt, and known samples from defendant and Watson. Altesleben determined that the blue scarf

bag . . . lying underneath the black suitcase." Marinelli testified that the suitcase contained female clothing and hygiene products, prescriptions bearing the name Tonia Sledewski-Watson, and "paperwork . . . with the name Tonia Michelle Sledewski . . . ." The suitcase also contained a red bag holding "papers with the name Alan Wood on them" and "a picture I.D. card with the name Alan Wood on it." Marinelli recalled that the shoulder bag contained "envelopes of . . . miscellaneous papers" and the knife that another witness, Sara Paruch, testified had gone missing when defendant worked in her house.

[6] The Royal Oak police sergeant who booked defendant on November 22, 2011, testified that defendant's left hand had "scabbing in the area of the knuckles."

[7] This testimony was introduced at trial; see Part V of this opinion for our discussion of defendant's challenge to the admission of this testimony.

sample contained a DNA mixture from at least four contributors. She could not identify "a major donor in that sample" and could not exclude defendant as a contributor. In analyzing the nail clippings from Dailey's right hand, Altesleben explained that she found a mixture of DNA from more than two contributors, she could not identify major and minor donors, and she could not "make any conclusive determinations regarding [defendant's] DNA as being a contributor to this profile." However, "a Y DNA type was detected on this sample which would indicate that at least one of the donors must be male." Altesleben forwarded these items to forensic scientist Heather Vitta for Y-STR DNA testing.

Vitta, an expert in DNA analysis including Y-STR DNA testing, testified about her performance of Y-STR DNA analyses on the samples from the blue scarf and Dailey's right-hand nail clippings, as well as a known sample from defendant. Vitta explained that Y-STR DNA testing focuses on areas of only the Y chromosome and has proved useful in isolating male donors to samples that also contain quantities of female DNA and that scientists referred to the Y chromosome profile produced in Y-STR DNA testing as a "haplotype." Regarding the blue scarf sample, Vitta testified that she identified the DNA of "up to three males" and that "a major male contributor to the scarf" existed. Regarding the sample from Dailey's right-hand nail clippings, she testified that she identified the DNA of two males and "a major male donor" also existed in this sample. According to Vitta, the major male haplotypes in the scarf and nail-clipping samples matched one another and the haplotype she identified from defendant's known sample; this match signified to Vitta that she could not exclude defendant as the contributor to the major male haplotypes on the scarf and nail-clipping

samples.[8] Vitta entered into a database the major male haplotypes she identified in the scarf and nail-clipping samples, applied a 95% confidence limit, and yielded the following frequency results: (1) with respect to the major male haplotype in the scarf sample, the haplotype frequency was estimated as 1 in 1,923 in the Caucasian male population, 1 in 1,558 in the African-American male population, and 1 in 1,005 in the Hispanic male population and (2) with respect to the major male haplotype in the nail-clipping sample, the haplotype frequency was 1 in 2,342 in the Caucasian male population, 1 in 2,105 in the African-American male population, and 1 in 1,145 in the Hispanic male population.

C. OTHER-ACTS EVIDENCE

Before trial, the prosecution filed a motion to admit, under MRE 404(b)(1), evidence of several other acts, including (1) defendant's theft of a purse from his 77-year-old landlady, Joanne LaBarge, in October 2011, (2) defendant's multiple acts of theft between October 2010 and October 2011 from the shared Royal Oak home of two disabled women, Christina Duchamp and Nancy Foerster, who had hired defendant to work around their house, and (3) defendant's theft in September 2011 from a Berkley home where he was working for Joseph Paruch. Following a hearing held on June 13, 2012, the trial court entered an opinion and order,

[8] Vitta cautioned that "with Y-STR analysis because we're not looking at all of the chromosome DNA it is more limited in its ability to tell the difference between one male and another male and it's not considered a unique identification." Vitta added that because men inherited their "male Y chromosome haplotype . . . all the way down the line," a man "could have [male] cousins that would have the same haplotype as you," and it was possible "to have a completely unrelated male share the haplotype . . . ."

dated June 18, 2012, admitting the other-acts evidence. The trial court ruled, in relevant part:

> The Court finds the proffered evidence to be admissible under MRE 404(b). First, the Court finds the "other acts" evidence is being offered for proper purposes. Here, the evidence is for the purposes of proving (1) that Defendant intended to kill or cause great bodily harm[,] (2) that Defendant intended to commit the crime of Larceny, (3) that Defendant acted with premeditation and deliberation, (4) that Defendant had a motive to commit the crimes charged, (5) that Defendant acted pursuant to a common scheme, plan, or system, and (6) that co-Defendant Tonia Michele Watson is not fabricating the incident. All of these are proper purposes.

Concerning MRE 403, the court concluded that "the proffered similar acts are highly probative on the issue of whether Defendant committed the charged acts" and rejected the position that the risk of unfair prejudice "substantially outweigh[ed] its probative value."

At trial, Joseph Paruch testified that he and his wife and daughter lived in Berkley in September 2011. Paruch identified defendant as the man who had approached him at a Home Depot store in early September 2011 to inquire whether he "had any odd jobs for him to do." Later the same day, Paruch drove defendant to his house to show defendant a bathroom that he wanted remodeled, and defendant agreed to perform the work. Between September 13, 2011, and September 22, 2011, defendant worked for approximately three hours a day after Paruch or his wife arrived home and could supervise defendant, and Paruch paid defendant in cash. Paruch recalled that on September 22, 2011, defendant for the first time failed to appear for work. Paruch noticed that a portion of the bed in his bedroom was out of place; searching the room, he discovered that a .32 caliber handgun and a jar of medical marijuana were

missing. Paruch reported the theft to the Berkley police. Later that day, defendant called Paruch to tell him that he had not "come to work because he was making arrangements to get a . . . new apartment." Defendant never returned to finish the job. A couple of weeks later, Paruch received a call from the Berkley police, which prompted him to undertake additional searching in his bedroom, and he noticed that a knife was missing from his bedroom nightstand. Paruch acknowledged that defendant had not been charged with a crime relating to the theft from his house.

Sara Paruch, Joseph Paruch's daughter, also identified defendant at trial as the man her parents had hired to work in their house. Sara testified that, on September 22, 2011, after a discussion with her father about some items missing from the house, she became suspicious about a knife missing from a desk in her bedroom. When a detective called her, she became certain that her knife had also been taken. She added that defendant once helped her perform a task in her bedroom, and she "notice[d] him looking around [her] bedroom" enough to make her suspicious and uncomfortable. Sara denied having filed a complaint relating to her missing knife.

Watson testified that in September 2011, defendant told her about his Home Depot meeting with Joseph Paruch and his work on a bathroom at the Paruchs' house. Watson recounted that at some point around September 2011, she observed defendant in possession of "a black bag that had a gun in it," two knives, and "two bags of marijuana and quarters," none of which belonged to him. Watson recalled defendant having advised her that he had obtained the property from the Paruchs. According to Watson, defendant sold the handgun. Watson identified the knives at trial and testified that defendant usually carried one of the knives with

him. The Paruchs also identified the knives as those that had been stolen from them.

Watson testified that in February 2011, she became acquainted with Royal Oak residents Christina Duchamp and Nancy Foerster through defendant. Watson and defendant both did work at the house where Duchamp and Foerster lived and received payment for their work. In Watson's estimation, Duchamp had a physical disability and Foerster had mental and physical disabilities. Watson recalled that in late June 2011, Duchamp informed defendant about money and other property missing from the house and "that they just didn't need . . . his help anymore." Watson confirmed that defendant stole money, pain pills, and silver from the house. In October 2011, defendant told Watson that he went to Duchamp and Foerster's house, but Duchamp reiterated that they didn't want him to work for them anymore. Watson described how, later in October 2011, she and defendant took a bus to Duchamp and Foerster's house at 5:00 a.m. intending to steal from them. They knew that Duchamp and Foerster would be home. Defendant brought with him a baseball bat and went inside alone through a window. He then came outside with a red purse that contained a credit card in Duchamp's name, and around 9:00 a.m. on October 12, 2011, she and defendant bought groceries from a Meijer store. Watson paid for the groceries using Duchamp's credit card. When asked whether defendant had discussed his intentions while inside the house, Watson answered that defendant "had thought about tying them up and putting them in the basement and trying to get money from the pin numbers . . . [of] their credit cards" and "[s]etting the house on fire."

Watson further testified that in October 2011, she and defendant lived together in a Pontiac rental home.

Watson characterized their landlady, LaBarge, as "a nice lady" who "was . . . very patient with [her and defendant] as far as getting the rent," letting them move in without a deposit, and coming "by to check on us." Once, when they visited LaBarge's house, Watson saw defendant take LaBarge's purse from a chair, and she and defendant "went out back and looked through the contents." Watson remembered that she and defendant had discussed "going into her home [to steal again], but [defendant] said that it would be noticeable because" LaBarge lived on a main street.

The jury convicted defendant. This appeal followed.

II. ADMISSION OF OTHER-ACTS EVIDENCE

Defendant argues that the trial court's admission of other-acts evidence violated MRE 404(b)(1), which prohibits the admission of evidence of a defendant's other acts or crimes when introduced solely for the purpose of showing that the defendant's action was in conformity with his criminal character. See *People v Sabin (After Remand)*, 463 Mich 43, 56; 614 NW2d 888 (2000). We disagree. We review for an abuse of discretion a trial court's ruling on the admission of evidence; however, we review de novo preliminary legal issues regarding admissibility. *People v Jambor (On Remand)*, 273 Mich App 477, 481; 729 NW2d 569 (2007).

MRE 404(b)(1) provides in relevant part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

> crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Evidence of a defendant's other acts or crimes is admissible if (1) the prosecution offers the evidence for a proper purpose under MRE 404(b)(1); (2) the other-acts evidence satisfies the definition of logical relevance within MRE 401; and (3) any unfair prejudice arising from the admission of the other-acts evidence does not substantially outweigh its probative value, MRE 403; on request, the trial court can read the jury a limiting instruction that describes the proper consideration of the other-acts evidence. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003).

We conclude that the trial court acted within its discretion in admitting the other-acts evidence for several relevant purposes not related to character. The evidence of defendant's other thefts admitted at trial was relevant to proving several elements of the offenses with which defendant was charged. First, all three other acts of defendant's theft—from the Paruch house in September 2011, from the residence of Duchamp and Foerster in October 2011, and from LaBarge's house in October 2011—reasonably tended to make it more likely than not that he intended to commit larceny from Dailey's house in November 2011, an element of the present larceny-in-a-building charge against defendant. MRE 401; MCL 750.360; *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). Second, the evidence of defendant's theft from Duchamp and Foerster—and specifically his carrying of a baseball bat inside their house and his statements about tying them up, placing them in the basement, and setting their house ablaze—reasonably tended to make it more likely than not that defendant either intended to kill or inflict great bodily harm on

Dailey in November 2011, an element of the first-degree-felony-murder charge, MRE 401; MCL 750.316(1)(b); *People v Comella*, 296 Mich App 643, 651-652; 823 NW2d 138 (2012), or premeditated and deliberated the killing of Dailey in November 2011, an element of the first-degree-premeditated-murder charge, MCL 750.316(1)(a). Watson's testimony that defendant carried into Dailey's house a knife that he stole from the Paruch house also tended to prove the elements of premeditation and deliberation. *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000).

Additionally, a large portion of the other-acts evidence was admissible to show the existence of a common plan, scheme, or system. "[E]vidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." *Sabin*, 463 Mich at 63. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." *Id*. at 65-66 (quotation marks and citation omitted). "[E]vidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts." *Id*. at 66 (quotation marks and citation omitted).

The bulk of the other acts also shared several common features with the offenses in the instant case. The evidence regarding Duchamp and Foerster demonstrated that defendant targeted vulnerable women,

specifically that he became acquainted with Duchamp and Foerster, two disabled women, by offering to work around their home. Similarly in this case, he became acquainted with Dailey, an 80-year-old woman who lived alone, by offering to work around her house. In each situation, he returned to the homes of the vulnerable women intending to steal from them and armed himself with a weapon, a baseball bat in October 2011 and a knife in this case. On each occasion, defendant stole purses and bank cards from the vulnerable women. A jury could reasonably infer that defendant employed a common plan, scheme, or system to achieve his acts of targeting and stealing from Dailey, Duchamp, and Foerster, notwithstanding that defendant did not physically harm Duchamp or Foerster. *Sabin*, 463 Mich at 63-66. Regarding defendant's thefts from LaBarge, defendant again targeted a vulnerable and elderly woman for theft, entered her home, and stole purses or wallets. A jury could reasonably infer that defendant employed a common plan, scheme, or system to achieve his acts of targeting and stealing from Dailey and his landlady. *Id*. We find no abuse of discretion in the trial court's admission of this evidence.

Further, some of the other-acts evidence would have been admissible even without resort to MRE 404(b). Without analyzing admissibility under MRE 404(b), a court may admit "[e]vidence of other criminal acts . . . when it explains the circumstances of the crime." *People v Malone*, 287 Mich App 648, 662; 792 NW2d 7 (2010). The evidence of defendant's prior theft from the Paruch home helped explain where he acquired the knife he used in assaulting Dailey. Further, Watson's testimony about defendant's possession of a knife he stole from the Paruch house and his use of the knife in killing Dailey constituted direct, relevant evidence sup-

porting the murder charges. *People v Hall*, 433 Mich 573, 580-581; 447 NW2d 580 (1989).

Regarding unfair prejudice, defendant fails to offer any specific example of unfair prejudice or other basis for exclusion under MRE 403. In light of the probative value inherent in the other-acts evidence toward proving multiple relevant matters and the limiting instruction that the court read to the jury concerning its proper consideration of the other-acts evidence, we do not find that the danger of "unfair prejudice, confusion of the issues, or misleading the jury" substantially outweighed the probative value of the evidence, MRE 403. See *Starr*, 457 Mich at 503; see also *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (observing that "a limiting instruction such as this one that cautions the jury not to infer that a defendant had a bad character and acted in accordance with that character can protect the defendant's right to a fair trial").

We find no error in the trial court's admission of other-acts evidence.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor engaged in misconduct in her opening statement by vouching for the credibility of Watson and that the trial court erred by not granting his motion for a mistrial. We disagree. This Court "review[s] claims of prosecutorial misconduct case by case . . . to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review for an abuse of discretion a trial court's decision regarding a motion for a mistrial. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

A prosecutor may not vouch for the credibility of his or her witnesses "to the effect that [the prosecutor] has some special knowledge concerning a witness'[s] truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, merely " '[b]y calling a witness who testifies pursuant to an agreement requiring him to testify truthfully, the Government does not insinuate possession of information not heard by the jury and the prosecutor cannot be taken as having expressed his personal opinion on a witness'[s] veracity.' " *Id*. (citation omitted) (first alteration in original).

During opening statements, the prosecutor addressed Watson's testimony as follows:

> You are also going to hear from Tonia Watson in this case. And I'm sure that the defendant is going to do everything he can to make her look like a liar. So be prepared for that.
>
> She's going to testify as a witness for the prosecution because aside from Nancy Dailey and the defendant she's the only one that knows what happened in that house that night.
>
> Now you are going to hear about her role that she played in the crimes that were committed because like I said she was not completely innocent.
>
> You're going to hear that she's a thief. You're going to hear that her fingerprint was found on a jewelry case, on a jewelry box that was found in Nancy Dailey's bedroom on a dresser.
>
> You're also going to hear that she was originally charged not with first degree premeditated murder, but she was charged with felony murder for the role that she played in assisting and committing the larceny that was the underlying offense for the felony murder.
>
> She was also charged with larceny in a building and she was also charged with the financial transaction device for the one that she attempted to use that card that we know of.

> You're going to hear that as a result of her coming in this court testifying before you and it's conditioned upon the prosecutor believing that she's testifying truthfully she will get a reduced charge. She will be pleading to second degree murder, larceny in a building and financial transaction device. She will serve a minimum--

Defense counsel objected at that point on the ground that the prosecutor's comments constituted improper vouching for the witness. The trial court reinstructed the jury that the opening statements of attorneys were not evidence and that the trial court would provide the jury with the applicable law. Defendant moved for a mistrial on the basis of the prosecutor's comments; the trial court denied the motion.

Our review of the trial court record convinces us that the prosecutor's reference to Watson's plea agreement did not embody an inappropriate " 'suggest[ion] that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully.' " *Bahoda*, 448 Mich at 276 (citation omitted). Further, even if the prosecutor's statements were improper, the trial court's instructions, which emphasized that the prosecutor's opening statement was not evidence and that the jury alone had the responsibility to determine witness credibility, cured any potential prejudice. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (observing that "[c]urative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions") (citations omitted). Therefore, the trial court acted within its discretion by denying defendant's motion for a mistrial. *Schaw*, 288 Mich App at 236.

IV. ADMISSION OF Y-STR DNA TESTING EVIDENCE

Defendant next argues that the trial court erred by admitting the testimony of the prosecution's experts

concerning Y-STR DNA testing,[9] either because it should not have been admitted pursuant to MRE 702 or because it should have been excluded under MRE 403. We disagree. This Court reviews for an abuse of discretion a trial court's qualification of an expert witness and its ultimate ruling regarding whether to admit expert testimony. *Unger*, 278 Mich App at 216.

MRE 702, which governs the admissibility of expert testimony, provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

A trial court "may admit evidence only once it ensures, pursuant to MRE 702, that expert testimony meets that rule's standard of reliability." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004). "When evaluating the reliability of a scientific theory or technique, courts consider certain factors, including but not limited to whether the theory has been or can be tested, whether it has been published and peer-reviewed, its level of general acceptance, and its error rate if known," *People v Kowalski*, 492 Mich 106, 131; 821 NW2d 14 (2012) (opinion by MARY BETH KELLY, J.), and "the existence and maintenance of standards controlling the technique's op-

[9] "STR" stands for "short tandem repeats," which are short DNA sequences that are repeated numerous times in a particular area of a chromosome. Federal Judicial Center & National Research Council, Reference Manual on Scientific Evidence (3d ed), pp 140-142.

eration," *Daubert v Merrell Dow Pharm, Inc*, 509 US 579, 594; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

> MRE 702 mandates a searching inquiry, not just of the data underlying expert testimony, but also of the manner in which the expert interprets and extrapolates from those data. Thus, it is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Gilbert*, 470 Mich at 782.]

The trial court need not "admit only evidence that is unassailable" or investigate "whether an expert's opinion is necessarily correct or universally accepted." *Unger*, 278 Mich App at 218 (quotation marks and citation omitted).

The trial court held a *Daubert* hearing in this case, at which Julie Marie Ferragut testified that she had worked since January 2003 as "a senior DNA analyst" at Bode Technology, "a private forensic DNA laboratory." Ferragut further testified about her academic and scientific credentials and explained that her job involved performing "DNA testing on forensic evidence samples," including DNA testing (1) in backlogged cases of law enforcement agencies, (2) for defense attorneys and the Innocence Project, (3) to identify victims of mass disasters, and (4) to add convicted-offender profiles to a database. Ferragut estimated that Bode Technology had processed 1.4 million DNA profiles for the convicted-offender database. Ferragut testified that she completed twice-yearly proficiency testing for both autosomal STR DNA testing and Y-STR testing.[10] Ferragut further testified that Bode Technol-

[10] Autosomal STR DNA testing is a common and well-established form of DNA testing. See *People v Lee*, 212 Mich App 228, 261-283; 537 NW2d

ogy had received accreditations from "the American Society of Crime Lab Directors, the Lab Accreditation Forum, . . . Forensic Quality Services, and . . . the New York State Department of Health."

Ferragut testified that for approximately 10 years she had undertaken autosomal STR DNA testing, and for seven years had performed Y-STR DNA testing in approximately one or two percent of her caseload. Ferragut completed training programs on both forms of DNA testing. She also confirmed that she had testified as an expert in 32 jurisdictions, including Michigan; that on each occasion courts admitted her testing results; that she had testified at least eight times about Y-STR DNA testing, including in Michigan in 2007; and that her testimony about Y-STR DNA testing had occurred on behalf of both the prosecution and the defense. The trial court qualified Ferragut as "an expert in DNA analysis, including Y-STR." According to Ferragut, approximately 2,000 peer reviews of Y-STR DNA testing had documented its general acceptance as reliable within the scientific community, and her own experience with Y-STR DNA testing established that it "produce[d] accurate and reliable results."

Ferragut explained that the Y-STR DNA analysis involves testing DNA only on the Y-chromosome and that Y-STR DNA testing could not uniquely identify an individual because "a given male is going to have the

---

233 (1995) (discussing an older DNA testing method). It involves testing areas on autosomal chromosomes in the sample. Autosomal chromosomes do not include the X and Y chromosomes, which are the sex chromosomes found in humans. Y-STR DNA testing is a more specific form of DNA testing that involves testing only the Y chromosome, which is only found in males. As discussed in more detail later, we hold that the trial court correctly determined that Y-STR DNA testing possesses the same hallmarks of reliability that have led courts to allow the admission of evidence of autosomal DNA testing.

same Y-STR profile as his father, and his grandfather . . . .” As one situation in which Y-STR DNA testing might prove useful, Ferragut noted “that with mixtures of male and female DNA, a lot of times the female DNA can overwhelm the male DNA or . . . mask the male DNA altogether, so with using Y-STR’s, we’re able to target the male DNA without any kind of interference from the female DNA.”

Ferragut further testified that the analysis of both autosomal DNA and Y chromosomal DNA involved the same series of steps and control measures. Ferragut explained that the only difference between the amplification step[11] in autosomal STR DNA and Y-STR DNA analyses involved the targeting of different areas of DNA through commercially produced kits. Ferragut added that, if a match exists between the DNA profile obtained from an evidence sample and that from a known sample (one obtained from an identified individual), the analyst generates a statistical calculation by entering the DNA profile information into a computer program “to see how common that profile is in the general population.” Ferragut explained that in the event of a Y-STR DNA match, “it can be searched in a data base, and depending on the number of matches that were obtained in the data base, you can then use a statistical calculation to determine how common it is or you would expect it to be in the population of unrelated males.” Ferragut further explained that if an analyst identified a Y-STR DNA match in “all the [Y chromosome] locations on the evidence” with “all the locations identified in a known suspect’s sample,” the DNA could have come from the suspect or someone else in his

[11] Amplification is necessary because of the small amount of DNA in a sample. It involves producing additional copies of the DNA of interest through a chemical process.

paternal line; additionally there was "a possibility that it could randomly match in the population." Finally, Ferragut stated that, after DNA testing occurs, "a technical review is performed on the case to make sure that it is scientifically accurate."

Vitta testified at the *Daubert* hearing that in 1997 she began working at the Michigan State Police "Northville Biology and DNA unit" identifying bodily fluids and performing autosomal STR DNA and Y-STR DNA analyses. In 2005, she had become the supervisor of the Northville laboratory, and in that position she "supervise[d] the other . . . forensic scientists . . . conducting case work analysis on forensic evidence samples as well as reference samples" and did her own testing of autosomal DNA and Y chromosomal DNA. Vitta also recounted her extensive academic and professional credentials.

Vitta testified that the Northville laboratory currently had multiple national and international accreditations, for which independent auditors frequently examined "every aspect of the laboratory," including "cases and reports . . . and the data that was generated for those cases." The Northville laboratory also used controls at each step of its DNA testing process. Vitta estimated that she had performed thousands of DNA tests and testified as an expert on the subject many times, but this was her first case testifying as an expert in Y-STR DNA testing. The trial court certified Vitta as an expert in DNA analysis, including Y-STR DNA analysis.

Vitta testified that autosomal STR DNA testing involved chromosomes other than the sex chromosomes, while Y-STR DNA testing involved analyzing areas present only on one of the sex chromosomes, the Y chromosome. Vitta verified that the Northville labo-

ratory adhered to national guidelines in performing DNA analyses. She summarized the very similar steps involved in both autosomal STR DNA and Y-STR DNA testing. Vitta acknowledged that an autosomal STR DNA match could specifically identify one person, but a Y-STR DNA match did not allow for the exclusion of a random match. Vitta offered an example of when Y-STR DNA testing could prove beneficial, stating, "[I]f you have a sample that . . . has a lot of female DNA in it, and only a tiny amount of male DNA, . . . it ignores completely that non-male DNA portion of that sample, and can pinpoint . . . just the male contribution to that sample."

Vitta testified that the statistical calculation regarding a Y-STR DNA match (haplotype) differed from the calculation performed on an autosomal STR DNA match. The Michigan State Police used a database called "the USYSTR data base," which at the time of Vitta's testimony in September 2012 consisted of "approximately 23,000 male samples" contributed by academic institutions, law enforcement, and other groups across the United States.[12] When Vitta performed the Y-STR DNA analyses in this case, the USYSTR database contained more than 18,000 sample haplotypes. Concerning haplotypes from Midwest males, Vitta recounted that organizations in Illinois, Minnesota, and Wisconsin had submitted samples, and because Michigan submitted samples to the FBI, which contributed samples to the USYSTR database, the database might contain some Michigan samples. When making calculations of haplotype frequency, Vitta testified that a

[12] Vitta explained that before the USYSTR database was used in case work, population geneticists examined it to ensure "that it meets the criteria for use for calculating these frequency estimates." Vitta added that "different peer review articles" concerning the USYSTR database reflected its acceptance in the scientific community.

"scientific working group on DNA [analysis] methods" recommended that scientists employ a particular calculation when using the USYSTR database and apply "a 95 percent confidence limit . . . to any calculation . . . conducted using the USYSTR" database.[13]

In this case, Vitta conducted Y-STR DNA testing on "a reference sample from [defendant]," on DNA extracts from a blue scarf "that the victim . . . was bound with when she was found on November 20, 2012," and on DNA extracts from fingernail clippings off the victim's right hand. Vitta testified that she identified DNA haplotypes at multiple locations for the blue scarf sample, the right-hand nail clippings, and defendant's known sample. She noticed the same "major male [haplotype] . . . developed from both" the blue scarf and nail clipping samples. With respect to the blue scarf, Vitta undertook "a side-by-side comparison [of] the same areas of the . . . Y chromosome that were amplified" in the known sample from defendant, compared "the [haplotypes] . . . obtained at each one of those locations," noticed in the blue scarf sample "results that were consistent with three or more male donors," and opined that the major male donor haplotype in the blue scarf "matched the reference sample haplotype from [defendant]." Vitta also discovered that the major male donor of the DNA under the victim's fingernails matched "the major male Y-STR haplotype" from defendant's known sample.

Vitta testified that because the areas of the Y chromosome examined in Y-STR DNA testing "are inherited in . . . a package . . . from generation to generation down the male line," the significance of a Y haplotype match is that an individual is not excluded as a source

[13] According to Vitta, the confidence interval signified "how accurate the calculation, the ultimate frequency estimate is . . . ."

of the DNA, although anyone "in that same paternal lineage," or, less likely, an unrelated male, could also share the same haplotype. When Vitta entered into the USYSTR database the major male haplotype she identified on the scarf that bound the victim, she received the following information: applying "a 95 percent confidence interval, the major Y-STR haplotype . . . detected from the blue scarf would be expected to be observed in [1 in] 1,923 Caucasian males, [1 in] 1,558 African-American males, and [1 in] 1,005 Hispanic males." When Vitta entered into the USYSTR database the major male haplotype she identified under the victim's fingernails, it apprised her that taking into account the 95 percent confidence interval, the likelihood of observing the haplotype in the population of "Caucasian males was one in 2,342; African-American males one in 2,105; and Hispanic males one in 1,145."

The trial court ruled that the offered Y-STR DNA evidence was admissible, specifically holding that the prosecution had met the burden of showing that Ferragut's and Vitta's testimony was rooted in "recognized scientific, technical, or other specialized knowledge" that would assist the trier of fact. *Gilbert*, 470 Mich at 789 (quotation marks omitted). The trial court also concluded that defendant's issue with regard to the statistical analysis procedures and the database used in Y-STR DNA analysis would go to the weight of the evidence, not its admissibility. See *People v Holtzer*, 255 Mich App 478, 491; 660 NW2d 405 (2003). Finally, the trial court ruled that the evidence's probative value was not outweighed by the danger of unfair prejudice. MRE 403.

We conclude that the prosecution carried its burden of demonstrating admissibility under MRE 702. Abundant evidence illustrated that the Y-STR DNA analysis

technique "has been or can be tested," *Kowalski*, 492 Mich at 131, and that standards exist to govern the performance of the technique, *Daubert*, 509 US at 594. The testimony of Ferragut and Vitta revealed that autosomal STR DNA analysis, the more common and well-established technique, and Y-STR DNA analysis, which came into being more recently, share a nearly identical series of requisite steps in the laboratory. Ferragut and Vitta testified that national guidelines delineate laboratory procedures for properly analyzing Y chromosomal DNA, multiple controls exist at each step of the Y-STR DNA analysis, the laboratories at which they worked subject the Y-STR DNA analysis to review, and accreditation organizations mandate routine proficiency testing of analysts who performed the Y-STR DNA analysis. Guidelines also exist for the commercial kits that test DNA on the Y chromosome in Y-STR DNA analysis. Further, both Ferragut and Vitta testified that many publications and peer reviews have scrutinized the soundness of the Y-STR DNA testing technique, as well as the statistical analysis methods and the database used by analysts. We conclude that the evidence was properly admitted under MRE 702.[14]

Further, Ferragut and Vitta repeatedly and plainly explained at the *Daubert* hearing the limited significance of a Y-STR DNA match, specifically that a match could not uniquely identify a male DNA donor and could only include a male as a potential DNA donor. At trial, Altesleben, Vitta, and a defense expert

[14] See, e.g., *State v Maestas*, 2012 Utah 46, ¶¶ 130-136; 299 P3d 892 (2012); *People v Stevey*, 209 Cal App 4th 1400, 1410-1416; 148 Cal Rptr 3d 1 (2012); *State v Calleia*, 414 NJ Super 125, 147-149; 997 A2d 1051 (NJ App, 2010), rev'd on other grounds 206 NJ 274 (2011); *State v Bander*, 150 Wash App 690, 718; 208 P3d 1242 (2009); *Curtis v State*, 205 SW3d 656, 661 (Tex App, 2006). See also *State v Metcalf*, 2012 Ohio 674 (Ohio App, 2012).

presented these limitations to the jury. We detect no danger of confusion or other unfair prejudice that would substantially outweigh the probative value inherent in the Y-STR DNA testing evidence. MRE 403.

V. RIGHT OF CONFRONTATION

Defendant next argues that the trial court violated his right to confront witnesses against him, as well as MRE 804(b)(1), by allowing the admission of Altesleben's preliminary examination testimony. Defendant did not object to the admission of this evidence; this issue is therefore unpreserved and reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

We conclude that the trial court did not err by deeming Altesleben unavailable to testify at trial. Further, defendant enjoyed a prior, similar opportunity to cross-examine Altesleben, and thus the trial court violated neither the Confrontation Clauses, US Const, Am VI and Const 1963, art 1, § 20, nor MRE 804(b)(1) by allowing the reading of Altesleben's preliminary examination testimony at trial. Defendant also has not established that trial counsel was ineffective for failing to object to the reading of Altesleben's prior testimony.

A trial court may admit "[f]ormer testimony . . . under both MRE 804(b)(1) and the Confrontation Clause as long as the witness is unavailable for trial and was subject to cross-examination during the prior testimony." *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). MRE 804, which describes hearsay exceptions for various prior statements of unavailable witnesses, provides, in relevant part:

> (a) *Definition of Unavailabilty.* "Unavailability as a witness" includes situations in which the declarant—
>
> * * *
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity . . . .
>
> * * *
>
> (b) *Hearsay Exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) *Former Testimony*. Testimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The prosecutor moved to admit at trial Altesleben's preliminary examination testimony on the basis of a doctor's order confining her to "bed rest as a result of complications associated with her pregnancy . . . ." The court found that Altesleben was unavailable and admitted her preliminary examination testimony. We conclude that the trial court did not err by determining that Altesleben was unavailable because of a "then existing physical . . . illness or infirmity." MRE 804(a)(4). See *Garland*, 286 Mich App at 7 (holding that "[b]ased on the evidence on the record showing that the victim was experiencing a high-risk pregnancy, that she lived in Virginia, and that she was unable to fly or travel to Michigan to testify, the trial court did not clearly err by determining that the victim was unavailable").

Further, "MRE 804(b)(1) by its language permits testimony from 'the same or a different [prior] proceeding' if the party against whom the testimony is

offered had the opportunity and motive in the prior proceeding 'to develop the testimony by direct, cross, or redirect examination'." *People v Morris*, 139 Mich App 550, 555; 362 NW2d 830 (1984) (alteration in original). In this case, defendant had ample opportunity to cross-examine Altesleben during his and Watson's joint preliminary examination. Altesleben testified at the preliminary examination on the very charges for which defendant stood trial. Defense counsel for both defendant and Watson cross-examined Altesleben during the preliminary examination; no indication exists that the district court limited their opportunities to cross-examine Altesleben, and the trial court admitted both cross-examinations at defendant's jury trial. Consequently, the trial court did not err by admitting the preliminary examination testimony pursuant to MRE 804(b)(1). See *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998); *Morris*, 139 Mich App at 555. For the same reasons, defendant was not denied his right to confront witnesses against him. See *California v Green*, 399 US 149, 165; 90 S Ct 1930; 26 L Ed 2d 489 (1970).

Because we find no error in the trial court's admission of this evidence, we also find no merit to defendant's alternative argument that his trial counsel was ineffective for failing to raise a groundless objection to the reading of Altesleben's preliminary examination testimony. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

VI. ACCOMPLICE JURY INSTRUCTION

Next, defendant argues that the trial court improperly bolstered Watson's credibility with an improper jury instruction. We disagree. In the first instance,

defendant waived any claim of error regarding the jury instructions when his counsel affirmatively approved the instructions. *People v Carter*, 462 Mich 206, 208-209, 215; 612 NW2d 144 (2000). Further, the jury instructions were not improper.

"A criminal defendant has the right to have a properly instructed jury consider the evidence against him." *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000) (quotation marks and citation omitted). This Court reviews jury instructions as a whole to determine whether error requiring reversal occurred. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses, or theories that the evidence supports. *Id*. Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *Bartlett*, 231 Mich App at 143-144.

Watson testified that on November 20, 2011, she and defendant returned to Dailey's house after defendant had proposed robbing Dailey; she and defendant entered Dailey's house; they both participated in taking Dailey's personal property from different areas of the house; and in Watson's presence, defendant repeatedly punched Dailey's face and stomped on her neck, twisted Dailey's neck with his hands, bound her hands with a scarf, and exhibited to Watson a knife before returning to Dailey's bedroom. Watson also testified that in December 2012, the prosecution agreed to dismiss a felony-murder charge against her if she pleaded guilty of second-degree murder, larceny in a building, and unlawful possession of a financial transaction device.

Watson affirmed that if she "fulfill[ed] certain conditions . . . [she would] serve a minimum of twenty-three years[.]"

The trial court gave instructions that closely mirrored standard accomplice instructions CJI2d 5.4[15] and CJI2d 5.6.[16] Defendant nonetheless complains that the

---

[15] The text of CJI2d 5.4 provided:

> (1) *[Name witness]* says [he / she] took part in the crime that the defendant is charged with committing.
>
> *[Choose as many of the following as apply:]*
>
> [(a) (*Name witness*) has already been convicted of charges arising out of the commission of that crime.]
>
> [(b) The evidence clearly shows that (*name witness*) is guilty of the same crime the defendant is charged with.]
>
> [(c) (*Name witness*) has been promised that (he / she) will not be prosecuted for the crime the defendant is charged with committing based upon any information derived directly or indirectly from the witness's truthful testimony. The witness may be prosecuted if the prosecution obtains additional, independent evidence against the witness.]
>
> [(d) (*Name witness*) has been promised that (he / she) will not be prosecuted for the crime the defendant is charged with committing.]
>
> (2) Such a witness is called an accomplice.

Effective March 1, 2014, the applicable instruction became M Crim JI 5.4. MCR 2.512(D)(2).

[16] The text of CJI2d 5.6 provided:

> (1) You should examine an accomplice's testimony closely and be very careful about accepting it.
>
> (2) You may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable. However, there is nothing wrong with the prosecutor's using an accomplice as a witness. You may convict the defendant based only on an accomplice's testimony if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.

instructions as given contained language regarding Watson's plea agreement premised on her truthful testimony (which language also appears in CJI2d 5.4), improperly bolstering Watson's credibility.

However, the instructions did not state or suggest that Watson had offered truthful testimony, but only that the prosecution had agreed to pursue a lesser charge against Watson if she offered truthful testimony and that the prosecution remained free to alter the plea agreement if it obtained additional evidence against Watson. Furthermore, the entirety of the instructions mirroring CJI2d 5.4 and CJI2d 5.6 plainly cautioned the jury about accepting Watson's testimony for multiple reasons. Moreover, the trial court informed the jury on three occasions that it had the sole responsibility to assess credibility. In light of Watson's testimony establishing her longtime use of cocaine and heroin and her offering of a statement to the

---

(3) When you decide whether you believe an accomplice, consider the following:

(a) Was the accomplice's testimony falsely slanted to make the defendant seem guilty because of the accomplice's own interests, biases, or for some other reason?

(b) Has the accomplice been offered a reward or been promised anything that might lead [him / her] to give false testimony? *[State what the evidence has shown. Enumerate or define reward.]*

(c) Has the accomplice been promised that [he / she] will not be prosecuted, or promised a lighter sentence or allowed to plead guilty to a less serious charge? If so, could this have influenced [his / her] testimony?

[(d) Does the accomplice have a criminal record?]

(4) In general, you should consider an accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it.

Effective March 1, 2014, the applicable instruction became M Crim JI 5.6. MCR 2.512(D)(2)

police, the trial court additionally gave an addict-informer instruction, CJI2d 5.7,[17] which provided additional cautions to the jury regarding judging Watson's credibility.[18] Finally, the trial court instructed the jury that it should consider her agreement to testify in exchange for the prosecution's dismissal of a charge involving "a possible penalty of life without parole" "as it relates to [her] credibility and as it may tend to show [her] bias or self-interest."

---

[17] Now M Crim JI 5.7.

[18] The trial court instructed the jury as follows with respect to Watson's status as an addict informer:

> You have heard the testimony of Tonia Watson who has given information to the police in this case. The evidence shows that she is addicted . . . to drugs, namely heroin and cocaine.
>
> *You should examine the testimony of an addicted informer closely and be very careful about accepting it.* You should think about whether the testimony is supported by other evidence because then it may be more reliable.
>
> However, there's nothing wrong with the prosecutor using an addicted informer as a witness. You may convict the defendant based on such a witness' testimony alone if you believe the testimony and it proves the defendant's guilt beyond a reasonable doubt.
>
> *When you decide whether to believe Tonia Watson consider the following. Did the fact that this witness is addicted to drugs affect her memory of events or ability to testify accurately*[*?*] *Does the witness' addiction give her some special reason to testify falsely*[*?*] *Does the witness expect a reward or some special treatment or has she been offered a reward or been promised anything that might lead to her giving false testimony*[*?*] *Has the witness been promised that she will not be prosecuted for any charge or promised a lighter sentence or allowed to plead guilty to a less serious charge*[*?*] *If so, could this have influenced her testimony*[*?*] *Does the witness have a past criminal record*[*?*]
>
> *In general, you should consider an addicted informer's testimony more cautiously than you would that of an ordinary witness. You should be sure you have examined it closely before you base a conviction on it*. [Emphasis added.]

We find no error in the trial court's use of an instruction modeled on CJI2d 5.4. *People v Jensen*, 162 Mich App 171, 187-188; 412 NW2d 681 (1987) (explaining that in light of a witness's "admissions and his guilty plea to a reduced charge arising from the incident, his status as an accomplice was beyond dispute" and that the court should have instructed the jury pursuant to CJI2d 5.4). And because the trial court correctly and accurately conveyed to the jury the contents of CJI2d 5.4 and CJI2d 5.6, defense counsel need not have objected to the proper jury instructions. *Thomas*, 260 Mich App at 457.

VII. LAY-OPINION TESTIMONY

In his Standard 4 brief,[19] defendant argues that Detective Perry Edgell of the Royal Oak Police Department improperly opined at trial that a knife in evidence constituted the same one that defendant had used to kill Dailey and discarded onto the Woodward Avenue median. We disagree. Defendant objected to the foundation for Edgell's description of the knife, but did not object to Edgell's description as improper lay-opinion testimony; this issue is therefore unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763, 774.

Edgell testified that he participated in the investigation of Dailey's death and was familiar with the location where the police recovered a knife "in the median of Woodward [Avenue]." After the prosecutor asked Edgell to point on a map to the precise location where the police discovered the knife, the following colloquy occurred:

---

[19] A defendant may file a pro se brief pursuant to Administrative Order No. 2004-6, Standard 4.

[*Edgell*]: Yes. The knife that was used to kill Nancy Dailey was found--

[*Defense counsel*]: Objection, your Honor to the statement that the knife that was used to kill Nancy Dailey. I move to strike. There's absolutely no evidence--

The Court: I'll strike it.

[*Prosecutor*]: That's fine.

[*Defense counsel*]: Thank you.

At the conclusion of Edgell's testimony, defense counsel requested a mistrial, arguing that Edgell's reference to the knife as the murder weapon prejudiced defendant's right to a fair trial because "[t]hat determination . . . is purely within the providence [sic] of the jury" and "there was no reason for him . . . to volunteer that type of information before this jury." The trial court denied the mistrial motion, reasoning that it had "struck the statement from the record and if the defense wants a special instruction now or later on you can have one." The record does not indicate that defense counsel ultimately requested a special jury instruction.

After Edgell's stricken testimony, several officers, Watson, and Paruch all testified to the effect that the knife recovered from the median was the same knife that had been (1) stolen from the Paruch household, (2) shown to Watson by defendant before he returned to Dailey's bedroom, (3) indicated by defendant to Watson as the knife that he used to cut and stab Dailey's throat and thereafter "stomped . . . in[to] the median over there by Woodward" by the Seville Motel, and (4) recovered partially stuck in the ground at that location. Thus, even assuming that Edgell's statement was erroneous, defendant cannot demonstrate, in light of other properly admitted evidence, that his substantial rights were affected by this isolated (and stricken) statement.

We find no plain error requiring reversal in the trial court's refusal to grant a mistrial based on Edgell's stricken statement. *Carines*, 460 Mich at 763, 774.

VIII. EXCULPATORY EVIDENCE

Next, defendant argues in his Standard 4 brief that the prosecution suppressed exculpatory evidence in the form of DNA tests, conducted seven months after the offense was committed, on Jonathan Baker and DeJuan Crawford. We disagree. This issue was not raised at trial and is therefore unpreserved and must be reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764, 774.

"Due process requires the prosecution to disclose evidence in its possession that is exculpatory and material, regardless of whether the defendant requests the disclosure." *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007), citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). To establish a *Brady* violation, a defendant must prove

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Schumacher*, 276 Mich App at 177 (quotation marks and citation omitted).]

Defendant attaches as Exhibit 1 to his Standard 4 brief a June 2012 "DNA Extraction Worksheet," which lists many items that Altesleben extracted DNA from in this case, including a "[k]nown buccal [swab] from DeJuan Crawford" and "[k]nown blood from Jonathan Baker." But defendant identifies nothing tending to

establish that this evidence was favorable to him, that he could not have possessed it with reasonable diligence, that the prosecution suppressed it, or that a reasonable probability existed that the disclosure of the evidence might have altered the outcome of his trial. *Id*. In short, defendant has utterly failed to support his claim that the prosecution suppressed exculpatory evidence.

IX. CHAIN OF CUSTODY/EVIDENCE CONTAMINATION/MISHANDLING OF EVIDENCE

Next, defendant argues in his Standard 4 brief that key DNA evidence was mishandled. Defendant did not object at trial to the admissibility of the evidence delivered to the police forensic laboratory for testing on the basis that the police failed to maintain the chain of custody or otherwise exposed the evidence to degradation or tampering, or on the basis that Altesleben improperly processed or tested evidence. Consequently, this issue is unpreserved and reviewed for plain error affecting substantial rights. *Carines*, 460 Mich at 763, 774. We disagree that error requiring reversal occurred.

First, defendant argues that the record reflects that Detective Carl Barretto removed these items from police storage around noon on November 25, 2011, but that the forensic laboratory inexplicably did not receive the items until late on November 28, 2011. In the intervening time, the evidence was locked in Barretto's office, which defendant argues allowed for potential contamination or tampering with evidence.

At trial, defense counsel questioned Barretto regarding his handling of evidence. Barretto confirmed that on Friday, November 25, 2011, the day after Thanksgiving, he had processed all the evidence tested by the Sterling Heights state police forensic laboratory, including the

clippings from Dailey's fingernails, the hair removed from Dailey's head, the hairs found on Dailey's body, Dailey's clothes, and the blue scarf used to bind Dailey's arms. Barretto insisted that he had complied with departmental policies by advising the property officer on November 25, 2011, "which pieces of evidence [he] needed to take to the lab." Barretto acknowledged that he delivered the evidence to the laboratory at 10:40 a.m. on November 28, 2011. However, Barretto repeatedly testified that he had secured the evidence in his office, and further explained as follows about the reason for the delayed delivery:

> As I previously stated, sir, it was locked and secured in my office. The lab was closed on that day being a holiday week and weekend. The lab was closed that Friday afternoon, actually the entire Friday. I wanted to take it basically as quick [as] I can Monday morning to the lab. That's why I already had the property signed out and ready to go, as I stated secured in my office.
>
> * * *
>
> It remained in that same condition in my office . . . when I took it to the lab on Monday morning.

Barretto in later testimony reiterated that the evidence he delivered to the laboratory was in the same condition as when it was recovered from Dr. Bernardino Pacris, the forensic pathologist who performed Dailey's autopsy.

In summary, the record belies defendant's suggestion that Barretto subjected the evidence to contamination or tampering. Defendant has failed to offer on appeal anything beyond mere speculation that tagged, logged in, and secured evidence locked in a police detective's office was vulnerable to tampering or contamination, and therefore has failed to substantiate any error, plain

or otherwise, concerning Barretto's transfer of evidence to the police forensic laboratory.

Defendant attached as Exhibits 8 through 18 to his Standard 4 brief printouts of log entries that the Michigan State Police crime laboratories maintained concerning the forensic testing of evidence in this case. According to defendant, the log entries "show that Ms. Altesleben continuously failed to log evidence out properly, anywhere from 6 hours to 6 days, therefore making this documentary evidence invalid." We disagree. Contrary to defendant's contention, the exhibits contain Altesleben's log entries concerning the items she examined. And defendant presents no factual basis suggesting that Altesleben improperly processed or stored the evidence or that her manner of processing the evidence might have contaminated it. Defendant accordingly has failed to substantiate any error, plain or otherwise, concerning Altesleben's evidence processing.

Because defendant has not established any factual support for his arguments concerning the mishandling of evidence, he has not established a factual predicate for his alternative claim that his counsel was ineffective for failing to object to its admission on this ground. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

X. ADMISSION OF WATSON'S STATEMENT TO THE ROYAL OAK POLICE

Finally, defendant argues in his Standard 4 brief that the admission of Watson's statement to the Royal Oak police violated his constitutional rights, or alternatively that his counsel was ineffective for failing to object to its admission. We disagree. Defendant's argument is partially premised on his claim that the police violated Watson's right to protection from unreasonable searches and seizures in obtaining her statement; how-

ever, defendant has no standing to challenge a violation of Watson's Fourth Amendment rights. *People v Gadomski*, 274 Mich App 174, 178; 731 NW2d 466 (2007). Similarly, his trial counsel was not required to lodge a meritless objection on this ground. *Thomas*, 260 Mich App at 457.

Defendant also argues that his trial counsel should have obtained "medical records from the Royal Oak police department for the treatment of Ms. Watson's withdraws [sic]."[20] However, any such records would only be relevant with respect to the voluntariness of Watson's statements to the police, which defendant lacks the standing to challenge. *In re Investigative Subpoena re Homicide of Morton*, 258 Mich App 507, 509; 671 NW2d 570 (2003). Further, defense counsel questioned Watson at length about her use of illegal and prescription drugs, including around the time of her statements; we thus find no error requiring reversal in counsel's failure to obtain these records. *People v Marshall*, 298 Mich App 607, 612; 830 NW2d 414 (2012), vacated in part on other grounds 493 Mich 1020 (2013).

Because we conclude that defendant has not demonstrated actual errors resulting in unfair prejudice, defendant's claim that the cumulative effect of several errors warrants reversal must also fail. See *People v LeBlanc*, 465 Mich 575, 591 & n 12; 640 NW2d 246 (2002); *Carines*, 460 Mich at 763, 774.

Affirmed.

MARKEY and K. F. KELLY, JJ., concurred with BOONSTRA, P.J.

---

[20] It appears that defendant is referring to an alleged withdrawal from drugs.

LAVIGNE v FORSHEE

Docket No. 312530. Submitted February 11, 2014, at Lansing. Decided October 28, 2014, at 9:10 a.m.

Kimberly Sue Lavigne and Diane K. Lavigne brought an action under 42 USC 1983 in the Gratiot Circuit Court, alleging that police detective Kristi Forshee and a police deputy, Eric Leonard, had violated their Fourth Amendment rights under color of law by searching their home without a warrant. Defendants had knocked on the door of plaintiffs' home after receiving a tip that Kimberly Lavigne was illegally selling the marijuana that she was authorized to grow and use for medical purposes. According to Diane Lavigne, she answered the door and told defendants, who were not wearing uniforms, that Kimberly was not home. Diane was then asked to call Kimberly, and when she went into the house to do so, defendants identified themselves as police officers and told her that she could not go into the house without them. According to Kimberly, who was in fact home, she told defendant Forshee to leave the house, and Forshee responded that they did not need a warrant and that they wanted to see Kimberly's medical-marijuana documentation and her marijuana plants. Kimberly ultimately allowed Forshee upstairs to do so after repeatedly asking Forshee to either get a search warrant or leave the house. The court, Randy L. Tahvonen, J., granted summary disposition in defendants' favor on plaintiffs' § 1983 claim, as well as their state-law tort claims, after ruling that the record established that plaintiffs had consented to the search. Plaintiffs appealed the order only with respect to the § 1983 claim. Defendant Eric Leonard was subsequently dismissed by stipulation.

The Court of Appeals *held*:

1. The trial court erred by granting summary disposition because questions of material fact remained regarding whether either plaintiff voluntarily consented to the search; whether, if consent was granted, it was revoked; and whether consent was coerced by claims of lawful authority to act without a warrant.

2. Forshee was not entitled to qualified immunity because a reasonably competent police officer should have known that voluntary consent could not be inferred from plaintiffs' mere nonver-

bal acquiescence to an officer's claim of lawful authority to enter and search their home in the absence of a warrant. Further, Forshee's assertion of entitlement to immunity does not address Kimberly Lavigne's claim to have revoked any consent that was initially given.

Reversed and remanded for further proceedings.

CIVIL RIGHTS — POLICE OFFICERS — QUALIFIED IMMUNITY — SEARCHES WITHOUT WARRANTS — CLAIMS OF LAWFUL AUTHORITY — CONSENT.

A police officer is not entitled to qualified immunity from claims under 42 USC 1983 for having conducted a search without a warrant under the consent exception to the warrant requirement if the consent was inferred from acquiescence to the officer's claim of lawful authority to conduct the warrantless search.

J. Nicholas Bostic for plaintiffs.

Plunkett Cooney (by *Mary Massaron Ross* and *Josephine A. DeLorenzo*) for defendant.

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

PER CURIAM. Plaintiffs, Diane Lavigne and Kimberly Lavigne, mother and daughter respectively,[1] appeal by right the trial court's order granting defendants' motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiffs' action under 42 USC 1983, asserting that defendants violated plaintiffs' Fourth Amendment right to be free from unreasonable searches and seizures.[2] We reverse and remand for further proceedings.

---

[1] For the sake of clarity, reference to the individual plaintiffs will be by their first name.

[2] Plaintiffs have not appealed the dismissal of their state-law tort claims and have resolved their dispute with Deputy Eric Leonard. By stipulation, plaintiffs' appeal of the trial court's order regarding defendant Leonard has been dismissed with prejudice. *Lavigne v Forshee*, unpublished order of the Court of Appeals, entered February 28, 2013 (Docket No. 312530).

I

A. SUMMARY OF FACTUAL AND LEGAL CLAIMS

Plaintiffs allege in their 42 USC 1983 claim that Detective Kristi Forshee and Deputy Eric Leonard violated their Fourth Amendment rights by unreasonably searching their home on September 29, 2010, without a warrant, probable cause, or consent. Plaintiffs assert that the search was plainly unreasonable because it was the product of police coercion, rather than voluntary consent. Defendant Forshee argued that because she believed plaintiffs had consented to the officers' entry into their home, she did not violate plaintiffs' Fourth Amendment rights or, alternatively, that she was entitled to qualified immunity because her conduct did not evince plain incompetence or a blatant disregard for plaintiffs' constitutional rights.

According to Forshee, the police were investigating an anonymous tip that Kimberly was growing marijuana in her residence and unlawfully selling it to high school students. The day before the entry, the police had stopped at the home to talk to Kimberly, but were told she was out shopping. The next morning, officers retrieved several trash bags from the end of the home's driveway. Inside they discovered suspected marijuana stems, branches, and "roaches." Leonard testified that when he informed the prosecutor about the anonymous tip and the results of the "trash pull," the prosecutor stated that although he believed the officers had gathered sufficient information to seek a search warrant, he recommended that the officers attempt to obtain consent for a search through a "knock and talk" procedure.

Forshee asserted that she went to plaintiffs' home with Leonard and uniformed officer Robert Morningstar. The officers were greeted by Diane, and, because

Forshee and Leonard were dressed in plain clothes, they identified themselves as police officers. Forshee stated that she and Leonard had also affixed their badges to their sweatshirts. Diane came outside and told the officers that Kimberly was not at home but that she would call her. Forshee testified that before Diane reentered the home to call Kimberly, Forshee asked if she could follow Diane inside for the officers' safety. Diane, however, did not respond. Forshee claimed that she stood in the threshold of the doorway, between the outer storm door and the inner main door, while Diane walked to a nearby table to retrieve a phone. Kimberly, who actually was in the home, then approached them. Forshee testified that neither Diane nor Kimberly asked the officers to leave the home or objected to her entry. Forshee also testified that she spoke to Kimberly regarding the marijuana complaint and that Kimberly asserted she had a medical exemption, offering to show Forshee the grow operation in her room. Forshee asserted that she asked to follow Kimberly upstairs to her room for the purpose of officer safety after Kimberly asked to change out of her pajamas. For these reasons, Forshee testified that she believed plaintiffs had consented to her entry into the residence and that Kimberly consented to being followed upstairs to inspect the marijuana grow operation.

In their depositions, Leonard and Morningstar substantially corroborated Forshee's testimony. But, although Leonard testified that before entering the home Morningstar was on the porch next to him, who in turn was standing next to Forshee, Morningstar testified that he was not on the porch and was too far away to hear any conversations between Diane, Leonard, and Forshee before entry. Leonard further asserted that Diane opened the outer door and entered the home after Forshee asked to follow her into the home.

Kimberly testified that she heard the officers ask Diane to get a phone to call Kimberly and also heard Diane tell the officers that she would do so and return immediately. Kimberly claimed that Forshee had entered the home behind Diane by opening the door and that she then heard the screen door shut. Kimberly testified that she specifically told Forshee, Leonard, and (later) a third officer in uniform (Morningstar) to leave because they did not have permission to enter the home and did not have a warrant. Kimberly claimed that the officers refused, citing concerns for their own safety, to leave the home and get a warrant, and also told her they did not need a warrant to enter and search the home because of the drug-dealing complaint. Kimberly contends that Forshee demanded to follow her upstairs and to see her marijuana grow operation. After waiting five minutes for the police to leave, Kimberly conceded and went upstairs to get the medical marijuana paperwork because she wanted the officers to leave. Kimberly contends that she was under duress when she unlocked the spare bedroom upstairs and allowed Forshee to enter and examine her grow operation.

Diane testified that Forshee and Leonard were dressed in plain clothes and did not immediately inform her that they were police officers when she went to the door. She also denied seeing either officer wearing a police badge, but conceded that Forshee and Leonard had informed her that they were officers after telling her that she could not go into the house without them. Diane offered to call Kimberly after telling the officers that Kimberly was not home. According to Diane, the officers followed her into the home before the screen door closed behind her. Diane testified that the officers proceeded into the dining room area, where Kimberly approached them and introduced herself. Diane said that Forshee asked to see Kimberly's medical marijuana

card, and that Kimberly said that it was upstairs. Diane asserted that Kimberly asked the officers whether they had a warrant. She noted that Forshee would not allow Kimberly to retrieve her medical marijuana card by herself, and that Forshee demanded to see her "plants." When asked, Diane did not recall Kimberly saying anything else to the officers.

Forshee further testified that all three officers left the residence after she inspected the marijuana grow operation and that Kimberly eventually showed Forshee her medical marijuana paperwork, which was located in her vehicle. Forshee denied any subsequent involvement or intentional contact with plaintiffs. Criminal charges were not filed against either plaintiff as a result of the incident.

B. THE TRIAL COURT'S RULING

After oral arguments on defendants' motion for summary disposition under MCR 2.116(C)(10), the trial court granted the motion on all plaintiffs' claims. The trial court ruled that plaintiffs could not prevail because the record indisputably established that the officers had consent to enter the home; consequently, the officers did not violate plaintiffs' Fourth Amendment rights against unreasonable searches and seizures. The court further ruled that Forshee's claim of qualified immunity was moot, but noted that it would likely apply.

II

A. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868

(2008). Under MCR 2.116(C)(10), the motion is properly granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. "Whether a defendant is entitled to qualified immunity is a question of law that we review de novo." *Morden v Grand Traverse Co*, 275 Mich App 325, 340; 738 NW2d 278 (2007).

In a motion for summary disposition under MCR 2.116(C)(10), the moving party must specifically identify the issues for which no factual dispute exists, and must support this claim with evidence such as affidavits, depositions, admissions, or other documents. MCR 2.116(G)(4); *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006). If the moving party meets its initial burden, the opposing party then has the burden of showing with evidentiary materials the substance of which would be admissible that a genuine issue of disputed material fact exists. *Id*.; *Bronson Methodist Hosp v Home-Owners Ins Co*, 295 Mich App 431, 440-441; 814 NW2d 670 (2012); MCR 2.116(G)(6). A genuine issue of material fact exists if the record, viewed in a light most favorable to the nonmoving party, leaves open a matter on which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008). When deciding a motion for summary disposition, a court may not decide disputed factual issues. *Burkhardt v Bailey*, 260 Mich App 636, 646-647; 680 NW2d 453 (2004).

B. ANALYSIS

1. CONSENT

Under 42 USC 1983, a person is liable in an action at law if that person, "under color of any statute, ordinance, regulation, custom, or usage, of any State . . .

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . ." The statute "itself is not the source of substantive rights; it merely provides a remedy for the violation of rights guaranteed by the federal constitution or federal statutes." *York v Detroit (After Remand)*, 438 Mich 744, 757-758; 475 NW2d 346 (1991). The federal right at issue in this case is that provided by the Fourth Amendment of the United States Constitution: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." See *People v Kazmierczak*, 461 Mich 411, 417, n 3; 605 NW2d 667 (2000) (noting that the Fourth Amendment applies to the states). The Fourth Amendment's prohibition of unreasonable searches protects people rather than places or areas. *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011). When the government infringes an individual's reasonable or justifiable expectation of privacy, a search for purposes of the Fourth Amendment has occurred. *Id*. With respect to expectations of privacy, a person's home is at the very core of the Fourth Amendment, and the zone of privacy is most clearly defined when bounded by its physical dimensions. *People v Slaughter*, 489 Mich 302, 319; 803 NW2d 171 (2011).

The Fourth Amendment prohibits only unreasonable searches. *Id*. at 311. In general, searches conducted without both a warrant and probable cause to believe evidence of wrongdoing might be located at the place searched are unreasonable per se. *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996); *People v Snider*, 239 Mich App 393, 406-407; 608 NW2d 502 (2000). There are, however, several well-defined exceptions to

the Fourth Amendment's warrant requirement. *Slaughter*, 489 Mich at 311-312; *Champion*, 452 Mich at 98. Consent is the exception to the warrant requirement on which defendants relied and the trial court granted summary disposition. See *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999) ("One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent."). " 'The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given.' " *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001) (citation omitted). Whether consent to search is freely and voluntarily given presents a question of fact that must be determined on the basis of the totality of the circumstances; the presence of coercion or duress will militate against a finding of voluntariness. *Borchard-Ruhland*, 460 Mich at 294.

In this case, the police used a law enforcement tactic known as "knock and talk" for the purpose of investigating suspected wrongdoing. *Frohriep*, 247 Mich App at 697. Generally, this procedure is used when the police lack probable cause sufficient to obtain a search warrant so they "approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items." *Id*. While this tactic does not violate constitutional protections, a citizen's "right to be free of unreasonable searches and seizures may be implicated where a person, under particular circumstances, does not feel free to leave or where consent to search is coerced." *Id*. at 698. As a result, simply characterizing police conduct as a "knock and talk" does not eliminate the Fourth Amendment's protections against unreasonable searches and seizures.

People v Galloway, 259 Mich App 634, 642; 675 NW2d 883 (2003). When the tactic is used, "ordinary rules that govern police conduct must be applied to the circumstances of the particular case." *Frohriep*, 247 Mich App at 698-699.

Plaintiffs must establish to prove their § 1983 claim that (1) defendants acted under color of state law and (2) that defendants' conduct deprived plaintiffs of a federal right—in this case, the Fourth Amendment's protection against unreasonable searches and seizures. *Davis v Wayne Co Sheriff*, 201 Mich App 572, 576-577; 507 NW2d 751 (1993). At the summary disposition stage, the issue is whether plaintiffs have demonstrated that a genuine issue of material fact exists as to each of these elements. *Morden*, 275 Mich App at 332. It is undisputed that defendants were acting under color of state law and that they did not have a warrant when they entered defendants' home. So, the question becomes whether the undisputed facts established an exception to the warrant requirement—i.e., on the facts of this case, whether plaintiffs freely and voluntarily consented to defendants entering and searching their home.

We conclude that this case is rife with material questions of fact as to whether plaintiffs freely and voluntarily consented to defendants' entry and search of their home. Furthermore, even if valid consent was granted, questions of material fact exist regarding the scope of the consent granted and whether consent was subsequently revoked. Because questions of material fact remain for the trier of fact regarding plaintiffs' § 1983 claim, specifically regarding defendants' claim of consent, the trial court erred by granting defendants summary disposition. *Morden*, 275 Mich App at 332; *Burkhardt*, 260 Mich App at 646-647.

The consent necessary to justify a search generally must be obtained "from the person whose property is being searched or from a third party who possesses common authority over the property." *People v Brown*, 279 Mich App 116, 131; 755 NW2d 664 (2008). In this case, the police initially contacted Diane, and the facts suggest that defendants could have formed an objectively reasonable belief that she had the authority to grant them consent to enter the house. *Id*. Nevertheless, the evidence, viewed in a light most favorable to plaintiffs, leaves open questions of material fact about whether Diane's alleged consent was "unequivocal, specific, and freely and intelligently given." *Frohriep*, 247 Mich App at 702 (citation and quotation marks omitted). Indeed, questions of material fact exist regarding whether the alleged consent was "the result of duress or coercion, express or implied." *Schneckloth v Bustamonte*, 412 US 218, 248; 93 S Ct 2041; 36 L Ed 2d 854 (1973). While voluntary consent may be given in the form of "words, gesture, or conduct," *United States v Carter*, 378 F3d 584, 587 (CA 6, 2004) (citation and quotation marks omitted), it cannot be established " 'by showing no more than acquiescence to a claim of lawful authority,' " *People v Farrow*, 461 Mich 202, 208; 600 NW2d 634 (1999), quoting *Bumper v North Carolina*, 391 US 543, 548-549; 88 S Ct 1788; 20 L Ed 2d 797 (1968).[3]

Even if Diane voluntarily consented to defendants' initial entry to the home, questions of material fact

[3] Although both *Farrow* and *Bumper* determined that consent cannot be voluntary when given in response to a false representation that the police have a valid warrant, the principles discussed in those cases apply by analogy to a situation in which the police assert that they have lawful authority to enter the home without a warrant under the guise of officer safety. See *People v Chowdhury*, 285 Mich App 509, 524-526; 775 NW2d 845 (2009).

remain regarding whether any consent that was granted was thereafter revoked. This Court has observed that "the consent of a third party does not render a search valid if [another] party is present and expressly objects to the search." *Brown*, 279 Mich App at 131-132. Further, "consent may be limited in scope and may be revoked." *Frohriep*, 247 Mich App at 703, citing *People v Powell*, 199 Mich App 492, 496-499; 502 NW2d 353 (1993). So, even if the fact-finder determined that Diane validly consented to a limited entry for the purpose of officer safety while Diane telephoned Kimberly, Kimberly revoked that consent, if her testimony is believed, after she made her presence known. Moreover, even if Kimberly's testimony regarding revocation of consent in her initial contact with the officers is not believed, questions of material fact remain whether the subsequent upstairs bedroom search was the result of coercion based on Forshee's claim of lawful authority to act without a warrant. The Fourth Amendment requires defendants establish that "consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 US at 248. This burden is not met by showing mere acquiescence to claims of lawful authority. *Farrow*, 461 Mich at 208; *People v Chowdhury*, 285 Mich App 509, 524-526; 775 NW2d 845 (2009). The trial court erred by granting defendants summary disposition because questions of material fact remain regarding whether either Diane or Kimberly voluntarily consented to the search, whether if consent was granted it was revoked, and whether consent was coerced by claims of lawful authority to act without a warrant. *Allison*, 481 Mich at 425; *Morden*, 275 Mich App at 332.

2. QUALIFIED IMMUNITY

Defendant Forshee argues that the trial court should be affirmed on the alternative basis that qualified

immunity shields her from plaintiffs' § 1983 claim. A police officer may invoke the defense of qualified immunity to avoid the burden of standing trial when faced with a claim that the officer violated a person's constitutional rights. *Walsh v Taylor*, 263 Mich App 618, 635; 689 NW2d 506 (2004). Although classified as an affirmative defense that must be pleaded, *Harlow v Fitzgerald*, 457 US 800, 815; 102 S Ct 2727; 73 L Ed 2d 396 (1982), a plaintiff has the burden of overcoming the assertion of qualified immunity at the pretrial stage, *Pearson v Callahan*, 555 US 223, 231-232; 129 S Ct 808; 172 L Ed 2d 565 (2009). "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id*. at 231, quoting *Harlow*, 457 US at 818. Thus, in the case of a police officer, qualified immunity will not apply if the officer transgresses a right that was " 'clearly established,' " meaning that " 'it would be clear to a reasonable officer that [her] conduct was unlawful in the situation [she] confronted.' " *Groh v Ramirez*, 540 US 551, 558-559, 563; 124 S Ct 1284; 157 L Ed 2d 1068 (2004), quoting *Saucier v Katz*, 533 US 194, 202; 121 S Ct 2151; 150 L Ed 2d 272 (2001); see also *Walsh*, 263 Mich App at 636. When the law is clearly established, "the immunity defense ordinarily should fail, since a reasonably competent [police officer] should know the law governing his [or her] conduct." *Harlow*, 457 US at 818-819.

Defendant Forshee does not dispute that the law is clearly established that the police cannot make a warrantless entry into a home unless a recognized exception to the Fourth Amendment's warrant requirement exists. She relies solely on consent, which clearly established law

requires to be "voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 US at 248; see also *People v Lumpkin (On Remand)*, 64 Mich App 123, 125-126; 235 NW2d 166 (1975) (applying this standard). Forshee's argument rests on two principles. First, voluntary consent to search may be granted by conduct. See *Carter*, 378 F3d at 587. Second, "qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Pearson*, 555 US at 231, quoting *Groh*, 540 US at 567 (Kennedy, J., dissenting). Forshee splices these principles together to argue that she is entitled to qualified immunity because, at worst, she mistook Diane's conduct for consent when she "opened the door and walked in the house, allowing the officers to follow in behind her, without telling them they could not enter."

We find Forshee's claim of qualified immunity wanting. First, as discussed already, from the evidence viewed in the light most favorable to plaintiffs, a reasonable jury could conclude that Diane did no more than acquiesce to Forshee's claim of lawful authority to accompany Diane inside the house for the purpose of officer safety. As discussed already, the law is clearly established that voluntary consent cannot be established " 'by showing no more than acquiescence to a claim of lawful authority.' " *Farrow*, 461 Mich at 208; quoting *Bumper*, 391 US at 548-549. In each of the cited cases, the police used an invalid or nonexistent warrant to conduct a search that was later claimed valid on the basis of consent. These cases hold that " '[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search.' " *Id*. In such a situation, consent is not voluntary but coerced by the officer's claim of lawful authority. *Bumper*, 391 US at

549-550. A reasonably competent police officer should know that voluntary consent cannot be inferred from mere nonverbal acquiescence to an officer's claim that the officer has the lawful authority to enter the home and conduct a search in the absence of a warrant. For this reason, we conclude that Forshee's claim of qualified immunity fails. See *Harlow*, 457 US at 818-819; see also *Guider v Smith*, 431 Mich 559, 568; 431 NW2d 810 (1988).

Forshee's argument for qualified immunity also does not address Kimberly's claim to have revoked any consent for the officer's entry into the home that Diane may have communicated by her conduct. At the time of the search, under clearly established law, once voluntarily granted, consent may subsequently be revoked at any time. See *Powell*, 199 Mich App at 496-498. So, if Kimberly's testimony regarding revoking any consent that Diane may have granted is believed, defendant Forshee is not entitled to qualified immunity for remaining in the home and the subsequent warrantless search she conducted. Again, if the trier of fact believes Kimberly's testimony, no reasonable officer in such a situation could believe that remaining in the home and conducting further searches was lawful. *Groh*, 540 US at 563. We also note this is not a case in which police officers are accorded latitude to act without a warrant, such as when presented with exigent circumstances,[4] effecting a lawful arrest,[5] while executing a lawfully issued search warrant,[6] or having particularized reasons to fear for their safety during an investigatory

[4] *Chowdhury*, 285 Mich App at 526; *Snider*, 239 Mich App at 408.

[5] *Arizona v Gant*, 556 US 332, 335; 129 S Ct 1710; 173 L Ed 2d 485 (2009).

[6] *People v Zuccarini*, 172 Mich App 11, 13-14; 431 NW2d 446 (1988).

stop.[7] See *Groh*, 540 US at 565 n 9. Rather, voluntary consent is the only asserted justification for the officers' intrusion on the core protection of the Fourth Amendment—the right to retreat into one's own home and be free from unreasonable searches and seizure. *Id*. at 558-559. For all these reasons, we conclude that Forshee is not entitled to qualified immunity.

We reverse and remand for further proceedings. We do not retain jurisdiction. As the prevailing party, appellant may tax costs pursuant to MCR 7.219.

SHAPIRO, P.J., and MARKEY and STEPHENS, JJ., concurred.

---

[7] *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *Champion*, 452 Mich at 98-99.

PEOPLE v WILDER

Docket No. 316220. Submitted October 9, 2014, at Petoskey. Decided October 28, 2014, at 9:15 a.m. Leave to appeal sought.

Rebecca A. Wilder was convicted following a jury trial in the Alger Circuit Court, William W. Carmody, J., of possession of a firearm while intoxicated (PFWI), MCL 750.237. She was acquitted of charges of felonious assault, possession of a firearm during the commission of a felony (felony-firearm), and domestic violence. Before trial, defendant had moved to dismiss the PFWI charge, arguing that MCL 750.237 was unconstitutional as applied to the circumstances of this case because it infringed her right to keep and bear arms under the Second Amendment and Const 1963, art 1, § 6, especially within the confines of her home. The trial court denied the motion. The Court of Appeals granted defendant's delayed application for leave to appeal

The Court of Appeals *held*:

1. A two-pronged analysis applies to an as-applied constitutional challenge of MCL 750.237. The threshold inquiry is whether MCL 750.237 regulates conduct that falls within the scope of the Second Amendment right as historically understood. If the state demonstrates that the regulated activity falls outside of the Second Amendment's scope, the analysis can stop, because the activity is not protected by the Second Amendment. Under the second prong, if a defendant's conduct falls within the scope of the Second Amendment, intermediate scrutiny is applicable. Under intermediate scrutiny, the government bears the burden of establishing that the challenged regulation serves an important, substantial, or significant governmental interest and that there is a reasonable fit between the asserted interest or objective and the burden placed on an individual's Second Amendment right.

2. While defendant generally possessed the gun in her own home as a means of self-defense, which ordinarily falls within the scope of the Second Amendment, there was evidence that defendant used the gun for an unlawful or unjustifiable purpose when she threatened and assaulted the complainant with the gun. Because there was evidence that defendant used the gun for an unlawful purpose, which would not be protected by the constitu-

tional right to keep and bear arms, the trial court properly denied the pretrial motion to dismiss the PFWI charge and the motion for a directed verdict that was made after the close of the prosecutor's case-in-chief.

3. Assuming that defendant's conduct was consistent with her version of the events, aside from the prohibitions contained in MCL 750.237, there was nothing unlawful about defendant's moving the gun in her home as a precautionary measure or for purposes of personal safety. Therefore, analysis under the second prong is required. The governmental objective of protecting persons and society from an intoxicated person who actually possesses a firearm is substantial and important. In the context of determining whether there exists a reasonable fit or substantial relationship between the state's interest and the burden on defendant's Second Amendment right, there must be a weighing of the possible harm or danger that arose when defendant did move the gun against the possible harm or danger had defendant not moved the gun. It must be concluded as a matter of law that it was defendant's act of handling the gun while intoxicated that presented the greater risk to safety. Any impairment of defendant's constitutional right was substantially related to the important governmental interest in preventing intoxicated individuals from possessing firearms. Convicting defendant under MCL 750.237 under the circumstances presented satisfies intermediate scrutiny.

Affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, and *Karen A. Bahrman*, Prosecuting Attorney, for the people.

Casselman & Henderson, PC (by *Thomas P. Casselman*), for defendant.

Before: MURPHY, C.J., and SAWYER and M. J. KELLY, JJ.

MURPHY, C.J. We granted defendant's delayed application for leave to appeal her jury-trial conviction of possession of a firearm while intoxicated (PFWI), MCL 750.237. The jury acquitted her of charges of felonious assault, MCL 750.82, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b,

and domestic violence, MCL 750.81(2). Defendant was sentenced to serve nine months' probation and 60 days in jail. At trial, defendant herself testified that she had been intoxicated and that she had briefly possessed a firearm. According to defendant, however, the possession was solely for the purpose of moving the gun for personal safety or precautionary reasons, so that it would not be readily accessible to her domestic partner who was angry at defendant, was familiar with the gun's location, and was also intoxicated. This appeal poses the question whether the state and federal constitutional right to keep and bear arms, US Const, Am II; Const 1963, art 1, § 6,[1] precluded defendant's prosecution and conviction under MCL 750.237, or minimally requires that we remand for a new trial, in this as-applied challenge of the statute. We affirm.

This case arises out of a domestic dispute. On July 2, 2011, at about 5:00 a.m., defendant, a retired deputy sheriff, called 911 to report a possible home invasion. A short time later, defendant called the police and stated that a response was no longer necessary. The police nevertheless proceeded to defendant's home to investigate. Two responding state troopers testified that upon their arrival at the home, they found both defendant and her domestic partner, the complainant, to be in an intoxicated state, with defendant being the more intoxicated of the pair. The complainant told the troopers that defendant had threatened and assaulted her. At the

[1] The Second Amendment of the United States Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." Const 1963, art 1, § 6 provides: "Every person has a right to keep and bear arms for the defense of himself and the state." The Second Amendment is applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *McDonald v City of Chicago, Illinois*, 561 US 742, 750; 130 S Ct 3020; 177 L Ed 2d 894 (2010).

scene, the complainant took a preliminary Breathalyzer test (PBT), which reflected a blood alcohol level of 0.13%. Defendant refused to take a PBT at the scene; however, she did ultimately submit to a PBT about three hours later at the county jail, which revealed a blood alcohol level of 0.167%.

According to the complainant, defendant was upset over various matters and somewhat angry before defendant retired to the couple's shared bedroom in the early-morning hours of July 2, 2011. The complainant decided to sleep on the living-room couch. The complainant testified that within 10 to 15 minutes, defendant emerged from the bedroom and began hitting and strangling the complainant, yelling for the complainant to get out of the house. The complainant broke free from defendant's grasp, grabbed a sweatshirt, and then ran to the front door. The complainant indicated at one point during her testimony that before she left the home, the complainant turned around and was confronted by defendant pointing a handgun at the complainant's chest from a distance of about six inches. Later in her testimony, the complainant explained that the complainant was already outside the home when defendant first brandished the gun, aiming it directly at the complainant through a porch screen window or door. The complainant testified that defendant orally threatened to kill her. While the complainant was outside, defendant remained in the home, and the complainant pleaded with defendant for an opportunity to retrieve some pants and her medicine, but defendant refused her request. From outside, the complainant could hear defendant call 911 and report that an intruder was attempting to enter the home. After the police subsequently arrived, the complainant was allowed to retrieve some items from the bedroom. In her

bedroom closet, the complainant saw the gun that defendant had earlier brandished, and she gave it to the troopers.

Defendant took the stand in her own defense and presented a different account of the events than that elicited from the complainant. Defendant testified that she had been drinking alcohol throughout the day on July 1, 2011, and that when the complainant arrived home from work shortly before midnight on July 1, the two drank several beers. Defendant acknowledged that she was intoxicated at the time of the charged offenses, but noted that the complainant was likewise intoxicated. Defendant testified that in the early morning hours of July 2, as the two were consuming alcohol, they discussed various matters, including the possibility of a separation. Defendant claimed that the complainant was angry and that the major point of contention between the two stemmed from the complainant's incessant requests or demands for sex, which defendant had been rejecting for some time. Defendant also recounted earlier episodes in the relationship with the complainant in which the complainant, while angry, had smashed defendant's fishing rod against a wall and threw defendant's laptop computer to the floor. Defendant stated that, because of the complainant's inebriated state, her anger, and her prior acts of property destruction, while the complainant was in the bathroom, defendant had moved a handgun she owned from the bottom shelf of her nightstand next to her bed to the complainant's personal closet in the bedroom, even though defendant had her own closet in the room. According to defendant, the complainant was fully aware that the gun was kept on the lower shelf of the nightstand. And defendant explained that she moved the gun because she was fearful that the complainant might use it against her.

When asked on cross-examination why defendant had placed the gun in the complainant's own closet considering the nature of defendant's fear, defendant claimed that she had had to move quickly and the complainant's closet was the nearest to the nightstand. Defendant testified that she asked the complainant to leave, but the complainant had retorted that defendant could not make her leave. Defendant subsequently went to sleep, but was later awakened and frightened by the sound of someone stirring outside of her home. The person outside demanded to be let in, and defendant, not recognizing the voice at first and not being able to see the individual in the darkness, called 911, because she believed that a home invasion was occurring. Shortly thereafter, defendant discovered that it was the complainant outside of the home, and defendant let her inside. Defendant testified that she then called the police to explain that a response was no longer necessary, but the police nevertheless responded. Defendant denied threatening or physically assaulting the complainant, and she denied brandishing the handgun and pointing it at the complainant.

Defendant was charged with felonious assault, MCL 750.82, felony-firearm, MCL 750.227b, domestic violence, MCL 750.81(2), and PFWI pursuant to MCL 750.237, which provides, in relevant part, as follows:

> (1) An individual shall not carry, have in possession or under control, or use in any manner . . . a firearm under any of the following circumstances:
>
> (a) The individual is under the influence of alcoholic liquor . . . .
>
> * * *
>
> (c) Because of the consumption of alcoholic liquor, . . . the individual's ability to use a firearm is visibly impaired.

Before trial, defendant moved to dismiss the PFWI charge, arguing that MCL 750.237 was unconstitutional as applied to the circumstances of this case, because it infringed her Second Amendment right, as well as her right under Const 1963, art 1, § 6 to keep and bear arms, especially within the confines of her home. Defendant did not assert that MCL 750.237 was facially unconstitutional. The trial court denied the motion, ruling that "given the broad powers of the [L]egislature to pass legislation for the general health, safety and welfare of the public, and combined with the minimalistic nature of the penalty associated therewith, a 90-day misdemeanor penalty, the issue does not raise itself to the level of constitutional scrutiny, as suggested by . . . [d]efendant."

Following the presentation of the prosecution's proofs at trial, defendant moved for a directed verdict on the PFWI charge for the constitutional reasons previously argued, and the court denied the motion, standing by its original ruling. The jury was instructed as follows regarding the charge:

> The People to prove this charge must first prove as follows, that the defendant carried or possessed or used or discharged a firearm. Secondly, that the defendant was under the influence of alcoholic liquor, or that her ability to use a firearm was visibly impaired because of the consumption of alcoholic liquor . . . at the time she carried, or possessed, or used or discharged the firearm.

At the end of this instruction, the trial court stated, "And an objection to this instruction is noted for the record, Mr. Casselman [defense counsel]."

Defendant was acquitted of all charges except the charge of PFWI, for which defendant was found guilty by the jury. Following trial, defendant filed a motion for judgment notwithstanding the verdict, which was de-

nied, and subsequently she filed a motion for a new trial or a directed verdict of acquittal, which was also denied. The primary basis for these motions was the alleged infringement of defendant's state and federal constitutional right to keep and bear arms, along with associated or interwoven claims of instructional error. In the motion for a new trial or a directed verdict of acquittal, defendant cited and relied on a recently issued opinion from this Court in *People v Deroche*, 299 Mich App 301; 829 NW2d 891 (2013). The panel in *Deroche* held that the Second Amendment precludes a prosecution under MCL 750.237 if the prosecution's theory of guilt is one of constructive possession of a firearm in one's own home. *Id*. at 303. In denying defendant's motion in a written opinion, the trial court distinguished *Deroche* on the basis that in the case at bar there was evidence of actual possession, along with evidence that defendant used the gun to threaten and assault the complainant. Although the court recognized some similarities to *Deroche*, they were insufficient to support a new trial or a directed verdict of acquittal. The trial court further elaborated:

> The record is clear that the [d]efendant was in actual possession of a firearm while intoxicated, during a domestic dispute, by her own admission. The purpose of her handling the firearm at the time, for stated safety purposes, can certainly be argued on the merits, but the fact that a domestic dispute was the underlying circumstance, fueled by alcohol, with the presence and actual possession of a firearm, cannot be discounted in the overall analysis. These facts may not have escaped the jury also in their decision-making process.

With respect to jury instructions, the trial court ruled that defendant failed to request, despite having the opportunity, instructions that she was now claiming should have been given, e.g., one defining "possession"

or one framing the elements of PFWI around the right to keep and bear arms. The trial court additionally ruled that defendant had waived any instructional error by expressly indicating satisfaction with the instructions as given.

This Court granted defendant's delayed application for leave to appeal. *People v Wilder*, unpublished order of the Court of Appeals, entered December 6, 2013 (Docket No. 316220). On appeal, defendant argues that given the state and federal constitutional right to keep and bear arms, it was lawful for defendant to move the firearm within her own home for the purpose of secreting it from the complainant whom defendant feared might misuse the gun, despite the fact that at the time of the movement of the gun, defendant was under the influence of alcohol. Accordingly, it is defendant's view that the conviction under MCL 750.237 cannot stand constitutional scrutiny. In response, the prosecution argues that MCL 750.237 is constitutional as applied to the circumstances of this case, considering that defendant had actual possession of the gun while intoxicated and that there was evidence that defendant used the firearm to threaten and assault the complainant. Defendant replies, however, that she was acquitted of the felonious assault, felony-firearm, and domestic violence charges.

We review de novo the constitutionality of a statute. *People v Loper*, 299 Mich App 451, 457; 830 NW2d 836 (2013). The Second Amendment and Const 1963, art 1, § 6 both guarantee an individual "a right to keep and bear arms for self-defense." *People v Yanna*, 297 Mich App 137, 142; 824 NW2d 241 (2012). The Second Amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Dist of Columbia v Heller*,

554 US 570, 635; 128 S Ct 2783; 171 L Ed 2d 637 (2008); see also *Deroche*, 299 Mich App at 305-306 (the Second Amendment guarantees the right to possess a firearm in case of confrontation). However, as explained by the United States Supreme Court in *Heller*, 554 US at 626-627, some limits can be placed on the right to keep and bear arms:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. [Citations omitted. See also *Deroche*, 299 Mich App at 306-307.]

This Court in *Deroche* acknowledged that there are constitutionally acceptable categorical regulations of gun possession and then discussed the particular statute at issue here, MCL 750.237:

> It follows that a statute, such as the one in this case, could fall within the categories of presumptively lawful regulatory measures. Like the restrictions preventing felons, the mentally ill, or illegal drug users from possessing firearms because they are viewed as at-risk people in society who should not bear arms, individuals under the influence of alcoholic liquor may also pose a serious danger to society if permitted to possess or carry firearms because

> those individuals will have "difficulty exercising self-control, making it dangerous for them to possess deadly firearms." At this juncture, assuming that the statute at hand is facially constitutional, the issue is whether the statute, as applied to defendant, is unconstitutional. [*Deroche*, 299 Mich App at 307-308 (citations omitted).]

Again, defendant pursued an as-applied constitutional challenge and not a facial challenge of MCL 750.237. A facial challenge involves a claim that a legislative enactment is unconstitutional on its face, in that there is no set of circumstances under which the enactment is constitutionally valid. *Bonner v Brighton*, 495 Mich 209, 223 n 26; 848 NW2d 380 (2014). "An as-applied challenge, to be distinguished from a facial challenge, alleges 'a present infringement or denial of a specific right[,] or of a particular injury in process of actual execution' of government action." *Id*. at n 27 (citation omitted).

With respect to an as-applied constitutional challenge of MCL 750.237, "the threshold inquiry is whether MCL 750.237 regulates conduct that falls within the scope of the Second Amendment right as historically understood." *Deroche*, 299 Mich App at 308-309 (discussing the first prong of a two-pronged approach as adopted from the opinion of the United States Court of Appeals for the Sixth Circuit in *United States v Greeno*, 679 F3d 510, 518 (CA 6, 2012)). Relative to the threshold inquiry or first prong of the analysis, if the state demonstrates that the regulated activity falls outside of the Second Amendment's scope, the analysis can stop, because the activity is not protected by the Second Amendment. *Deroche*, 299 Mich App at 309, quoting *Greeno*, 679 F3d at 518. In regard to the second prong of the analysis, if a defendant's conduct falls within the scope of the Second Amendment, intermediate scrutiny is applicable. *Deroche*, 299

Mich App at 310. Under intermediate scrutiny, the government bears the burden of establishing that the challenged regulation serves an important, substantial, or significant governmental interest and that there is a reasonable fit between the asserted interest or objective and the burden placed on an individual's Second Amendment right. *Id*.; *United States v Marzzarella*, 614 F3d 85, 97-98 (CA 3, 2010).

Returning to the first prong and the question whether the regulated conduct falls within the scope of the Second Amendment, the Court in *Deroche* elaborated:

> The Second Amendment protects a "law-abiding" person's right to bear arms in his or her home as a means of self-defense. A right to possess a handgun in one's home as a means of self-defense is a constitutional right that is at the core of Second Amendment protection.
>
> While Second Amendment rights are not unlimited, this conduct is protected. Aside from the statute at issue, defendant was not engaging in an unlawful behavior and there was no evidence to suggest that defendant possessed the handgun for an unlawful purpose. Further, it was not established that this is a case in which someone was unlawfully allowed to own or possess a handgun in the first instance. Additionally, the prosecution has failed to establish that the conduct at issue has historically been outside of the scope of Second Amendment protection. Given our earlier discussion, defendant's conduct fell within the protections of the Second Amendment. While the perceived danger associated with intoxicated individuals and handguns is real and important, these issues are addressed by analyzing the conduct under the second prong of the *Greeno* test as discussed below. [*Deroche*, 299 Mich App at 309-310 (citations omitted).]

In *United States v Sheldon*, 5 Blume Sup Ct Trans 337, 346 (1829), the Supreme Court of the Territory of Michigan similarly observed:

> The constitution of the United States also grants to the citizen the right to keep and bear arms. But the grant of this privilege cannot be construed into the right in him who keeps a gun to destroy his neighbor. No rights are intended to be granted by the constitution for an unlawful or unjustifiable purpose.

Here, while defendant generally possessed the gun in her own home as a means of self-defense, which ordinarily falls within the scope of the Second Amendment, there was indeed evidence that, as opposed to the circumstances in *Deroche*, defendant used the gun for an unlawful or unjustifiable purpose, i.e., she threatened and assaulted the complainant with the gun. Because there was evidence that defendant used the gun for an unlawful purpose, which would not be protected by the constitutional right to keep and bear arms, the trial court properly denied the pretrial motion to dismiss the PFWI charge and the motion for a directed verdict that was made after the close of the prosecution's case-in-chief. See *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003) ("In assessing a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution[.]").

Determining whether defendant's conduct fell within the scope of the Second Amendment for purposes of the posttrial motions becomes more difficult, given that defendant was acquitted on the felonious assault and domestic violence charges, thereby perhaps suggesting that the jury was not satisfied that the prosecution had proven beyond a reasonable doubt that defendant had actually brandished and pointed the gun at the complainant. However, we can only speculate regarding the basis for the jury's verdict of acquittal on the felonious assault and domestic violence charges. First, the domes-

tic violence charge did not require proofs associated with the gun, and it appears from the record that the charge related to the allegations that defendant hit and strangled the complainant. With respect to the felonious assault charge, which did require proof in this particular case that defendant used a gun to assault the complainant, perhaps the jurors simply concluded that the prosecution failed to establish that defendant intended to injure the complainant or place her in reasonable apprehension of an immediate battery; a required element of felonious assault that was covered by the trial court's instructions. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).[2] Therefore, we cannot necessarily conclude that the jury found that no gun was pointed at the complainant simply on the basis of the acquittals.[3] And neither can we necessarily conclude that the jury fully accepted defendant's account of the events that transpired. Accordingly, even if we assumed that defendant's constitutional argument was generally valid and sound, under no circumstance can we hold that the evidence was *insufficient* to sustain the PFWI conviction, so that defendant could not be retried. Rather, at best from defendant's perspective, a jury would need to resolve in a new trial factual issues bearing on the constitutional right to keep and bear arms. We therefore continue our analysis to determine whether defendant is entitled to a new trial.

---

[2] The acquittal on the felony-firearm charge is also not conclusively enlightening regarding whether defendant brandished a gun in the complainant's direction, considering that the acquittal could simply have been based on the jury's rejection of the felonious assault charge, which was the predicate offense for the felony-firearm charge.

[3] Intentionally aiming a gun at or toward a person without malice is a misdemeanor. MCL 750.233(1). Accordingly, the mere act of pointing a gun at the complainant, even if it did not amount to a felonious assault, was still unlawful and would not fall within the scope of Second Amendment protection.

Assuming for purposes of our review that defendant's conduct was consistent with her version of the events and that the jurors fully believed her testimony, the question, still with respect to the first prong of the analysis, is whether that presumed conduct fell within the scope of the state and federal constitutional right to keep and bear arms. Aside from the prohibitions contained in MCL 750.237, there was nothing unlawful about defendant's moving the gun located in her home as a precautionary measure or for purposes of personal safety in an effort to avoid the possibility that the intoxicated and angry complainant would procure the gun and turn it against defendant. Therefore, we must shift gears to the second prong of the constitutional analysis. *Deroche*, 299 Mich App at 310. This inquiry entails examination of, in part, the strength of the state's justification for regulating or restricting the exercise of the constitutional right at issue. *Id*. at 309, quoting *Greeno*, 679 F3d at 518. For purposes of the analytical framework, we shall determine as a matter of law whether the constitutional right to keep and bears arms was violated by considering the testimony presented by defendant and other undisputed evidence. See *People v Knight*, 473 Mich 324, 343; 701 NW2d 715 (2005) (while assuming that the proffered reasons for peremptory challenges are true, the court determines as a matter of law whether the challenges violated the Equal Protection Clause); *State v Maas*, 1999 Utah App 325, ¶ 13; 991 P2d 1108 (1999) ("[W]hether a given set of facts gives rise to a constitutional violation is a matter of law."). If the answer is yes, a properly instructed jury in a new trial would need to resolve underlying factual disputes about how the gun was utilized by defendant.[4]

[4] Although the trial court found that defendant waived any claim of instructional error, the court had noted a defense counsel objection to the instruction on the PFWI charge, but we cannot discern from the record the

With respect to the application of intermediate scrutiny under the second prong of the analysis, the governmental objective of protecting persons and society from an intoxicated individual who actually possesses a firearm is certainly substantial and important. *Deroche*, 299 Mich App at 307-308 (intoxicated individuals pose a serious danger to society if permitted to possess a firearm, because those individuals will have difficulty exercising self-control).[5] The extreme danger posed by a drunken person with a gun is real and cannot be over emphasized. In regards to whether there is a reasonable fit between the government's substantial and important interest in protecting society from gun-wielding, intoxicated individuals and the burden on the constitutional right to keep and bear arms, the *Deroche* panel concluded that there the infringement "was not substantially related to [the] objective" of "preventing intoxicated individuals from committing crimes involving handguns . . . ." *Id*. at 311. The Court explained:

> We initially note that at the time of the officers' entry into the home, and at the time they were actually able to establish the level of defendant's intoxication, defendant's possession was constructive rather than actual. Thus, to allow application of this statute to defendant under these circumstances, we would in essence be forcing a person to choose between possessing a firearm in his or her home and consuming alcohol. But to force such a choice is unreason-

---

nature of that objection. Given our ultimate holding today, we shall proceed on the assumption that defendant preserved a challenge of the PFWI instruction.

[5] In *State v Richard*, 298 SW3d 529 (Mo, 2009), the Missouri Supreme Court addressed a Second Amendment challenge of a statute comparable to MCL 750.237, noting that the state's police power to preserve the health, welfare, and safety of its citizens through the regulation of harmful threats encompassed the authority to prohibit an intoxicated individual from possessing a loaded firearm, because such legislation was reasonable in light of the demonstrated threat to public safety posed by such an individual.

> able. As the facts illustrate, there was no sign of unlawful behavior or any perceived threat that a crime involving a handgun would be committed. . . . [T]he government's legitimate concern is not that a person who has consumed alcohol is in the vicinity of a firearm, but that the person actually has it in his or her physical possession.
>
> In conclusion, the government cannot justify infringing on defendant's Second Amendment right to possess a handgun in his home simply because defendant was intoxicated in the general vicinity of the firearm. [*Id.* at 311-312.]

In this case, under defendant's version of the events, she was not engaged in any unlawful behavior, but, as opposed to the facts in *Deroche*, defendant actually possessed the gun, albeit for a brief time. The prosecution's case was not predicated on constructive possession, and the jury was never instructed that possession could be constructive. However, we do not read *Deroche* to suggest that actual possession will defeat a Second Amendment claim in every conceivable circumstance. In the context of determining whether there exists a reasonable fit or substantial relationship between the state's interest and the burden on defendant's Second Amendment right, there needs to be a weighing of the possible harm or danger had defendant not moved the gun and the possible harm or danger that arose when defendant did move the gun. In other words, the issue becomes which of these two circumstances presented the greater threat to safety.

Initially, we note that this case did not present facts that would support a claim of or instruction on self-defense, which requires an honest and reasonable belief that death or great bodily harm is imminent. MCL 780.972(1)(a).[6] Further, defendant did not argue the legal

[6] We note that our Supreme Court in *People v Dupree*, 486 Mich 693, 696-697; 788 NW2d 399 (2010), absent any discussion of the Second

defense of necessity, see *People v Hubbard*, 115 Mich App 73, 80; 320 NW2d 294 (1982); rather, her position was framed solely around the constitutional right to keep and bear arms. In weighing the possible harm or danger posed by the two situations, we conclude as a matter of law that it was defendant's act of handling the firearm while intoxicated that presented the greater threat to safety, as opposed to the hypothetical situation in which defendant did not move the firearm. There can be no reasonable dispute given the record that defendant was more intoxicated than the complainant, which was reflected in the PBTs, and defendant's level of intoxication was significant; she had been drinking all day and into the night. Additionally, even under defendant's account of the events that transpired, emotions were running exceptionally high on the part of both defendant and the complainant. Handling a firearm in a highly drunken and highly emotional state, even if briefly, posed a substantial danger to defendant herself, let alone the complainant who was nearby, of an accidental discharge or even an intentional discharge clouded by the alcohol. While it may be arguable that the danger in moving the gun as a precautionary measure was not so great, we conclude that the danger posed had the firearm not been moved was negligible; defendant's safety was not meaningfully increased by moving the gun. There was no testimony that the complainant had, at the time of the offense or previously, handled the gun in a threatening manner or had even threatened to use the gun against defendant. Indeed, there was no evidence indicating that the complainant had ever discharged a firearm or was familiar with discharging a gun. Defendant even testified that the com-

---

Amendment or Const 1963, art 1, § 6, held that self-defense is generally available to a defendant in challenging a charge of possession of a firearm by a felon when the defense is supported by sufficient evidence.

plainant had asked her to teach her about using firearms, but defendant also testified that she had never done so.

Additionally, defendant did not testify that, at the time of the offense, the complainant had physically harmed her or had threatened to physically harm her. Moreover, defendant testified that there had been many earlier occasions on which she and the complainant were intoxicated and embroiled in conflict and argument. Although the complainant had previously thrown a fishing rod and computer belonging to defendant, and there was testimony of an incident wherein the complainant had slammed a door on defendant's fingers, there was no evidence suggesting even a remote possibility that the complainant would shoot defendant. We also note that, aside from the gun at issue, defendant had an extensive gun collection that was kept in the house.

On the basis of the undisputed facts and even assuming that the claims made by defendant in her testimony were true, we cannot conclude that defendant is entitled to a new trial on the ground that her state and federal constitutional right to keep and bear arms was violated. Any impairment of defendant's constitutional right resulting from outlawing her movement of the gun was substantially related to the important governmental interest in preventing intoxicated individuals from possessing firearms. Therefore, convicting defendant under MCL 750.237 and the circumstances presented survives or satisfies intermediate scrutiny. Reversal is unwarranted.

Affirmed.

SAWYER and M. J. KELLY, JJ., concurred with MURPHY, C.J.

SPARTAN STORES, INC v CITY OF GRAND RAPIDS

Docket No. 314669. Submitted August 6, 2014, at Lansing. Decided October 30, 2014, at 9:00 a.m. Leave to appeal sought.

Spartan Stores, Inc., and Family Fare, LLC, filed a petition in the Tax Tribunal, seeking to challenge the city of Grand Rapids' property tax assessment of a shopping mall in which Family Fare leases space to operate a grocery store. Family Fare is a wholly owned subsidiary of Seaway Food Towns, Inc., which is, in turn, a wholly owned subsidiary of Spartan. Petitioners claimed that they could challenge the assessment in the Tax Tribunal because they are a "party in interest" under MCL 205.735a(6). The city maintained that petitioners could not challenge the assessment because only property owners or their agents, not leaseholders, may be considered a "party in interest" under MCL 205.735a(6). The Tax Tribunal agreed with the city and granted summary disposition in favor of the city. Petitioners appealed.

The Court of Appeals *held*:

1. A "party in interest" under MCL 205.735a(6) includes persons or entities with a property interest in the property being assessed. Family Fare is a "party in interest" under the statute because it has a leasehold in the shopping center and thus possesses a property interest in the assessed property. Spartan is not a "party in interest" because it does not have a property interest in the assessed property. The order granting summary disposition in favor of the city is reversed and the matter is remanded to the Tax Tribunal for further proceedings consistent with this opinion.

2. The Tax Tribunal has original jurisdiction over tax-assessment petitions brought by a party in interest that involve property classified under MCL 211.34c as commercial, industrial, or developmental real property, or commercial, industrial or utility personal property.

3. The property in question in this dispute is a parcel used for commercial purposes. Because the property is commercial real property, a party in interest to the assessment of the property may, under MCL 205.735a(4)(a), appeal the assessment directly to the Tax Tribunal without first protesting before the board of review.

4. In the context of a property dispute, a property interest is a legal share in something or all or part of a legal or equitable claim to or right in property. The word "interest," as applied to land, embraces and includes leasehold interests and rights derived therefrom.

Reversed and remanded.

TAXATION — TAX TRIBUNAL ACT — WORDS AND PHRASES — PARTY IN INTEREST.

The phrase "party in interest" in MCL 205.735a(6) includes persons or entities with a property interest in the property being assessed; a property interest, in the context of a property dispute, is a legal share in something or all or part of a legal or equitable claim to or right in property; the word "interest," when applied to land, embraces and includes leasehold interests and rights derived therefrom.

Miller, Canfield, Paddock & Stone, PLC (by *Jack L. Van Coevering* and *Marcy L. Rosen*), for petitioners.

Catherine M. Mish, City Attorney, and *Kristen Rewa*, Assistant City Attorney, for respondent.

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

SAAD, P.J. Petitioners appeal the Tax Tribunal's grant of summary disposition to respondent pursuant to MCR 2.116(C)(4). For the reasons stated in this opinion, we reverse and remand for proceedings consistent with this opinion.

I. NATURE OF THE CASE

This case involves an issue of first impression: the proper definition of the term "party in interest" as used in MCL 205.735a(6). Enacted in 2006, MCL 205.735a allows a "party in interest" to a tax-assessment dispute that involves specified types of property to bypass the board of review and protest the assessment directly before the Tax Tribunal.

Petitioner Spartan Stores, Inc. (Spartan), owns petitioner Family Fare, LLC (Family Fare), which operates a grocery store that leases space in a shopping center. Both

claim that they are a "party in interest" under MCL 205.735a(6), and therefore may challenge the assessment of the shopping mall in the Tax Tribunal. Respondent, the city of Grand Rapids, maintains that, in general, only property owners or their agents, not leaseholders, may be considered a "party in interest" under MCL 205.735a(6), and therefore petitioners may not challenge the assessment of the shopping mall in the Tax Tribunal.

We agree with petitioners' broader argument and hold that a "party in interest" under MCL 205.735a(6) includes persons or entities with a *property* interest in the property being assessed. We do so because: (1) the plain meaning of the statute mandates this result, and (2) the stated purpose of MCL 205.735a is to remove procedural barriers in property-tax disputes involving specifically defined businesses, and defining the term "party in interest" to mean "persons or entities with a property interest in the property being assessed" effectuates this aim.

Therefore, we hold that Family Fare is a "party in interest" under MCL 205.735a(6), because it has a leasehold in the shopping center and thus possesses a property interest in the property being assessed. By application of the same principle, we rule that Family Fare's copetitioner, Spartan, is not a "party in interest" because it does not have a property interest in the property being assessed. We accordingly reverse the Tax Tribunal's grant of summary disposition to respondent pursuant to MCR 2.116(C)(4) and remand for proceedings consistent with this opinion.

II. FACTS AND PROCEDURAL HISTORY

Petitioner Family Fare is a Michigan business that is a wholly owned subsidiary of Spartan.[1] It operates

[1] Actually, Family Fare is a wholly owned subsidiary of Seaway Food Towns, Inc., which is in turn a wholly owned subsidiary of Spartan.

a grocery store in a shopping center at 4325 Breton Road in Grand Rapids and leases its space from the shopping center owner, Jade Pig Ventures—Breton Meadows, LLC (Breton Meadows). Under the lease, Family Fare is responsible for 78.71% of the shopping center's taxes.

In 2010, Spartan filed a petition in the tribunal pursuant to MCL 205.735a to challenge Grand Rapids' tax assessment of the property that Family Fare leased. Grand Rapids responded with a motion for summary disposition under MCR 2.116(C)(4) and argued that the tribunal lacked jurisdiction because Spartan was not a "person in interest" under MCL 205.735a(6). Family Fare then filed a motion for inclusion in the suit as an additional party, because as the entity responsible for the property taxes at issue, it was a "party in interest."

At first, the tribunal permitted Family Fare's inclusion in the suit, reasoning that it was a "party in interest" because it "lease[d] the subject property and is responsible for payment of property taxes for said property." But the tribunal reversed itself and granted respondent's motion for summary disposition, because petitioners supposedly failed to demonstrate that they were a "party in interest" under MCL 205.735a(6). Petitioners now appeal in our Court and argue that the tribunal erred when it granted respondent's motion for summary disposition under MCR 2.116(C)(4) because they are a "party in interest" under MCL 205.735a(6).

III. STANDARD OF REVIEW

Where fraud is not claimed, we review the Tax Tribunal's "decision for misapplication of the law or adoption of a wrong principle." *Wexford Med Group v Cadillac*, 474 Mich 192, 201; 713 NW2d 734 (2006). The tribunal's findings of fact are conclusive "if they are

supported by competent, material, and substantial evidence on the whole record." *Id*. (quotation marks and citations omitted). Though we "defer[] to the tribunal's interpretation of a statute that it is charged with administering and enforcing,"[2] when statutory interpretation is involved, we review "the tribunal's decision de novo." *Id*. at 202. The tribunal's grant or denial of a motion for summary disposition is also reviewed de novo. *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 75; 780 NW2d 753 (2010).

The primary goal of statutory interpretation "is to discern and give effect to the intent of the Legislature." *Lafarge Midwest, Inc v Detroit*, 290 Mich App 240, 246; 801 NW2d 629 (2010). "When ascertaining the Legislature's intent, a reviewing court should focus first on the plain language of the statute in question . . . ." *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 560; 837 NW2d 244 (2013) (citations omitted). The contested portions of a statute "must be read in relation to the statute as a whole and work in mutual agreement." *US Fidelity & Guarantee Co v Michigan Catastrophic Claims Ass'n (On Rehearing)*, 484 Mich 1, 13; 795 NW2d 101 (2009).

IV. ANALYSIS

A. LEGISLATIVE BACKGROUND: THE GENERAL PROPERTY TAX ACT AND THE TAX TRIBUNAL ACT

The statute at issue, MCL 205.735a, is part of a set of laws that govern the appeal of property-tax assessments in Michigan. To correctly interpret MCL 205.735a, it must be placed in context with the two separate statutory frameworks with which it interacts: (1) the Gen-

[2] *Inter Coop Council v Dep't of Treasury*, 257 Mich App 219, 222; 668 NW2d 181 (2003).

eral Property Tax Act (GPTA), MCL 211.1 *et seq*., and (2) the Tax Tribunal Act (TTA), MCL 205.701 *et seq*.

Among other things, the GPTA specifies a method by which "person[s] whose property is assessed on the assessment roll or [their] . . . agent[s]" may "protest" the assessment on their property before the board of review. MCL 211.30(4); 2 Cameron, Michigan Real Property Law (3d ed), § 28.19, p 1611. The boards of review are local-level bodies that are permitted to "correct the assessed value or tentative taxable value" of properties "in a manner that will make the valuation of the property relatively just and proper . . . ." MCL 211.30(4). Again, in general, the *only* parties who may bring a protest before the board of review are "person[s] whose property is assessed on the assessment roll or [their] . . . agent[s]"—i.e., property owners or their agents.[3] *Id*.[4] Persons or entities who are not the property owner or the owner's agent—for example, a commercial leaseholder who lacks the authorization of the property owner—may not protest tax assessments at the board of review. *Walgreen Co v Macomb Twp*, 280 Mich App 58, 64-65; 760 NW2d 594 (2008).

However, the board of review's decision on a property-tax assessment is not necessarily the final one. If the property owner or its agent so chooses, they may appeal the board's decision to the Tax Tribunal, an administrative body created by the TTA, MCL 205.701 *et seq*. The TTA is separate and distinct from the GPTA,

---

[3] There are exceptions to this general rule, such as a tenant under a long-term lease that exceeds 35 years. MCL 211.27a(6)(g). See *Walgreen Co v Macomb Twp*, 280 Mich App 58, 66; 760 NW2d 594 (2008).

[4] See also *Walgreen Co*, 280 Mich App at 63 ("when read as a whole, MCL 211.30 affords 'taxpayers' the opportunity to be heard on tax protests, but *only* 'a person whose property is assessed on the assessment roll or his or her agent' may actually *make* such a property tax protest before the board of review").

and the Tax Tribunal's mandates and procedures are different from those of the board of review. See *Walgreen Co*, 280 Mich App at 65.

MCL 205.721 creates the Tax Tribunal and specifies that it is a "quasi-judicial agency" that functions as an appellate forum for property-tax-assessment disputes. MCL 205.731(a) grants the Tax Tribunal "exclusive and original jurisdiction" over "[a] proceeding for direct review of a final decision, finding, ruling, determination, or order of an agency relating to assessment, valuation, rates, special assessments, allocation, or equalization, under the property tax laws of this state."

The tribunal's jurisdiction with regard to proceedings commenced before January 1, 2007, was strictly limited by MCL 205.735(3). First, the tribunal was only permitted to hear actions that had already been "protested before the board of review . . . ." MCL 205.735(2); *Covert Twp v Consumers Power Co*, 217 Mich App 352, 355; 551 NW2d 464 (1996). Second, petitioners before the tribunal must be a "party in interest"—namely, a "person[] with an interest in the property being assessed." *Jefferson Sch v Detroit Edison Co*, 154 Mich App 390, 397; 397 NW2d 320 (1986).[5] Because of the interplay between the GPTA (which specifies that only property owners or their agents may bring protests before the board of review) and the TTA (which only allowed parties that had appeared before the board of review to appear before the Tax Tribunal), historically it was unnecessary for courts to define the use of "party in interest" in MCL 205.735(3) with any more specificity, because the term necessarily encompassed only those parties that had protested before the board of

[5] The term "party in interest" as used in MCL 205.735(3) bears no relation to the standing-related term "real party in interest" used in MCR 2.201(B). *Walgreen Co*, 280 Mich App at 65.

review—i.e., the property owner or its agent. MCL 211.30(4). In other words, the board of review's strict limit on which parties could contest property-tax assessments served as a screen on which parties could appeal those assessments to the Tax Tribunal, and necessarily limited the scope of the phrase "party in interest" in MCL 205.735(3) to property owners or their agents.

B. MCL 205.735a

The Legislature upended this arrangement in 2006, when it enacted MCL 205.735a, which applies to a proceeding before the Tax Tribunal that is commenced after December 31, 2006, which allows specified parties to bypass the board of review and appeal property-tax assessments directly to the Tax Tribunal. The legislation had its origins in complaints from business owners, who disliked the fact that the protest of a tax assessment began at a local board of review. Their concerns were threefold. First, property-tax assessments of business property—which range from department stores to massive manufacturing plants—are "quite complex," and business owners believed that "many local boards of review [did] not have the expertise to properly review business property tax disputes." House Legislative Analysis, HB 5854, August 23, 2006, p 3. Second, the GPTA's byzantine procedural requirements resulted in a "multitude of filings," which took a "great deal of time and resources to prepare." *Id*. And third, because business owners often disagreed with the conclusions of the board of review, appearance before the board had "become a formality, in order to preserve . . . appeal rights to the tax tribunal." *Id*.

MCL 205.735a(4) addresses these concerns by mandating:

> (a) For an assessment dispute as to the valuation or exemption of property classified under section 34c of the general property tax act . . . MCL 211.34c, as *commercial real property*, *industrial real property*, or *developmental real property*, the assessment *may be protested before the board of review or appealed directly to the tribunal without protest before the board of review* as provided in subsection (6).
>
> (b) For an assessment dispute as to the valuation or exemption of property classified under section 34c of the general property tax act . . . MCL 211.34c, as commercial personal property, industrial personal property, or utility personal property, the assessment may be protested before the board of review or appealed directly to the tribunal without protest before the board of review as provided in subsection (6), if a statement of assessable property is filed under section 19 of the general property tax act . . . MCL 211.19, prior to the commencement of the board of review for the tax year involved. [MCL 205.735a(4) (emphasis added).]

In turn, MCL 205.735a(6) specifies that if the property assessed is of the type mentioned above—and *only* if the property assessed is of the type mentioned above—"a party in interest," may bypass the board of review and file a petition directly with the Tax Tribunal "on or before May 31 of the tax year involved." Accordingly, the tribunal has *original* jurisdiction over tax-assessment petitions that (1) involve "property classified under . . . MCL 211.34c" as commercial, industrial, or developmental real property, or commercial, industrial, or utility personal property, and (2) are brought by a "party in interest." *Id*.[6]

---

[6] Stated another way, an individual or entity that is not a "party in interest" under MCL 205.735a(6) does not have standing to invoke the Tax Tribunal's jurisdiction. Because this case involves a statutory cause of action—in other words, a cause of action provided at law by the Legislature in MCL 205.735a(4)—it is inappropriate for us to apply the

1. "PROPERTY CLASSIFIED UNDER . . . MCL 211.34c"

MCL 211.34c(2)(b)(*i*) states that "[c]ommercial real property includes the following": "[p]latted or unplatted parcels used for commercial purposes, whether wholesale, retail, or service, with or without buildings."

Here, it is undisputed that the property in question, the shopping center owned by Breton Meadows from which Family Fare leases space, is a "parcel[] used for commercial purposes." Accordingly, a "party in interest" to the assessment of the property may appeal the assessment "directly to the tribunal without protest before the board of review . . . ." MCL 205.735a(4)(a).

2. "PARTY IN INTEREST"

To repeat, neither MCL 205.735a, nor the TTA, of which MCL 205.735a is a part, define the phrase "party in interest." Our Court has defined the phrase to encompass "persons with an interest in the property being assessed"[7], but it did so before passage of MCL 205.735a and in a way that offers little clarity.[8]

If a term used in a statute is undefined, a court may look to a dictionary for interpretative assistance. *Klooster*

---

common-law doctrine of standing. See *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 372; 792 NW2d 686 (2010).

[7] *Jefferson Sch*, 154 Mich App at 397.

[8] We also believe that *Walgreen Co*'s holding that the term "party in interest" as used in MCL 205.735(3) has no relation to the standing-related term "real party in interest" used in MCR 2.201(B) should be applied to the use of "party in interest" in MCL 205.735a(6). *Walgreen Co*, 280 Mich App at 65. The Legislature chose to place MCL 205.735a in the same statutory framework as MCL 205.735(3), which indicates that they intended "party in interest" to have the same definition in each section of the statute. See *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") (quotation marks and citations omitted).

v City of Charlevoix, 488 Mich 289, 304; 795 NW2d 578 (2011). Because the terms at issue have a "unique legal meaning" and are located in a complicated statute on tax-appeal procedure, we use a legal dictionary as opposed to a lay dictionary. See *People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007). "Party" is defined as "[s]omeone who takes part in a transaction." *Black's Law Dictionary* (10th ed). "In" is a preposition meaning "[u]nder or based on the law of." *Id*. In the context of a property dispute, "interest" means "[a] legal share in something; all or part of a legal or equitable claim to or right in property." *Id*.

Michigan courts have long held that leaseholds manifestly are "interests," in that they are "part of a legal . . . claim to or right in property." See *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 33; 614 NW2d 634 (2000) (KELLY, J., concurring) ("leases are interests in real property"), *In re Park Site on Private Claim 16, Detroit*, 247 Mich 1, 4; 225 NW 498 (1929) (holding that there was a taking of the Belle Isle Coliseum Company's "leasehold interest" in land condemned by the city of Detroit), and *Lookholder v State Hwy Comm'r*, 354 Mich 28, 35; 91 NW2d 834 (1958) ("the settled rule in Michigan [is] that a leasehold, and rights derived from a leasehold, constitute 'property,' for the taking of which just compensation must be made or secured"). Most importantly, for the purposes of our case, "the word 'interest' as applied to land embraces and includes leasehold interests and rights derived therefrom . . . ." *Lookholder*, 354 Mich at 36.

Therefore, as used in MCL 205.735a(6), "party in interest" refers to a person or entity with a property interest[9] in the property being assessed. As "parties

[9] Again, "property interest" is defined as "[a] legal share in something; all or part of a legal or equitable claim to or right in property." *Black's Law Dictionary* (10th ed), p 934.

in interest" under the statute, persons or entities with a property interest in the property being assessed may directly appeal the assessment to the Tax Tribunal. MCL 205.735a(4).

Grand Rapids makes two well-taken arguments against this interpretation of MCL 205.735a(6), but both must nonetheless be rejected. The city points to the GPTA's strict requirements on which parties may appear before the board of review, and suggests that a similarly limited approach—i.e., one where a "party in interest" must be a property owner or its agent—is a proper reading of this new section of the TTA. But this interpretation ignores the legislative background of MCL 205.735a, which stated an intent to remove procedural and formalistic obstacles from appeals on tax-assessment of commercial property. Barring a large leaseholder tenant—which, ultimately, is the actual entity that bears the financial burden of the tax—from contesting the assessment does not effectuate these aims. And, in any event, had the Legislature wanted to use the more stringent jurisdictional limitation language from the GPTA, it was free to do so. The fact that it did not militates against a statutory interpretation that imports the GPTA's definitions to the TTA.[10]

We are also unconvinced that interpreting MCL 205.735a to allow commercial leaseholders to contest assessments before the tribunal will open the floodgates to meritless actions. Business tenants are adept at negotiating with their landlord and cotenants—and would do so with regard to which party was best situated to contest the assessment. Furthermore, the

[10] See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 217-219; 801 NW2d 35 (2011) (noting that the absence of a specific remedy in a statute indicated that the Legislature did not intend for that remedy to be provided).

tribunal may consolidate cases if multiple leaseholders challenge an assessment. In other words, ruling that a commercial leaseholder is a "party in interest," and thus is allowed to contest an assessment before the Tax Tribunal, does not "invite all kinds of appeals by political activist groups, by numerous tax-levying units of local government, and perhaps by disgruntled neighbors." *Jefferson Sch*, 154 Mich App at 397. Instead, it gives business entities the streamlined method to protest a property-tax assessment envisioned by the Legislature's enactment of MCL 205.735a.

3. APPLICATION

In this case, Family Fare is a "party in interest" under MCL 205.735a(6). It has a leasehold—a property interest, i.e., "[a] legal share in something; all or part of a legal or equitable claim to or right in property"[11]—in the shopping center, which was assessed by Grand Rapids and is the subject of this dispute. Accordingly, as a "party in interest" under MCL 205.735a(6), it may invoke the Tax Tribunal's jurisdiction under MCL 205.731(a) to dispute Grand Rapids' tax assessment of the shopping center.

The same cannot be said of Spartan, Family Fare's ultimate owner.[12] While Spartan, as Family Fare's corporate parent, certainly has a *financial* interest in the tax assessment of the shopping center, it does not have a *property* interest in the assessment of the shopping center. It does not own the property—Breton Meadows does. And it did not sign the lease—Family Fare did.[13]

[11] *Black's Law Dictionary* (10th ed), p 934.

[12] As noted, Family Fare is a wholly owned subsidiary of Seaway Food Towns, Inc., which is in turn a wholly owned subsidiary of Spartan.

[13] Again, Family Fare and Spartan are separate corporate entities. Spartan unconvincingly argues that we should disregard this formal

Because Spartan lacks a property interest in the shopping center, it is not a "party in interest" under MCL 205.735a(6) and it cannot protest the assessment of the shopping center directly before the Tax Tribunal.

V. CONCLUSION

Accordingly, we hold that Family Fare, as a party with a property interest in the property being assessed, is a "party in interest" under MCL 205.735a(6) and that the Tax Tribunal has jurisdiction over its appeal. The tribunal's grant of summary disposition to respondent under MCR 2.116(C)(4) is therefore reversed and we remand for proceedings consistent with this opinion. We do not retain jurisdiction.

Reversed and remanded.

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

---

separation because (1) the businesses share a headquarters address and high-level management staff, and (2) Family Fare is "simply another brand, a 'retail banner' " of Spartan. In other words, Spartan asks us to ignore the corporate form because it is inconvenient for Spartan's current interests to acknowledge that the two businesses are distinct entities. This approach contravenes Michigan law, which states:

> It is a well-recognized principle that separate corporate entities will be respected. Michigan law presumes that, absent some abuse of corporate form, parent and subsidiary corporations are separate and distinct entities. This presumption, often referred to as a "corporate veil," may be pierced only where an otherwise separate corporate existence has been used to "subvert justice or cause a result that [is] contrary to some other clearly overriding public policy." [*Seasword v Hilti, Inc (After Remand)*, 449 Mich 542, 547-548; 537 NW2d 221 (1995) (citations omitted).]

Consistent with Michigan law, the separate corporate forms of Spartan and Family Fare must be respected.

BREDOW v LAND & CO

Docket No. 315219. Submitted June 10, 2014, at Grand Rapids. Decided October 30, 2014, at 9:05 a.m. Leave to appeal sought.

Gordon Joseph Bredow and Suzanne Bredow brought an action in the Kent Circuit Court against Land & Co., PRD Construction, Inc., and others, after Gordon was injured while on property owned or managed by defendants. Gordon was employed by a company that leased space on defendants' property. On December 26, 2008, Gordon and a coworker began to clear ice and snow from an area near the building's main entrance. Large icicles had formed on the building, and Gordon was attempting to remove some of them when a large amount of ice and snow fell from the roof, striking and injuring him. Gordon alleged that defendants' negligence had caused his injuries, and his wife, Suzanne, brought a claim for loss of consortium. Defendants moved for summary disposition. The court, Donald A. Johnston, J., treated the action as one sounding in premises liability and granted summary disposition in favor of defendants, concluding that the snow and ice on the roof constituted an open and obvious danger without any special aspects. Plaintiffs appealed.

The Court of Appeals *held*:

To state a claim in a premises liability action, the plaintiff must demonstrate that (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. An individual's status as a trespasser, licensee, or invitee at the time of injury determines the duty the landowner owes to that person. Tenants are generally considered invitees of the landlord. But an individual's status as an invitee is subject to change during the visit to the premises if the individual exceeds the scope of his or her invitation. When an invitee fails to use the premises in the usual, ordinary, or customary way, he or she becomes a licensee. In this case, Gordon was an invitee when he entered the premises to go to work, but when he undertook the unsolicited act of clearing icicles from the building—a task unrelated to his work—he lost his status as an invitee and became a licensee. A landowner only owes a duty to a licensee to warn the

licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved. Because Gordon was a licensee, defendants owed him no duty of inspection or affirmative care to make the premises safe for his activities, but only were obliged to warn him of a hidden danger on the property involving an unreasonable risk of harm if Gordon did not know or have reason to know of the danger. The evidence established that Gordon knew of the danger, so defendants had no duty warn him of the hazard or safeguard him from the condition. The trial court properly granted summary disposition in favor of defendants.

Affirmed.

WHITBECK, J., concurring, agreed with the lead opinion and wrote separately only to address the dissent. The dissent would reverse because, although the hazard was open and obvious, the hazard may have been unreasonably dangerous. In prior caselaw discussing unreasonably dangerous hazards, our Supreme Court had in mind the severe nature of the danger to an innocent invitee, and it follows that the dangerous condition of the land must cause the plaintiff's injury for one to recover because a hazard was unreasonably dangerous. But in this case, Gordon by his own unsolicited actions caused the danger and his own injury. He was not an innocent victim of the accumulation of ice and snow on the roof.

RONAYNE KRAUSE, P.J., dissenting, disagreed with the majority that Gordon lost his invitee status merely because he departed from his formal job responsibilities, and concluded that the trial court erred by failing to consider whether the hazard that injured Gordon was unreasonably dangerous. An invitee may outstay his or her welcome on any given premises and thereby become a licensee or trespasser. However, in the cases relied on in the lead opinion, the plaintiffs all either did something they were not allowed to do or went somewhere they were not allowed to go. Nothing in the record in this case indicated that Gordon was not allowed to use the door or clear access to it. Rather, Gordon was attempting to depart the premises in the normal and customary manner, but was impeded by an alleged defect within that way. Finding that Gordon lost his status as an invitee works an unprecedented and unsupported restriction on who may be an invitee. The hazard in this case was open and obvious. A hazard that is open and obvious is generally left to the invitee to avoid on his or her own and is not part of the landowner's duty, but even if a hazard is open and obvious, a premises possessor may owe a duty to an invitee to protect the invitee from unreasonable risks of

harm, including dangers that are effectively unavoidable and those that pose an unreasonably high risk of severe harm. The evidence in this case indicated that the hazard was not effectively unavoidable because the employees could have used an alternative door to the building. The trial court, however, erred by failing to consider whether the hazard was unreasonably dangerous. Although an accumulation of ice and snow on a roof is not unreasonably dangerous per se, the trial court should have addressed the question whether the specific accumulation at issue in this case was unreasonably dangerous.

NEGLIGENCE — PREMISES LIABILITY — INVITEES — USUAL, ORDINARY, OR CUSTOMARY USE OF THE PREMISES.

In a premises liability action, an individual's status as a trespasser, licensee, or invitee at the time of injury determines the duty the landowner owed to that person; an individual's status as an invitee is subject to change during the visit to the premises if the individual exceeds the scope of his or her invitation; when an invitee fails to use the premises in the usual, ordinary, or customary way, he or she becomes a licensee.

Speaker Law Firm (by *Steven A. Hicks*) and *Allaben & Bandeen, PC* (by *John R. Allaben*), for plaintiffs.

Hunt Suedhoff Kalamaros LLP (by *Philip E. Kalamaros* and *Brad R. Pero*) for defendants.

Before: RONAYNE KRAUSE, P.J., and HOEKSTRA and WHITBECK, JJ.

HOEKSTRA, J. In this premises liability action, plaintiffs appeal by right the trial court's grant of summary disposition to defendants. Because we conclude that plaintiff Gordon J. Bredow[1] was injured while engaging in an activity on defendants' premises that was outside the scope of his invitation and that he must therefore be

[1] Because plaintiff Suzanne Bredow's sole claim is a derivative claim for loss of consortium, references in this opinion to "plaintiff" are to her husband, plaintiff Gordon J. Bredow.

classified as a licensee for whom defendants owed no duty to maintain the premises or to warn him of a known hazard, we affirm.

In December 2008, Ferguson Enterprises, a wholesale distributor of plumbing supplies and other items, employed plaintiff as a project manager in its pricing center. In this role, plaintiff explained that he worked "with data," creating spreadsheets and other tools to aid those individuals analyzing commodity and matrix pricing for the Midwest. The pricing center where plaintiff worked was located in a rented warehouse which was part of a facility owned and managed by defendants.

On December 26, 2008, plaintiff and a coworker, Greg Layton, acting on their own accord, undertook the task of clearing snow and ice from an area near the building's entrance. Plaintiff, in particular, began clearing large icicles that were hanging from the building's roof. As he did so, large amounts of snow and ice fell from the roof onto plaintiff, causing him serious injury.

Plaintiff lacked specific recollection of the events surrounding his injury and indicated that Layton would be best able to describe the incident. According to Layton's description, on the day in question, the "very thick" ice forming on the building's roof was of such a length that it almost reached the ground. Early in the day, the ground near the entrance of the building appeared clear, but, by afternoon, ice had begun to fall from the roof. Unsolicited, Layton and plaintiff attempted to remove this ice debris from the ground, including ice chunks somewhat smaller around than a bowling ball.

Plaintiff then began to attempt the removal of icicles hanging down from the building's roof. Layton explained that, just before plaintiff's injury, plaintiff was

using a "snow shovel to pry one of the icicles that were hanging from the building off of the building," at which time "snow and ice from on top of the roof came down with" the icicle. It was the snow and ice from on top of the roof that struck plaintiff, knocking him down and causing his injuries.

Layton noted that, as a matter of "common sense," the risk of falling ice posed a danger as evidenced by the ice on the ground. Recognizing this danger, Layton also indicated that, while plaintiff pushed on the icicles, Layton "was kind of edging back because it seemed dangerous so [he] didn't want to be near it." In Layton's opinion, the section of the roof near where plaintiff chose to strike the icicles could have come down at any time. Likewise, though plaintiff had few memories of the specific events surrounding his injury, he had previously seen snow and ice on the building's roof, and he had heard snow and ice falling off the building's roof before the incident in question. He also described the process of "push[ing]" or "clearing" the icicles, stating, "[Y]ou kind of push [the icicles] while you're looking up, so you don't I mean, you can image getting something that's dropping down and tipping over and teetering. It can be dangerous."

Sometime after sustaining his injury, plaintiff filed suit against defendants. Defendants later moved for summary disposition, which the trial court granted after determining that the snow and ice on the roof constituted an open and obvious danger without any special aspects. Plaintiff now appeals as of right.

A trial court's decision to grant a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). In this case, the trial court considered materials outside the pleadings when granting summary disposition,

meaning that we review the decision as having been granted under MCR 2.116(C)(10). *Hughes v Region VII Area Agency on Aging*, 277 Mich App 268, 273; 744 NW2d 10 (2007). Summary disposition should be granted under MCR 2.116(C)(10) when "there is no genuine issue of material fact . . . ." *Id*. In determining whether a conflict in the evidence remains, the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties must be viewed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A material question of fact remains when, after viewing the evidence in this light, reasonable minds could differ on an issue. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

The present case is clearly one of premises liability, meaning that plaintiff's injury arose from an allegedly dangerous condition on the land. *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 692; 822 NW2d 254 (2012). To state a claim of premises liability, a plaintiff must show the elements of negligence; that is, a plaintiff must demonstrate that "(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).

In this case, we note that the parties focus their appellate arguments on the issues of proximate causation, and whether, for purposes of assessing defendants' duty, the danger in question was open and obvious, and, if so, whether the open and obvious danger had "special aspects." Before reaching the parties' arguments, under the particular circumstances of this case, we find it necessary to first decide plaintiff's status as an entrant

on defendants' property in order to ascertain the duty owed by defendants.[2] See *James v Alberts*, 464 Mich 12, 20; 626 NW2d 158 (2001) (recognizing that an individual's status as trespasser, licensee, or invitee determines the landowner's attendant duty). Specifically, the parties apparently operate under the assumption that plaintiff was an invitee at the time of his injury, but, for the reasons explained in this opinion, we have determined that plaintiff was, at best, a licensee at the time of his injury, and, for this reason, defendants owed plaintiff a reduced standard of care which did not include an affirmative obligation to make the premises safe for plaintiff or to warn him of the evident danger posed by knocking down icicles.

In Michigan, the duty owed by a landowner with respect to the conditions of his or her land depends on the category of person entering the land, i.e., whether the individual is a (1) trespasser, (2) licensee, or (3) invitee. *Id*. at 19. An explanation of the respective categories, and the attendant standard of care owed by a landowner, was provided in *Stitt v Holland Abundant Life Fellowship*, 462 Mich 591, 596-597; 614 NW2d 88 (2000), wherein the Court stated:

> A "trespasser" is a person who enters upon another's land, without the landowner's consent. The landowner owes no duty to the trespasser except to refrain from injuring him by "wilful and wanton" misconduct.
>
> A "licensee" is a person who is privileged to enter the land of another by virtue of the possessor's consent. A landowner owes a licensee a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to

[2] Though the parties have not framed the matter this way, "addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002).

> know of the dangers involved. The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit. Typically, social guests are licensees who assume the ordinary risks associated with their visit.
>
> The final category is invitees. An "invitee" is "a person who enters upon the land of another upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make [it] safe for [the invitee's] reception." The landowner has a duty of care, not only to warn the invitee of any known dangers, but the additional obligation to also make the premises safe, which requires the landowner to inspect the premises and, depending upon the circumstances, make any necessary repairs or warn of any discovered hazards. Thus, an invitee is entitled to the highest level of protection under premises liability law. [Citations omitted.]

For purposes of determining a landowner's duty in a premises liability case, the entrant's status as an invitee, licensee, or trespasser on the land is considered "at the time of injury." *Burnett v Bruner*, 247 Mich App 365, 368; 636 NW2d 773 (2001). Typically, invitee status is conferred on individuals entering the property of another for business purposes, meaning there must be some prospect of pecuniary gain prompting the landowner to extend an invitation onto the premises. *Stitt*, 462 Mich at 597, 603-604. For instance, a tenant is considered an invitee of the landlord. *Benton*, 270 Mich App at 440.

However, depending on the circumstances, an individual's status as an invitee on the property is subject to change during the visit to the premises if the individual exceeds the scope of his or her invitation. See 2 Restatement Torts, 2d, § 332, comment *l*, pp 181-183. An invitee may, for example, exceed the scope of an invitation when he or she departs from the location encompassed by the invitation, or when he or she stays on the

property beyond the time permitted by the invitation. *Id*. See also *Carreras v Honeggers & Co, Inc*, 68 Mich App 716, 727-728; 244 NW2d 10 (1976). In *Constantineau v DCI Food Equip, Inc*, 195 Mich App 511, 514-515; 491 NW2d 262 (1992), this Court recognized that a visitor's status may change while on the property, and we offered two examples, drawn from long-established caselaw, in which an individual lost invitee status by exceeding the scope of an invitation. This Court summarized those cases as follows:

> In *Bennett v Butterfield*, 112 Mich 96; 70 NW 410 (1897), the plaintiff was injured while he was a customer in the defendant's store. The plaintiff claimed that he was invited into a place of danger without warning and without proper guards at the entrance to protect him. The evidence, however, established that the plaintiff attempted to enter an elevator without invitation or permission. Consequently, the Supreme Court held that the plaintiff alone was "responsible for the accident and the injury, and [could] not recover." *Id*. at 98. Similarly, in *Hutchinson v Cleveland-Cliffs Iron Co*, 141 Mich 346; 104 NW 698 (1905), no duty was owed to an injured worker who had not been invited to enter that portion of the mill where the injury occurred. [*Constantineau*, 195 Mich App at 515 (alteration in original).]

In the same way, in *Bedell v Berkey*, 76 Mich 435, 439-440; 43 NW 308 (1889), an individual who entered a factory property to conduct business and was injured when he wandered into a storm room could not recover for the reason that "all persons who stray about other people's premises at their own will must look out for their own safety in such places." See also *Buhalis*, 296 Mich App at 697 (holding landowner not liable when the visitor to the property strayed from the safe means of ingress and egress provided). Stated more broadly, it has long been recognized that an invitee is expected to use a landowner's premises in the "usual, ordinary, and

customary way," and that when an invitee fails to do so, he or she becomes, at best, a mere licensee. *Armstrong v Medbury*, 67 Mich 250, 253-254; 34 NW 566 (1887) (quotation marks omitted).

In this regard, apart from geographical or temporal constraints on an invitation, an invitee might also exceed the scope of an invitation, and consequently lose invitee status, by acting in a manner inconsistent with the scope and purpose of the invitation. See 62 Am Jur 2d, Premises Liability, § 107, p 484 ("Deviation from an invitation to enter onto the possessor's land occurs when the entrant acts in a manner inconsistent with the scope of an express or implied invitation, thereby demonstrating a change in relationship between that person and the possessor."). In other words, because an invitee is expected to use a landowner's premises in the usual, ordinary, and customary way, he or she loses invitee status by failing to act in this manner. See *Bird v Clover Leaf-Harris Dairy*, 102 Utah 330; 125 P2d 797 (1942); *St Mary's Med Ctr of Evansville, Inc v Loomis*, 783 NE2d 274, 282 (Ind Ct App, 2002). By way of illustration, caselaw from other jurisdictions is replete with instructive examples of ways in which individuals have lost invitee status by acting outside the usual, ordinary, and customary way on the landowner's property. See, e.g., *Hogate v American Golf Corp*, 97 SW3d 44, 48 (Mo Ct App, 2002) (finding the defendant had issued a general invitation to the public to use a golf course to walk, drive carts, and play golf; therefore, an individual who was injured while riding a bike on a fairway had exceeded the scope of his invitation); *Bird*, 102 Utah 330 (holding an individual who failed to park his car in the usual, ordinary, and customary way contemplated for the public was a licensee); *Gavin v O'Connor*, 99 NJL 162, 163-166; 122 A 842 (1923) (determining that a child killed while swinging on a

clothesline had exceeded the scope of his invitation to play in the yard by putting the clothesline to an unintended use); *Brunengraber v Firestone Tire & Rubber Co*, 214 F Supp 420, 422-423 (SD NY, 1963) (concluding a customer who entered a mechanic's garage as an invitee but remained in the garage for the private purpose of cleaning out the trunk of his car was, at best, a licensee).[3] Consistent with Michigan law regarding the scope of an invitee's invitation, these cases reinforce the notion that a landowner's duty to an invitee is shaped by the invitation extended, and an individual exceeding the scope of that invitation, whether by geography, time, or activity, is not entitled to the standard of care that a landowner owes an invitee.

Turning to the present facts, plaintiff clearly qualified as an invitee when he initially entered the premises for the purpose of working for Ferguson Enterprises and fulfilling his role as a project manager in the pricing center. As an invitee to the property, his invitation would include ingress and egress to the building. See 2 Restatement Torts, 2d, § 332, comment *l*, pp 182-183. Therefore, plaintiff could, as an invitee, enter the warehouse and carryout his business function there in the form of his work for Ferguson Enterprises.

However, when plaintiff undertook the unsolicited act of clearing icicles from the building—a task unre-

[3] See also *Sims v Giles*, 343 SC 708, 733; 541 SE2d 857 (SC App, 2001) (recognizing that, in some cases, a worker may lose invitee status when the worker exceeds the scope of the work); *Barry v Southern Pac Co*, 64 Ariz 116, 121-123; 166 P2d 825 (1946) (concluding an individual lying on the roadbed between the rails of a railroad track was a trespasser even if someone walking in that location might have been a licensee); *Page v Town of Newbury*, 113 Vt 336, 340; 34 A2d 218 (1943) ("[O]ne entering [the lands of another] may become a trespasser by committing active and positive acts not included in the terms of his license or authority to enter . . . .").

lated to his function at Ferguson Enterprises and to his purpose for being on the property—plaintiff lost his status as an invitee and became, at best, a mere licensee.[4] That is, in renting out the warehouse property, defendants held it open to the use of Ferguson Enterprises and its employees engaged in conducting business for Ferguson Enterprises. In contrast, defendants employed maintenance personnel to ensure proper maintenance of the building, including tasks such as snow removal and issues related to roof repairs. There is no indication that defendants extended an invitation, either express or implied, to Ferguson Enterprises or its employees to tackle the task of removing large, potentially dangerous icicles from the building. By doing so of his own volition, plaintiff used the property in a manner that cannot be considered usual, ordinary, and customary, and he thereby exceeded the scope of his invitation, becoming, at best, a licensee.[5] Stated differently, the question in this case is not

---

[4] See 2 Restatement Torts, 2d, § 332, comment *b*, p 177 ("[A] volunteer helper who comes upon land to aid in getting a truck out of a mudhole, or in putting out a fire, without being asked to do so, is a licensee, but not an invitee.").

[5] The dissent suggests that plaintiff's attempt to remove icicles from the roof may be considered part of an ordinary departure from the premises because the icicles impeded his access to the building and defendants neither implicitly nor explicitly forbade plaintiff's removal of the icicles. We respectfully disagree. While plaintiff viewed the icicles as a potential safety hazard, we see nothing in the record that indicates the icicles in fact prevented plaintiff from entering or exiting the building through the entry in question. Moreover, as the dissent acknowledges, there were other means of ingress and egress made available to plaintiff, further belying the suggestion that entering or exiting the building necessitated plaintiff's unsolicited removal of the icicles. In short, this is not a situation in which an invitee was trapped in a building, forced to knock down icicles to gain his escape. Rather, unsolicited, plaintiff voluntarily took it upon himself to correct what he perceived as a safety hazard on the property. In our view, the mere fact that plaintiff perceived the icicles as a safety hazard, and voluntarily chose to personally

whether defendants provided reasonably safe entry into the building for invitees using the property in an ordinary way for its proper purpose; the question is whether defendants can be held liable when, of his own accord and unbeknownst to defendants, plaintiff took it upon himself to commence the apparently dangerous task of removing icicles from the building, thereby performing an act outside the scope of his business purpose for visiting the property and his invitation to be on the premises.

Given the change in plaintiff's status as an entrant to the property, to ascertain what duty defendants owed plaintiff, we consider the duty owed by a landowner to a licensee, which is, as noted, "a duty only to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the licensee does not know or have reason to know of the dangers involved." *Stitt*, 462 Mich at 596. See also *Kosmalski v St John's Lutheran Church*, 261 Mich App 56, 65; 680 NW2d 50 (2004) ("[T]he law in Michigan requires that a landowner owes a licensee a duty to warn the licensee of any hidden dangers the owner knows or has reason to know of, if the hidden danger involves an unreasonable risk of harm and the licensee does not know or have reason to know of the hidden danger and the risk involved."). "The landowner owes no duty of inspection or affirmative care to make the premises safe for the licensee's visit." *Stitt*, 462 Mich at 596.

Accordingly, in the present case, given that plaintiff qualifies as a licensee, defendants owed him no duty of inspection and no affirmative duty of care to make the premises safe for his activities. See *id.* The only potential duty defendants owed to plaintiff would be to warn him of

---

undertake removal of the icicles, does not transform his conduct into action sanctioned by defendants' invitation to use the property.

a hidden danger on the property involving an unreasonable risk of harm, and such duty only exists provided that plaintiff did not know or have reason to know of the danger involved. See *id.*; *Kosmalski*, 261 Mich App at 65. Plainly, in this case, plaintiff knew of the danger posed by falling snow and ice, given that he had heard ice and snow falling from the roof, and he specifically described the process of pushing icicles as "dangerous." Moreover, aside from the fact that he actually knew of the risks, he had ample reason to know of the danger, given that there were massive icicles and large ice chunks on the ground and that he had heard snow and ice fall from the roof. In these circumstances, he had every reason to recognize that snow and ice falling from the roof posed a hazard to those below, particularly if one undertook the removal of icicles on the roof. Because plaintiff knew or had reason to know of the danger posed by falling snow and ice when he undertook the clearing of the icicles, defendants owed no duty, either to warn him of the hazard or to safeguard him from the condition. See *Stitt*, 462 Mich at 596. Therefore, no material question of fact remains regarding defendants' duty to plaintiff, and the trial court properly granted summary disposition to defendants.

Affirmed.

WHITBECK, J. (*concurring*). I concur with the lead opinion. I write separately solely to address our dissenting colleague's analysis of the open and obvious danger doctrine.

I first note that we all apparently agree that the accumulation of snow and ice on the roof was open and obvious[1] and that any hazard that this accumulation

[1] See our dissenting colleague's statement that "[t]he question is a close one, but I believe the trial court correctly found that *in this particular case*, the danger was open and obvious."

created was effectively avoidable because there was another usable exit.[2] Setting aside the question of plaintiff's[3] status as an invitee, our dissenting colleague would reverse on the unreasonably dangerous prong of the premises liability paradigm. Briefly summarized, that paradigm is that there is no liability if the hazard was open and obvious, with the two exceptions that liability may still attach if the hazard was unreasonably dangerous *or* if the hazard was effectively unavoidable.[4] Therefore, if we were to consider the snow and ice accumulation on the roof as a latent defect about which defendants should have warned plaintiff, we must then deal with the exception to the open and obvious danger doctrine for unreasonably dangerous hazards.

In *Lugo v Ameritech Corp, Inc*, the Michigan Supreme Court gave the example of an unguarded 30-foot-deep pit to illustrate when a condition might be unreasonably dangerous:

> [W]ith regard to open and obvious dangers, the critical question is whether there is evidence that creates a genuine issue of material fact regarding whether there are truly "special aspects" of the open and obvious condition that differentiate the risk from typical open and obvious risks so as to create an unreasonable risk of harm, i.e., whether the "special aspect" of the condition should prevail in imposing liability upon the defendant or the openness and obviousness of the condition should prevail in barring liability.

---

[2] See our dissenting colleague's statement that "[h]owever, the evidence was that employees could have used an alternative door to the building; doing so would merely have been inconvenient and contrary to their established and expected practice. *Consequently, the danger was not effectively unavoidable.*" (Emphasis added.)

[3] For ease of reference, like the lead opinion, this opinion refers to plaintiff Gordon J. Bredow in the singular because his wife's claim is derivative.

[4] See, generally, *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001).

> An illustration of such a situation might involve, for example, a commercial building with only one exit for the general public where the floor is covered with standing water. While the condition is open and obvious, a customer wishing to exit the store must leave the store through the water. In other words, the open and obvious condition is effectively unavoidable. Similarly, an open and obvious condition might be unreasonably dangerous because of special aspects that impose an unreasonably high risk of severe harm. To use another example, consider an unguarded thirty foot deep pit in the middle of a parking lot. The condition might well be open and obvious, and one would likely be capable of avoiding the danger. Nevertheless, this situation would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken. In sum, only those special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided will serve to remove that condition from the open and obvious danger doctrine.[5]

Central to the analysis of both our dissenting colleague and the Supreme Court is the proverbial 30-foot-deep unguarded pit. According to Supreme Court's formulation, such a pit would be unreasonably dangerous. But to whom? I suggest that the Supreme Court had in mind the severe nature of the danger to an innocent invitee on the land who might fall by misadventure into the pit. It follows, then, that the dangerous condition of the land must cause a plaintiff's injury.

The Supreme Court's hypothetical 30-foot-deep pit is not even remotely similar to the situation we have here. It was certainly conceivable that ice or snow might fall off the building; indeed plaintiff testified that sometimes chunks a foot in diameter would fall off the

---

[5] *Id*. at 517-519.

building. But the only complaints were that they were loud when they fell. What would not be typically expected is that a whole 12- to 14-foot section of snow, ice, and debris will fall off a roof without reason.

Plaintiff here was certainly not an innocent plaintiff who was simply injured by misadventure. As the lead opinion points out, by his unsolicited actions, plaintiff caused the danger and therefore caused his own injury. How, then, can we say it was the accumulation of ice and snow on the roof that was, without more, unreasonably dangerous? And how, then, can we say it was the dangerous condition—presuming that it was dangerous—that caused plaintiff's injury when plaintiff's own actions directly led to that injury?

By analogy, consider a person—let's call him the Gratuitous Volunteer—who sees and climbs down into a 30-foot-deep earthen pit and then proceeds, entirely on his own, to shovel away at one of the earthen walls to make a ramp back up. But, not surprisingly, the shoveling weakens the wall and it collapses, injuring the Gratuitous Volunteer. Clearly, before the Gratuitous Volunteer began shoveling, the wall was stable and safe and the pit was not unreasonably dangerous to him or to anyone else similarly situated. It was purely and simply the Gratuitous Volunteer's own actions that caused the pit to become dangerous at all, much less unreasonably dangerous. The Gratuitous Volunteer's actions, not the condition of the land, caused his injury. The same is true of plaintiff here.

I also note our dissenting colleague's statement that she "would also decline to address defendants' alternative argument that plaintiff's injury is his own fault: defendants appear to have raised this for the first time on appeal, and I would leave it up to the parties to address on remand." The record belies this assertion.

At the hearing below, the trial court discussed the causation issue and declared that "plaintiff then progressed to using his shovel to knock away snow and ice hanging from the roof. This, in turn, caused a large portion of snow and ice to come crashing down onto the plaintiff and knocking him to the ground." Defendants raised this issue in their brief on appeal as an alternative ground for affirmance. Plaintiff's counsel at oral argument conceded that this issue was raised below. Whether counsel's concession following my direct question on this point was wise is irrelevant; it remains a concession. The issue was raised before and discussed by the trial court and raised by defendants on appeal. If we are to consider at all our dissenting colleague's analysis regarding whether there was an unreasonably dangerous condition, we must consider it in light of this issue.

RONAYNE KRAUSE, P.J. (*dissenting*). I respectfully dissent because I cannot agree with the lead opinion's conclusion that plaintiff[1] lost his invitee status merely because he departed from his formal job responsibilities and because I believe the trial court erred by failing to consider whether the hazard that injured plaintiff was unreasonably dangerous.

As the lead opinion notes, the parties have at no time contested plaintiff's status as an invitee on defendants' premises. I agree with the lead opinion that the courts are not obligated to comply with parties' stipulations or statements of law. See *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803); *Rice v Ruddiman*, 10 Mich 125, 138 (1862); *In re Finlay Estate*, 430 Mich

[1] For ease of reference, like the lead and concurring opinions, this opinion refers to plaintiff Gordon J. Bredow in the singular given that plaintiff Suzanne Bredow's sole claim is derivative.

590, 595-596; 424 NW2d 272 (1988). Of course, the parties themselves *are* bound to their own stipulations, whether to facts or to law, and may not subsequently raise them as errors on appeal. *Chapdelaine v Sochocki*, 247 Mich App 167, 177; 635 NW2d 339 (2001). Nonetheless, I agree with the lead opinion that the parties appear to have been acting under an assumption, rather than a formal stipulation, that plaintiff was an invitee at the time of his injury. See *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969). It is not improper for this Court to correct a misapprehension of law under which the parties before it may be operating, I disagree that any such misapprehension existed here.[2]

I further agree with the lead opinion's recitation of the general law governing the standard of care owed by landlords to various classes of individuals on the land and the general definitions of licensees and invitees. We all agree, at least, that plaintiff was an invitee when he initially entered upon defendant's premises. I take no exception to the general principle that an invitee *can* outstay his or her welcome on any given premises and thereby become a licensee or trespasser. However, I do not conclude that plaintiff did so here. The lead opinion cites a number of cases in which invitees became mere licensees or trespassers, but all of those cases have one curious factual commonality: the plaintiffs all either did something they were not allowed to do or went somewhere they were not allowed to go. *Bedel v Berkey*, 76 Mich 435, 439-440; 43 NW 308 (1889); *Bennett v Butterfield*, 112 Mich 96, 96-98; 70 NW 410 (1897); *Hutchinson v Cleveland-Cliffs Iron Co*, 141 Mich 346, 347-349; 104 NW 698 (1905). It makes obvious sense for an

[2] Similarly, I note that plaintiff never formally conceded that this action sounds in premises liability, but I agree entirely with the lead opinion and the trial court that it does.

invitee to forfeit that status upon violating stated or readily apparent limitations on the scope of their invitation. I find nothing in the record indicating that plaintiff was told or should have been aware that he was not allowed to use the door or clear the access to the door.

The lead opinion further asserts that an invitee must make use of the premises in the " 'usual, ordinary, and customary way' " to maintain his or her status as an invitee, in reliance on *Armstrong v Medbury*, 67 Mich 250, 253; 34 NW 566 (1887), and an agglomeration of cases from outside Michigan.[3] The words do appear in

[3] Even if the out of state cases were binding, they would not support the lead opinion's conclusions. Briefly: in *Bird v Clover Leaf-Harris Dairy*, 102 Utah 330; 125 P2d 797 (1942), the plaintiff parked a car in a location that was actually and obviously impermissible; in *St Mary's Med Ctr of Evansville, Inc v Loomis*, 783 NE2d 274, 282-283 (Ind App, 2002), the plaintiff, who was not an employee, entered a room clearly marked " 'Employees Only' " but nevertheless *retained* his invitee status because similar employees regularly entered that room; in *Hogate v American Golf Corp*, 97 SW3d 44, 48 (Mo App, 2002), the plaintiff lost any invitee status by riding a bicycle onto premises that did not permit bicycling; in *Gavin v O'Connor*, 99 NJL 162, 163-166; 122 A 842 (1923), the plaintiff lost any invitee status by using a clothesline for the purpose of swinging on it, contrary to its obvious intended purpose; in *Brunengraber v Firestone Tire & Rubber Co*, 214 F Supp 420, 422-423 (SD NY, 1963), the plaintiff was an invitee when he entered an area customers such as himself were not to enter because the defendant's manager requested he do so, but he lost that status by remaining in the area beyond the scope of the request; in *Sims v Giles*, 343 SC 708, 733; 541 SE2d 857 (SC App, 2001), the court discussed a worker who lost his invitee status on the premises by leaving the location where he was supposed to be working; in *Barry v Southern Pac Co*, 64 Ariz 116, 121-123; 166 P2d 825 (1946), an intoxicated and unconscious individual sleeping on a railroad track was a trespasser notwithstanding whatever pedestrian use might ordinarily have been made of the railroad's right-of-way; and in *Page v Town of Newbury*, 113 Vt 336, 340; 34 A2d 218 (1943), as the majority notes, the Court explained that "one entering [the lands of another] may become a trespasser by committing active and positive acts not included in the terms of his license or authority to enter . . . ." In other words, all of these

Armstrong, but in full context, the Court approved a jury instruction to have been given in its entirety as follows:

> The plaintiff was bound to leave defendant's premises by the usual, ordinary, and customary way in which the premises are and have been departed from, provided the same be safe and in good condition; and if for his own convenience, or other reason (than defect in the usual place of departure), he leaves such way, he becomes at best a licensee, and cannot recover for injuries from a defect outside of said way, unless it was substantially adjacent to such way, and in this case the defect was not so adjacent. [(*Armstrong*, 67 Mich at 253) (quotation marks omitted).]

The situation at bar is the opposite: plaintiff *was* in fact attempting to depart from the premises in the normal and customary manner, but was impeded by an alleged defect *within* that way and was—albeit perhaps incautiously—attempting to rectify the defect. Again, plaintiff may not be able to recover for his injuries, but the fact that he was attempting to remove what he apparently believed to be a hazard to his transit hardly seems like a frolic and detour.

The lead opinion also takes out of context a quotation from *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 697; 822 NW2d 254 (2012), regarding persons straying from obvious paths of safety; in that case, this Court never held that the plaintiff ceased to be an invitee, but rather that the defendant had satisfied the duty of care under the circumstances of the case. Again, plaintiff was merely trying to go home via the normal and customary route that all such employ-

---

cases continue to stand merely for the reasonable proposition that an invitee may lose that status by doing something explicitly or implicitly *impermissible* on the premises.

ees were expected to, and did, take.[4] Likewise, the fact that plaintiff was doing something unnecessary to his job makes him no different from, say, any employee cleaning the snow off his or her car in an employer's parking lot after work in order to go home. If such an employee were to slip and fall on ice while doing so, it is of course highly unlikely that the employee could recover in Michigan. However, that preclusion would not be because the employee had ceased engaging in acts that directly benefitted the employer and was instead attempting to leave the premises, but rather due to a probable preclusive application of the open and obvious danger doctrine.

I find the lead opinion's expansion of the rules governing the loss of invitee status grossly unwarranted and inappropriate. Plaintiff was apparently just trying to go home and make the way to doing so safe. Furthermore, there was evidence that he did so in accordance with the expectations of his employer. He did nothing and went nowhere that was implicitly or explicitly disallowed by the premises owner. Finding that he lost his status as an invitee under the circumstances works an unprecedented and unsupported restriction on the nature of what constitutes an invitee.

Further, punishing an employee for attempting to abate a danger at his workplace is bad public policy. Plaintiff was attempting to remove a potential injurious hazard from the main entrance of his workplace to allow for fellow employees or other invitees to enter or exit without the risk of harm. This is not a situation in

[4] As I will discuss, a safer route existed that plaintiff could have taken, which has implications under the open and obvious danger doctrine. However, that alternative route was neither expected nor normal for employees to take. I disagree with the lead opinion about the extent to which the record evidence shows plaintiff's expected and normal egress from the building to have been safe.

which an individual willingly puts himself in harm's way by attempting to aid another on land over which he has no ownership or responsibility. Plaintiff was at work and attempted to protect not only himself, but also his workplace, fellow employees, and any other invitees. While an employee should not attempt to remedy any hazard, such as the hypothetical pit in *Lugo*, other conditions, such as snow and ice accumulation in Michigan, are common. It would be unreasonable to punish an employee if he got to work first and decided to shovel the sidewalk. If the employee is not allowed to act on his or her desire to protect others, then a potential hazard remains on the land that could cause injuries to people and a lawsuit for the employer. Determining that, regardless of the reason, any employee must be punished for attempting to remedy any potential hazard at his or her workplace, which consequently deters employees from removing those hazards, creates greater dangers for invitees and the employer, and therefore is bad public policy.

Defendants are required to make reasonable efforts to protect the safety of those on the property, although not to the extent of guaranteeing that safety. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012). However, any hazard that is "open and obvious," meaning "it is reasonable to expect that an average person with ordinary intelligence would have discovered it upon casual inspection," is generally left to the invitee to avoid on his or her own and is not part of the landowner's duty. *Id*. at 460-461. However, open and obvious dangers may impose a duty on the landowner if the danger has "special aspects" that pose an unreasonable risk. *Id*. at 462. Determining whether a danger is open and obvious requires an objective analysis based on the objective condition of the property. *Id*. at 461.

Our Supreme Court has held that any icy roof in the winter posed an open and obvious danger because anyone *on* the roof would immediately be aware that an icy roof is slippery. *Perkoviq v Delcor Homes—Lake Shore Pointe, Ltd*, 466 Mich 11, 16-18; 643 NW2d 212 (2002). Because the Court focused on the slippery "condition of the roof," *id*. at 18-19, *Perkoviq* is just another slip-and-fall case, remarkable because of the unusual surface involved, however, irrelevant to the instant situation. It is, in fact, obvious that snow and ice on a sloped surface would pose a slip-and-fall hazard to a person traversing that surface. That does not, ipso facto, establish whether it is obviously dangerous to anyone not presently attempting to navigate the surface. Although I tend to agree with defendants that any Michigan resident would be aware that snow and ice tend to accumulate on roofs and along gutters, the dangerousness thereof is not necessarily so obvious. To the contrary, snow is generally regarded as soft and harmless, save perhaps the danger its weight might pose to the roof structure itself. Average Michigan residents of ordinary intelligence would be expected to appreciate that a twenty-foot icicle would be dangerous, but it was not the icicle here that injured plaintiff.

I would not hold that the danger of snow and ice falling from a rooftop and thereby causing injury is open and obvious per se. However, notwithstanding the fact that the standard for openness and obviousness is objective, it calls for consideration of what a reasonable person would have been expected to discover on casual inspection *from the plaintiff's position*. *Slaughter v Blarney Castle Oil Co*, 281 Mich App 474, 479; 760 NW2d 287 (2008). In other words, it is not a purely academic inquiry, divorced from the unique context of any particular case.

The trial court, rather than engaging in a rote application of slip-and-fall cases to the instant situation, properly concluded that other objective circumstances present at the scene would have suggested to an average person of ordinary circumstances that the roof was actively dropping dangerous ice and snow onto the ground, so there was likely "more where that came from," and that anything else on the roof would likely be precarious. Consequently, it would be a matter of common knowledge that knocking down an icicle could destabilize any other accumulation present. The evidence of the large and heavy ice chunks on the ground would have suggested that there was indeed serious danger associated with being underneath the roof, in the path of more such debris. The question is a close one, but I believe the trial court correctly found that *in this particular case*, the danger was open and obvious.

Even if a hazard is open and obvious, a premises possessor may nevertheless owe a duty to an invitee to protect the invitee from "unreasonable" risks of harm. *Hoffner*, 492 Mich at 461. The "special aspects" exception must be construed narrowly, and special aspects will only be found under exceptional and extreme circumstances. *Id*. at 462. The two special aspects explicitly discussed by our Supreme Court are dangers that are "effectively unavoidable" or that "impose an unreasonably high risk of severe harm." *Lugo v Ameritech Corp*, *Inc*, 464 Mich 512, 518; 629 NW2d 384 (2001). An example of the latter is "an unguarded thirty foot deep pit in the middle of a parking lot" that may be avoidable but "would present such a substantial risk of death or severe injury to one who fell in the pit that it would be unreasonably dangerous to maintain the condition, at least absent reasonable warnings or other remedial measures being taken." *Id*. Therefore, the degree of potential harm alone "may, in some unusual

circumstances, be the key factor that makes such a condition unreasonably dangerous." *Id*. at 518 n 2. However, courts should not find such extreme dangers merely because some severe harm is imaginable or because some severe harm actually occurred. *Id*.

Plaintiff argues that the trial court erred by finding that the danger of falling ice and snow here was not effectively unavoidable. I disagree. If a plaintiff has a choice to decline to confront the danger, it is not "effectively unavoidable." *Hoffner*, 492 Mich at 468-469. Plaintiff contends that he needed to clear the debris and icicles in order to exit the building. If plaintiff had, in fact, actually been trapped, the condition would essentially by definition be effectively unavoidable. See *id*. at 473. However, the evidence was that employees could have used an alternative door to the building; doing so would merely have been inconvenient and contrary to their established and expected practice.[5] Consequently, the danger was not effectively unavoidable. Plaintiff makes much of the fact that he was attempting to abate a danger to others, but his motives, while noble, are simply not relevant to whether a condition is objectively effectively unavoidable.

Plaintiff also argues that the trial court erred by failing to find that the hazard was unreasonably dangerous. I agree that the trial court erred by failing to address the possibility. A condition that poses an unreasonably high risk of severe harm is an *alternative* special aspect. The thirty-foot pit discussed by our Supreme Court in *Lugo* would all but guarantee serious

[5] It would appear that if plaintiff had in fact availed himself of the alternative, and ordinarily unused, egress from the building, the majority would find that he would have lost his invitee status in any event by departing from the normal and customary egress route.

injury to anyone who fell into it. Therefore, it would possess a special aspect, potentially subjecting the premises owner to liability even if the pit were open and obvious. Defendants' argument here that the situation did not pose much of a risk of harm because no one before plaintiff was harmed is inapposite. It is a variant on the a priori argument rejected by our Supreme Court in *Lugo*: whether any sort of injury, severe or otherwise, *actually* occurred is of little relevance to the *degree* of potential danger. The absence of any special aspects found in *Perkoviq* is, again, irrelevant: the hazard posed by ice and snow accumulation on roof to a person on that roof is fundamentally different from the hazard posed to someone not on that roof.

As with the question whether accumulated snow and ice on a roof is open and obvious, I would not hold that such accumulation is or is not unreasonably dangerous per se. The unique details of the specific situation are critical. In light of the trial court's failure to address this question, I would likewise decline to do so and instead remand for the parties to address this before the trial court. I would also decline to address defendants' alternative argument that plaintiff's injury is his own fault: defendants appear to have raised this for the first time on appeal, and I would leave it up to the parties to address on remand.

MIKELONIS v ALABASTER TOWNSHIP

Docket No. 315512. Submitted June 6, 2014, at Lansing. Decided November 4, 2014, at 9:00 a.m.

Gretchen L. Mikelonis appeared before the Alabaster Township board of review in 2010 to challenge the Alabaster Township assessor's 2002 decision to uncap the taxable value of a piece of property that she owned and to correct her tax bills accordingly. Ultimately, the parties agreed that the taxable value should not have been uncapped, agreed on what the current taxable value should be, and stipulated to correct petitioner's previous tax bills in a consent judgment. However, the Tax Tribunal only accepted the stipulation for consent judgment for tax years 2011 and 2012, concluding that it lacked jurisdiction over the 2007 through 2010 tax years because the uncapping of the property's taxable value was not the result of either a clerical error or qualified error under MCL 211.53b but was rather an error of law. Petitioner appealed.

The Court of Appeals *held*:

The Tax Tribunal erred by concluding that it did not have jurisdiction to fully accept the parties' stipulation for a consent judgment under MCL 211.53b. MCL 211.27a(4) specifically provides that an adjustment to the taxable value of a property to correct an erroneous uncapping is considered to be the correction of a clerical error, and MCL 211.53b(10) defines a qualified error to include an adjustment under MCL 211.27a(4). Because the stipulated consent judgment complied with the applicable statutory provisions, the Tax Tribunal should have accepted it in full.

Reversed and remanded for entry of the stipulated consent judgment.

Abbott, Thomson, Mauldin & Beer, PLC (by *Clyde W. Mauldin*), for petitioner.

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM. Petitioner Gretchen L. Mikelonis appeals an order of partial dismissal from the Michigan Tax Tribunal. We reverse and remand for entry of the stipulated consent judgment.

This appeal involves the taxable value of a parcel of property located in respondent Alabaster Township. It was originally purchased by petitioner's parents. In 1993, petitioner's parents created a joint tenancy with rights of survivorship in one-half of the property between themselves and petitioner, subject to a life estate in her parents. By a quitclaim deed in 2000, petitioner created a similar joint tenancy in an additional one-quarter of the property, retaining a life estate in that quarter and continuing to own the remaining one-quarter as tenants by the entirety. Then, in 2001, petitioner's parents conveyed all of their interest to petitioner, extinguishing the joint tenancy and releasing the life estate. This transfer resulted in respondent's assessor uncapping the taxable value of the property beginning with the 2002 tax year.

In 2010, petitioner challenged the uncapping and sought to correct the 2007 through 2010 tax bills. She subsequently challenged the uncapping with respect to the 2011 and 2012 tax years as well. The parties stipulated that the taxable value should not have been uncapped in 2002 and agreed on what the current taxable value should be. This resulted in the parties' entering into a consent judgment whereby petitioner waived her right to recover taxes paid for the 2007, 2008, and 2009 tax years. The parties further agreed that petitioner could recover the excess taxes paid for the 2010, 2011, and 2012 tax years based on the recapped taxable values as stipulated. The Tax Tribunal, however, concluded that it lacked jurisdiction over the 2007 through 2010 tax years and only accepted the

stipulation for consent judgment for tax years 2011 and 2012. Petitioner now appeals and we reverse.

The Tax Tribunal reasoned as follows regarding why it did not have jurisdiction over the 2010 and earlier tax years:

> The Tribunal, having given due consideration to the Stipulation and the case files, finds the Tribunal has no authority over the subject property's taxable values for the 2007, 2008, 2009, and 2010 tax years under MCL 205.735a or 211.53a, as Petitioner did not protest those residential property assessments to Respondent's March Board of Review and file by July 31 of those tax years. See also *Electronic Data Systems Corporation v Township of Flint*, 253 Mich App 538; 656 NW2d 215 (2002). Further, the uncapping of the property's taxable value was not the result of either a clerical error or qualified error under MCL 211.53a or 211.53b.

The Tax Tribunal's reasoning, however, ignores the clear provisions of MCL 211.27a and MCL 211.53b. MCL 211.27a(3) and (4) provide as follows:

> (3) Upon a transfer of ownership of property after 1994, the property's taxable value for the calendar year following the year of the transfer is the property's state equalized valuation for the calendar year following the transfer.
>
> (4) If the taxable value of property is adjusted under subsection (3), a subsequent increase in the property's taxable value is subject to the limitation set forth in subsection (2) until a subsequent transfer of ownership occurs. If the taxable value of property is adjusted under subsection (3) and the assessor determines that there had not been a transfer of ownership, the taxable value of the property shall be adjusted at the July or December board of review. Notwithstanding the limitation provided in [MCL 211.53b(1)] on the number of years for which a correction may be made, the July or December board of review may adjust the taxable value of property under this subsection for the current year and for the 3

> immediately preceding calendar years. A corrected tax bill shall be issued for each year for which the taxable value is adjusted by the local tax collecting unit if the local tax collecting unit has possession of the tax roll or by the county treasurer if the county has possession of the tax roll. For purposes of [MCL 211.53b], an adjustment under this subsection shall be considered the correction of a clerical error.

MCL 211.53b, referred to in § 27a(4), provides in part as follows:

> (1) If there has been a qualified error, the qualified error shall be verified by the local assessing officer and approved by the board of review. Except as otherwise provided in subsection (9), the board of review shall meet for the purposes of this section on Tuesday following the second Monday in December and on Tuesday following the third Monday in July. If approved, the board of review shall file an affidavit within 30 days relative to the qualified error with the proper officials and all affected official records shall be corrected. If the qualified error results in an overpayment or underpayment, the rebate, including any interest paid, shall be made to the taxpayer or the taxpayer shall be notified and payment made within 30 days of the notice. A rebate shall be without interest. The treasurer in possession of the appropriate tax roll may deduct the rebate from the appropriate tax collecting unit's subsequent distribution of taxes. The treasurer in possession of the appropriate tax roll shall bill to the appropriate tax collecting unit the tax collecting unit's share of taxes rebated. Except as otherwise provided in subsections (6) and (8) and [MCL 211.27a(4)], a correction under this subsection may be made for the current year and the immediately preceding year only.
>
> * * *
>
> (10) As used in this section, "qualified error" means 1 or more of the following:

> (a) A clerical error relative to the correct assessment figures, the rate of taxation, or the mathematical computation relating to the assessing of taxes.
>
> (b) A mutual mistake of fact.
>
> (c) An adjustment under [MCL 211.27a(4)] or an exemption under [MCL 211.7hh(3)(b)].

MCL 211.27a(4) clearly provides that, if it is determined that there had not been a transfer of ownership that allows for the uncapping of the taxable value, the board of review has the authority to adjust the taxable value for the current year and the three previous years. The parties stipulated that "Petitioner appeared before the Respondent's December 17, 2010 Board of Review pursuant to MCL 211.53b seeking correction of a qualified error in the tax bills received and paid by her for the 2010, 2009, 2008, and 2007 tax years." The parties also stipulated "that the taxable value of the subject property should not have been uncapped beginning in the 2002 tax year" and that the proposed values agreed upon had "been verified by Respondent's current assessor."

The Tax Tribunal concluded that the erroneous uncapping "was not the result of a clerical error or qualified error under MCL 211.53a or 211.53b." "Rather," the tribunal continued, "the uncapping was erroneous as a matter of law . . . ." But MCL 211.53b(10)(a) defines a qualified error to include a "clerical error relative to the correct assessment figures," and MCL 211.27a(4) provides that "[f]or purposes of section 53b, an adjustment under this subsection shall be considered the correction of a clerical error." Further, MCL 211.53b(10)(c) defines a qualified error to include "[a]n adjustment under section 27a(4)." For purposes of MCL 211.53b, the definition of clerical error and qualified error are contained in the statute,

and "[w]here a statute sets forth its own definitions, the terms must be applied as expressly defined." *Cherry Growers, Inc v Agricultural Mktg and Bargaining Bd*, 240 Mich App 153, 169; 610 NW2d 613 (2000).

Accordingly, when petitioner sought a refund under MCL 211.53b(1) of taxes assessed and paid under an erroneous conclusion that a transfer of ownership had occurred, petitioner was seeking correction of a qualified error, which would normally limit recovery to "the current year and the immediately preceding year only," but is not so limited because of MCL 211.27a(4). Instead, the taxable value could be adjusted "for the current year and for the 3 immediately preceding calendar years." MCL 211.27a(4) The parties' stipulation was in full compliance with these two statutory provisions.

For these reasons, we conclude that the Tax Tribunal did have jurisdiction over all the tax years from 2007 and later. Therefore, it should have accepted in full the parties' stipulation for a consent judgment.

Reversed and remanded to the Tax Tribunal with instructions to enter the stipulated consent judgment. We do not retain jurisdiction. Petitioner may tax costs.

SAWYER, P.J. and METER and FORT HOOD, JJ., concurred.

ALTOBELLI v HARTMANN

Docket No. 313470. Submitted June 10, 2014, at Lansing. Decided November 4, 2014, at 9:05 a.m. Leave to appeal sought.

Dean Altobelli brought an action in the Ingham Circuit Court against Michael W. Hartmann, Michael A. Coakley, and other principals at Miller Canfield Paddock & Stone, PLLC, alleging various statutory and common-law tort claims in connection with plaintiff's departure from the firm. Plaintiff alleged that defendants had terminated his ownership interest in the firm in violation of the firm's operating agreement after plaintiff accepted a temporary position at the University of Alabama on the basis of an alleged understanding that he could return to the firm when the position ended. In lieu of answering the complaint, defendants filed a motion for summary disposition, alleging that plaintiff had voluntarily withdrawn from the firm by accepting other employment, and a motion to compel arbitration under the mandatory arbitration clause of the firm's operating agreement. The court, Paula J. M. Manderfield, J., ruled that because plaintiff had sued defendants individually and had not sued the firm itself, the dispute did not fall within the scope of the arbitration clause. The court also granted plaintiff's motion for summary disposition with respect to his claims of shareholder oppression, conversion, and tortious interference with a business expectancy, concluding that plaintiff had not withdrawn under the terms of the operating agreement and that defendants had acted without authority by terminating plaintiff's ownership interest in the firm. The Court of Appeals granted defendants' application for leave to appeal.

The Court of Appeals *held*:

1. The circuit court did not err by denying defendants' motion for summary disposition. The firm's arbitration provision clearly and unambiguously contemplated arbitration of disputes between the firm and a principal, not disputes between principals.

2. The circuit court erred in its interpretation and application of the Limited Liability Company Act, MCL 450.4101 *et seq*., and thus erred by concluding that plaintiff could not have voluntarily withdrawn from the firm. The phrase "A member may withdraw from a limited liability company only as provided in an operating

agreement" in MCL 450.4509(1), and the 1997 amendment of that provision to remove a member's option to withdraw by written notice, did not mean that a limited liability company's operating agreement was required to provide a specific method or procedure for voluntary withdrawal; rather, it meant that a member of a limited liability company could not voluntarily withdraw unless the company's operating agreement allowed it. Accordingly, the circuit court erred by granting plaintiff's motion for partial summary disposition because there was a genuine issue of material fact with regard to whether plaintiff voluntarily withdrew from the firm.

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

Fett & Fields, PC (by *James K. Fett*) and The Abood Law Firm (by *Andrew P. Abood*) for plaintiff.

Dean Altobelli *in propria persona.*

Smith Haughey Rice & Roegge (by *E. Thomas McCarthy, Jr.* and *John R. Oostema*) and *Brookover Carr & Schaberg PC* (by *George M. Brookover*) for defendants.

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

BORRELLO, P.J. Plaintiff Dean Altobelli filed a multicount complaint against defendants Michael W. Hartmann, Michael A. Coakley and others, alleging that defendants wrongfully terminated his property interest in his membership at Miller Canfield Paddock & Stone, PLLC ("Miller Canfield" or "the firm"). On November 7, 2012, the circuit court denied defendants' motion for summary disposition and motion to compel arbitration, and granted plaintiff's motion for partial summary disposition under MCR 2.116(C)(10) on Count II (shareholder oppression), Count III (conversion), and Count V (tortious interference with a business relationship or expectancy). This Court granted defendants' application for leave to appeal the circuit court's order and

stayed further proceedings in the lower court.[1] For the reasons set forth in this opinion, we affirm the circuit court's order denying defendants' motion to compel arbitration, reverse the circuit court's order granting partial summary disposition in favor of plaintiff, and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. PLAINTIFF'S MEMBERSHIP IN THE FIRM

Prior to the events leading to this lawsuit, plaintiff Dean Altobelli was a senior principal at Miller Canfield, where he worked for 17 years. Plaintiff became an equity owner in the firm in January 2006. In late May or early June of 2010, plaintiff, who had played football at Michigan State University when Nick Saban was the head coach, was offered an opportunity to work as a coach and intern for Saban at the University of Alabama football program. Plaintiff proposed a 7 to 12 month leave of absence to defendant Michael Hartmann, Chief Executive Officer (CEO) and one of the managers of Miller Canfield, and to Michael Coakley, who was not a manager but was head of the firm's litigation practice group, of which plaintiff was apparently a member. One term of this proposal was that plaintiff would be able to return as senior principal any time before June 1, 2011.

Plaintiff contends that Hartmann "supported my opportunity" and that Hartmann told plaintiff he could spend as much time as needed at Alabama and still receive certain allocated income from his clients. Defendants dispute this assertion, and Hartmann

[1] *Altobelli v Hartmann*, unpublished order of the Court of Appeals, entered April 16, 2013 (Docket No. 313470).

specifically stated that he "never promised Altobelli that he could have any kind of leave of absence, and made no statements about supporting a leave of absence upon which he reasonably could rely." Hartmann claimed that plaintiff "asked for my opinion about whether he could come back to the Firm" and that Hartmann replied he "thought that [plaintiff] probably could." However, Hartmann averred that both he and plaintiff "knew that I was not in a position to make any commitment that the Firm would take him back in the future . . . as I did not have the authority to make such a commitment." Hartmann further stated that "no Principal of the Firm has ever been given approval to work full time at another job while remaining a Principal at Miller Canfield." Plaintiff represented that in reliance on his view of Hartmann's statements, he "moved . . . to finalize arrangements with the University of Alabama while preserving [my] business at the Firm," and he executed documents with Alabama in June 2010. Plaintiff stated that he spent "about 400 hours during June and July 2010" preserving clients and business for the firm.

Plaintiff alleged that Hartmann "did a 180 degree turn" when Hartmann returned from a June 2010 vacation and "rejected the idea of a leave of absence that protected my ownership interest[,] stating that instead he wanted me to withdraw from the Firm without any written assurance that my ownership would be protected." Plaintiff sent an e-mail on July 7, 2010, seeking approval from Hartmann and the managers "under section 2.17 of the [firm's] operating agreement to approve my outside compensation from the University of Alabama." As an alternative, plaintiff also addressed compensation due him if he withdrew from the firm.

Plaintiff asserts that despite his several requests, the firm managers would not meet with him to discuss his status. In e-mails dated July 7 and July 8, 2010, plaintiff stated: "I have no plans to resign from the firm as of the end of June" and "I will not voluntarily resign my principal status and compensation at this time." On July 20, 2010, plaintiff detailed his goals and contributions for the coming reporting period (July 2010 through June 2011), including the value of the Alabama opportunity. Plaintiff stated that the next day, July 21, 2010, "Hartmann called me and told me that the managers decided to 'terminate' my ownership effective July 31, 2010." Plaintiff "demanded a vote of the principals" and an opportunity to present his case to them, asserting that the managers lacked authority to terminate his ownership interest.

Plaintiff averred that he sent an e-mail to the managers on July 22, 2010, asserting that he disagreed with the decision to terminate his ownership status and questioned defendants' authority to terminate his ownership. Hartmann replied to plaintiff's July 22, 2010 e-mail that same day, and averred that it stated: "I did not say the Firm had terminated your position. I told you that since you had voluntarily accepted a full time position at the University of Alabama and had already started your new position that the Firm would consider you to have withdrawn from the partnership as of July 31, 2010." Hartmann reiterated, "[T]he Firm did not terminate your position. You voluntarily accepted another full time job in Alabama."

Plaintiff stated that he continued to work for the benefit of his clients and the firm throughout 2010, alleging that he was "shorted" on his 2010 income. Plaintiff claimed that various other members of the firm were not aware of the situation, and that a former manager had

told him "Hartmann had a duty to sit down . . . to work things out" and that the situation that developed "should have never happened." Hartmann responded that the firm had compensated plaintiff for his 2010 work and that he had received additional money by appealing the original compensation award.

Hartmann stated that on "information and belief," plaintiff continued to be employed by the University of Alabama football program as of September 12, 2012. Defendants contend that plaintiff never returned to the firm or asked for the return of any clients or cases.

B. THE FIRM'S OPERATING AGREEMENT

Miller Canfield is a professional limited liability company under the Limited Liability Company Act (LLCA), MCL 450.4101 *et seq*. The internal affairs of the firm are governed by the Miller Canfield Operating Agreement. The Operating Agreement provides that members of the firm are referred to as "principals," § 2.3, and it vests five senior principals, who are the managing directors, with "[s]ole, full and complete power and authority to manage" the firm. § 2.8. The Operating Agreement provides the managing directors with authority to appoint a CEO who has, "with binding effect on the Managing Directors, the power and authority of the Managing Directors with respect to the day-to-day administration of the business and affairs of the Firm between meetings of the Managing Directors." § 2.14.

The responsibilities of the principals are set forth in § 2.17 of the Operating Agreement and § 2.29 governs the withdrawal of a principal; those provisions provide in relevant part as follows:

> 2.17 Responsibilities of Principals. Each Principal shall devote his or her full time and best efforts to the success of the Firm except as otherwise approved in writing by the

CEO with the approval of the Managing Directors. Without limiting the generality of the foregoing, no Principal may serve (i) as an executor, administrator, trustee, or other fiduciary, (ii) as a director, officer, employee, member, partner or in another similar capacity for any corporation, partnership, limited liability company or other business entity, (iii) in any political or governmental office, whether or not elected or (iv) in any similar capacity, in each case without the prior written approval of the CEO with the approval of the Managing Directors. Each Principal shall deliver to the Firm all fees, salaries, remuneration and other compensation received by him or her for services rendered in any of the above described capacities and also teaching, speaking and writing fees, honoraria and other payments, whether or not related to the practice of law, unless otherwise approved in writing by the CEO with the approval of the Managing Directors. . . .

* * *

2.29 Voluntary and Involuntary Withdrawal of a Principal. A Principal may voluntarily withdraw from the Firm at any time and shall withdraw involuntarily in the event two-thirds (2/3) of the persons who are then Senior Principals vote in favor of such withdrawal, as provided in section 2.8 hereof. A Principal shall be deemed to have voluntarily withdrawn from the Firm upon such Principal's death. Subject to applicable law, any Principal who in any fiscal year of the Firm, withdraws voluntarily or involuntarily shall be entitled to receive an amount equal to his or her proportionate share of the Firm's net income or proportionate amount of fixed dollar compensation for that portion of such fiscal year which concludes with the date of withdrawal . . . .

The Operating Agreement further provides:

3.6 Alternative Dispute Resolution: Mandatory Arbitration. Any dispute, controversy or claim (hereinafter "Dispute") between the Firm or the Partnership and any current or former Principal or Principals of the Firm or

> current or former partner or partners of the Partnership (collectively referred to as the "Parties") of any kind or nature whatsoever (including, without limitation, any dispute controversy or claim regarding step placement, or compensation, or the payment or non-payment of any bonus, the amount or change in amount of any bonus) shall be solely and conclusively resolved according to the following procedure:
>
> (a) In the event of a Dispute, the Parties agree to first try in good faith to settle the dispute directly. If the parties are unable to resolve the dispute, they shall submit the dispute to third party neutral facilitation in accordance with the mediation rules of the American Arbitration Association ("Mediation"). If the Dispute is not resolved by a signed Settlement Agreement within ninety (90) days of a written request for Mediation given to one Party by the other identifying the Dispute, the Dispute shall be settled by binding arbitration ("Arbitration") in accordance with the internal laws of the State of Michigan. The Arbitration shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association except as specifically provided herein. Judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. There shall be three (3) arbitrators; one of whom shall be appointed by the Firm, one by the Principal(s) and/or partner(s) (as applicable) and the third of whom shall be appointed by the first two arbitrators. The hearing shall be held in the Detroit metropolitan area.

C. PROCEDURAL HISTORY

Plaintiff filed his original complaint on June 13, 2012, and his amended complaint 13 days later. Plaintiff alleged the following six claims: breach of fiduciary duty (Count I), illegal shareholder oppression contrary to MCL 450.4515 (Count II), conversion (Count III), bad-faith misrepresentation (Count IV), tortious interfer-

ence with a business relationship or expectancy (Count V), and civil conspiracy (Count VI).

On July 13, 2012, in lieu of answering the complaint, defendants filed a motion for summary disposition and a motion to compel arbitration. Defendants argued that plaintiff voluntarily withdrew from the firm "[b]y switching careers and accepting other employment." Defendants asserted that the court was required to dismiss the complaint because plaintiff's claims fell within the ambit of the Operating Agreement's mandatory arbitration clause, § 3.6, which provided that: "[a]ny dispute . . . between the Firm . . . and any . . . former Principal . . . of any kind or nature whatsoever . . . shall be solely . . . resolved according to the following procedure," namely, arbitration. As defendants noted, "The arbitration provision is written in expansive terms. It obligated and obligates [plaintiff] to arbitrate any and every dispute relating to his former position at the Firm. Not just some of those disputes, but all of them. It could not be drafted in broader language." Defendants further argued that "for purposes of this submission, it matters not one wit [sic] that [plaintiff] has limited his claims in this suit to claims against decision makers in the Firm rather than the firm itself."

In contrast, plaintiff argued that he could pursue claims against defendants individually because Michigan law provides that corporate employees and officials may be held personally liable for their own tortious acts even if acting on behalf of a company. Plaintiff further argued that the central issue in the case involved ultra vires conduct, and asserted that the nature of his claims showed that his suit was not against the firm, but rather against defendants individually.

The circuit court ruled that the dispute did not fall within the scope of the arbitration clause, reasoning:

> The language of the arbitration clause in the Operating Agreement is crystal clear. It provides that disputes "between the Firm . . . and any current or former principal or principals of the Firm . . ." must be submitted to arbitration. It does not even mention disputes between current or former principals. . . .
>
> * * *
>
> This point is further reinforced by the arbitrator selection procedure set forth within the arbitration clause. Specifically, the clause provides that the arbitration shall be conducted by three arbitrators, "one of whom shall be appointed by the Firm, one by the Principal(s) . . . and the third of whom shall be appointed by the first two arbitrators." In a dispute solely between current or former principals, the Firm would not be a party, yet the only provision governing arbitrator selection requires the Firm in all instances to select one of the arbitrators. Thus clearly the arbitration clause was intended only to apply to disputes between a principal or principles [sic] and the firm itself.

The circuit court went on to state that other sections of the Operating Agreement reinforced that point because the provisions "repeatedly differentiate between the firm and the principals."

Referring to three forms developed by Miller Canfield that plaintiff attached to his response to defendants' motion, the circuit court stated:

> Moreover, the firm itself has drafted professional practice forms that instruct attorneys within the firm that in drafting legal documents they must distinguish between a company as an entity and the directors, officers, and members of the company. Thus, any claim that use of the term "the Firm" in the Operating Agreement includes present or former principals acting within their official capacity, is simply incorrect.

After concluding that there was no presumption of arbitrability under MCR 3.602 and that the present case did not fall within the ambit of the Michigan Arbitration Act, MCL 600.5001 *et seq*.,[2] the circuit court concluded as follows:

> Moreover, Defendants' argument that this dispute is actually between the Plaintiff and the firm, rather than between present or former Principals, is equally misguided. Plaintiff explicitly asserted his claims against the various Principals in their individual capacity, and seeks to hold the Defendants personally liable for their actions. Michigan law provides that corporate employees and officials can be held personally liable for all tortious acts in which they participate, regardless of whether they were acting on their own behalf or on behalf of the company.
>
> Based on the above, the Court finds that the dispute in this case falls outside the scope of the arbitration agreement, and therefore denies Defendants' motion for summary disposition.

After rejecting defendants' arguments concerning arbitration, the circuit court granted partial summary disposition to plaintiff on his claims for shareholder oppression, conversion, and tortious interference with a business expectancy. At the outset of its analysis, the circuit court reasoned that MCL 450.4509(1) required an LLC to set forth in its operating agreement the manner by which a member may voluntarily withdraw and concluded that plaintiff had not voluntarily withdrawn under the terms of the Operating Agreement. It also concluded that plaintiff did not withdraw involuntarily because the required two-thirds vote was not

[2] After the circuit court's order, effective July 1, 2013, the Michigan arbitration act, MCL 600.5001 *et seq*., was repealed and replaced by the Uniform Arbitration Act, MCL 691.1681 *et seq*. See 2012 PA 370 and 2012 PA 371. However, the legislative change has no bearing on the resolution of the issues presented in this case.

held. The circuit court then concluded that defendants acted without authority by depriving plaintiff of his ownership interest in the firm. On the basis of this conclusion, the circuit court ruled that termination of plaintiff's ownership substantially interfered with his interest as a member and that he was entitled to summary disposition on his shareholder oppression claim. Further, because it concluded that defendants terminated plaintiff's ownership interest without authority, the circuit court ruled that plaintiff was entitled to summary disposition on his conversion claim. Finally, the circuit court concluded that the improper termination of plaintiff's ownership interest tortiously interfered with his business relationship with Miller Canfield, other principals, and his clients.

This Court granted defendants' application for leave to appeal the circuit court's order.

II. STANDARD OF REVIEW

Defendants contend that the circuit court erred by denying their motion to compel arbitration and by granting plaintiff partial summary disposition.

We review de novo a circuit court's determination regarding whether an issue is subject to arbitration. *In re Nestorovski Estate*, 283 Mich App 177, 184; 769 NW2d 720 (2009). "This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The circuit court granted partial summary disposition under MCR 2.116(C)(10). "In reviewing a motion brought under MCR 2.116(C)(10), we review the evidence submitted by the parties in a light most favorable to the nonmoving party to determine whether there is a genuine issue regarding any material fact."

Cuddington v United Health Servs, Inc, 298 Mich App 264, 271; 826 NW2d 519 (2012). "A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ." *Bennett v Detroit Police Chief*, 274 Mich App 307, 317; 732 NW2d 164 (2007). This case requires that we construe and apply the relevant statutes; issues of statutory construction involve questions of law that are also reviewed de novo. *Cuddington*, 298 Mich App at 271.

III. ANALYSIS

A. ARBITRABILITY

On appeal, defendants first argue that the circuit court erred by denying their motion to compel arbitration because, according to defendants, plaintiff attempted to make an "end run" around the arbitration process by filing suit against defendants individually rather than against the business entity, i.e., the firm.

This Court has previously set forth the basic standards to determine whether a party is compelled to seek arbitration as follows:

> The existence of an arbitration agreement and the enforceability of its terms are judicial questions for the court, not the arbitrators. The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties. To ascertain the arbitrability of an issue, [a] court must consider whether there is an arbitration provision in the parties' contract, whether the disputed issue is arguably within the arbitration clause, and whether the dispute is expressly exempt from arbitration by the terms of the contract. The court should resolve all conflicts in favor of arbitration. However, a court should not interpret a contract's language beyond determining whether arbitration applies and should not allow the parties to divide their disputes between the court and an arbitrator. [*Fromm v*

MEEMIC Ins Co, 264 Mich App 302, 305-306; 690 NW2d 528 (2004) (quotation marks and citations omitted).]

Defendants contend that *Rooyakker & Sitz v Plante & Moran, PLLC*, 276 Mich App 146; 742 NW2d 409 (2007), is dispositive of the issue of whether this matter is subject to arbitration. In *Rooyakker*, the individual plaintiffs, Mathew D. Rooyakker, George M. Sitz, and Sandra K. Burns, were employed by the defendant Plante & Moran, an accounting and business consulting firm. *Id*. at 148. As a condition of employment, the individual plaintiffs signed an agreement with Plante & Moran that contained a "client solicitation" clause and an "arbitration clause." *Id*. The client solicitation clause provided in pertinent part as follows:

> "During the staff member's employment and during the two year period thereafter the staff member shall not, directly or indirectly, render professional accounting, tax, consulting or any other service provided by the Firm at the date of termination (whether voluntary or involuntary), other than as a bona fide, full-time employee of a client, to any Firm client." [*Id*. at 148-149.]

The arbitration clause provided in pertinent part:

> "At the option of the Firm, any dispute or controversy arising out of or relating to this Agreement, may be settled by arbitration held in Oakland County, Michigan, following the rules then in effect of the American Arbitration Association." [*Id*. at 149.]

The individual plaintiffs worked at Plante & Moran's Gaylord office. *Id*. at 148. When that office closed, the individual plaintiffs declined to relocate to another office and instead commenced working for the plaintiff Rooyakker & Sitz, PLLC. *Id*. at 150. Shortly thereafter, Plante & Moran initiated arbitration proceedings against the plaintiffs individually, alleging that they had violated the client solicitation clause. *Id*. The plaintiffs

then commenced suit, alleging, among other things, that the agreement was unenforceable and that the individual defendants Kevin Lang and Michelle Carroll had interfered with business expectations and defamed the plaintiff Rooyakker & Sitz, PLLC. *Id*. at 150-151. Ultimately, the trial court held that the parties were bound by the arbitration clause and granted summary disposition in favor of the defendants. *Id*. at 151-152.

The plaintiffs appealed, arguing in part that the trial court had erred by ordering the plaintiff Rooyakker & Sitz, PLLC, and the individual defendants Lang and Carroll to submit to arbitration when those parties were not signatories to the original agreement containing the arbitration clause. *Id*. at 162. This Court rejected the plaintiff's argument, reasoning as follows:

> [T]he broad language of the arbitration clause—"*any dispute or controversy arising out of or relating to*" the agreement—vests the arbitrator with the authority to hear plaintiffs' . . . claims, even if they involve nonparties to the agreement. Further, Michigan courts clearly favor keeping all issues in a single forum. Therefore, we do not believe that the trial court erred in referring plaintiffs' . . . claims to arbitration because they arise out of or relate to the individual plaintiffs' past employment with Plante & Moran. [*Id*. at 163-164 (citations omitted; emphasis added).]

We disagree with defendants' assertion that *Rooyakker* is directly on point. The central question in this case does not involve whether plaintiff should be allowed to sever his claims into arbitrable and nonarbitrable categories. Rather the central question presented in this case is whether plaintiff can sue defendants as individuals, or whether plaintiff is required to arbitrate his claims against them. That question was not at issue in *Rooyakker*. Therefore, we turn to the language of the operating agreement to discern whether the operating agreement mandates arbitration of plaintiff's claims.

Like the arbitration clause at issue in the present case, the arbitration clause in *Rooyakker*, 276 Mich App at 149, did include the phrase "[a]ny dispute or controversy," and it is that language on which defendants heavily rely for their argument on this issue. However, in *Rooyakker*, the full phrase was "[a]t the option of the Firm, any dispute or controversy *arising out of or relating to this Agreement*, may be settled by arbitration. . . ." *Rooyakker*, 276 Mich App at 149 (emphasis added). However, in the present case, the precise language is as follows:

> Any dispute, controversy or claim (hereinafter "Dispute") *between the Firm or the Partnership and any current or former Principal or Principals* of the Firm or current or former partner or partners of the Partnership of any kind or nature whatsoever . . . shall be solely and conclusively resolved according to the following procedure[.] [Emphasis added.]

Abbreviated and emphasized to be pertinent to the present case, it is "Any dispute, controversy or claim . . . *between the Firm . . . and any current or former Principal* . . . of any kind or nature whatsoever . . . shall be solely and conclusively resolved according to the arbitration procedure." Thus, the arbitration provision in *Rooyakker* is not the same as, or even analogous to, that in the present case. The arbitration clause in this case is more restrictive in that it limits its scope to disputes between the firm and a principal.

In the present case, there is clearly an arbitration provision in the Operating Agreement. The question is whether it applies to these particular parties, which, by legal necessity, implicates the next question: whether the disputed issue is arguably within the arbitration clause.

> In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written because an unambiguous contract reflects the parties' intent as a matter of law. [*In re Egbert R Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008) (citations omitted).]

As the circuit court concluded, the plain language of the arbitration provision in this case clearly and unambiguously contemplates arbitration of disputes between "the Firm" and "a Principal." There is no language contained in the operating agreement from which this Court could infer that the arbitration provision contemplated disputes between principals, i.e., between plaintiff and the firm managers he has sued. We also cannot find that the language of the provision is ambiguous on this point. Indeed, as the circuit court observed, the provision "does not even mention disputes between current or former principals." And, as the circuit court also noted, there are other provisions in the operating agreement that clearly distinguish between the firm and its principals. For example, the arbitrator selection procedure calls for the arbitration to be conducted by three arbitrators, "one of whom shall be appointed by the Firm, one by the Principal(s) . . . and the third of whom shall be appointed by the first two arbitrators." As the circuit court observed, "In a dispute solely between current or former principals, the Firm would not be a party, yet the only provision governing arbitrator selection requires the Firm in all instances to select one of the arbitrators." In *Rooyakker*, this Court stated that when interpreting arbitration clauses, "[t]he court should resolve all conflicts in favor of arbitration." *Rooyakker*, 276 Mich App at 163 (quotation marks and citations omitted). However, because of the clear and

unambiguous language restricting the arbitration requirement to disputes between "the Firm" and "a Principal," there is no conflict requiring resolution.

Defendants additionally rely on *Hall v Stark Reagan, PC*, 294 Mich App 88; 818 NW2d 367 (2011), rev'd in part 493 Mich 903 (2012), in which this Court considered the arbitrability of the plaintiffs' age discrimination claims. This Court held that those claims did not come within the following language in the arbitration agreement at issue: " 'Any dispute regarding interpretation or enforcement of any of the parties' rights or obligations hereunder,' " reasoning that "[t]he 'rights or obligations' delineated in the contract bear no relationship to [the plaintiffs'] age-discrimination claims." *Id*. at 94, 98. Our Supreme Court reversed in an order on the following grounds:

> The dispute in this case concerns the motives of the defendant shareholders in invoking the separation provisions of the Shareholders' Agreement . . . with respect to the plaintiffs. This is a "dispute regarding interpretation or enforcement of . . . the parties' rights or obligations" under the Shareholders' Agreement, and is therefore subject to binding arbitration pursuant to . . . the Agreement. [*Hall*, 493 Mich at 903.]

Defendants contend that the circuit court erred when it relied on this Court's now "defunct" decision in *Hall* to conclude that § 3.6 did not extend to plaintiff's dispute with the individual principals of the firm. However, to state that the circuit court "relied" on *Hall* is to overstate the circuit court's ruling relative to *Hall*. The circuit court cited *Hall* in footnotes to the following passage in its ruling:

> [A] party may not be compelled to arbitration without his consent, and courts may not "use policy considerations as a substitute for party agreement." Moreover, a Court

> must not extend the reach of an arbitration agreement through implication, especially where it is an agreement between attorneys with expertise in arbitration.

We glean from this portion of the circuit court's ruling that the proposition for which the circuit court cited *Hall* was essentially that "by their chosen words, the contracting parties determined the scope of their arbitration agreement," *Hall*, 294 Mich App at 98 n 3, which is also unremarkable and unassailable. As this Court and our Supreme Court have observed, that is a bedrock principle in contract law. See generally *Bayati v Bayati*, 264 Mich App 595, 599; 691 NW2d 812 (2004); *In re Egbert R Smith Trust*, 480 Mich at 24. Hence, the manner in which the circuit court relied on this Court's ruling in *Hall* does not call into question its conclusion that the shareholder-oppression, conversion, and tortious-interference claims did not come within the arbitration provision in the present case. Moreover, the language in the arbitration clause at issue in *Hall*, like the clause in *Rooyakker*, addresses which types of claims are subject to arbitration, not whom the disputes must be between for arbitration to be required, and that is the central question in this case.

In reaching its conclusions on this issue, the circuit court rejected defendants' arguments that this dispute is really between plaintiff and the firm, not between plaintiff and present or former principals. The circuit court noted that plaintiff's claims were asserted against defendants in their individual capacity and sought to hold them personally liable for their actions. Indeed, plaintiff's essential claim is that defendants took his ownership interest in contravention of the firm's own stated exclusive method for doing so—by two-thirds vote of the senior principals. "It is well established that corporate employees and officials are personally liable

for all tortious and criminal acts in which they participate, regardless of whether they are acting on their own behalf or on behalf of a corporation." *Joy Mgt Co v Detroit*, 183 Mich App 334, 340; 455 NW2d 55 (1990).

We therefore concur with the circuit court that the dispute between plaintiff and the named individual defendants is not even arguably within the arbitration clause. The circuit court therefore did not err by denying defendants' motion for summary disposition.

B. PARTIAL SUMMARY-DISPOSITION

Defendants next argue that the circuit court erred by granting plaintiff's motion for partial summary disposition with respect to the claims of shareholder oppression, conversion, and tortious interference with a business expectancy. Defendants contend that there was a genuine issue of material fact and cite affidavits they submitted with their response to plaintiff's motion. Defendants contend that the circuit court "elected to disregard the Defendants' opposing [a]ffidavits that contested all of the material facts on which Altobelli relied in making his claims." (Emphasis omitted.)

The circuit court's grant of partial summary disposition was based on its interpretation of MCL 450.4509(1), a subsection of the LLCA governing a member's withdrawal from a limited liability company. Before discussing the circuit court's interpretation of this statute, a brief overview of the statutory history of this provision is useful.

MCL 450.4509(1) provides in pertinent part: "A member may withdraw from a limited liability company only as provided in an operating agreement." This provision was amended by 1997 PA 52. Before that amendment, it provided in pertinent part:

> A member may withdraw from a limited liability company as provided in an operating agreement or by giving written notice to the company and to the other members at least 90 days in advance of the date of withdrawal . . . . [MCL 450.4509(1), as enacted by 1993 PA 23.]

Thus, the statute before the amendment allowed withdrawal in two situations: first, "as provided in an operating agreement," and second, under the withdrawal mechanism provided by the statute, which required 90 days' written notice. The 1997 amendment removed the statutory withdrawal mechanism and provided that withdrawal from an LLC was proper "only as provided in the operating agreement." 1997 PA 52.

The circuit court reasoned that the revised language of MCL 450.4509(1) "requires an LLC to set forth in its operating agreement the method by which a member may withdraw." The court reasoned as follows:

> A review of the history of the statute establishes that the "only as provided" language in section (1) explicitly refers to methods of withdrawal. Prior to 1997 [MCL 450.4509(1)] provided that a member could withdraw "ONLY as provided . . . in an operating agreement, or by giving written notice to the company and to the other members at least 90 days in advance of the date of withdrawal . . ." [Capitalization in 1997 HB 4606.]
>
> Since 1997 the statute has provided that a member wishing to withdraw from an LLC must strictly comply with the requirements for withdrawal set forth in the LLC's operating agreement, or his withdrawal is ineffective.
>
> * * *
>
> Thus, Plaintiff is correct that the statute requires an LLC to set forth in its operating agreement the method by which a member may withdraw.

After concluding that MCL 450.4509(1) required an LLC to set forth the methods by which a member may voluntarily withdraw, the circuit court proceeded to hold that the Operating Agreement did not provide a means for individual principal members to voluntarily withdraw from Miller Canfield. The circuit court reasoned as follows:

> The Miller Canfield operating agreement provides that a principal has the right to voluntarily withdraw from the firm, but the only method provided for in the operating agreement applies only to a principal who becomes an employee of a professional corporation. No method of voluntarily withdrawal is provided for an individual principal. As a result, in essence the Miller Canfield operating agreement does not permit an individual to voluntarily withdraw from the firm, because it does not provide the method that must be complied with in order for such a voluntary withdrawal to occur. Moreover, because no method has been provided, Plaintiff cannot be deemed to have voluntarily waived his ownership rights in the firm.

Having concluded that the Operating Agreement did not provide a means for plaintiff to withdraw from the firm, the court proceeded to grant partial summary disposition in favor of plaintiff with respect to Counts II, III, and V, because, according to the circuit court, these claims were "premised on the underlying assertion that Plaintiff did not voluntarily withdraw from the firm; that no events constituting an automatic withdrawal occurred; and that no involuntary withdrawal in conformity with the operating agreement occurred." The circuit court stated, "No method was set forth here, and therefore there was no method with which Plaintiff could comply. Under these circumstances, the Court finds that there is no genuine issue of material fact that Plaintiff did not voluntarily withdraw from Miller Canfield."

Defendants argue that the circuit court erred by concluding that the Operating Agreement did not provide a means for an individual principal to voluntarily withdraw. Specifically, defendants cite § 2.29 of the Operating Agreement, which provides that "[a] Principal may voluntarily withdraw from the Firm at any time . . . ." Defendants also note that other language in § 2.29 mentions "voluntary withdrawal" several times, including language that states, "[a] Principal shall be deemed to have voluntarily withdrawn from the Firm upon such Principal's death," and in other parts stating how voluntary withdrawal affects distribution and compensation.

We hold that the circuit court's interpretation of MCL 450.4509(1) and of the Operating Agreement is legally incorrect. The statute provides that "[a] member may withdraw from a limited liability company *only as provided in an operating agreement*" (emphasis added). The circuit court interpreted the statutory language "only as provided in an operating agreement" to mean that the operating agreement must provide a specific method or procedure for voluntary withdrawal. Absent specified means and procedures, the court reasoned, there can be no voluntary withdrawal.

Contrary to the circuit court's interpretation, the 1997 statutory amendment's removal of a member's ability to withdraw through written notice does not compel the conclusion that there can be no voluntary withdrawal from an LLC whose operating agreement does not provide a specified procedure for withdrawal. Such a conclusion has no basis in the plain language of the statute. Reviewing the relevant statutory language, we find no verbiage to cause this Court to conclude that an LLC's operating agreement cannot permit voluntary withdrawal without delineating any conditions prece-

dent in its operating agreement. To require such conditions or procedural steps forces an LLC to insert something into its operating agreement that none of its members may wish to include. Consequently, we read the "only as provided" language to mean that a member can no longer withdraw unless an operating agreement permits withdrawal. We therefore conclude that the circuit court erred in its interpretation and application of MCL 450.4509(1) and, thus, erred in its conclusion that plaintiff could not have voluntarily withdrawn from the firm.

Because the circuit court concluded that the Operating Agreement did not permit plaintiff to voluntarily withdraw, it rejected defendants' argument that whether plaintiff voluntarily withdrew should be analyzed by applying the facts to the dictionary definition of "voluntary." "Courts may consult dictionary definitions to ascertain the plain and ordinary meaning of terms undefined in an agreement." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). The Operating Agreement contains three references to circumstances that constitute voluntary withdrawal, but does not further define the term. Specifically, § 2.29 provides that "[a] Principal may voluntarily withdraw from the Firm at any time . . . . A Principal shall be deemed to have voluntarily withdrawn from the Firm upon such Principal's death." In addition, § 2.34 addresses several named professional corporations that were allowed to continue as senior principals and provides in pertinent part:

> (b) Any individual who was a Principal in the Firm and who became an employee of such professional corporation shall no longer be a Principal in the Firm for any purpose whatsoever . . . and such individual shall be deemed to have voluntarily withdrawn as a Principal in the Firm. . . .

> (c) Any Principal which is a professional corporation may elect by advance written notice . . . to withdraw from the Firm . . . .

Although the circumstances set forth in these provisions constitute a "voluntary withdrawal," the Operating Agreement does not contain any language indicating that these are the *only* circumstances in which a principal may withdraw from the firm. At the least, the juxtaposition of "*[a] Principal may voluntarily withdraw from the Firm at any time*" with the three specified circumstances set forth above makes the agreement ambiguous on that point. We therefore turn to the dictionary to clarify the definition of the term "voluntary."

Random House Webster's College Dictionary (2001) defines "voluntary" in relevant part as "done, made, brought about, or undertaken of one's own accord or by free choice" and "acting or done without compulsion or obligation." Thus, in the context of the Operating Agreement, "voluntary" can reasonably be construed to include actions taken by an individual of his or her own accord, by free choice, without compulsion or obligation.

In this case, defendants submitted two affidavits to support that there was a genuine issue of material fact regarding whether plaintiff voluntarily withdrew from the firm. In one of the affidavits, Hartmann averred as follows:

> The factual assertion underlying Plaintiff's Motion for Partial Summary Disposition is that the defendants ousted him from the Firm and terminated his ownership interest. That assertion is simply untrue. Dean Altobelli left the Firm to take another job.

Hartmann averred that "[o]ne time honored way for principals to withdraw from the Firm is to simply take

another job. Over the years, a number of principals have withdrawn from the Firm by taking another job." Hartmann asserted that plaintiff voluntarily withdrew from the firm when he vacated his office, stopped coming to work, took another job, and accepted compensation and benefits from another employer. Hartmann stated that plaintiff "was not ousted from the Firm. This was not a termination or an involuntary withdrawal requiring a two-thirds vote of the other Senior Principals." Hartmann further stated that under the Operating Agreement, the managers had to approve any outside employment, and the managers decided not to approve plaintiff's request to work at the University of Alabama. Hartmann asserted that "[n]o vote or input from the other Principal or owners was required."

In addition, Hartmann cited § 2.17 of the Operating Agreement, which in pertinent part provides:

> Each principal shall devote his or her full time and best efforts to the success of the Firm except as otherwise approved in writing by the CEO with approval of the Managing Directors. . . . [N]o Principal may serve . . . as a[n] . . . employee . . . or in another similar capacity for any corporation, partnership, limited liability company or other business entity . . . without the prior written approval of the CEO with the approval of the Managing Directors.

Hartmann stated that plaintiff was aware that written approval was required before he could work full-time for another entity, yet nevertheless left for the University of Alabama.

Hartmann also quoted the following from a July 7, 2010 e-mail that plaintiff sent him and others from which it could be reasonably inferred that plaintiff understood that if the managers did not approve his

working at the University of Alabama, his departure for the university would constitute withdrawal from the firm:

> I want to discuss my status with the firm, my compensation and client matters and come to an agreement with the firm. As far as status, I have asked Mike Hartmann to seek approval from the managers under section 2.17 of the operating agreement to approve my outside compensation from the University of Alabama. If approved, I expect that my status and compensation as a senior principal at the firm will not change for the next 6 plus months. . . . Alternatively, I think it is only fair that if I withdraw from the firm and continue to work on a transition of client business, we should come to an agreement on my 2010 compensation . . . .

Furthermore, although plaintiff asked for a 7 to 12 month leave of absence, when proposing the terms of that request, plaintiff stated, "Dean Altobelli may return to Miller Canfield as a senior principal at any time before June 1, 2011." Hartmann asserted that the language in this request "makes it clear that [plaintiff] knew all along that he could not **continue** as a Principal at Miller Canfield while holding another job. Indeed, his own proposal seeks to allow him to **return** to Miller Canfield as a Principal."

Hartmann denied that plaintiff described the opportunity at Alabama as a temporary career enhancement. Hartmann averred that "[plaintiff] told me that he had taken a full time job that he hoped would lead to greater coaching opportunities for him." Hartmann also noted that on January 24, 2011, plaintiff submitted a proposal indicating that he would continue to work at the University of Alabama but was interested in becoming "of counsel" at the firm, and that under the heading "Return to Principal Status," plaintiff proposed that

"Dean's principal status will be reinstated in 2011." Hartmann proceeded to explain:

> By the time of the exchange of emails in early July 2010, [plaintiff] had, as a practical matter, already left the Firm. He had already asked other lawyers in the Firm, including LeRoy Asher [Jr.], to take over clients he had been servicing and cases he was handling, and had already transitioned clients and case files to Mr. Asher and others.

Hartmann also stated:

> [Plaintiff] asked for my opinion about whether he could come back to the Firm someday in the future if his coaching career did not work out; I told him that, in my opinion, I thought that he probably could. He and I both knew that I was not in a position to make any commitment that the Firm would take him back in the future if he wanted to return, as I did not have the authority to make such a commitment.

Finally, Hartmann averred as follows:

> Upon information and belief, [plaintiff] is now in his third year of employment with the University of Alabama football program. I have reviewed the website for the University of Alabama 2012 football program and have seen that [plaintiff] is identified as being on the staff of the football program as a "Defensive Analyst."

In his affidavit, LeRoy Asher, Jr., confirmed that plaintiff had "asked whether, if he returned to the Firm in the future, I would return the mortgage servicing client to him."

Viewed in a light most favorable to defendants, we conclude that these affidavits leave open a genuine issue of material fact regarding whether plaintiff voluntarily withdrew from the firm—i.e., whether plaintiff left the firm of his own accord and by his own free choice without compulsion or obligation. In the event that he did, there would have been no need for a vote of

the senior principals to expel him. The circuit court's determination that the vote was required, the lack of that vote, and the declaration in MCL 450.4504(1) that a membership interest in an LLC is personal property, were the basis on which the circuit court granted partial summary disposition on the claims of shareholder oppression, conversion, and tortious interference with a business expectancy. Because there was a genuine issue of material fact regarding whether plaintiff voluntarily left the firm, summary disposition was inappropriate. *Cuddington*, 298 Mich App at 270; MCR 2.116(C)(10).

IV. CONCLUSION

The circuit court did not err by denying defendants' motion to compel arbitration because the claims asserted by plaintiff in this case do not fall within the arbitration clause contained in Miller Canfield's Operating Agreement. However, there remains a genuine issue of material fact as to whether plaintiff voluntarily withdrew from the firm, and the circuit court erred by granting plaintiff's motion for partial summary disposition.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Neither party having prevailed in full, neither may tax costs. MCR 7.219(A). Jurisdiction is not retained.

SERVITTO and BECKERING, JJ., concurred with BORRELLO, P.J.

PEOPLE v MARTINEZ

Docket No. 311804. Submitted December 3, 2013, at Grand Rapids. Decided November 4, 2014, at 9:10 a.m.

Gilbert A. Martinez pleaded guilty in the Muskegon Circuit Court, William C. Marietti, J., to a charge of second-degree criminal sexual conduct (CSC). The court accepted the plea and entered an order of *nolle prosequi* with regard to the original charge of first-degree CSC. The plea agreement provided that the court would not impose a minimum sentence of more than four years in prison. Before sentencing, the complainant stated new allegations against defendant concerning fellatio. The prosecutor had not been previously aware of the allegations. On the basis of the new allegations, two counts alleging first-degree CSC were then brought against defendant under a different circuit court docket number. Defendant moved to quash the new charges on the basis that they were barred by the plea agreement. The prosecutor argued that the new charges were not covered by the plea agreement. The court determined that a mutual mistake of fact had occurred because the police reports on which the plea agreement was based did not contain allegations of fellatio. The court determined that the remedy was that the "deal is off" and there "is no plea agreement." The court ruled that a mutual mistake of fact justified rescinding the plea agreement. The court entered an order remanding the new charges regarding fellatio to the district court for a preliminary examination. The court also entered an order vacating defendant's guilty plea to the charge of second-degree CSC. A trial thereafter commenced and defendant was convicted of first-degree CSC and sentenced to 15 to 25 years in prison. Defendant appealed.

The Court of Appeals *held*:

1. Neither MCR 6.310(B)(1) nor MCR 6.310(E) permitted, on the facts of this case, the trial court to vacate defendant's guilty plea on its own motion or that of the prosecutor. The trial court abused its discretion by doing so.

2. The circuit court erred by interpreting the term "investigation" in the plea agreement, which provided that the original charge of first-degree CSC would be dismissed and the prosecutor

agreed to "not bring any other charges regarding sexual contact or penetration with [the complainant] that grows out of the same investigation that occurred during the period of 1996 through 2000," to mean police reports in existence at the time of the plea. The "investigation" of other charges that would not be prosecuted included sexual contact or penetration against the complainant during 1996 through 2000.

3. The fact that the complainant, after defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor does not create a mutual mistake of fact. A mutual mistake of fact did not occur in the negotiation of the plea bargain. No caselaw supports vacating the plea agreement under these circumstances.

4. The fact that the new information came to light after the plea was entered does not justify vacating defendant's bargained-for plea.

5. The circuit court abused its discretion by vacating defendant's plea. The bargained-for plea became binding when the court accepted it. Defendant's conviction and sentence for first-degree CSC is vacated and the case is remanded for sentencing on second-degree CSC in accordance with the plea agreement.

Vacated and remanded for sentencing.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *D. J. Hilson*, Prosecuting Attorney, and *Terrence E. Dean*, Assistant Prosecuting Attorney, for the people.

Gerald Ferry for defendant.

Gilbert A. Martinez *in propria persona*.

Before: SAWYER, P.J., and MARKEY and STEPHENS, JJ.

PER CURIAM. Defendant appeals by right his conviction following a bench trial of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a). He was sentenced to 15 to 25 years' imprisonment. Defendant argues that the evidence at trial was insufficient to support his conviction and, in a Standard 4 brief, that

the trial court abused its discretion by vacating his guilty plea to a charge of second-degree CSC, MCL 750.520c(1)(a), that was entered pursuant to a plea bargain with the prosecutor "to dismiss the original charge of first-degree CSC and . . . not bring any other charges regarding sexual contact or penetration with [the complainant] that grows out of this same investigation that occurred during the period of 1996 through 2000." The plea agreement also had a *Cobbs*[1] component that "the Court would not impose a minimum sentence of more than four years in" prison. The trial court accepted defendant's guilty plea under the plea bargain but vacated it before sentencing. We vacate defendant's conviction and sentence for first-degree CSC and remand for sentencing on second-degree CSC in accordance with the plea agreement.

On October 29, 2001, defendant pleaded guilty to a charge of child sexually abusive activity involving the complaint. MCL 750.145c(2). Defendant was sentenced for that offense to 4 to 20 years' imprisonment. On March 14, 2007, defendant was granted parole but violated the terms of his release by attempting to contact the complainant, who informed her mother. The complainant disclosed to her mother that defendant had sexually assaulted her during the time of the making of the sexually abusive materials that were the subject of defendant's conviction. The complainant's mother contacted the police, resulting in defendant's arrest for the parole violation.

In an interview with the police, defendant initially denied having had any sexual contact with the complainant but later admitted that he had molested her three times. He later claimed that his statement regarding molestation referred to his actions of producing

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

videotapes. On the basis of the new allegations, the prosecutor charged defendant with one count of first-degree CSC, MCL 750.520b(1)(a), alleging an occurrence during 1996 to 2001 of "penile-vaginal and/or digital-vaginal" penetration of a victim under the age of 13. After a preliminary examination on November 4, 2008, defendant was bound over to the circuit court. On February 27, 2009, the prosecution filed notice of its intent to introduce evidence under MRE 404(b), MCL 768.27, and MCL 768.27a of other acts of "sexual contact and penetration by defendant with [the complainant] both before and after the charged events." And on April 20, 2009, the prosecutor moved to amend the information to allege three counts of first-degree CSC: (1) "digital-vaginal," (2) "penile-vaginal," and (3) "object-vaginal." This motion was based on the complainant's testimony at the preliminary examination concerning an uncharged act of intercourse and "many other acts of sexual penetration."

On September 14, 2009, the day on which the prosecutor's motion to amend the information was to be heard, defendant instead agreed to enter a guilty plea to a charge of second-degree CSC pursuant to the plea agreement noted already. The circuit court restated the parties' agreement as being that "the prosecutor agreed to dismiss the charge of criminal sexual conduct first degree and any other charges stemming out of this particular investigation in return for a plea of guilty by you to criminal sexual conduct in the second degree." The circuit court further stated the *Cobbs* portion of the agreement was that defendant's "minimum sentence will not be more than four years in the Michigan Department of Corrections and that you will receive credit for any time served waiting for trial on this particular offense and that it will not be consecutive to your parole term." The circuit court accepted defen-

dant's plea and an order of *nolle prosequi* regarding the original count of first-degree CSC was entered on September 18, 2009. Defendant's sentencing was set for October 13, 2009, but adjourned several times.

On October 6, 2009, the complainant, in an interview with a social worker, stated new allegations regarding fellatio with defendant. Defendant does not dispute that the prosecutor was not previously aware of these allegations. The register of actions in this case reflects the filing of an information on October 7, 2009, but one is not contained in the circuit court file. Apparently, the prosecutor brought two counts of first-degree CSC involving oral penetration of the complainant in Muskegon Circuit Court Docket No. 10-59054-FC. On March 12, 2010, defendant moved to quash the new charges on the basis that they were barred by the plea agreement. On March 22, 2010, the prosecution filed a brief in opposition to the motion, arguing that the new charges were not covered by the plea agreement because defendant did not disclose the allegations regarding fellatio and that, because the allegations were unknown to the prosecutor when the plea agreement was negotiated, they did not "grow[] out of [the] same investigation." Alternatively, the prosecution argued that defendant misled the prosecution into a disadvantageous agreement, or facts had come to light that were not within the fair contemplation of the agreement, or there was a mutual or unilateral mistake that warranted setting aside the agreement. See *People v Reagan*, 395 Mich 306, 318; 235 NW2d 581 (1975).

The circuit court held a hearing on defendant's motion to quash the new charges on April 9, 2010. At the hearing, the court reviewed the police reports that were available to the prosecutor and defense counsel at the time the plea agreement was negotiated. The court

reasoned that a mutual mistake of fact had occurred because the police reports on which the plea agreement was based did not contain allegations of fellatio. The court determined that the remedy was that "[t]he deal is off" and "[t]here is no plea agreement." The court also reasoned that because the plea agreement included a *Cobbs* component, "which the Court had to buy into also," the fact that the court was unaware of the allegations of fellatio strengthened the court's ruling that a mutual mistake of fact justified rescinding the plea agreement. As a result of the court's ruling, an order was entered vacating defendant's guilty plea to second-degree CSC,[2] and the new charges regarding fellatio were remanded to the district court for a preliminary examination.[3] The trial commenced on May 11, 2010, on the reinstated charge of first-degree CSC. The court reaffirmed its ruling vacating the bargained guilty plea to second-degree CSC.

I. STANDARD OF REVIEW

We review a trial court's decision on a motion to withdraw a plea for an abuse of discretion. *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes. Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear

[2] The order was signed April 16, 2010, but is date stamped April 19, 2010, and entered on the circuit court register of actions records as April 21, 2010.

[3] The record, although not entirely clear, suggests that defendant waived preliminary examination on the new charges in Docket No. 10-59054-FC for the purpose of filing his motion to quash in the circuit court with the understanding that the case would be remanded to the district court for a preliminary examination if the circuit court's ruling was adverse to defendant.

error." *People v Terrell*, 289 Mich App 553, 559; 797 NW2d 684 (2010) (citations omitted).

This case also presents questions regarding the interpretation of the court rules, and in particular MCR 6.310, which governs withdrawal or vacation of a plea. See *People v Brown*, 492 Mich 684, 687, 692; 822 NW2d 208 (2012). "The proper interpretation and application of a court rule is a question of law that is reviewed de novo." *Cole*, 491 Mich at 330. The rules of statutory construction also apply to court rules. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). "If the language of the court rule is clear and unambiguous, judicial construction is normally neither necessary nor permitted." *People v Strong*, 213 Mich App 107, 111; 539 NW2d 736 (1995). Thus, the unambiguous language of court rules must be enforced as written. *Williams*, 483 Mich at 232.

II. ANALYSIS

A. THE COURT RULES

At the time the trial court vacated defendant's plea, MCR 6.310(B)(1) provided as follows with respect to withdrawal of a plea after acceptance by the court but before sentencing:

> [A] plea may be withdrawn on the *defendant's motion* or with the *defendant's consent* only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C). [Emphasis added.]

It is patent that MCR 6.310(B)(1) did not permit the circuit court to vacate defendant's plea because defendant neither moved for such action nor consented to it.

Subrule (E) of MCR 6.310 is the only other possible provision that might apply to vacating defendant's plea before sentencing. That subsection governs vacating a plea on the prosecutor's motion. It provides: "On the prosecutor's motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement." In this case, although the prosecutor moved to vacate defendant's plea in the course of responding to defendant's motion to quash the information alleging new offenses,[4] the prosecutor's motion was not based on defendant's failing to comply with the terms of the plea agreement. The record shows that defendant fully complied with his part of the plea bargain by pleading guilty to the count of second-degree CSC that was added to the information.

"A trial court's authority to vacate an accepted plea is governed by MCR 6.310(B) and C[.]" *Strong*, 213 Mich App at 110. In *Strong*, the trial court vacated the defendant's plea to one count of assault with intent to commit second-degree CSC under a plea bargain in which the prosecutor agreed to dismiss charges of second-degree CSC and being a third-offense habitual offender; the plea bargain also included an agreement to recommend a sentence that the defendant could serve in the county jail. *Id*. at 108-109. The trial court vacated the defendant's plea because at the time of sentencing the defendant professed his innocence. *Id*. at 109-110. The defendant was subsequently charged with

[4] Under MCR 2.119(A)(1), which is applicable in a criminal proceeding under MCR 6.001(D), a motion must (1) be in writing, (2) state with particularity the grounds and authority on which it is based, (3) state the relief or order sought, and (4) be signed by the party or attorney as provided in MCR 2.114. The part of the prosecutor's brief moving the court to vacate the plea (1) was in writing, (2) cited relevant caselaw in support of its position, (3) stated that it sought that the plea be vacated, and (4) was signed; thus, it was a proper motion before the trial court.

and convicted of second-degree CSC and being a third-offense habitual offender and sentenced to 3 to 30 years' imprisonment. *Id*. at 110.

Except for relocating Subrule (C) to Subsection (E), and designating Subrule (B) as (B)(1), the essence of MCR 6.310(B)(1) and (E) have remained the same since *Strong* was decided.[5] Consequently, the holding of *Strong* applies equally to the instant case. The Court opined:

> Because the language used in the court rule is clear and unambiguous, we apply its plain and ordinary meaning. On its face, MCR 6.310 allows a trial court to set aside an accepted plea only where (1) a motion to withdraw the plea is brought by the defendant; (2) the court on its own motion and with the consent of the defendant sets aside the plea; or (3) a motion to vacate the plea is brought by the prosecution on the ground that the defendant has violated the terms of the plea agreement. The plain language of the court rule clearly limits the discretion of the trial court to vacate an accepted plea. The trial court may exercise its discretion to vacate an accepted plea only under the parameters of the court rule. [*Strong*, 213 Mich App at 111-112.]

---

[5] MCR 6.310(B)(2) was adopted July 13, 2005. See 473 Mich xlii, lxiv. It addresses a defendant's right to withdraw a plea involving a sentence recommendation or sentence agreement, see *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), or withdraw a plea involving a preliminary assessment of a possible sentence by the trial court, *Cobbs*, 443 Mich 276. MCR 6.310(B)(3) was added after the events in this case, by order dated September 18, 2013, effective January 1, 2014. Subrule (B)(3) "clarifies that a defendant's misconduct that occurs between the time the plea is accepted and the defendant's sentencing may result in a forfeiture of the defendant's right to withdraw a plea in either a *Cobbs* or *Killebrew* case." 495 Mich clxxxviii (staff comment). The new amendment also modifies MCR 6.310(B)(2)(a) to "eliminate the ability of a defendant to withdraw a plea if the defendant and prosecutor agree that the prosecutor will recommend a particular sentence, but the court chooses to impose a sentence greater than that recommended by the prosecutor." *Id*. The record here reflects no misconduct by defendant that would implicate MCR 6.310(B)(3).

The Court went on to hold that the trial court abused its discretion by vacating the defendant's plea because "defendant neither moved to withdraw his plea nor consented to its withdrawal." *Id*. at 112. Because on the facts of this case, neither MCR 6.310(B)(1) nor MCR 6.310(E) permitted the trial court to vacate defendant's guilty plea on its own motion or that of the prosecutor, we find that the trial court abused its discretion by doing so.

That the court rules do not permit the trial court's action should normally end the analysis. Nevertheless, situations may arise that are simply not covered by the court rules. For example, in *People v Siebert*, 201 Mich App 402; 507 NW2d 211 (1993), aff'd 450 Mich 500 (1995), the defendants faced drug charges that provided, on conviction, for a sentence of life in prison without parole. The prosecutor and the defendants entered a plea and sentence bargain that required that the defendants be sentenced to a prison term of 20 to 30 years. *Id*. at 404-405. The trial court, however, imposed a sentence of 5 to 30 years on defendant Siebert and 3 to 30 years on defendant Oatman and denied the prosecutor's motion to vacate or withdraw from the plea under the rationale of *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982). The *Siebert* Court reasoned that MCR 6.310(C)[6] was not the only basis on which the prosecutor may withdraw from a plea agreement. *Siebert*, 201 Mich App at 406. Further, the Court reasoned "that while *Killebrew* and MCR 6.302(C)(3) do not expressly provide prosecutors with a right to withdraw, neither is inconsistent with such a right. Indeed, *Killebrew* implies such a right in the case of a sentence agreement." *Siebert*, 201 Mich App at 408. The Court concluded that the trial court abused its discretion by

[6] Now MCR 6.310(E).

not allowing the prosecutor to withdraw from the plea agreement after imposing a sentence of less than the agreed-upon term of years. *Id*. at 417. Consequently, we examine the circuit court's reasons apart from the court rules to justify its ruling vacating defendant's accepted plea.

B. CONTRACT PRINCIPLES

"The authority of a prosecutor to make bargains with defendants has long been recognized as an essential component of the efficient administration of justice." *People v Jackson*, 192 Mich App 10, 14-15; 480 NW2d 283 (1991), citing *Santobello v New York*, 404 US 257, 260-261; 92 S Ct 495; 30 L Ed 2d 427 (1971). The prosecutor's broad discretion in deciding what charges to bring is the underlying basis of plea-bargaining. *Jackson*, 192 Mich App at 15. And, while analogous to a contract, plea bargains are not governed by the standards of commerce but must comport with the interests of justice in the administration of criminal laws. *Reagan*, 395 Mich at 314 (the standards of commerce do not and should not govern the administration of criminal justice); *Jackson*, 192 Mich App at 15 (strict contract theories or principles peculiar to commercial transactions may not apply). Thus, the scope of a plea bargain is determined by its terms under principles of contract interpretation but those terms must serve the interests of justice. See *People v Lombardo*, 216 Mich App 500, 510; 549 NW2d 596 (1996). "In other words, contractual theories will not be applied if to do so would subvert the ends of justice." *People v Swirles (After Remand)*, 218 Mich App 133, 135; 553 NW2d 357 (1996).

The cardinal rule of contract interpretation is to determine the parties' intent from the language of the

contract. *Id.*; *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). In general, contract language is interpreted according to its plain meaning. *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "An unambiguous contract must be enforced according to its terms." *Burkhardt*, 260 Mich App at 656. Further, a contract provision is not ambiguous because a word is undefined; rather, a contract's terms must be construed in accordance with their common meanings. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999). A court may not create an ambiguity where none exists. *Mahnick v Bell Co*, 256 Mich App 154, 159; 662 NW2d 830 (2003).

In this case, the circuit court interpreted "investigation" to mean "police reports in existence at the time of the plea." On this basis, the court concluded that a mutual mistake of fact had occurred that vitiated the plea agreement because the subsequently revealed allegations were not contained in the police reports. This reasoning is flawed. First, the parties could have, but did not, state that the plea agreement was bounded by existing police reports. Further, *Black's Law Dictionary* (10th ed), defines "investigation" as "[t]he activity of trying to find out the truth about something, such as a crime . . . ." While a police investigation may be summarized in a police report, it is not the same as an "investigation." The circuit court erred by rewriting the parties' plea agreement. *Burkhardt*, 260 Mich App at 656-657; *Lombardo*, 216 Mich App at 510-511. While the parties could have stated that the prosecutor agreed not to bring additional charges that were disclosed in known police reports or to which defendant confessed his culpability, they did not do so. Instead, the phrase "grows out of this same investigation" must be understood by its relation to the agreement as a whole.

Holmes, 281 Mich App at 596 (contracts are read as a whole, giving harmonious effect to each word and phrase). The prosecutor agreed to "not bring any other charges regarding sexual contact or penetration with [the complainant] that grows out of this same investigation that occurred during the period of 1996 through 2000." Thus, the "investigation" of other charges that would not be prosecuted included (1) specific types of offenses—sexual contact or penetration; (2) against a named person, the complainant, and (3) during a specified timeframe—1996 through 2000.

The fact that the complainant, after defendant's plea pursuant to the agreement was accepted, disclosed allegations of additional offenses that were unknown to the prosecutor does not create a mutual mistake of fact. A mutual 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). Clearly, a mutual mistake of fact did not occur in the negotiation of the plea bargain in this case. Defendant is under no obligation to reveal the extent of his criminal behavior to the police or the prosecutor. Further, the prosecutor was aware at the time of the plea agreement of the possibility of other offenses involving the complaint, even if not to the extent that the complainant later alleged. No caselaw supports vacating the plea agreement under these circumstances. Quite the contrary, "[a]s a general rule, even unwise plea bargains are binding on the prosecutor." *People v Cummings*, 84 Mich App 509, 512; 269 NW2d 658 (1978).

The only other basis the circuit court asserted to justify vacating defendant's plea was that the court was involved in the agreement by expressing its preliminary

assessment "on the record [of] the length of sentence that, on the basis of the information then available to the judge, appear[ed] to be appropriate for the charged offense." *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993) (emphasis omitted). But the circuit court's "preliminary evaluation of the case does not bind the judge's sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources." *Id*. Thus, the circuit court retains its discretion to impose what it later determines to be a just sentence, subject to defendant's right to "affirm or withdraw the plea." MCR 6.310(B)(2); *Cobbs*, 443 Mich at 281-283. The circuit court's retention of sentencing discretion, however, does not permit it to invade the prosecutor's charging authority that is the basis of the plea bargaining process. *Cobbs*, 443 Mich at 284; *Jackson*, 192 Mich App at 14-15. Consequently, the fact that new information came to light after the *Cobbs* plea was entered does not justify the circuit court in vacating defendant's bargained-for plea.

C. CONCLUSION

We have found no basis under the court rules that would justify the circuit court's vacating defendant's plea to second-degree CSC pursuant to the bargain with the prosecutor that was stated on the record. Therefore, we conclude that the circuit court abused its discretion by doing so. *Strong*, 213 Mich App at 110-112. We have also found wanting the circuit court's reasons apart from the court rules for vacating defendant's plea. Neither contract principles nor the circuit court's participation in the plea bargain under *Cobbs* justifies vacating defendant's plea. We hold the bargained-for

plea to second-degree CSC became binding when the circuit court accepted it. *Reagan*, 395 Mich at 318; *Jackson*, 192 Mich App at 15-16. We vacate defendant's conviction and sentence for first-degree criminal sexual conduct and remand for sentencing on second-degree criminal sexual conduct in accordance with the plea agreement.[7] We do not retain jurisdiction.

SAWYER, P.J., and MARKEY and STEPHENS, JJ., concurred.

---

[7] On remand, if the circuit court determines that it is in the interest of justice to impose a sentence outside the *Cobbs* evaluation, the circuit court shall afford defendant "the opportunity to affirm or withdraw the plea." MCR 6.310(B)(2).

PEOPLE v GINGRICH

Docket No. 310416. Submitted March 6, 2014, at Grand Rapids. Decided November 6, 2014, at 9:00 a.m.

Maximilian P. Gingrich was charged with two counts of possessing child sexually abusive material, MCL 750.145c(4), and two counts of using a computer to commit a crime, MCL 752.796. Defendant had brought a computer into Best Buy for repairs. As a Best Buy technician backed up the data on the computer, he saw files entitled "12-year old Lolita" and "12-year-old female virgin's pussy." The technician informed his manager, who contacted the police. Kent County Sheriff's Deputy Gary Vickery arrived at the store and requested that the technician open the suspicious files. To do so, the technician removed defendant's hard drive from the machine that had been performing the backup and attached it to a computer that would permit opening and browsing the files. Under the officer's direction, the technician opened the files, revealing pornographic pictures involving minors. During his preliminary examination, defendant moved to suppress the evidence of the pictures found on his computer, arguing that the search was conducted in violation of the Fourth Amendment, US Const, Am IV, because it was conducted without a warrant and no exception to the warrant requirement applied. The 63rd District Court, Steven R. Servaas, J., rejected defendant's argument. Defendant raised the argument again in the Kent Circuit Court, moving to quash the information or, in the alternative, suppress the evidence and dismiss the charges. The circuit court, Paul J. Sullivan, J., held that a search without both probable cause and a warrant is generally unreasonable unless a recognized exception to the warrant requirement applies and that, in this case, the search and seizure of defendant's computer was not permissible under a recognized exception to the warrant requirement. Accordingly, the circuit court required that the items seized and observations made be excluded from evidence along with any fruit of the illegal search. Because there was no evidence beyond that which was suppressed that supported the charges against defendant, the circuit court dismissed the charges. The prosecution appealed by delayed leave granted.

The Court of Appeals *held*:

The Fourth Amendment of the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and the Michigan Constitution's prohibition against unreasonable searches and seizures, Const 1963, art 1, § 11, is construed as protecting the same interests. Unless an exception applies, a warrant is required for the government to search an object or area that is protected by the Fourth Amendment. A trespass alone does not qualify, but there must be conjoined with that an attempt to find something or obtain information. In addition, the government needs a warrant, assuming no exception applies, before searching something in which the person has a reasonable expectation of privacy. If the government physically intrudes on a constitutionally protected area in search of evidence without a warrant, the reasonable-expectation-of-privacy inquiry is unnecessary. In this case, a search for purposes of the Fourth Amendment occurred because the police learned what they learned only by physically intruding on defendant's property (his computer) to gather evidence. The circuit court correctly held that a warrant was required before the police directed the technician to attach the hard drive to another computer for purposes of searching the hard drive for evidence. The police did not obtain a warrant to conduct the search and offered no exception to the warrant requirement to justify the actions of the police. The police search was unreasonable.

Affirmed.

CONSTITUTIONAL LAW — FOURTH AMENDMENT — SEARCHES AND SEIZURES — PERSONAL COMPUTERS.

The Fourth Amendment of the United States Constitution, US Const, Am IV, protects the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and the Michigan Constitution's prohibition against unreasonable searches and seizures, Const 1963, art 1, § 11, is construed as protecting the same interests; unless an exception applies, a warrant is required for the government to search an object or area that is protected by the Fourth Amendment; trespass alone does not qualify, but there must be conjoined with that an attempt to find something or obtain information; a personal computer storing personal information in the form of digital data is an "effect" under the Fourth Amendment and a "possession" under art 1, § 11 of the Michigan Constitution; a physical intrusion by the government on a personal computer to

search for evidence of criminal activity without a warrant when no exception to the warrant requirement applies is an unreasonable search.

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

Stuart G. Friedman for defendant.

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

PER CURIAM. The prosecution appeals by leave granted the circuit court's order granting defendant's motion to suppress evidence of child pornography, MCL 750.145c(4). The evidence was found on defendant's laptop computer during a warrantless search by police after the police were notified by Best Buy employees of suspicious file names the employees saw while performing repairs to the computer. The circuit court ruled that a search without both probable cause and a warrant is generally unreasonable unless a recognized exception to the warrant requirement applies, and that in this case, the search and seizure was not permissible under the exigent-circumstances, consent, plain-view, or inevitable-discovery exceptions. Our review of United States Supreme Court precedent, by which this Court is clearly bound regarding matters of federal law, *People v Gillam*, 479 Mich 253, 261; 734 NWd2 585 (2007), convinces us that the circuit court ruled correctly. Accordingly, we affirm.

I. SUMMARY OF PERTINENT FACTS AND PROCEEDINGS

The limited facts pertinent to this appeal were developed at defendant's preliminary examination on charges

of two counts of possessing child sexually abusive material, MCL 750.145c(4), and two counts of using a computer to commit a crime, MCL 752.796. At the preliminary examination, Chad Vandepanne, a computer repair technician for Best Buy, testified that he received a work order to perform a "diagnostic repair with a backup" on defendant's computer.[1] The requested work required Vandepanne to physically remove the computer's hard drive, back up all the data on the computer, and then perform a full hardware and software diagnostic, repairing any problems that were discovered. Vandepanne testified that Best Buy's policy did not permit employees to open any customer computer files, but a machine performing the backup would display computer file names. During the backup of defendant's computer, Vandepanne noticed files entitled, "12-year old Lolita" and "12-year-old female virgin's pussy," which led him to suspect the files might be child pornography. After seeing the file names, Vandepanne informed his manager of what he saw. Kent County Sheriff's Deputy Gary Vickery arrived 15 minutes later, and Vandepanne pointed out the suspicious file names while the backup of defendant's computer was still running.

According to both Vandepanne and Vickery, when the backup process ended Vickery requested that

[1] No one from Best Buy who had direct contact with defendant testified at the preliminary examination and the unsigned work order was not admitted in evidence. The prosecution attempted to supplement the record by attaching the work order to its late motion for reconsideration of the circuit court's ruling. The prosecution has also submitted a copy of the work order with its brief on appeal, but a party may not expand the record on appeal, which consists of "the original papers filed in that court or a certified copy, the transcript of any testimony or other proceedings in the case appealed, and the exhibits introduced." MCR 7.210(A)(1). See also *People v Nix*, 301 Mich App 195, 203; 836 NW2d 224 (2013); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). We therefore decline to consider the work order.

Vandepanne open the suspicious files. To do so, Vandepanne had to remove the hard drive from the backup machine and attach it to a computer that would permit opening and browsing the suspect files. When he did this, the suspect files were opened, revealing pornographic pictures involving minors. Vickery requested, and Vandepanne gave him, the computer hard drive containing the suspected child pornography. Vickery also seized defendant's computer, power supply cord, and nine software discs. Vickery admitted that a search warrant could have been, but was not, obtained before opening the suspicious computer files.

After Vickery's testimony, defendant moved to suppress the evidence of the photographs found on his computer. He argued that Vickery did not obtain a warrant and that no exception to the warrant requirement applied to his case. The prosecution argued that the motion was premature and that defendant did not have an expectation of privacy in the files that were opened because he turned the computer over to Best Buy for repairs. The district court agreed with the latter argument, ruling that defendant had no valid expectation of privacy because he voluntarily delivered his computer to a large corporation for repair with knowledge that technicians might view its stored images while performing repair work.

In the circuit court, defendant moved to quash the information or in the alternative to suppress the evidence and dismiss the charges. As noted already, the circuit court ruled that the initial search of defendant's computer by Vickery was unreasonable because a search warrant was not obtained.

Moreover, while expressing concern that no evidence indicated whether defendant knew of Best Buy's privacy policy, the court ruled that the warrantless search

and seizure by the police violated defendant's constitutional rights because no exception to the warrant requirement applied. Consequently, the exclusionary rule required that the items seized and observations made be excluded from evidence, along with the fruit of the illegal search. Because no other evidence beyond that which was suppressed supported the charges against defendant, they were also dismissed. The circuit court subsequently ruled that the prosecution's motion for reconsideration was not timely, and therefore denied it. The prosecution now appeals by leave granted.

II. ANALYSIS

A. STANDARD OF REVIEW

We review de novo a trial court's ultimate decision on a motion to suppress on the basis of an alleged constitutional violation. *People v Dagwan*, 269 Mich App 338, 341; 711 NW2d 386 (2005). The trial court's findings of fact from a suppression hearing are reviewed for clear error, according deference to the trial court's determination. *Id*. at 342; *People v Roberts*, 292 Mich App 492, 502; 808 NW2d 290 (2011). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011) (citation and quotation marks omitted). Any ancillary questions of law relevant to the motion to suppress are also reviewed de novo. *Id*.

B. ANALYSIS

A warrant is only required if the government conducts a search of an object or area that is protected by the Fourth Amendment. See *O'Connor v Ortega*, 480

US 709, 715; 107 S Ct 1492; 94 L Ed 2d 714 (1987).[2] The Fourth Amendment itself protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." US Const, Am IV. Under the plain terms of the amendment, "[w]hen 'the Government obtains information by physically intruding' on persons, houses, papers or effects, 'a search within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.' " *Florida v Jardines*, 569 US ___, ___; 133 S Ct 1409, 1414; 185 L Ed2d 495 (2013), quoting in part *United States v Jones*, 565 US ___, ___ n 3; 132 S Ct 945, 950 n 3; 181 L Ed 2d 911 (2012) (some quotation marks omitted). A "[t]respass alone does not qualify, but there must be conjoined with that . . . an attempt to find something or to obtain information." *Jones*, 565 US at ___ n 5; 132 S Ct at 951 n 5.

In addition, the government needs a warrant (assuming no exception applies) before searching something in which the person has a reasonable expectation of privacy. *Soldal v Cook Co*, 506 US 56, 62-63; 113 S Ct 538; 121 L Ed 2d 450 (1992). But, if the government physically intrudes on a constitutionally protected area (a person's home, papers, or effects) in search of evidence without a warrant, then the reasonable-expectation inquiry[3] is unnecessary. *Jardines*, 569 US at ___; 133 S Ct at 1417, citing *Jones*, 565 US at ___; 132 S Ct at 950-952; *Carman v Carroll*, 749 F3d 192, 197 (CA 3, 2014). That is because the reasonable-expectation test is in addition to the traditional

[2] The Michigan Constitution's prohibition against unreasonable searches and seizures is construed as protecting the same interests as the Fourth Amendment of the United States Constitution. *People v Lemons*, 299 Mich App 541, 545; 830 NW2d 794 (2013).

[3] See *Katz v United States*, 389 US 347; 88 S Ct 507; 19 L Ed 2d 576 (1967).

property-based understanding of the Fourth Amendment. *Jardines*, 569 US at ___; 133 S Ct at 1417, citing *Jones*, 565 US at ___; 132 S Ct at 950-952; *Carman*, 749 F3d at 197. In other words, these are separate tests that can be applied depending on the interest at issue, but a finding that one is met is sufficient to find a violation of the Fourth Amendment.

As defendant argues, this matter is easily resolved.[4] A search for purposes of the Fourth Amendment occurred in this case because "the officers learned what they learned only by physically intruding on [defendant's] property [his computer] to gather evidence [which] is enough to establish that a search occurred." *Jardines*, 569 US at___; 133 S Ct at 1417. It can hardly be doubted that a computer, which can contain vast amounts of personal information in the form of digital data, is an "effect[]," US Const, Am IV, and a "possession[]," Const 1963, art 1, § 11, within the meaning of the constitutional proscription against unreasonable searches and seizures. See *People v Smith*, 420 Mich 1, 20; 360 NW2d 841 (1984) (opining that as used in the two constitutional provisions, " 'possessions' and 'effects' are virtually identical in meaning" and therefore there exists no reason to treat those provisions differently). The record evidence also shows that *only at the command of the police* did the Best Buy employee physically take the hard drive to defendant's computer (thus, a trespass on defendant's "effects") and attach it to a store computer in order to gather evidence of child pornography. The circuit court correctly held that a warrant was required before the police directed the Best Buy employee to attach the hard drive to another computer for purposes

[4] As *Jardines* says straight-forward cases should be. See *Jardines*, 569 US at __; 133 S Ct at 1417 ("One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy.").

of searching the hard drive for evidence. Having reached this conclusion, there is no need to determine whether defendant also had a reasonable expectation of privacy in the information contained in the computer. *Jardines*, 569 US at ___; 133 S Ct at 1417, citing *Jones*, 565 US at ___; 132 S Ct at 951-952.

Our conclusion that it was necessary for the police to obtain a search warrant before exceeding the scope of the private search is further buttressed by the decision in *Jones*. In *Jones*, government agents tracked the movements of a suspected drug trafficker by placing an electronic Global Positioning System (GPS) device on the undercarriage of a vehicle registered to the suspect's wife while it was parked in a public parking lot. *Jones*, 565 US at ___; 132 S Ct at 948. Jones was later charged with, among other offenses, conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. *Id*. at ___; 132 S Ct at 948. The district court denied Jones's motion to suppress the GPS evidence, finding that one " 'traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.' " *Id*. at ___; 132 S Ct at 948 (citation omitted). The United States Court of Appeals for the District of Columbia Circuit reversed Jones's conviction "because of admission of the evidence obtained by warrantless use of the GPS device . . . ." *Id*. at ___; 132 S Ct at 949. The United States Supreme Court affirmed, holding that attaching the GPS tracking device to an individual's vehicle, and thereby monitoring the vehicle's movements on public streets, constituted a search within the meaning of the Fourth Amendment. *Id*. at ___; 132 S Ct at 948-949.

Justice Scalia, writing for the Court, noted that it was "beyond dispute that a vehicle is an 'effect' as that

term is used in the [Fourth] Amendment," *id*. at ___; 132 S Ct at 949, and added that "[b]y attaching the [GPS] device to the Jeep, officers encroached on a protected area," *id*. at ___; 132 S Ct at 952. "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id*. at ___; 132 S Ct at 949. Consequently, because the government obtained information by physically intruding on a constitutionally protected area, the Court concluded a search within the protection of the Fourth Amendment had occurred. *Id*. at ___ n 3; 132 S Ct at 950 n 3. Hence, when the government commits a trespass on "houses," "papers" or "effects" (or searches something, without a warrant, in which the person has a reasonable expectation of privacy) for the purpose of obtaining information, such a trespass or invasion of privacy is a search within the meaning of the Fourth Amendment. *Id*. at ___ n 5; 132 S Ct at 951 n 5.

C. CONCLUSIONS

In sum, we hold that under the Fourth Amendment, as reinforced by *Jardines* and *Jones*, a personal computer storing personal information in the form of digital data must be considered defendant's "effect" under the Fourth Amendment, and "possession" under the Michigan Constitution, see Const 1963, art 1, § 11. To access the data and obtain information from defendant's computer, his "effect" or "possession," the Best Buy employees as directed by the police physically attached another device to its hard drive. That action was a trespass—a search under the Fourth Amendment and Const 1963, art 1, § 11—because the government physi-

cally intruded on defendant's property to obtain information. *Jones*, 565 US at ___; 132 S Ct at 949-953; see also *Smith*, 420 Mich at 7 n 2, 18-20. The police did not obtain a warrant to conduct the search and the prosecution's brief offers no exception to the warrant requirement to justify the actions of the police.

As the circuit court ruled, "[a] search and seizure without a warrant is unreasonable per se and violates the Fourth and Fourteenth Amendments of the United States Constitution and Const 1963, art 1, § 11, unless shown to be within one of the exceptions to the rule." *People v Wagner*, 114 Mich App 541, 546-547; 320 NW2d 251 (1982); see also *Riley v California*, 573 US ___; 134 S Ct 2473, 2482, 2493; 189 L Ed 2d 430 (2014) ("[T]he warrant requirement is an important working part of our machinery of government, not merely an inconvenience to be somehow 'weighed' against the claims of police efficiency") (citations and some quotation marks omitted), and *Katz*, 389 US at 357 ("Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.") (citations and quotation marks omitted). Consequently, we conclude that the police search in this case without a warrant or applicable exception to the warrant requirement, was per se unreasonable under the Fourth Amendment and Const 1963, art 1, § 11.

Affirmed.

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

PEOPLE v BUTLER-JACKSON

Docket No. 315591. Submitted September 9, 2014, at Detroit. Decided November 6, 2014, at 9:05 a.m. Leave to appeal sought.

Lois Butler-Jackson was convicted following a jury trial in the Macomb Circuit Court, Diane M. Druzinski, J., of conspiracy to commit a legal act in an illegal manner and intentionally placing false information in a patient's medical record. The convictions arose from the actions of defendant, a physician, who with Brian Deloose, a nonphysician, were in the business of providing, for a price, physician certifications required to obtain registry identification cards issued by the Department of Licensing and Regulatory Affairs to qualifying patients for the medical use of marijuana under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*. Defendant would provide Deloose with signed, but otherwise blank, physician certification forms and Deloose would meet with their customers, fill in the blanks with the required information, and obtain money in exchange for the certifications. Defendant was charged with conspiracy to commit a legal act in an illegal manner, MCL 750.157a, for unlawfully conspiring to issue signed physician certifications under the MMMA without establishing a bona fide physician-patient relationship or without establishing a factual basis to form a professional opinion that the person is likely to receive therapeutic or palliative benefit from the use of marijuana. She was also charged with falsifying medical records, MCL 750.492a(1)(a). Deloose was charged with conspiracy, falsifying medical records, and three counts of delivery or manufacturing of marijuana, MCL 333.7401(2)(d)(*iii*). The trial court denied defendant's second motion to quash, holding that the "illegal manner" in which defendant was alleged to have committed the legal acts of certifying individuals for marijuana use was her failure to comply with the requirements of MCL 333.26424(f). The court also held that, although defendant would be afforded the protections set forth in MCL 333.26424(f) if she had complied with it, the natural corollary to that is that if the physician does not comply, the physician is subject to prosecution. Defendant appealed her convictions.

In a lead opinion by CAVANAGH, J., and a concurring opinion by RIORDAN, P.J., and an opinion concurring in part and dissenting in part by TALBOT, J., the Court of Appeals *held*:

1. There is no merit to defendant's claim that she was entitled to immunity under MCL 333.26424(f). There is no evidence that defendant had any type of bona fide physician-patient relationship with the persons seeking certifications or that she completed full assessments of the persons' medical histories before signing the certifications. There is no evidence that defendant could have formulated a professional opinion regarding the likelihood that those persons would benefit from the medical use of marijuana to treat or alleviate serious or debilitating medical conditions or related symptoms.

2. The assessment of court costs was appropriate.

In a lead opinion by CAVANAGH, J., and a concurring opinion by RIORDAN, P.J., the Court of Appeals *held*:

The failure to abide by the dictates of MCL 333.26424(f) is not an illegal act. The information did not set forth the criminal offense of conspiracy to commit a legal act in an illegal manner. Defendant's conspiracy conviction must be vacated.

Affirmed in part and vacated in part.

Presiding Judge RIORDAN, concurring, added that defendant and Deloose did not conspire to commit a legal act in an illegal manner under MCL 750.157a and, in fact, may have conspired to commit illegal acts through the use of MCL 333.26424(f).

Judge TALBOT, concurring in part and dissenting in part, disagreed with the determination of the majority that the allegations did not constitute the crime of conspiracy to commit a legal act in an illegal manner. A physician's actions that are not in compliance with MCL 333.26424(f) do not make a physician immune from arrest and prosecution. As a result, a physician's actions that fail to comply with the statute would be "illegal" under the dictionary definition of "illegal" because a physician is not afforded immunity from criminal prosecution for those actions and they are forbidden by law or statute. The conviction for conspiracy to commit a legal act in an illegal manner should be affirmed.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Joshua D. Abbott*, Chief Appellate Attorney, and *Joshua Van Laan*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Desiree M. Ferguson*) for defendant.

Before: RIORDAN, P.J., and CAVANAGH and TALBOT, JJ.

CAVANAGH, J. Defendant appeals as of right her jury convictions of conspiracy to commit a legal act in an illegal manner, MCL 750.157a, and intentionally placing false information in a patient's medical record, MCL 750.492a(1)(a). I believe defendant's conspiracy conviction should be vacated. In all other respects, I would affirm.

Defendant, a physician, and Brian Deloose were in the business of providing, for a price, physician certifications required to obtain registry identification cards issued by the Department of Licensing and Regulatory Affairs[1] to qualifying patients for the medical use of marijuana under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq*.[2] See MCL 333.26426(a)(1). Defendant would provide Deloose with signed, but otherwise blank, physician certification forms, and Deloose would meet with their customers, fill in the blanks with the required information, and obtain money in exchange for the "physician certifications." Their customers could then submit the "physician certification," claiming to be eligible for a registry identification card as a "qualifying patient" under MCL 333.26426(a)(1) of the MMMA. A "qualifying patient" is "a person who has been diagnosed by a physician as having a debilitating medical condition." MCL 333.26423(i). And a qualifying patient with a registry identification card is not "subject to arrest, prosecution,

[1] MCL 333.26423(c) and (j).

[2] While the statutory provisions refer to "marihuana," in this opinion I use the more common spelling "marijuana."

or penalty in any manner . . . for the medical use of marihuana in accordance with this act . . . ." MCL 333.26424(a).

Criminal charges were filed against defendant and Deloose following a police investigation that involved two undercover police officers purchasing "physician certifications" from Deloose that were signed by defendant. The officers did not see defendant, were not examined by defendant, and gave defendant no medical history. The transactions with Deloose took approximately 15 to 20 minutes, the officers paid $250 for their "physician certifications," and defendant received a portion of the proceeds from each sale. Defendant was charged with conspiracy to commit a legal act in an illegal manner in violation of MCL 750.157a, for unlawfully conspiring "to issue signed 'Physician Certifications' under the Michigan Medical Marihuana Act without establishing a bona fide physician-patient relationship and/or without establishing a factual basis to form a professional opinion that the person is likely to receive therapeutic or palliative benefit from the use of marihuana . . . ." Defendant was also charged with falsifying medical records in violation of MCL 750.492a(1)(a). Deloose was charged with conspiracy and falsifying medical records, but he was also charged with three counts of delivery or manufacture of marijuana in violation of MCL 333.7401(2)(d)(*iii*).

Subsequently, defendant filed a motion to quash the information, arguing that her conduct was in conformity with the MMMA and, thus, she was entitled to immunity under MCL 333.26424(f). In the alternative, she argued that the statute was so vague her right to due process was violated. Further, defendant argued that any "certification" she provided did not constitute a medical chart or report.

The prosecutor responded to defendant's motion to quash, arguing that defendant was not charged with a violation of the MMMA; rather, she was charged with conspiracy to commit a legal act in an illegal manner. The "legal act" was her providing her signature on medical marijuana certification forms. The "illegal manner" included her failing to examine any of their customers and providing signed, blank certification forms to Deloose. The prosecutor argued that, because defendant did not comply with the MMMA, she could not assert any of its defenses. Further, the "physician certifications" constituted medical records and, when defendant signed her name to blank certification forms attesting to her professional medical opinion without any contact with their customers, she falsified medical records.

The trial court agreed with the prosecutor, noting that the essence of a conspiracy is the agreement itself and concluding that defendant "participated in a scheme to legally provide certifications for potential consumers, in an illegal fashion" by presigning certifications without examining the customers. Further, the trial court held, the definition of "medical record" includes information recorded in any form that pertains to a patient's health, MCL 333.26263(i). And defendant signed certifications stating that she "had responsibility for the care and treatment" of the named patient who, in her medical opinion, was diagnosed with a debilitating medical condition and was likely to benefit from the medical use of marijuana. Thus, defendant's motion to quash the information was denied.

Defendant moved for reconsideration of the trial court's opinion and order, arguing that the court failed to address her claim of immunity under MCL 333.26424(f) and her claim that the statute was vague.

The trial court issued an opinion and order denying defendant's motion for reconsideration, holding that defendant was not charged with crimes under the MMMA; however, even if she was, defendant failed to establish that she complied with MCL 333.26424(f) and was entitled to immunity. Thereafter, defendant filed an application for leave to appeal to this Court, which was denied. *People v Butler-Jackson*, unpublished order of the Court of Appeals, entered November 19, 2012 (Docket No. 312869).

Subsequently, defendant filed a second motion to quash the information with regard to the conspiracy charge, arguing that the charge must be dismissed because the "unlawful manner" element of the conspiracy charge could not be established; her failure to follow the certification procedure set forth in the MMMA did not constitute a criminal offense. The prosecutor opposed defendant's motion, arguing that the manner in which the legal act was accomplished need not be "criminal." And, here, the "legal act" committed by defendant was certifying that individuals suffered from debilitating medical conditions and would benefit from the medical use of marijuana. The "illegal manner" was her failure to comply with the requirements of MCL 333.26424(f) because she certified individuals for the medical use of marijuana but did not have bona fide physician-patient relationships and did not complete full medical history assessments. The prosecutor argued that "[t]he logical corollary to [this immunity statute] is that if the physician does not comport with the statute, she is subject to prosecution."

The trial court issued an opinion and order denying defendant's second motion to quash, holding that the "illegal manner" in which defendant was alleged to have committed the legal acts of certifying individuals

for marijuana use was her failure to comply with the requirements of MCL 333.26424(f). Further, the court held, although defendant would be afforded the protections set forth in that statute if she had complied with it, "the natural corollary to that is that if the physician does not comply, he or she is subject to prosecution." Thereafter, a jury trial was conducted and defendant was convicted of both charged offenses. This appeal followed.

Defendant argues that her conspiracy conviction must be reversed because she was immune from prosecution under MCL 333.26424(f) of the MMMA and, in the alternative, her conspiracy conviction must be vacated because her conduct was not illegal. I agree, in part.

We review de novo issues of statutory interpretation. *People v Gardner*, 482 Mich 41, 46; 753 NW2d 78 (2008). Generally, the primary goal of statutory interpretation is to discern and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). But the MMMA was the result of a voter initiative, therefore we must ascertain and give effect to the intent of the electorate. *People v Kolanek*, 491 Mich 382, 397; 817 NW2d 528 (2012). To that end, "words of an initiative law are given their ordinary and customary meaning as would have been understood by the voters." *Welch Foods, Inc v Attorney General*, 213 Mich App 459, 461; 540 NW2d 693 (1995).

First, I consider defendant's claim that she was immune from prosecution under MCL 333.26424(f) of the MMMA. At the relevant time, MCL 333.26424(f) provided:

> A physician shall not be subject to arrest, prosecution, or penalty in any manner . . . solely for providing written certifications, in the course of a bona fide physician-patient

> relationship and after the physician has completed a full assessment of the qualifying patient's medical history, or for otherwise stating that, in the physician's professional opinion, a patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms associated with the serious or debilitating medical condition . . . .

Defendant argues that she was entitled to immunity because she had bona fide relationships with her customers and stated that, in her professional opinion, her customers were likely to benefit from the medical use of marijuana. At the time she was charged, the phrase "bona fide relationship" was not defined in the MMMA; however, defendant argues, she did not have to physically meet with patients to have "bona fide physician-patient relationships."

I need not decide whether defendant had to physically meet with her customers to have "bona fide physician-patient relationships" because, in this case, there was no evidence of *any* type of "physician-patient relationship." But, as this Court noted in *People v Redden*, 290 Mich App 65, 86; 799 NW2d 184 (2010), quoting *Random House Webster's College Dictionary* (1997), the definition of "bona fide" includes: " '2. authentic; genuine; real.' " Here, there was no evidence that defendant had "bona fide physician-patient relationships" with the undercover police officers, or similar persons, seeking certifications, or that she completed full assessments of their medical histories before signing the written certifications that were filled out and issued by Deloose. And there was no evidence that defendant could have formulated any "professional opinion" regarding the likelihood that the undercover police officers, or similar persons—who only saw and paid Deloose for the certifications—would likely benefit

from the medical use of marijuana to treat or alleviate serious or debilitating medical conditions or related symptoms. Accordingly, defendant's claim that she was entitled to immunity under MCL 333.26424(f) is wholly without merit.

Second, I consider defendant's claim that she could not be convicted of conspiracy to commit a legal act in an unlawful manner for failing to comply with MCL 333.26424(f) because such conduct is not illegal. In essence, defendant is arguing on appeal, and argued in the trial court, that the allegations set forth in the information did not constitute the crime of conspiracy to commit a legal act in an illegal manner.[3] I agree.

The conspiracy statute, MCL 750.157a provides:

> Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . .

Defendant was *not* charged with conspiring to commit "an offense prohibited by law." For example, defendant was not charged with conspiracy to deliver marijuana to their customers who actually obtained registry identification cards with defendant's "physician certifications" and then used the identification cards to purchase marijuana. She also was not charged with, for example, conspiracy to obtain money by false pretenses

[3] While defendant argues on appeal that the conspiracy statute is "impermissibly vague as applied to her circumstances," it appears from her argument that she is actually claiming that the information was insufficient because it failed to allege that criminal means were used to accomplish the lawful object of the alleged conspiracy. That is, she argues, "[f]ailure to comply with the requirements of the MMMA is not a felony, a misdemeanor, or even a civil infraction." Thus, we need not consider the related issues whether the conspiracy statute was vague as applied to her circumstances or whether this prosecution was barred by the "rule of lenity."

in violation of MCL 750.218(1)(c) for selling physician certifications by falsely representing that the certifications satisfied the requirements of the MMMA knowing that they were, in fact, worthless because defendant did not have bona fide physician-patient relationships with their customers, did not complete a full assessment of their customers' medical history, and could not render any professional opinion that their use of marijuana would be beneficial as required by the MMMA.

Instead, defendant was charged with conspiring to commit a legal act in an illegal manner. Specifically, defendant was charged with unlawfully conspiring "to issue signed 'Physician Certifications' under the Michigan Medical Marihuana Act without establishing a bona fide physician-patient relationship and/or without establishing a factual basis to form a professional opinion that the person is likely to receive therapeutic or palliative benefit from the use of marihuana." I agree with defendant that the "illegal manner" charged was not "illegal."

When the charge of conspiracy is premised on the performance of a legal act in an illegal manner, the element of criminality that must be established is the illegal manner; otherwise the agreement is not a crime. See *People v Arnold*, 46 Mich 268, 271; 9 NW 406 (1881). As our Supreme Court held in *Alderman v People*, 4 Mich 414 (1857):

> [T]o constitute an indictable conspiracy, there must be a combination of two or more persons to commit some act, known as an offense at common law, or that has been declared such by statute.
>
> * * *
>
> . . . If, on the contrary, the combination be to do an act, not in itself unlawful, but which it is agreed to accomplish

> by criminal or unlawful means, then those means must be particularly set forth, and be such as constitute an offense, either at common law or by statute. [*Id*. at 432-433.]

I first determine whether defendant and Deloose conspired to commit "a legal act." As already discussed, defendant and Deloose were in the business of providing, for a price, physician certifications to prospective applicants seeking registry identification cards issued by the Department of Licensing and Regulatory Affairs for the medical use of marijuana. An agreement to provide the service of issuing physician certifications for a price, alone, is not an illegal act. A physician certification must be submitted in support of a request for a registry identification card and, generally, physicians and their assistants are paid for their services. Thus, I conclude that defendant and Deloose conspired to commit "a legal act," i.e., an act that was not "an offense prohibited by law" within the contemplation of MCL 750.157a.

Next, I consider whether defendant and Deloose conspired to commit that legal act "in an illegal manner." MCL 750.157a does not define the phrase "illegal manner"; thus, I may consult a dictionary to construe the terms according to their ordinary and generally accepted meanings. See *People v Haynes*, 281 Mich App 27, 29; 760 NW2d 283 (2008). The word "illegal" means "forbidden by law or statute." *Random House Webster's College Dictionary* (1997). And the word "manner" means "a way of doing, being done, or happening; mode of action, occurrence, etc." *Id*.

Here, the "manner" in which defendant and Deloose conducted their business of providing physician certifications to their customers for money included that defendant would sign blank certification forms that stated:

> I hereby certify that I am a physician licensed to practice medicine in Michigan. I have responsibility for the care and treatment for the above named patient. It is my professional opinion that the applicant has been diagnosed with a debilitating medical condition as indicated above. The medical use of marijuana is likely to provide therapeutic benefits for the symptoms or affects [sic] of applicant's condition. This is not a prescription for the use of medical marijuana. Additionally if the patient ceases to suffer from the above identified debilitating condition I hereby certify I will notify the department in writing.

The manner in which defendant and Deloose conducted their business of providing physician certifications to their customers also included that Deloose would meet with their customers, fill in the information required by the certification form, and collect money in exchange for the completed document that appeared on its face to be legitimate and valid for purposes of the MMMA. Defendant had no previous relationships with any of their customers, did not meet with their customers, did not examine their customers, and did not collect any medical history from their customers. Accordingly, despite her certified statements to the contrary, defendant could not have had "responsibility for the care and treatment" of the prospective applicants, and could not have formulated a "professional opinion that the applicant has been diagnosed with a debilitating medical condition," or that the "medical use of marijuana [was] likely to provide therapeutic benefits for the symptoms or affects [sic] of applicant's condition."

The issue, then, is whether this "manner" of providing physician certifications was "illegal." The prosecution argued in the trial court, and argues here on appeal, that the failure to comply with the requirements of MCL 333.26424(f) was "illegal." But MCL 333.26424(f) does not state that the failure to comply

with its requirements is "illegal." That is, this statute does not define prohibited conduct and it does not authorize punishment for noncompliance. Rather, MCL 333.26424(f) grants immunity from arrest, prosecution, or penalty to physicians who meet the delineated requirements, just as Subsections (a) and (b) of the statute grant broad immunity to qualifying patients and primary caregivers who meet the statutory requirements. See *People v Carruthers*, 301 Mich App 590, 597-598; 837 NW2d 16 (2013). The MMMA does provide for prosecution for certain proscribed acts. MCL 333.26427(d) provides that "[f]raudulent representation to a law enforcement official of any fact or circumstance relating to the medical use of marihuana to avoid arrest or prosecution" is punishable by a fine. And MCL 333.26424(k) provides that it is a felony for a registered qualifying patient or registered primary caregiver to sell marijuana to someone not allowed to use it for medical purposes under the MMMA. Unlike these statutory provisions, MCL 333.26424(f) does not prohibit physicians from issuing written certifications in the absence of a bona fide physician-patient relationship, without conducting a full assessment of medical history, and when a "professional opinion" cannot be formulated. That is, this statute does not define any prohibited conduct, does not characterize any such conduct as constituting either a misdemeanor or felony, and does not provide for any punishment.

The prosecutor argued in the trial court, and the trial court agreed, that "[t]he logical corollary to [MCL 333.26424(f)] is that if the physician does not comport with the statute, she is subject to prosecution." I disagree. The "logical corollary" is that a physician who fails to comply with the statute is *not* immune from "arrest, prosecution, or penalty in any manner." See MCL 333.26424(f). Therefore, I conclude that the

charged "manner" that defendant and Deloose were alleged to have used to accomplish the legal act of providing physician certifications for money was not "illegal" because the failure to comply with the requirements of MCL 333.26424(f) is not illegal. That is, the issuance of signed physician certifications for purposes of the MMMA "without establishing a bona fide physician-patient relationship and/or without establishing a factual basis to form a professional opinion that the person is likely to receive therapeutic or palliative benefit from the use of marihuana" is not illegal under MCL 333.26424(f). Accordingly, the information did not set forth the criminal offense of conspiracy to commit a legal act in an illegal manner and defendant's conspiracy conviction must be vacated.[4] See, e.g., *People v Summers*, 115 Mich 537, 543; 73 NW 818 (1898); *People v Petheram*, 64 Mich 252, 258; 31 NW 188 (1887); *Alderman*, 4 Mich at 429.

Further, defendant argues by supplemental brief that her sentence impermissibly included the assessment of court costs in the amount of $1,000. After review de novo of this issue of law, I disagree. See *People v Cunningham*, 496 Mich 145, 149; 852 NW2d 118 (2014).

In *Cunningham*, 496 Mich at 149, our Supreme Court held that a sentence cannot include the imposition of court costs unless authorized by statute. The Court noted, however, that the Legislature has chosen to provide courts with the authority to impose costs under certain circumstances, including "when a criminal defendant is placed on probation . . . ." *Id*. at 150-

[4] In light of this conclusion, there is no need to address defendant's related challenge to the sufficiency of the evidence premised on her claim that "the prosecution presented no evidence to establish that any action taken by [her] was done in an 'illegal manner.' "

151. Pursuant to MCL 771.3(2)(c), as a condition of probation, a court may require the probationer to "[p]ay costs pursuant to subsection (5)." And Subsection (5) provides: "If the court requires the probationer to pay costs under subsection (2), the costs shall be limited to expenses specifically incurred in prosecuting the defendant or providing legal assistance to the defendant and supervision of the probationer."

In this case, defendant was sentenced to 18 months' probation and ordered to pay supervision fees of $360, court costs in the amount of $1,000, and $3,416.90 in repayment of court-appointed attorney fees. The trial court was authorized by MCL 771.3(2)(c) to impose these costs against defendant. Accordingly, defendant's claim is without merit.

Defendant's conspiracy conviction should be vacated. In all other respects, we should affirm.

RIORDAN, P.J. (*concurring*). I concur with the lead opinion's analysis and conclusions but add that defendant and Brian Deloose did not conspire to commit a "legal act in an illegal manner" under MCL 750.157a. In fact, they may have done the opposite and conspired to commit illegal acts, in part through the use of MCL 333.26424(f).

Defendant was convicted of violating MCL 750.492a(1)a, the falsification of medical records, an illegal act. Deloose also was convicted of falsifying medical records and of three counts of delivery or manufacture of marijuana in violation of MCL 333.7401(2)(d)(*iii*), also illegal acts. Considering those underlying convictions, defendant and Deloose may have conspired to commit those illegal acts and could

have been more appropriately charged for conspiracy under the "commit an offense prohibited by law" prong of MCL 750.157a.

In any event, since a failure to abide by the dictates of MCL 333.26424(f) is not an illegal act, it is not possible to use that statute as a basis for a charge of conspiring to commit a legal act in an illegal manner under MCL 750.157a.

TALBOT, J. (*concurring in part and dissenting in part*). While I concur with the majority that Lois Butler-Jackson was not immune from prosecution under MCL 333.26424(f) of the Michigan Medical Marihuana Act, and that the assessment of court costs of $1,000 were permissibly included in her sentence, I write separately because I disagree with the majority's determination that the allegations contained in the information did not constitute the crime of conspiracy to commit a legal act in an illegal manner.[1]

MCL 750.157a provides, in relevant part, that "[a]ny person who conspires together with 1 or more persons to . . . commit a legal act in an illegal manner is guilty of the crime of conspiracy . . . ." MCL 750.157a "requires proof of an agreement between two or more persons and proof of the specific intent to combine with others to do what is unlawful . . . ."[2]

"The primary goal of statutory construction is to give effect to the intent of the Legislature."[3] The first criterion in determining intent is the specific language of the statute.[4] In reading a provision, "[t]he fair and

[1] MCL 750.157a.

[2] *People v Jemison*, 187 Mich App 90, 93; 466 NW2d 378 (1991).

[3] *People v Light*, 290 Mich App 717, 722; 803 NW2d 720 (2010) (citation and quotation marks omitted).

[4] *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004).

natural import of the provision governs, considering the subject matter of the entire statute."[5] *Random House Webster's College Dictionary* (1997) defines "legal" as "permitted by law; lawful" and "illegal" as "forbidden by law or statute." Thus, the relevant portion of MCL 750.157a prohibits a person from conspiring with one or more people to commit an act permitted by law in a manner forbidden by law or statute.

The prosecution alleged that Butler-Jackson

> did unlawfully conspire, combine, confederate and agree together with Brian Scott Deloose, to commit a legal act in an illegal manner, to wit: to issue signed "Physician Certifications" under the Michigan Medical Marihuana Act without establishing a bona fide physician-patient relationship and/or without establishing a factual basis to form a professional opinion that the person is likely to receive therapeutic or palliative benefit from the use of marihuana . . . .

Therefore, Butler-Jackson was charged with conspiracy to commit a legal act in an illegal manner on the basis of Butler-Jackson's failure to comply with the requirements of MCL 333.26424(f).

During the period relevant to this case, MCL 333.26424(f) provided that a physician "shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by the Michigan board of medicine, the Michigan board of osteopathic medicine and surgery, or any other business or occupational or professional licensing board or bureau" under certain circumstances. As aptly noted by the prosecution, the "logical corollary" of this is that a physician's actions that are not in compliance with MCL 333.26424(f) do *not* make the physician immune

[5] *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009).

from arrest and prosecution, as well as other civil actions and private disciplinary action. As a result, a physician's actions that fail to comply with MCL 333.26424(f) would be "illegal" under the dictionary definition of the word because a physician is not afforded immunity from criminal prosecution for those actions; and thus they are "forbidden by law or statute." Accordingly, I would find that Butler-Jackson's conviction for conspiracy to commit a legal act in an illegal manner should be affirmed.[6]

---

[6] MCL 750.157a.

LM v STATE OF MICHIGAN

Docket Nos. 317071, 317072, and 317073. Submitted May 7, 2014, at Detroit. Decided November 6, 2014, at 9:10 a.m. Leave to appeal sought.

Eight minor plaintiffs—LM, SD, MS, LB, DF, ID, FC, and CM, through their respective next friends—brought an action in the Wayne Circuit Court against the state of Michigan, the State Board of Education, the Department of Education, the state Superintendent of Public Instruction (together, the state defendants), and the Highland Park School District, the Highland Park School District Emergency Manager, the Highland Park Public School Academy System, and Leona Group, LLC. Plaintiffs asserted that they had received inadequate and deficient instruction in the Highland Park public schools, resulting in their failure to obtain basic literacy skills and reading proficiency as required by the state. Defendants moved for summary disposition. The court, Marvin Stempien, J., granted summary disposition in favor of defendants with regard to plaintiffs' Equal Protection Clause claims, but otherwise denied defendants' motions for summary disposition. The state defendants appealed the denial of their motion for summary disposition to the extent it was based on governmental immunity in Docket No. 317071 and separately sought leave to appeal the remainder of the court's order in Docket No. 317072. The Highland Park School District and Highland Park School District Emergency Manager (the district defendants) sought leave to appeal the denial of their motion for summary disposition in in Docket No. 317073. The Court of Appeals granted the applications for leave to appeal and consolidated the appeals.

The Court of Appeals *held*:

1. Under MCL 141.1572 of the Local Financial Stability and Choice Act, a cause of action against the state, any officer or employee of the state acting in his or her official capacity, or any membership of a receivership transition advisory board acting in his or her official capacity, may not be maintained for any activity authorized by the act. The Legislature's use of the phrases "under this act" and "of this act" in the statute denotes restriction of liability to the specific provisions of the act, and could not be, as

suggested by the state defendants, construed to encompass other statutory provisions. Although any approvals provided by the state and district defendants of an educational plan by and through the appointment of an emergency manager might be a proper subject for immunity under MCL 141.1572, plaintiffs' claims of constitutional and separate statutory violations were not encompassed.

2. With regard to whether defendants were otherwise entitled to immunity, the general rule is that governmental immunity is not available in a state court action when it is alleged that the state violated a right conferred by the state constitution. Plaintiffs' constitutional claims were premised on Const 1963, art 8, §§ 1 and 2. Section 1 states that the means of education shall forever be encouraged, and § 2 states that the Legislature shall maintain and support a system of free public elementary and secondary schools, as defined by law, and that every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin. Section 1 encourages education, but does not mandate it. And the State Board of Education is part of the executive, not legislative, branch of government. Therefore, it is not a part of the branch of government referred to in § 2. Because the cited constitutional provisions did not support plaintiffs' constitutional claims, the trial court should have granted summary disposition in favor of defendants with regard to those claims.

3. MCL 380.1278(8) provides that, excluding special education pupils, pupils having a learning disability, and pupils with extenuating circumstances as determined by school officials, a pupil who does not score satisfactorily on the fourth- or seventh-grade Michigan Educational Assessment Program (MEAP) reading test shall be provided special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months. The statute leaves the determination of students identified as deficient for school officials, indicating decision-making at the local level, which is consistent with other Michigan statutes that indicate the state's role is only to provide general oversight. Therefore, MCL 380.1278(8) did not impose a duty on the state defendants to directly provide services for students who did not perform satisfactorily on the MEAP reading test. The district defendants did have certain duties under the statute, but plaintiffs' pleadings were sufficient with regard to only two of the named plaintiffs, it remained to be determined whether those students were subject to exclusion from the additional instruction requirements because of extenuating circumstances, and while the form of the additional instruction provided to those students

might be deemed insufficient given their lack of progress, that would constitute a separate claim. The statute also contained no express authorization permitting a private cause of action against the school district, so a private cause of action for monetary damages could not be brought. And plaintiffs were not entitled to a writ of mandamus because the school district was afforded wide-ranging discretion to identify the qualifying students and to determine the appropriate method of instruction. Given the lack of a remedy specified by the statute, its enforcement was not a matter for the courts, but rather an administrative matter better resolved between the individuals seeking to obtain services and the relevant school district. The dispute was nonjusticiable in nature because its resolution would have necessitated undue intrusion on other branches of government and would have required the courts to act in areas outside of their judicial expertise.

Reversed and remanded for entry of judgment in favor of the state and district defendants.

MURRAY, P.J., concurring, joined Judge JANSEN's opinion and wrote separately to address the more specific arguments put forth by plaintiffs. Plaintiffs constitutional arguments were not anchored in the text of Const 1963, art 8, §§ 1 or 2. There is no constitutional right to specific educational results in the text of Michigan's Constitution. To the extent that other states have concluded that their state constitutions guarantee a minimal level of education, those decisions were controlled by the particular wording of those states' constitutional provisions. Words like "sufficient," "adequate," or "quality" cannot be read into the Michigan Constitution's general, aspirational language concerning education. The Michigan Constitution gives the Legislature the authority to define the public education to be provided by school districts. It has done so through statutes such as MCL 380.1278(8). But mandamus is not an appropriate way to enforce MCL 380.1278(8) because of the discretion required to implement that statute. Judges are not equipped to decide matters of educational policy. The constitutionally appropriate forum for plaintiffs to seek redress is at the ballot box.

SHAPIRO, J., dissenting, concluded that the use of the term "shall" in Const 1963, art 8, §§ 1 and 2, rendered those provisions mandatory and subject to enforcement by the courts. In the majority's view, there are no minimal constitutional requirements to maintain and support. Rather, the requirement that a school district provide education is met by the mere existence of the school district. But prior Michigan caselaw makes clear that when public educational services fall below a minimal level, Const 1963,

art 8, § 2 is violated. For the educational provisions of the Constitution to have any meaning, schools must provide adequate educational services to all children. A review of the caselaw from other states that have considered this question demonstrates that the majority here stands nearly alone in its conclusions. Most states that have addressed the question have held that a cause of action may be brought and argued, and that a court may find, that the state has failed to satisfy a constitutional education clause when the state has failed to provide an adequate education to its children. The contrary result reached in Iowa is distinguishable given that the Iowa constitution does not assure a right to a free public education and, in fact, does not even contain the word "education." MCL 380.1278(8) also contains the word "shall" and is, therefore, mandatory. The district defendants did not dispute that a majority of the relevant students did not score satisfactorily on the reading test and, thus, essentially conceded that they had violated the plain terms of the statute. Contrary to the majority's assertion, the fact that it remains to be determined whether some of the plaintiffs might be subject to the exclusion-from-additional-instruction requirement because of extenuating circumstances is not a proper basis for reversing the trial court's denial of summary disposition. And also contrary to the majority's conclusion, a private cause of action may be inferred from MCL 380.1278(8). The majority wrongly declined to enforce the education policy enacted by the Legislature. With regard to plaintiff's statutory claim, the remedy would be straightforward if plaintiffs were to prevail at trial. Defendants would be ordered to provide the services specified in the statute, and a writ of mandamus would be available to direct that action. A writ will lie to require a body charged with a duty to take action notwithstanding the fact that execution of the duty may involve some measure of discretion. While defining a judicial remedy for the constitutional claims might have posed challenges, those challenges would not have been insurmountable, and the mere existence of those challenges did not provide a reason to refuse to hear the case. At minimum, a declaratory judgment or injunction directing compliance with the law would have been within the judiciary's purview.

1. GOVERNMENTAL IMMUNITY — LOCAL FINANCIAL STABILITY AND CHOICE ACT — ACTIVITIES AUTHORIZED BY THE ACT.

Under MCL 141.1572 a cause of action against the state, any officer or employee of the state acting in his or her official capacity, or any membership of a receivership transition advisory board acting in his or her official capacity, may not be maintained for any activity authorized by the Local Financial Stability and Choice Act; the

restriction of liability only applies with regard to activities authorized by the act and cannot be construed to encompass activities authorized by other acts.

2. CONSTITUTIONAL LAW — EDUCATION.

Const 1963, art 8, § 1 states that the means of education shall forever be encouraged, but it contains no specific mandate; Const 1963, art 8, § 2 states that the Legislature shall maintain and support a system of free public elementary and secondary schools, as defined by law, and that every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color, or national origin; while § 2 requires the state to provide for and finance a system of free public schools, the delivery of educational services is left to local school districts.

3. STATUTES — REVISED SCHOOL CODE — READING SKILLS — SPECIAL ASSISTANCE.

MCL 380.1278(8) provides that, excluding special education pupils, pupils having a learning disability, and pupils with extenuating circumstances as determined by school officials, a pupil who does not score satisfactorily on the fourth- or seventh-grade Michigan Educational Assessment Program (MEAP) reading test shall be provided special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months; the statute leaves the determination of students identified as deficient for local school officials and does not impose a duty on the state to directly provide services for students who do not perform satisfactorily on the MEAP reading test; a private cause of action for monetary damages may not be brought under MCL 380.1278(8) and mandamus is not an appropriate remedy for a violation of the statute.

Kary L. Moss, *Michael J. Steinberg*, *Mark P. Fancher*, *Shana E. Schoem*, *Mark D. Rosenbaum*, and *David B. Sapp*, *Nacht, Roumel, Salvatore, Blanchard & Walker, PC* (by *Jennifer B. Salvatore*, *Edward Alan Macey*, and *Nakisha N. Chaney*), and *Wilson Sonsini Goodrich & Rosati, PC* (by *Steven D. Guggenheim*, *Joni Ostler*, and *Doru Gavril*), for plaintiffs.

Bill Schuette, Attorney General, *Aaron D. Lindstrom*, Solicitor General, *Matthew Schneider*, Chief Legal Counsel, and *Darrin F. Fowler* and *Katherine Bennett*,

Assistant Attorneys General, for the state of Michigan, the State Board of Education, the Michigan Department of Education, and the Superintendent of Public Instruction.

Kienbaum Opperwall Hardy & Pelton, PLC (by *Noel D. Massie* and *Eric J. Pelton*), for the Highland Park School District and the Highland Park School District Emergency Manager.

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

JANSEN, J. In Docket No. 317071, defendants state of Michigan, State Board of Education, Michigan Department of Education, and state Superintendent of Public Instruction (hereinafter "the state defendants") appeal by right the denial of their motion for summary disposition, which was based on governmental immunity. In Docket No. 317072, the state defendants appeal by leave granted the same order, denying in part the remainder of their motion for summary disposition. In Docket No. 317073, defendants Highland Park School District and Highland Park School District Emergency Manager (hereinafter "the district defendants") appeal by leave granted that same order, denying in part their motion for summary disposition and an amended scheduling order. We reverse and remand for entry of judgment in favor of the state and district defendants.

This litigation arises from a complaint filed by the American Civil Liberties Union ("ACLU") on behalf of eight minor plaintiffs, who are students in Highland Park, asserting plaintiffs received inadequate and deficient instruction from the Highland Park public schools. According to plaintiffs, this inadequate and deficient instruction has resulted in their failure to obtain basic literacy skills and reading proficiency as

required by the state. Specifically, plaintiffs sought special assistance in accordance with MCL 380.1278(8), premised on their demonstrated lack of proficiency on the reading portion of the standardized Michigan Educational Assessment Program ("MEAP") test.

The state defendants argue that the trial court erred by denying their motion for summary disposition based on governmental immunity. We review de novo the trial court's grant or denial of summary disposition. *Wilson v King*, 298 Mich App 378, 381; 827 NW2d 203 (2012).

The state defendants assert that they were entitled to immunity premised on MCL 141.1572,[1] which states:

> This act does not impose any liability or responsibility in law or equity upon this state, any department, agency, or other entity of this state, or any officer or employee of this state, or any member of a receivership transition advisory board, for any action taken by any local government under this act, for any violation of the provisions of this act by any local government, or for any failure to comply with the provisions of this act by any local government. A cause of action against this state or any department, agency, or entity of this state, or any officer or employee of this state acting in his or her official capacity, or any membership of a receivership transition advisory board acting in his or her official capacity, may not be maintained for any activity authorized by this act, or for the act of a local government filing under chapter 9, including any proceeding following a local government's filing.

Specifically, the state defendants argue that this statutory provision, part of the Local Financial Stability and Choice Act, MCL 141.1541 *et seq.*, is applicable because plaintiffs' claims are premised on the state's liability through appointment of an emergency manager for the Highland Park schools. We note that the immunity

[1] 2012 PA 436, § 32, effective March 28, 2013.

provision contained in MCL 141.1572 is, in accordance with MCL 141.1544(6), applicable to any acts or failures occurring under any predecessor emergency manager laws as well.

In support of their assertion, the state defendants cite three paragraphs of plaintiffs' amended complaint, which consists of 125 separate, numbered paragraphs of allegations. Plaintiffs' original and amended complaints assert state responsibility for the failure to provide a bare or minimal level of education as allegedly mandated by Article 8 of the Michigan Constitution and adequate remedial services as delineated in MCL 380.1278(8). While plaintiffs allege that the state and district defendants have attempted to delegate responsibility for the provision of educational services to the district defendants through the operation of charter schools, plaintiffs do not suggest that establishment of an emergency manager is the basis for the litigation. Rather, plaintiffs repeatedly assert several diverse bases for liability of the state defendants, including Const 1963, art 8, §§ 1, 2, and 3; MCL 380.1278(8); MCL 16.400 *et seq.*; and MCL 388.1009 *et seq*. They have denied that their complaint arises from or is dependent upon the imposition of an emergency manager for the school district. Plaintiffs' allegations indicate the existence of the alleged educational and service deficiencies long before the imposition of the emergency manager.

The trial court was partially correct in its denial of summary disposition premised on immunity under MCL 141.1572. The stated purpose of the Local Financial Stability and Choice Act is "to safeguard and assure the financial accountability of local units of government and school districts . . . ." 2012 PA 436, title. Given the financial purpose of the act, it is difficult to sustain the state defendants' contention that it is applicable to all

actions undertaken by an emergency manager or those entities associated with him or her, involving the violation of any other statutory provisions not specifically encompassed within the act, such as MCL 380.1278(8). At the outset, MCL 141.1572 specifically limits imposition of liability "for any action taken by any local government *under this act*, for any violation of the provisions *of this act* by any local government, or for any failure to comply with the provisions *of this act* by any local government." (Emphasis added.) While an emergency manager is authorized by MCL 141.1551(1)(e) to include in a "financial and operating plan" "an educational plan" for school districts, MCL 141.1554 suggests that the role is financial in nature, encompassing the negotiation of contracts, disbursement of funds, reductions in class schedules, closing of schools, and related actions.

In *Tellin v Forsyth Twp*, 291 Mich App 692, 700-701; 806 NW2d 359 (2011), this Court recognized:

> A court must give effect to the Legislature's intent when construing a statute. In determining the Legislature's intent, this Court first looks at the language of the statute itself. This Court gives the words of the statutes their plain and ordinary meaning and will look outside the statutory language only if it is ambiguous. "The Legislature is presumed to be familiar with the rules of statutory construction and, when promulgating new laws, to be aware of the consequences of its use or omission of statutory language . . . ." In determining the plain meaning of the statute, this Court uses the "fair and natural import of the terms employed" and gives effect "to every word, phrase, and clause" as far as possible. [Citations omitted.]

The Legislature's use of the phrases "under this act" and "of this act" denotes restriction of liability to the specific provisions of the Local Financial Stability and Choice Act and cannot be construed, as suggested by

the state defendants, to encompass a completely separate statutory provision, MCL 380.1278(8). Therefore, although any approvals provided by the state and district defendants of an educational plan by and through the appointment of the emergency manager and system defendants may be a proper subject for immunity under MCL 141.1572, claims of constitutional and separate statutory violations are not encompassed.

The question, then, is whether the state defendants are otherwise entitled to governmental immunity. To answer this question, we must first determine whether plaintiffs have stated a cause of action arising directly from the Michigan Constitution or MCL 380.1278(8).

As this Court stated in *Co Road Ass'n of Mich v Governor*, 287 Mich App 95, 121; 782 NW2d 784 (2010):

> As a general rule, " 'governmental immunity is not available in a state court action where it is alleged that the state violated a right conferred by the state constitution.' " *Jones v Powell*, 227 Mich App 662, 673; 577 NW2d 130 (1998), aff'd 462 Mich 329; 612 NW2d 423 (2000), quoting *Marlin v Detroit*, 177 Mich App 108, 114; 441 NW2d 45 (1989). See also *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987) ("Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.").

Specifically, "[T]he state will be liable for a violation of the state constitution only in cases where a state custom or policy mandated the official's or employee's actions." *Reid v Michigan*, 239 Mich App 621, 629; 609 NW2d 215 (2000); see also *Carlton v Dep't of Corrections*, 215 Mich App 490, 504-505; 546 NW2d 671 (1996). As this Court explained in *Burdette v Michigan*, 166 Mich App 406, 408-409; 421 NW2d 185 (1988), citing *Smith*, 428 Mich 540:

> Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution. . . . [D]efendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions.

The state and district defendants contend that the trial court erred by denying them summary disposition because plaintiffs cannot demonstrate a viable cause of action under the Michigan Constitution or MCL 380.1278(8). In contrast, plaintiffs contend that the violation and basis for liability is premised on Const 1963, art 8, §§ 1 and 2, which provide:

> Sec. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.
>
> Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

There is no language within the cited constitutional provisions to support plaintiffs' claims. Article 8, § 1 merely "encourage[s]" education, but does not mandate it. Article 8, § 2 is specifically contrary to plaintiffs' position as it only requires the "legislature" to "maintain and support a system of free public elementary and secondary schools," with a local school district having the responsibility to "provide for the education of its pupils . . . ." It has been recognized that the State Board of Education falls within the executive, not the legislative, branch of our government, *Straus v Governor*, 459

Mich 526, 537; 592 NW2d 53 (1999), and it is therefore not a part of the branch of government referred to in Article 8, § 2. Given the language of the cited constitutional provisions, the role of the state in education is neither as direct nor as encompassing as argued by plaintiffs. The trial court should have granted summary disposition in favor of the state and district defendants with respect to plaintiffs' constitutional claims.

Although not cited by plaintiffs, Const 1963, art 8, § 3 defines the duties of the State Board of Education, and provides additional insight:

> Leadership and general supervision over all public education, including adult education and instructional programs in state institutions, except as to institutions of higher education granting baccalaureate degrees, is vested in a state board of education. It shall serve as the general planning and coordinating body for all public education, including higher education, and shall advise the legislature as to the financial requirements in connection therewith.

Like the constitutional provisions considered previously, this language provides support for our conclusion that plaintiffs do not have a direct cause of action arising under the Michigan Constitution.

The courts have long recognized that, for constitutional purposes, "[e]ducation, as important as it may be, has been held not to be a fundamental interest." *Martin Luther King Junior Elementary Sch Children v Mich Bd of Ed*, 451 F Supp 1324, 1328 (ED Mich, 1978), citing *San Antonio Indep Sch Dist v Rodriguez*, 411 US 1; 93 S Ct 1278; 36 L Ed 2d 16 (1973). Further, as Justices T. G. KAVANAGH and LEVIN observed in a concurring statement in *Governor v State Treasurer*, 390 Mich 389, 406 (1973) (*Governor II*):

> It must be apparent by now that we are of the opinion that the state's obligation to provide a system of public

> schools is not the same as the claimed obligation to provide equality of educational opportunity. Because of definitional difficulties and differences in educational philosophy and student ability, motivation, background, etc., no system of public schools can provide equality of educational opportunity in all its diverse dimensions. All that can properly be expected of the state is that it maintain and support a system of public schools that furnishes adequate educational services to all children.

In sum, the cited provisions of the Michigan Constitution require only that the Legislature provide for and finance a system of free public schools. The Michigan Constitution leaves the actual intricacies of the delivery of specific educational services to the local school districts. We conclude that plaintiffs have not stated a claim or cause of action arising directly under the Michigan Constitution.

Plaintiffs further argue that they have stated a claim under MCL 380.1278, with particular emphasis on MCL 380.1278(8), which provides:

> Excluding special education pupils, pupils having a learning disability, and pupils with extenuating circumstances as determined by school officials, a pupil who does not score satisfactorily on the 4th or 7th grade Michigan educational assessment program reading test shall be provided special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months.

The language of this statute indicates the dichotomy in responsibility between the state and local school districts in the provision of educational services. Specifically, MCL 380.1278(3) refers to the local district's responsibility to establish an actual curriculum for implementation with students. Any role of the state is merely advisory in suggesting a model curriculum subject to adoption by the local districts. MCL 380.1278(2).

Similarly, Subsection (8) leaves the determination of students identified as deficient on the MEAP reading tests for "school officials," indicating decision-making at the local, and not state, level. This is also consistent with provisions of the Revised School Code[2] and the assessment of remedial assistance programs act.[3] MCL 380.11a(3) defines the general powers of school districts:

> A general powers school district has all of the rights, powers, and duties expressly stated in this act; may exercise a power implied or incident to a power expressly stated in this act; and, except as provided by law, may exercise a power incidental or appropriate to the performance of a function related to operation of the school district in the interests of public elementary and secondary education in the school district, including, but not limited to, all of the following:
>
> (a) Educating pupils. In addition to educating pupils in grades K-12, this function may include operation of preschool, lifelong education, adult education, community education, training, enrichment, and recreation programs for other persons.

In turn, MCL 380.1282 provides in relevant part:

> (1) The board of a school district shall establish and carry on the grades, schools, and departments it considers necessary or desirable for the maintenance and improvement of its schools and determine the courses of study to be pursued.
>
> (2) The board of a school district shall provide a core academic curriculum, learning processes, special assistance particularly for students with reading disorders or who have demonstrated marked difficulty in achieving success on standardized tests, and sufficient access to each of these so that all pupils have a fair opportunity to achieve a state endorsement under section [MCL 380.1279].

---

[2] MCL 380.1 *et seq*.

[3] MCL 388.1081 *et seq*.

Finally, the statutory provision establishing MEAP testing, MCL 388.1081, indicates the very general oversight and informational nature of the state's role in educational services, providing:

> A statewide program of assessment of educational progress and remedial assistance in the basic skills of students in reading, mathematics, language arts and/or other general subject areas is established in the department of education which program shall:
>
> (a) Establish meaningful achievement goals in the basic skills for students, and identify those students with the greatest educational need in these skills.
>
> (b) Provide the state with the information needed to allocate state funds and professional services in a manner best calculated to equalize educational opportunities for students to achieve competence in such basic skills.
>
> (c) Provide school systems with strong incentives to introduce educational programs to improve the education of students in such basic skills and model programs to raise the level of achievement of students.
>
> (d) Develop a system for educational self-renewal that would continuously evaluate the programs and by this means help each school to discover and introduce program changes that are most likely to improve the quality of education.
>
> (e) Provide the public periodically with information concerning the progress of the state system of education. Such programs shall extend current department of education efforts to conduct periodic and comprehensive assessment of educational progress.

Read together with these related statutory provisions, it is clear that MCL 380.1278(8) does not impose a duty on the state defendants to directly provide services for students who do not perform satisfactorily on the MEAP test.

We acknowledge that the applicability of this provision is different with regard to the district defendants. MCL 380.1278(8) mandates "school officials" identify pupils that fail to "score satisfactorily on the 4th or 7th grade [MEAP] reading test" and to provide these individuals with "special assistance reasonably expected to enable the pupil[s] to bring [their] reading skills to grade level within 12 months." However, there remain at least two problems with plaintiffs' argument. First, the trial court denied plaintiffs' request to certify two classes of students. Accordingly, any remedy or outcome of this litigation is restricted to the eight identified students. Second, plaintiffs' pleadings are only sufficient with regard to two of the eight students named, FC and ID, who have deficient MEAP scores in reading for the relevant grade levels. Three students, CM, LB and MS, do not necessarily fall within the purview of MCL 380.1278(8). CM was in the third grade at the time and, therefore, did not have MEAP scores for fourth and seventh grade reading proficiency. Although LB and MS had progressed further in school, there are no specific MEAP scores identified for them that are consistent with the grade levels specified in MCL 380.1278(8). Finally, although SD, DF, and LM have deficient reading scores on the MEAP for the relevant grade levels, they have already been provided additional instruction. Further, it remains to be determined whether the qualifying students are subject to exclusion from additional instruction premised on "extenuating circumstances as determined by school officials . . . ." MCL 380.1278(8). While the form of the additional instruction may be deemed insufficient given the lack of progress in developing reading proficiency for these students, this would constitute a separate and distinct claim.

With respect to the district defendants, then, the question is whether MCL 380.1278(8) authorizes, for the qualified students, a private cause of action and whether such an action would be subject to immunity. MCL 380.1278 contains no express authorization permitting a private cause of action against a local school district for failing to comply with the statutory requirements; nor is there any evidence that the Legislature intended such a remedy. See *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007). Given the absence of any express legislative authorization, the statutory provision does not provide a private cause of action for monetary damages. *Id*.

In addition, we note that a school district, its board members, and its employees are generally protected by governmental immunity. See MCL 691.1407(1) and (2); MCL 691.1401(b) and (d); *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349, 400 n 8; 792 NW2d 686 (2010) (CORRIGAN, J., dissenting). Immunity, however, would not be available under the circumstances. As explained by Justice CORRIGAN:

> The inquiry is different when, as here, a governmental agency is involved. Because governmental agencies are generally immune from suit under the governmental tort liability act, MCL 691.1407, a plaintiff may sue a governmental agency for damages only when the Legislature *expressly* so authorizes. These cases do not establish that a plaintiff may infer a private cause of action for damages against a governmental agency. Rather, in a suit against a governmental agency, a plaintiff generally may seek only injunctive or declaratory relief upon showing that the particular plaintiff has a clear, legally enforceable right that the particular defendant had a duty to protect. [*Lansing Sch Ed Ass'n*, 487 Mich. at 399-400 (CORRIGAN, J., dissenting), citing *Lash*, 479 Mich at 194, 196 (citation omitted).]

Plaintiffs in this matter contend that they are not seeking economic damages, but rather a writ of mandamus to enforce the statutory provision, precluding the district defendants' claim of immunity. They assert that although the additional services required under MCL 380.1278(8) may require an ancillary expenditure of funds, the relief sought is primarily equitable and nonmonetary in nature.

A trial court's grant or denial of a writ of mandamus is reviewed for an abuse of discretion. *Casco Twp v Secretary of State*, 472 Mich 566, 571; 701 NW2d 102 (2005). "A court by definition abuses its discretion when it makes an error of law." *In re Waters Drain Drainage Dist*, 296 Mich App 214, 220; 818 NW2d 478 (2012). Although the underlying question whether the writ should be issued is reviewed for an abuse of discretion, "this Court reviews de novo as questions of law whether a defendant has a clear legal duty to perform and whether a plaintiff has a clear legal right to performance." *Barrow v Detroit Election Comm*, 301 Mich App 404, 411; 836 NW2d 498 (2013).

" '[A] writ of mandamus is an extraordinary remedy and will only be issued where (1) the party seeking the writ has a clear legal right to performance of the specific duty sought, (2) the defendant has the clear legal duty to perform the act requested, (3) the act is ministerial, and (4) no other remedy exists that might achieve the same result.' " *Sal-Mar Royal Village, LLC v Macomb Co Treasurer*, 301 Mich App 234, 237; 836 NW2d 236 (2013), quoting *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 284; 761 NW2d 210 (2008) (alteration in original).

In *Hanlin v Saugatuck Twp*, 299 Mich App 233, 248; 829 NW2d 335 (2013), this Court explained:

> A ministerial act is one for which the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of judgment or discretion. If the act requested by the plaintiff involves judgment or an exercise of discretion, a writ of mandamus is inappropriate. [Citation omitted.]

With regard to plaintiffs' request for a writ of mandamus, MCL 380.1278(8) indicates that plaintiffs had a legal right to receive "special assistance" in specifically defined or restricted circumstances. In turn, the district defendants had a statutory duty under MCL 380.1278(8) to provide "special assistance" to otherwise-qualified students who did "not score satisfactorily on the 4th or 7th grade [MEAP] reading test . . . ."

What precludes issuance of such a writ, however, is that the act to be performed cannot be considered ministerial in nature, as the school district is afforded wide-ranging discretion. Initially, the school district is permitted to identify the qualifying students, but the statute fails to define which pupils may have "extenuating circumstances" and thus may not be encompassed within the statute. In addition, the service to be provided is comprised of "special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months." While a defined goal is therefore provided, the actual method to be used is undefined and quite subjective, with the selected programs and instruction varying considerably based on the individual needs of the pupils and their respective academic grade and proficiency levels. Consequently, by definition, a writ of mandamus is not an appropriate remedy in this case. See *Hanlin*, 299 Mich App at 248.

The district defendants further assert that the trial court erred by failing to dismiss plaintiffs' claims be-

cause the claims were nonjusticiable and, in the alternative, the claims were rendered moot by the appointment of an emergency manager.

Given the lack of a remedy specified by the statute at issue, MCL 380.1278(8), we conclude that enforcement of this provision is not a matter for the courts, but rather an administrative matter better resolved between individuals seeking to obtain or enforce services and the pertinent school district. Moreover, it would be difficult, if not impossible, for the courts to fashion innumerable individual remedies. Indeed, determinations regarding the type of services that are necessary for individual pupils to meet the statutory reading-skills requirements fall within the expertise of the schools—not the courts. As observed in a slightly different context, " '[g]iven the nature of the case,' " it is incumbent on the courts to " 'take note of the limits of judicial competence in such matters.' " *Straus*, 459 Mich at 531 (citation omitted). Courts " 'cannot serve as . . . overseers . . . weighing the costs and benefits of competing . . . ideas or the wisdom of . . . taking certain actions, but may only determine whether some . . . provision has been violated . . . .' " *Id.* (citation omitted). While there is little genuine controversy that the district defendants have abysmally failed their pupils, the mechanism to correct this failure is not through the court system, particularly given the remedy sought by plaintiffs. The problem is multifaceted, comprised of deficiencies in the manner and type of academic instruction received, but also impacted by a variety of social and economic forces unique to the circumstances of each student. Consequently, there is no one-size-fits-all solution, and the greatest impact for each student will be one that is made up of several components and addresses his or her individual needs. Such a solution is not available through judicial intervention. We conclude

that the specific dispute at issue in this case, calling for the implementation of individualized reading programs and complex educational services, perhaps over a long period of time, is nonjusticiable in nature as it would necessitate undue intrusion upon the other branches of government and would require us to move beyond our area of judicial expertise. See *House Speaker v Governor*, 443 Mich 560, 574; 506 NW2d 190 (1993).

Given our conclusion that the trial court improperly denied summary disposition for the state and district defendants, we need not decide whether the issues in this case have been rendered moot by the appointment of an emergency manager and the subsequent contracting for charter schools. For the same reason, we decline to consider the district defendants' claims regarding the issuance of an amended scheduling order.[4]

Reversed and remanded for entry of judgment in favor of the state and district defendants. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, a public question having been involved.

MURRAY, P.J., concurred with JANSEN, J.

MURRAY, P.J. (*concurring*). In their briefs filed with this Court plaintiffs have set forth evidence that they are not educated to the level that would be reasonably

[4] It is true, as our dissenting colleague observes, that plaintiffs also requested declaratory relief. Plaintiffs' request for declaratory relief was not set forth as a separately labeled cause of action in their complaint. But this was not fatal to their request. "Although it has become commonplace in this state for a plaintiff to assert a request for declaratory relief as a separately labeled cause of action within his or her complaint, this is technically improper because 'declaratory relief is a remedy, not a claim.' " *Wiggins v City of Burton*, 291 Mich App 532, 561; 805 NW2d 517 (2011) (citation omitted). Nevertheless, given our foregoing analysis, we conclude that plaintiffs were not entitled to declaratory relief in this matter.

expected given their ages. This evidence should be of great concern to their parents, school authorities, and frankly any taxpayer or other concerned citizen. But those important educational concerns are not what we, judges of a court of law, are addressing today, for our exclusive task is to determine whether plaintiffs can pursue the legal theories set forth in their complaint. The majority opinion adequately explains why they cannot, and therefore I join that opinion. I write separately to briefly address some of the more specific arguments put forth by plaintiffs.

First, as made clear during oral argument before this Court, plaintiffs' constitutional arguments are not anchored in the text of either Const 1963, art 8 § 1 or § 2, yet it is that text that we must apply in determining whether plaintiffs can maintain a claim under these state constitutional provisions.[1] It is plain that nothing in either § 1 or § 2 of Article 8 even touches upon the specific issues about which plaintiffs complain. Instead, as the majority opinion makes clear, those provisions only articulate general aspirational propositions that are to guide the Legislature's enactment of legislation containing more specific education policy choices.[2] In no way can they be legitimately read to support a *consti-*

[1] To prevail against the state, plaintiffs would also have to show that any injury they suffered was caused by a state custom or policy, *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000), but that issue need not be addressed because there is no basis in the text for these claims.

[2] Indeed, Article 8, § 2 states that the Legislature shall maintain and support free public schools "as defined by law," which means that the public school system called for in § 2 is to be implemented by the Legislature. See *Midland Cogeneration Venture Ltd Partnership v Naftaly*, 489 Mich 83, 93-94; 803 NW2d 674 (2011); *People v Perks (On Remand)*, 259 Mich App 100, 113; 672 NW2d 902 (2003). This implies that a judicial monetary remedy for a violation of the general standards of § 2 would be inappropriate to recognize. *Lewis v Michigan*, 464 Mich 781, 787; 629 NW2d 868 (2001).

tutional right to specific educational results or to a guarantee of a certain level of education.

Second, plaintiffs maintain that their argument *is* supported by the text, as least in so far as the Michigan Supreme Court has construed § 2. In that regard, plaintiffs argue that in *Bond v Ann Arbor Sch Dist*, 383 Mich 693; 178 NW2d 484 (1970), our Supreme Court recognized a cause of action under Article 8, § 2. It is certainly true that the *Bond* Court upheld the plaintiffs' challenge under Article 8, § 2, that the school district was required to pay for books their children would use in public school. See *Bond*, 383 Mich at 699-702. But, in our decision today, we are assuming a direct cause of action can be brought under this provision. The question is whether plaintiffs' allegations make out a potential violation of these constitutional provisions, and in that regard *Bond* is of no assistance. *Bond* addressed a challenge invoking precise language in the constitutional provision—what was meant by a "free" public education—while plaintiffs in this case can point to no language in the text that supports their challenge seeking to establish a specific level or quality of education through the provision of a free public education. Thus, *Bond*'s analysis does not help here.[3]

Third, as the majority opinion makes clear, the statutory provision raised by plaintiffs, MCL 380.1278(8), is not amenable to mandamus relief. To implement that provision, which is itself a legislative remedy for poor reading performances as it compels

[3] The dissent asserts that *Bond* applies to plaintiffs' allegation that " '[t]here is a critical lack of textbooks in most classrooms.' " (Citation omitted.) *Bond*, however, only addressed whether under Article 8, § 2 a school district could require parents to pay for required textbooks, not the unrelated and policy driven question as to how many textbooks are sufficient for a particular class. And, plaintiffs do not allege that the school district is charging them for any of the textbooks.

school districts to provide "special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months," requires an enormous amount of discretion on the part of educators. On this point, it bears emphasizing what both the United States Supreme Court and our state Supreme Court have repeatedly held: judges are not equipped to decide matters of educational policy. See, e.g., *Parents Involved In Community Schs v Seattle Sch Dist No 1*, 551 US 701, 849; 127 S Ct 2738; 169 L Ed2d 508 (2007) (Breyer, J., dissenting), citing, *inter alia*, *San Antonio Indep Sch Dist v Rodriguez*, 411 US 1, 49-50; 93 S Ct 1278; 36 L Ed 2d 16 (1973); see also *Wisconsin v Yoder*, 406 US 205, 234-235; 92 S Ct 1526; 32 L Ed 2d 15 (1972); *Page v Klein Tools, Inc*, 461 Mich 703, 714-716; 610 NW2d 900 (2000); *Larson v Burmaster*, 2006 Wis App 142, ¶ 42; 295 Wis 2d 333; 720 NW2d 134 (2006).

This holds true whether we are addressing mandamus relief or trying to define what specific level of education is required by the Constitution. Indeed, in Michigan—like most states—what type of programs should be utilized to implement the general guarantees of Article 8, §§ 1 and 2, is a decision primarily left to either the state legislature or locally elected school district boards of education. *Slocum v Holton Bd of Ed*, 171 Mich App 92, 95-96; 429 NW2d 607 (1988); *Sheridan Rd Baptist Church v Dep't of Ed*, 132 Mich App 1, 21; 348 NW2d 263 (1984), aff'd 426 Mich 462 (1986). Those elected bodies have the capacity to conduct a number of tasks to address these important issues, including the ability to hear different policy arguments, listen to arguments for and against specific educational programs, to allow the taking of testimony, and to receive input from teachers and constituents, to name just a few. See, e.g., *Henry v Dow Chem Co*, 473 Mich 63,

92 n 24; 701 NW2d 684 (2005). We, the judiciary, do not have that same capacity, ability, or role, as we serve a significantly different and limited function in state government. *Id*.

Fourth, and finally, plaintiffs offer a number of decisions from our sister states holding that their state constitutions provide a guaranteed minimal level of education. It is certainly true that some state appellate courts have come to that conclusion. But it is just as true that, as most of those courts recognize, these decisions are "necessarily controlled in large measure by the particular wording of the constitutional provisions of those state charters regarding education . . . ." *Tennessee Small Sch Sys v McWherter*, 851 SW2d 139, 148 (Tenn, 1993). As the Iowa Supreme Court highlighted, many state constitutions' education clauses contain words like "adequate," "efficient," "quality" or "thorough" that denote a level of quality to the education that must be provided, *King v Iowa*, 818 NW2d 1, 19-21 (Iowa, 2012) (quotation marks and citations omitted), but, as discussed, our provisions contain no such verbiage. Many of the other cases relied upon by plaintiffs address funding level issues, and that issue—as plaintiffs have argued—is not a part of this lawsuit.[4] And if that issue was raised, plaintiffs would have a tough hurdle to overcome. See *Governor v State Treasurer*, 390 Mich 389 (1973) (T. G. KAVANAGH and LEVIN, JJ., concurring) (*Governor II*), and *East Jackson Pub Sch v Michigan*, 133 Mich App 132, 136-138; 348 NW2d 303 (1984).

---

[4] The following cases are therefore not analogous to the present controversy, at least in so far as they deal with the adequacy of legislative funding: *Leandro v North Carolina*, 346 NC 336, 342-343; 488 SE2d 249 (1997), *Tennessee Small Sch Sys*, 851 SW2d at 148-149, *Abbott v Burke*, 119 NJ 287, 314-315; 575 A2d 359 (1990), and *Rose v Council for Better Ed, Inc*, 790 SW2d 186 (Ky, 1989).

To the extent some courts have concluded that general, "aspirational" language similar to our language does call for minimum levels of educational results, I simply disagree with those decisions. I cannot by judicial fiat read words like "sufficient," "adequate" or "quality" into the text of Article 8, § 2, no matter how sound the result of doing so might seem,[5] when those words were not ratified by the people themselves. See *Nat'l Pride At Work, Inc v Governor*, 481 Mich 56, 67-68; 748 NW2d 524 (2008). That is not the proper function of the judiciary. We are neither equipped with the power nor the expertise to determine what courses, teaching credentials, staffing levels, etc., are necessary to provide whatever would be determined to be an adequate education. In the end, the constitutionally appropriate forum for plaintiffs is the ballot box, not the courts. "Voters elect our governor, legislators, and school board members. If these plaintiffs do not like how [Highland Park] schools are run, they should turn to the ballot box, not the courts." *King*, 818 NW2d at 43 (Waterman, J., concurring).[6] See, also, *Smith v Henderson*, 54 F Supp 3d 58, 61 (D DC, 2014) ("The core problem here is that the parents' fight is one for the ballot box—not the courts.").

The dissent's vituperative opinion glosses over many of the important legal distinctions that control the outcome of this case as framed by plaintiffs. Though all

---

[5] After all, no sane individual would oppose the proposition that Michigan schools should provide a quality education for all, particularly when so many financial resources are already provided to K-12 public education.

[6] At least one elected official, Governor Snyder, has acted pursuant to legislation (MCL 141.1541 *et seq*.) by appointing an emergency manager to oversee certain of the school district's operations in an attempt to remedy many of the problems that have plagued the district.

of us agree that the evidence of prior performance in the school district amongst this segment of students was poor, as members of the judiciary we cannot let our moral, political or emotional views of that situation obscure the rule of law that we must apply. See *Planned Parenthood of Greater Iowa, Inc v Miller*, 30 F Supp 2d 1157, 1160 (SD Iowa, 1998), aff'd 195 F3d 386 (CA 8, 1999). That said, several points must be made in response to the dissenting opinion.

First, the majority opinion is not leaving plaintiffs without a remedy. A remedy exists, it is simply not to be found, under these constitutional provisions and statute, in the court system. Instead, as previously made clear, the Michigan Constitution itself indicates that it is the Legislature that is to define the scope of the public education that Michigan children are entitled to, as the key phrase within Article 8, § 2, "as defined by law," indicates. See note 2 of this opinion and *King v Oakland Co Prosecutor*, 303 Mich App 222, 241; 842 NW2d 403 (2013). That delegation, coupled with the generalized language of the provision itself, compels the conclusion that *what level* of education is mandated by the Constitution is for the legislative branch to decide.

Second, and relatedly, the dissent offers a definition of "education" that we should utilize to define that term in Article 8, § 2. Assuming that definition was the common meaning at the time the Constitution was ratified in 1963, *Nat'l Pride At Work*, 481 Mich at 67, the definition offered by the dissent does not itself speak to a particular level of education required. Rather, it merely defines the ultimate goal of education, i.e., "developing" the knowledge, skills, minds and character of our youth. It provides no gauge as to the level of education to be provided and, as a result, how

courts are to enforce such vague provisions.[7] And this again highlights the significant obstacle that plaintiffs face in this case: the remedy. To judicially impose a remedy will either immediately, or inevitably, lead the courts into the forbidden territory of educational policymaking.

For example, say a school district's seventh graders average 55% on a math assessment test, and a court concluded that the district (not the state) was not sufficiently "developing" the students' minds, at least as it pertained to math. The dissent opines that an order simply declaring that the minimum level was not attained would suffice, and the school district—perhaps with assistance from the state—could develop ways to improve. But to what level? A 60%, 70% or 80% average? What about a 100% passing average? What curriculum should be used to obtain these higher averages? Should there be a lower teacher to student ratio for those students who have performed below the average? And, if the first attempt is unsuccessful in reaching that subjective goal, when will the court—through use of experts—start deciding what method would be *more appropriate* for the district to implement next in the name of complying with its order? Court supervision of the district's teaching methods and curriculum would be inevitable, yet that is precisely what the supreme

[7] Moreover, the dissent's reliance upon the "adequate educational services" phrase from *Governor II*, 390 Mich at 406, is greatly misplaced. *Governor II* was simply an order declaring that the Court's prior opinions addressing the governor's request for answers to certified questions, *Governor v State Treasurer*, 389 Mich 1; 203 NW2d 457 (1972) (*Governor I*), were vacated because the request had been improvidently granted, *Governor II*, 390 Mich 389. The concurring statement issued with the order that contains the phrase cited by the dissent, was signed by only two justices who agreed with the dismissal of the cause and the vacating of the prior opinions. Therefore, the statement was plainly dictum that commanded no majority.

courts of this state and nation have warned against. See *Yoder*, 406 US at 234-235; *Page*, 461 Mich at 714-716. The Illinois Supreme Court properly articulated these same constitutional concerns in *Lewis E v Spagnolo*, 186 Ill 2d 198, 209; 238 Ill Dec 1; 710 NE2d 798 (1999):

> Attempting to distinguish "high quality" from "minimally adequate" in this context is nothing more than semantics. No matter how the question is framed, recognition of the plaintiffs' cause of action under the education article would require the judiciary to ascertain from the constitution alone the content of an "adequate" education. The courts would be called upon to define what minimal standards of education are required by the constitution, under what conditions a classroom, school, or district falls below these minimums so as to constitute a "virtual absence of education," and what remedy should be imposed. Our decision in *Committee for Educational Rights* [*v Edgar*, 174 Ill 2d 1; 220 Ill Dec 166; 672 NE2d 1178 (1996)] made clear that these determinations are for the legislature, not the courts, to decide.

See, also, *Nebraska Coalition for Ed Equity & Adequacy v Heineman*, 273 Neb 531, 553-554; 731 NW2d 164 (2007).

In sum, whether it is a good or bad policy choice, the ratifying voters in 1963 gave the Legislature full authority to define the public education to be provided by school districts. The Legislature responded with, amongst other things, the very detailed Revised School Code. See MCL 380.1 *et seq*. Many of the statutes in that code contain remedies to be employed by districts once certain low scores occur, as is the case with MCL 380.1278(8). But mandamus is not an appropriate way to enforce that provision because of the built-in discretion required to implement that statute and because a decision by the school district as to those qualifying

plaintiffs has been made and implemented; plaintiffs are challenging the decision made and asserting that there are better programs for the school district to utilize in implementing the "special assistance" required under the statute[8]. As a consequence, the children—through their parents—have a remedy; it is just not with the courts under the claims pleaded by plaintiffs.

SHAPIRO, J. (*dissenting*). In one of the most significant cases of the last century, the United States Supreme Court declared that "education is perhaps the most important function of state and local governments." *Brown v Topeka Bd of Ed*, 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954). Nine years after that decision, the people of this state approved a new Constitution providing that local school districts "shall" provide an education to all students and that the Legislature "shall" maintain and support such schools. Const 1963, art 8, §§ 1 and 2. Sadly, my colleagues in the majority have judicially repealed these provisions with their decision today. They have also, by judicial fiat, repealed a legislative enactment that requires school districts to take specific action when pupils fail to attain basic competencies. MCL 380.1278(8).

I reject the majority's miserly view of the education constitutionally due Michigan's children. I agree with the majority that the judiciary is not suited to, and should avoid attempting to, manage school administration or fine-tune educational policy. However, this does not excuse the majority's abandonment of our essential judicial roles: enforcing the rule of law even when the

[8] Hence, this case is a far cry from what was at issue in *Teasal v Dep't of Mental Health*, 419 Mich 390, 409-412; 355 NW2d 75 (1984), where no decision had been made by the defendant under established criteria.

defendants are governmental entities and protecting the rights of all those who live within Michigan's borders, particularly those, like children, who do not have a voice in the political process. While the judiciary is not suited to selecting and executing educational policy, it is suited to determining whether defendants are complying with their constitutional and statutory duties and ordering them to take timely action to do so.

I. PLAINTIFFS' ALLEGATIONS AND THE MAJORITY'S CONCLUSIONS

Plaintiffs, students of defendant Highland Park School District (HPSD), allege that the government defendants violated plaintiffs' constitutional rights under Const 1963, art 8, §§ 1 and 2, and violated their own statutory duties under MCL 380.1278(8). Defendants assert that plaintiffs' complaint does not state a cause of action. That complaint, as noted by the trial court when it denied defendants' motion for summary disposition, contains a lengthy list of factual assertions that can only be fairly described as shocking and which, for purposes of this motion, we must adopt as true.[1] The majority concludes that even if these allegations and other equally disturbing ones are true, no court may even consider whether the education being provided to the children of Highland Park fails to meet constitutional and statutory requirements.

A few of the more disturbing accusations are as follows:

---

[1] *Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004) (citation omitted) ("In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court consider[s] all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them.") (citation and quotation marks omitted) (alteration in original). In addition, defendants do not, at least for purposes of this motion, dispute the accuracy of plaintiffs' factual allegations.

• There are 973 students enrolled in the HPSD;

• 65% of fourth-grade students tested below "proficient" on the Michigan Educational Assessment Program (MEAP) reading test and 87% scored below "proficient" on the MEAP math test;[2]

• 75% of seventh-grade students scored below "proficient" on the MEAP reading test and 93% scored below "proficient" on the MEAP math test;

• At the high school level, 90% of students failed the Michigan Merit Examination[3] reading test, 97% failed the math test, 94% failed the writing test, 100% failed the social studies test, and 100% failed the science test;

• A lack of textbooks exists such that students are rarely able to take home textbooks;

• Many classrooms have inadequate heat or no heat at all;

• School buildings are unsecured such that a homeless man was able to live and sleep in the facilities without detection by school officials; and

• Student files do not contain assessments of grade level performance, current and post MEAP assessment, counseling records, attendance records, or discipline records.

By contrast, in the demographically similar school district of Inkster, 98% of students met reading and math standards on the 2010 MEAP.

Failing to refer to these, or any of the other equally disturbing allegations in plaintiffs' complaint, the majority reaches the following conclusions: (1) the provision in

[2] Student performance on the MEAP is calculated to fall in one of four categories: "advanced," "proficient," "partially proficient," and "not proficient."

[3] This is the final standardized test administered to Michigan students.

the Michigan Constitution that guarantees that every school district "shall provide for the education of its pupils," Const 1963, art 8, § 2, has neither meaning nor effect and no level of failure by a school district to provide these requirements can ever constitute a violation of this provision; (2) the language in Article 8, §§ 1 and 2 of the Michigan Constitution providing that the state shall "maintain and support" a system of public schools and that "the means of education shall forever be encouraged," are merely aspirational and have no force of law; (3) that no child, parent, or citizen has the authority to seek judicial enforcement of the statutory mandate contained within MCL 380.1278(8) that a student whose reading ability is below grade level "shall be provided special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months." All these conclusions are erroneous.

II. CONSTITUTIONAL CLAIMS

Plaintiffs' constitutional claims arise solely under the education provisions of the 1963 Michigan Constitution. Specifically, plaintiffs' complaint alleges that defendants have violated Const 1963, art 8, §§ 1 and 2, which provide:

> Sec. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and *the means of education shall forever be encouraged*.
>
> Sec. 2. The legislature *shall maintain and support a system of free public elementary and secondary schools* as defined by law. *Every school district shall provide for the education of its pupils* without discrimination as to religion, creed, race, color or national origin. [Emphasis added.]

By virtue of their employment of the word "shall," these constitutional provisions are mandatory and re-

quire compliance. See *Port Huron v Amoco Oil Co, Inc*, 229 Mich App 616, 631; 583 NW2d 215 (1998) (stating that it is a well-established rule of statutory interpretation that "[w]hile the word 'shall' is generally used to designate a mandatory provision, 'may' designates discretion"). Nonetheless, the majority dispenses with these constitutional provisions in conclusory fashion with little, if any, analysis or consideration of the law. Its analysis falters at the very first step by relying on the fact that education is not a "fundamental interest" under the equal protection clause. See *Martin Luther King Jr Elementary Sch Children v Mich Bd of Ed*, 451 F Supp 1324, 1328 (ED Mich, 1978) (*MLK*).[4] While plaintiffs did assert an equal protection claim under Const 1963, art 1, § 2 before the trial court, that claim is not before this Court in the instant appeal, rendering the majority's discussion of equal protection a red herring.[5] The sole issue is whether plaintiffs have stated a claim that our Constitution's educational provisions have been violated.

The balance of the majority's consideration of § 1 is limited to a single conclusory sentence reading: "Article 8, § 1 merely 'encourage[s]' education, but does not

[4] In this regard, defendants and the majority rely heavily on *MLK*, 451 F Supp 1324, a single federal trial court opinion from 1978. The bulk of *MLK* involved the application of the federal Equal Protection Clause, a claim not raised in this case. *Id*. at 1327-1334. *MLK* did briefly address a claim made under Const 1963, art 8, § 2, concluding that it did not guarantee "equal" education to all students. *Id*. at 1333-1334. But *MLK* certainly did not define the scope of Const 1963, art 8, § 2, and, of course, we are not bound by lower federal court opinions. *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004).

[5] Moreover, even if plaintiffs' equal protection claim was before this Court, the fact that education has been held not to be a fundamental interest does not, in itself, defeat that claim. See, e.g., *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996) ("Unless the [alleged] discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry under the Equal Protection Clause is whether the classification is rationally related to a legitimate governmental purpose.").

mandate it."[6] The majority opinion wholly fails to address the considerable body of law in this state and sister states addressing the scope and import of such a constitutional provision.

As for § 2, the majority ignores the use of the mandatory word "shall" in the provision's first and second sentences, applying to the Legislature and the relevant school district respectively.[7] In so doing, the majority revises the Constitution's language so as to conclude that § 2 can never be violated. In the majority's view, there are no minimal requirements to "maintain and support." Moreover, a school district could provide nothing more than a building for students to sit in but remain in compliance with this constitutional provision, because, in the words of the majority, the Constitution leaves to the district "the actual intricacies of the delivery of specific educational services . . . ." I might agree with that sentiment if the issue in this case was merely the "intricacies" of the delivery of educational services. However, that is not the situation before us. Indeed, I do not believe that any reasonable person, and certainly no reasonable parent, would conclude that intricacies are at issue when, at the HPSD's high school, 90% of students failed the Michigan Merit Examination reading test, 97% failed the math test, 100% failed the social studies test, and 100% failed the science test. The message the majority sends

[6] Alteration in original.

[7] In *Feaster v Portage Pub Schs*, 451 Mich 351; 547 NW2d 328 (1996), the Supreme Court unanimously reversed the dismissal of a complaint seeking declaratory and injunctive relief against a school district. The Court emphasized that the statutory use of the word "shall" in directing action by a school district defeated the district's claims. It noted the longstanding policy that school laws are "to be liberally construed consistent with the public policy of fostering and encouraging free public education . . . ." *Id*. at 357 (citation and quotation marks omitted).

is that the mandatory constitutional provision that a school district "shall" provide education is met simply by the existence of the school district, regardless of whether a single student receives any semblance of an actual education.

Contrary to the majority in this case, Michigan courts have been willing to address such questions in the past. In *Bond v Ann Arbor Sch Dist*, 383 Mich 693; 178 NW2d 484 (1970), the plaintiffs attended free public schools, i.e., no tuition was charged. The plaintiffs nevertheless argued that the modest fee charged by the defendant school district for books and supplies, along with various other fees imposed by the district, violated the constitutional requirement that the Legislature "maintain and support a system of free public elementary and secondary schools . . . ." Const 1963, art 8, § 2. The case was tried without a jury, and the circuit court ruled, in part, that the fees charged for books and supplies were constitutional. The Court of Appeals affirmed. *Bond v Ann Arbor Pub Sch Dist*, 18 Mich App 506; 171 NW2d 557 (1969).

Our Supreme Court unanimously reversed that portion of the lower courts' rulings. *Bond*, 383 Mich 693. It held that a system of free public schools requires the free provision of the "necessary elements of any school's activity," alternatively stated as the materials that "are an essential part of a system of free public elementary and secondary schools." *Id*. at 702 (quotation marks omitted). Most important for purposes of the instant appeal is the Court's statement that " '[n]o education of any value is possible without school books.' " *Id*. at 701-702, quoting *Crowley v Bressler*, 41 NYS2d 441, 445-446; 181 Misc 59 (1943). The *Bond* Court's analysis makes clear that when public educational services fall below some minimal level, Const 1963, art 8, § 2 has

been violated. When the education provided, like one without textbooks, is not "of any value," the state has not met its constitutional obligation.[8] *Bond*, 383 Mich at 701-702 (citation and quotation marks omitted).

In *Snyder v Charlotte Pub Sch Dist*, 421 Mich 517, 525; 365 NW2d 151 (1984), our Supreme Court stated in more general terms:

> Although public education is not a fundamental right granted by the federal constitution, *it is not merely some governmental benefit which is indistinguishable from other forms of social welfare legislation*. *Plyer v Doe*, 457 US 202, 221; 102 S Ct 2382; 72 L Ed 2d 786 (1982). See also *San Antonio Independent School Dist v Rodriguez*, 411 US 1, 30; 93 S Ct 1278; 36 L Ed 2d 16 (1973). "[*E*]*ducation is perhaps the most important function of state and local governments*." *Brown v Topeka Bd of Ed*, 347 US 483, 493; 74 S Ct 686; 98 L Ed 873 (1954). [Emphasis added; alteration in original.]

The majority quotes the concurrence in *Governor v State Treasurer*, 390 Mich 389, 406 (1973) (*Governor II*) (T. G. KAVANAGH and LEVIN, JJ., concurring), for the proposition that "no system of public schools can provide equality of educational opportunity in all its diverse dimensions," but gives no weight to the sentence immediately following, which provides: "*All that can properly be expected of the state is that it maintain and support a system of public schools that furnishes adequate educational services to all children*." (Emphasis added.) While there is no constitutional requirement that schools provide an optimal education nor that all educational services be provided with perfect equality, for the educational provisions of our Constitution to

[8] Even if *Bond* were read to apply to nothing outside the provision of textbooks, it would still be applicable to this case because plaintiffs' complaint alleges that "[t]here is a critical lack of textbooks in most classrooms."

have any meaning, schools must provide "adequate educational services to all children." *Id*.

Moreover, in *Governor II*, which concerned a challenge to Michigan's entire system of public school funding, *id*. at 391, the concurrence stated:

> We are presented with generalized arguments concerning the nature of educational opportunity in this state. So that our opinion not be misconstrued, it is important to note that we are not presented with a concrete claim by either individual students or by school districts that they are suffering from particular specified educational inadequacies because of deficiencies . . . . Such concrete claims, when and if raised, will stand or fall on their own merits and not on account of anything we say here. In short, *we are not abandoning the school children of this state to legislative whim in derogation of any judicially enforceable right to an education they may have under our Constitution*. [*Id*. at 392-393 (emphasis added).]

In this case, the plaintiff schoolchildren have asked the courts to make good on this commitment not to abandon them. Unlike *Governor II*, this case is not one based on "generalized arguments" about educational opportunity, but rather on objective tests that support the allegation that the overwhelming majority of students in the HPSD are not receiving a minimally adequate education. Ironically, in *Governor II*, the defendants argued that the proper way to demonstrate denial of a constitutionally required education would be to evaluate the districts "in terms of 'output,' as measured by pupil accomplishment on certain achievement tests." *Id*. at 398. This is precisely what the instant plaintiffs have done, and the testing administered by state law is their best evidence.

Plaintiffs also cite several cases from our sister states that have considered this question and provide helpful

analyses.[9] A review of these cases demonstrates that my colleagues stand nearly alone in their conclusions.

The South Carolina Supreme Court, in *Abbeville Co Sch Dist v South Carolina*, 335 SC 58, 63-64; 515 SE2d 535 (1999), considered whether the state's public school funding scheme violated either the Equal Protection Clause or the state constitution's education clause. It found no equal protection violation, *id*. at 65, but concluded that the funding scheme violated the state constitution, *id*. at 68. The relevant clause closely resembles Const 1963, art 8, § 2 and provides:

> The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state and shall establish, organize and support such other public institutions of learning as may be desirable. [*Abbeville Co*, 335 SC at 66 (quotation marks and citation omitted).]

The trial court in *Abbeville* had concluded that the language of the provision was nonspecific and that "judicial restraint, separation of powers, and/or the political question doctrine prevented it from considering this education clause claim." *Id*. at 67. The South Carolina Supreme Court reversed that holding, ruling that the constitutional mandate required the state to "provide the opportunity for each child to receive a minimally adequate education," which it defined as follows:

> 1) the ability to read, write, and speak the English language, and knowledge of mathematics and physical science;

---

[9] The concurrence rejects some of these cases as "not analogous" because they deal with school funding issues rather than minimal educational quality. I do not see why the distinction renders those cases irrelevant to our instant inquiry. If anything, courts should be more hesitant to review broad funding mechanisms than a particular failure to provide minimal educational services in a single school district.

> 2) a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and
>
> 3) academic and vocational skills. [*Id*. at 68.]

The court went on to state:

> We recognize that we are not experts in education, and we do not intend to dictate the programs utilized in our public schools. Instead, we have defined, within deliberately broad parameters, the outlines of the constitution's requirement of minimally adequate education.
>
> Finally, we emphasize that the constitutional duty to ensure the provision of minimally adequate education to each student in South Carolina rests on the legislative branch of government. We do not intend by this opinion to suggest to any party that we will usurp the authority of that branch to determine the way in which educational opportunities are delivered to the children of our State. We do not intend the courts of this State to become super-legislatures or super-school boards. [*Id*. at 69.]

This holding is consistent with the holdings of other courts that have addressed the requirements of state constitutional provisions similar to Const 1963, art 8, § 2.

In *Lake View Sch Dist No. 25 of Phillips Co v Huckabee*, 351 Ark 31; 91 SW3d 472 (2002), the Arkansas Supreme Court held that the legislative and executive branches were in violation of the state constitution's education provision. See also Ark Const 1874, art 14, § 1. In rejecting a justiciability argument similar to that made in the instant case, the court noted that "[t]he State's argument appears to be that not only are legislative acts presumed to be constitutional, but that they are *per se* constitutional and not subject to judicial review." *Lakeview*, 351 Ark at 53 (citation omitted).

The high court of New York State, the Court of Appeals, reached the same conclusion. In *Campaign for*

Fiscal Equity, Inc v New York, 86 NY2d 307; 631 NYS2d 565; 655 NE2d 661 (1995), that court interpreted New York's constitutional education provision, which is nearly identical to Michigan's and mandates that "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." *Id*. at 314 (quotation marks and citation omitted). The court held that this provision "requires the State to offer all children the opportunity of a sound basic education. Such an education should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants . . . ." *Id*. at 316 (citation omitted).

In *Claremont Sch Dist v Governor*, 142 NH 462, 472; 703 A2d 1353 (1997), the New Hampshire Supreme Court, relying on a constitutional education clause even less specific than Michigan's,[10] held that "[o]ur society places tremendous value on education. Education provides the key to individual opportunities for social and economic advancement and forms the foundation for our democratic institutions and our place in the global economy." The court went on to enumerate several "benchmarks of a constitutionally adequate public education" and left it to the legislature to meet those benchmarks. *Id*. at 474-476.

In Tennessee, the state constitutional education clause contains language resembling Michigan's, providing:

> The state of Tennessee recognizes the inherent value of education and encourages its support. The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools. The General Assembly may establish and support such post-

[10] See NH Const 1784, part II, art 83.

> secondary educational institutions, including public institutions of higher learning, as it determines. [Tenn Const 1870, art XI, § 12.]

Relying on dictionary definitions of the word "education," the Tennessee Supreme Court held that the clause required "that the General Assembly shall maintain and support a system of free public schools that provides, at least, the opportunity to acquire general knowledge, develop the powers of reasoning and judgment, and generally prepare students intellectually for a mature life." *Tenn Small Sch Sys v McWherter*, 851 SW2d 139, 150-151 (Tenn, 1993).

Similarly, in *Rose v Council for Better Ed, Inc*, 790 SW2d 186 (Ky, 1989), the Kentucky Supreme Court addressed a Kentucky constitutional provision requiring that "[t]he General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." Ky Const 1891, § 183. The court found the question justiciable and determined that the school system was constitutionally deficient:

> [W]e [do not] intend to substitute our judicial authority for the authority and discretion of the General Assembly. We are, rather, exercising our constitutional duty in declaring that, when we consider the evidence in the record, and when we apply the constitutional requirement of Section 183 to that evidence, it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an "efficient" one in our view of the clear mandate of Section 183. The common school system in Kentucky is constitutionally deficient. [*Rose*, 790 SW2d at 189.]

In *Pauley v Kelly*, 162 W Va 672, 705-706; 255 SE2d 859 (1979), the West Virginia Supreme Court of Appeals held that their constitution required the state to pre-

pare students for useful occupations and citizenship including the development of literacy and the "ability to add, subtract, multiply and divide numbers[.]"

In *Seattle Sch Dist No. 1 of King Co v State of Washington*, 90 Wash 2d 476; 585 P2d 71 (1978), the Washington Supreme Court interpreted that state's constitutional education clause, which provides that "[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders," Wash Const 1889, art IX, § 1. The court held that, under this clause, "the State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the market place of ideas." *Seattle Sch Dist No. 1*, 90 Wash 2d at 517. The court explained that, "[t]he constitutional right to have the State 'make ample provision for the education of all (resident) children' would be hollow indeed if the possessor of the right could not compete adequately in our open political system, in the labor market, or in the market place of ideas." *Id*. at 518.

Given these holdings from our sister states, which favor plaintiffs, it is difficult to see why the majority finds judicial overreach in addressing whether our Constitution's education provision is violated when the overwhelming majority of students in the subject district cannot read or perform mathematics at grade level.

Defendants rely heavily on *King v Iowa*, 818 NW2d 1 (Iowa, 2012). However, the Iowa constitution's education clause bears little resemblance to the Michigan Constitution's education clauses. To recall, the relevant clauses of our Constitution, Const 1963, art 8, §§ 1 and 2, provide:

> Sec. 1. Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.
>
> Sec. 2. The legislature shall maintain and support a system of free public elementary and secondary schools as defined by law. Every school district shall provide for the education of its pupils without discrimination as to religion, creed, race, color or national origin.

The relevant clause of the Iowa constitution, by contrast, does not even contain the word "education." It reads, in relevant part, as follows: "The General Assembly shall encourage, by all suitable means, the promotion of intellectual, scientific, moral, and agricultural improvement." Iowa Const 1857, art IX, div 2, § 3. See also *King*, 818 NW2d at 12.[11]

In *King*, the Iowa high court referenced its state's unusual history of rejecting any constitutional provi-

[11] For this reason, *King* undercuts the concurrence's conclusion that to hear plaintiffs' claim under Const 1963, art 8, § 2, the judiciary must impermissibly "read . . . into" the Constitution words such as "sufficient," "adequate," or "quality" with regard to the education required to be provided to Michigan's children. While I agree that it is not the province of the judiciary to add words to the provisions of the Michigan Constitution, I suggest that it is my colleagues who seek to do so by adding the words "with no minimal standards of quality" to the requirement that the state and school districts provide for the "education" of Michigan's children. The word "education" means "the process of training and developing the knowledge, skill, mind, character, etc., especially by formal schooling; teaching; training," *Webster's New Twentieth Century Dictionary* (2d ed), and plaintiffs assert that a constitutionally satisfactory "education" has not been provided. In addition, Const 1963, art 8, § 2 requires that the Legislature maintain and support a system of public education "as defined by law," and plaintiffs have alleged that in the HPSD, the public education is in violation of state statute MCL 380.1278(8). Also, given that the concurrence concedes that "no sane individual would oppose the proposition that Michigan schools should provide a quality education for all," it is difficult to conclude that providing an "adequate" education was not the intent of the framers and voters in adopting these constitutional provisions.

sions to mandate free public schools. The court noted that as far back as 1859 it had "reached the conclusion that no aspect of the Iowa Constitution, including the education clause, authorized the legislature to provide for public schools," and that the state's 1857 constitutional convention had voted down a proposed amendment to provide for tuition-free schools. *King*, 818 NW2d at 14-15. Given that particular constitutional history, the *King* court concluded that if the Iowa constitution "did not assure a right to a free public education, it seems untenable to argue that [it] contained a judicially enforceable right to a free public education with certain minimum standards of quality." *Id*. at 15 (emphasis omitted).

The Michigan Constitution's education clauses read very differently than the Iowa constitution's education clauses. And the other states that have addressed this question have consistently held that a cause of action may be brought and argued, and that a court may find, that the state has failed to satisfy an education clause of the state's constitution when the state has failed to provide an adequate education to its children.[12]

III. STATUTORY CLAIMS

The majority's rejection of plaintiffs' statutory claims against the school district defendants is even more difficult to understand. MCL 380.1278(8), part of the Revised School Code,[13] provides:

---

[12] Moreover, like in *Haridopolos v Citizens for Strong Schs, Inc*, 81 So 3d 465, 472 (Fla App, 2011), "[t]he present case is, to be sure, distinguishable from *King*, which featured an attack on internal legislative processes . . . ." Notably, *Haridopolos* also concluded that even if the imposition of a remedy was beyond the court's role, the court, at minimum, had jurisdiction to enter a declaratory judgment. *Id*. at 473.

[13] MCL 380.1 *et seq*.

> Excluding special education pupils, pupils having a learning disability, and pupils with extenuating circumstances as determined by school officials, a pupil who does not score satisfactorily on the 4th or 7th grade Michigan educational assessment program [MEAP] reading test *shall be provided* special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months. [Emphasis added.]

Like the previously discussed constitutional provisions, this statute employs the word "shall," denoting required compliance on the part of the subject school district. See *Port Huron*, 229 Mich App at 631. Defendants do not appear to dispute that a majority of the relevant fourth-grade students did not score satisfactorily on the reading test, nor do they dispute that an overwhelming majority of seventh-grade students failed to do so as well. Thus, the district essentially concedes that it has violated the plain terms of the statute.

The majority nevertheless reverses the trial court's denial of defendants' motion for summary disposition, concluding that "it remains to be determined whether the [individual plaintiffs] are subject to exclusion from additional instruction premised on 'extenuating circumstances as determined by school officials . . . .' " (Citation omitted.) The fact that this issue "remains to be determined" is grounds for affirming the trial court's denial of summary disposition, not for reversing it. Moreover, defendants have not alleged or offered any evidence that the students fall within the exception for "pupils with extenuating circumstances as determined by school officials . . . ." MCL 380.1278(8).

The majority also states, "While the form of the additional instruction may be deemed insufficient given the lack of progress in developing reading proficiency for these students, this would constitute a separate and distinct claim." It offers no basis for this statement,

likely because there is none. Essentially, the majority states that if the services provided to these students are inadequate, it constitutes a "separate and distinct claim." In fact, that is exactly the letter and spirit of the claim now before us. To direct these minor plaintiffs, who have litigated these cases for over two years and are, therefore, two years closer to "graduation," to start over with a new case, premised on defendants' failure to remedy their educational shortcomings, mocks these children.

The majority further concludes that MCL 380.1278(8) does not provide a private cause of action. In reaching this conclusion, it cites only *Lash v Traverse City*, 479 Mich 180, 194; 735 NW2d 628 (2007), but does not refer to that case's reasoning. Rather, the majority implies that *Lash* held that, in the absence of an express statutory authorization of a private cause of action, no statute can ever give rise to a private cause of action. This is simply false. In *Lash*, our Supreme Court reiterated that

> when a statute is silent concerning whether a private remedy is available for a statutory violation, a court may infer a private cause of action "if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision . . . ." [*Lash*, 479 Mich at 192, quoting *Gardner v Wood*, 429 Mich 290, 301 n 5; 414 NW2d 706 (1987), quoting 4 Restatement Torts, 2d, § 874A, p 301.]

That is, a cause of action may be created to redress a statutory violation when the purpose of the statute at issue is held to be exclusively or in part (1) to protect a class of persons that includes the one whose interest has been invaded, (2) to protect the particular interest that has been invaded, (3) to protect that interest against the kind of harm that has resulted, and (4) to

protect that interest against the particular hazard from which the harm has resulted. *Lash*, 479 Mich at 192-193.

All these requirements are plainly met in this case. MCL 380.1278(8) explicitly defines the class of persons intended to be protected as "[non-special education pupils] who do[] not score satisfactorily on the 4th or 7th grade [MEAP] . . . reading test . . . ." The particular interest is obtaining a minimum level of education that will enable these children to become functioning members of society. The kind of harm is the denial of the "special assistance reasonably expected to enable the pupil to bring his or her reading skills to grade level within 12 months." The hazard is the failure to provide that assistance.

The majority's willingness to ignore the statute is particularly odd given the majority's repeated assertion that education policy is a matter for the Legislature. In enacting MCL 380.1278(8), the Legislature set education policy. It is merely a question of whether that policy, and the statute enacting it, will be enforced by the courts. The majority wrongly declines to do so.

IV. AVAILABLE RELIEF

In large measure, my colleagues base their dismissal of this case on the ground that if plaintiffs were to prevail at trial on either their statutory or constitutional claims, relief might not be easily fashioned and some forms of relief might constitute an overextension of judicial authority. In my view, there is no basis for this concern as to plaintiffs' statutory claim and any such concern as to the constitutional claims is both premature and exaggerated.

With regard to the statutory claim, if plaintiffs were to prevail at trial, the remedy would be straightforward.

Defendants would be ordered to provide the service that is specified in MCL 380.1278(8). Moreover, contrary to defendants' argument, a writ of mandamus would be available to so direct. The statute, using the word "shall" imposes a duty on the district to provide assistance to the relevant students. I agree that the precise nature of that assistance is left to the discretion of the district, but "the writ will lie to require a body or an officer charged with a duty to take action in the matter, notwithstanding the fact that the execution of that duty may involve some measure of discretion." *Teasel v Dep't of Mental Health*, 419 Mich 390, 410; 355 NW2d 75 (1984). As defendants have acknowledged in their briefs, "mandamus will lie to compel the exercise of discretion, but not to compel its exercise in a particular manner." *Id*.[14]

Moreover, like in *Teasel*, 419 Mich at 401, in which the relevant statute required not merely any psychiatric evaluation, but an *informed* one, the statute at issue in this case, MCL 380.1278(8), mandates a standard for the "special assistance" that must be provided, namely that the assistance must be "reasonably expected" to fulfill the statutory goal of bringing students' reading skills to grade level within 12 months. As our Supreme Court has repeatedly held, "reasonably expected" is a term of art that denotes an objective standard. See

[14] In *Teasel*, the plaintiff sought an injunction compelling the Department of Mental Health to return him to a state mental hospital, arguing that he was entitled to treatment and had been released without the statutorily required evaluation. *Teasel*, 419 Mich at 397-398. Writing for a unanimous Court, Justice RYAN clearly articulated the scope of mandamus in a case such as that before us. He explained that while the ultimate action chosen by a governmental agent or entity may remain discretionary and, therefore, beyond mandamus, a court does possess jurisdiction to direct that governmental agent or entity to exercise its discretion and to do so in accordance with the applicable statutory standards. *Id*. at 414-415.

Krohn v Home-Owners Ins Co, 490 Mich 145, 162-163; 802 NW2d 281 (2011); *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 290; 683 NW2d 656 (2004). Indeed, in other instances that have called for a "reasonableness" determination, the Supreme Court has found mandamus an appropriate remedy. See, e.g., *Hering v Royal Oak*, 326 Mich 232, 237; 40 NW2d 133 (1949); *Employees & Judge of Second Judicial Dist Ct v Hillsdale Co*, 423 Mich 705, 722; 378 NW2d 744 (1985).

Defendants essentially argue that they are above the law. They claim to possess the authority to violate a statutory mandate and insist that no action may be taken in the courts to enforce that mandate. This is precisely the situation that Justice RYAN cautioned against in *Teasel*:

> The [mandamus] power [of the judiciary] is not one to create a duty where none existed before or to mandate action where the decision whether to act is discretionary. Rather, the power is the constitutional power of a circuit court to direct, upon the complaint of an aggrieved party, that a duty imposed by law upon the executive department of government to make a decision according to legislatively established criteria be carried out. Were it otherwise, our citizens would be powerless to compel their public servants to conduct the business of government—to make a decision, whether good or bad, but some decision, based upon the legislatively established criteria where the duty to make a decision is clear. [*Teasel*, 419 Mich at 412 (emphasis omitted).]

In this case, plaintiffs allege that defendants have violated a statutory mandate, i.e., that they "shall" provide "special assistance" to students that fail the fourth- or seventh-grade MEAP reading test. While the precise nature of that required assistance remains discretionary, the government entity may not use that

discretion as an excuse to simply take no action at all. In other words, a government entity may not wholly avoid compliance with a statutory mandate on the ground that it retains some discretion as to the particular method of compliance.

I agree with my colleagues that defining a judicial remedy for the constitutional claim, should it be shown to be meritorious, may pose challenges. However, it is likely that a judicially crafted remedy would not be necessary. The parties may, and I believe likely would, design a remedy to which they can agree. If that does not occur, the question of remedy can be referred to the legislative branch for first consideration. Many state courts that have ruled in favor of plaintiffs on claims like the one now before us have declared the status quo unconstitutional and, rather than attempting to define what must be done, have simply directed the legislative or executive branch to adopt remedial action of their own choice and design. See *Claremont Sch Dist v Governor*, 143 NH 154, 157-158; 725 A2d 648 (1998); *Sheff v O'Neill*, 238 Conn 1, 3-4; 678 A2d 1267 (1996) (the court granted the plaintiffs' request for declaratory relief but stayed imposition of any judicially crafted remedy to afford the legislature an opportunity to act); *Brigham v Vermont*, 166 Vt 246, 268; 692 A2d 384 (1997) (declaratory relief granted and jurisdiction retained until remedial legislation could be enacted); *McDuffy v Secretary of Executive Office of Ed*, 415 Mass 545; 615 NE2d 516 (1993); *Rose*, 790 SW2d at 215-216 (holding that the legislature failed to fulfill its constitutional duty to provide for an efficient system of public schools, but withholding finality of the decision until 90 days after the adjournment of the legislative session).[15]

[15] My colleagues suggest that the only available solution for these children is political, i.e., for the voters of Highland Park to elect a

I reject the majority's view that the possibility that such challenges might be faced if and when plaintiffs prove their case is grounds to not hear their case at all. It is the very rare case in which the judiciary is able to impose a perfect remedy: the issuance of a personal protection order does not automatically insulate an individual from further harassment, the imprisonment of a convicted murderer does not bring the victim back to life or heal the victim's loved ones, and civil judgments often fail to make the prevailing party whole. In sum, the role of the courts is to determine the rights of the parties under the rule of law and, based on that determination, fashion a reasonable, albeit often imperfect, remedy when the parties cannot agree on one. In that respect, this case is no different than many others that come before our courts.

At minimum, it is clear that a declaratory judgment[16] finding that the status quo is in violation of Const 1963, art 8, §§ 1 and 2, or MCL 380.1278(8), or both, or an injunction directing compliance with those laws, is well within the judiciary's purview. Indeed, such action, if merited, is required by our constitutional role as a check and balance on the other branches. As Justice

---

"better" school board. However, as the discussed cases demonstrate, even if the question of remedy is later found to exceed judicial capabilities, it is well within the purview of the judiciary to declare the status quo unlawful and refer the determination of remedy to the political branches.

[16] The majority opinion fails to substantively discuss plaintiffs' request for declaratory relief despite the fact that the trial court declined to dismiss the claim. The complaint and amended complaint each requested that this Court "[d]eclare unlawful Defendants' violation of Plaintiffs' rights as pursuant to MCL 380.1278(8)," "[d]eclare as unconstitutional Defendants' violation of Plaintiffs' rights under Article 8, §§ 1 and 2 of the Michigan Constitution," and "[d]eclare as unconstitutional Defendants' violations of Plaintiffs' rights under Article 1, § 2 of the Michigan Constitution[.]" I believe the majority's cursory treatment of this claim is insufficient to support its summary dismissal.

Hugo Black observed: "[T]he judiciary was made independent because it has . . . the primary responsibility and duty of giving force and effect to constitutional liberties and limitations upon the executive and legislative branches." Black, *The Bill of Rights*, 35 NYU L Rev 865, 870 (1960).

V. CONCLUSION

My colleagues offer kindly worded sympathy to the children whose futures are in jeopardy through no fault of their own. But the schoolchildren who brought this claim are not requesting this Court's sympathy. They are asking that we allow their case to be heard.

The ultimate resolution of this case, if we were to allow it to be heard, cannot now be known. Defendants might prevail on the merits. The parties might agree on a remedy or, after trial, the trial court might impose a remedy from which none of the parties would appeal. Whether a remedy is imposed and, if so, whether it is proper, are questions that we should not, and may not, determine at this stage of the case. Most important, the mere existence of those questions should not lead us to refuse to hear the case altogether.

I wish to stress that I do not assert that this Court should now conclude that the state and school district are in violation of either statutory or constitutional standards. However, I do assert, consistent with precedent, that this is a justiciable matter, that plaintiffs have stated viable claims, and that the trial court, after hearing the relevant proofs, may render a decision subject to appellate review.

Accordingly, I respectfully dissent.